QUEER POETRY AND SEX-NEUTRALITY: TOWARD A MORE COMPREHENSIVE LEGAL THEORY OF SEXUAL CITIZENSHIP
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INTRODUCTION

This paper explores themes of sexual citizenship. Sexual citizenship concerns the extent to which citizens are afforded full membership in society based on their conformity to a specific set of sexual norms, many of which have been explicitly encoded into U.S. law. More specifically, sexual citizenship is the corpus of laws and norms that recognize (or deny) citizens rights and liberties based on their sexuality and sexual conduct. This paper arises out of the need to address problems associated with the socio-legal status of sexual minorities, namely civil liberties (such as privacy and speech) and civil rights (such as equality in family life and employment). Extant theories of sexual citizenship fall short of extending full citizenship rights

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to sexual minority groups, in part, because they fail to understand and explain sexuality in sex-neutral terms.

The prevailing system of sexual citizenship in the United States situates the rights and freedoms of its citizens within an Anglo-American legal framework based on Western religions (Judeo-Christian), government structures (democratic majoritarianism), and economic systems (competitive free markets), all of which privilege heterosexual males. Alternative theories of sexual citizenship attempt to correct this privilege, but these theories also have shortcomings. Feminist theories of sexual citizenship have not been successful in securing for sexual minorities the full panoply of rights and freedoms because, in part, they explain sexual citizenship problems in sex-negative terms based on gender inequality. While gender inequality is an important thread in the web of sexuality, legal scholars, judges, lawmakers and society as a whole have been reluctant to accept that problems with sexual citizenship can be reduced to gender inequality. Concomitantly, sexual orientation discrimination continues to flounder in feminist theories of sexual citizenship. Similarly, queer theories of sexual citizenship fail to convince society and lawmakers why those who engage in transgressive sexual behaviors should be afforded civil rights and liberties based solely on sex-positive, libertarian ideals. Critics suggest that a theory of sexual citizenship should be based on more than “if it feels good, do it.”2 In sum, extant theories of sexual citizenship are incomplete, which results in the continued exclusion of sexual minorities from the full panoply of citizenship rights and liberties.

When policy decisions are made about whether poor, racially diverse, gay men in Texas have the right to engage in consensual sodomy in the privacy of their own homes,3 these decisions are made by nine justices who are predominantly white (eight of nine), predominantly male (seven of nine), predominantly Judeo-Christian (nine of nine), predominantly elite (nine of nine), and predominantly non-gay (presumably, nine of nine). The purpose of this paper is not to lambast, yet again, the failings of a representative democracy that is, in fact, demographically unrepresentative. The purpose is to acknowledge this problem and then to add to the corpus of legal scholarship in furtherance of correcting the problem.

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2 Id. at 317.
3 See Dale Carpenter, The Unknown Past of Lawrence v. Texas, 102 MICH. L. REV. 1464, 1508–13 (2004) (describing the parties involved in Lawrence as neither wealthy, educated, well-groomed, or cultured—a white man with prior (minor) brushes with the law; an unemployed black man with a prior assault arrest; a white man prone to drunkenness, swearing, and violence; and an Hispanic man).
Theories of sexual citizenship often separate what is said about sexual minorities from who says it and how it is said. This paper does not correct the problem of excluding sexual minorities from certain rights and liberties, but, in Part One, it conceptualizes and describes an approach to critical queer legal theory that incorporates what sexual minority populations say about themes related to sexual citizenship. This approach is a content analysis of poetry written by queers. In Part Two, I apply this method to several works of poetry, ranging from works of one of the most acclaimed American gay poets in the modern era, John Ashbery, to relatively unknown poets, such as KrisDeLaRash, whose works have yet to be published. Part Two applies this approach and explores and analyzes themes of sexual citizenship through the lenses of queer poets. Many of the themes echo familiar themes of oppression, gender, and sexual autonomy. Other, less common themes also emerge, such as negotiated sexuality, chance, intersectionality, and happiness. In Part Three, I provide a brief summary of how these themes can inform a more complete theory of sexual citizenship. I conclude with the suggestion that a sex-neutral approach to sex and sexuality may be necessary to achieve full sexual citizenship.

PART ONE: QUEER EPISTEMOLOGY

What is Queer?

Scholars do not agree on a definition on queer, but there appears to be a general consensus forming around the notion that queer is a sex-positive ideology. In the words of one scholar:

Queer denotes not an identity but instead a political and existential stance, an ideological commitment, a decision to live outside some social norm or other. At the risk of (the certainty of) oversimplification, one could say that even if one is born straight or gay, one must decide to be queer.4

Queer is distinguishable from “gay” or “lesbian” because the latter terms define sexual orientation based on one’s gender and the gender of the person with whom the one has sexual relations. Queer theory accepts that gender is a social construction, distinguishable from sex, which is a biological designation. Queer, then, may not be synonymous with homosexual or gay. In the words of one scholar, “queer means to fuck with gender. There are straight queers, bi-

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queers, tranny queers, lez queers, S&M queers, fisting queers.⁵ In *The History of Sexuality*, Michel Foucault describes sexuality as not some natural urge, but, like gender, a discursive construction. The matrix of discourse surrounding norms of sexual citizenship constructs sexuality.⁶

In addition to challenging gender assumptions in sexuality, many critical queer scholars also challenge labels, identity politics, and essentializing language used to describe queer citizens.⁷ Alfred Kinsey refused to use labels to describe sexual orientation, since he believed sexual behavior could be described, but sexual identity was not fixed.⁸ Defining queer becomes not an act of labeling individuals, but an act of describing sexual conduct of individuals, much of which is viewed as socially transgressive. Even within the queer community, little agreement exists on whether and how queers should define themselves. The list of terms has become extensive: lesbian, gay, bisexual, transgendered, omnisexual, pansexual, asexual, metrosexual, pomosexual. Concerning the latter, just as postmodernism serves as a reaction to modernism in art, pomosexual (postmodern sexual) is a reactionary term that challenges scholarly attempts to pigeon-hole individuals into even the broadest categories of queer sexuality:

Pomosexuality lives in the space in which all other non-binary forms of sexual and gender identity reside—a boundary-free zone in which fences are crossed for the fun of it, or simply because some of us can’t be fenced in. It challenges either/or categorizations in favor of largely unmapped possibility and the intense charge that comes with transgression, as well as the need to transgress limits that do not make room for all of us.⁹

This characterization of sexuality is appealing because it is broad enough to accommodate a wide range of sexualities. On balance with the need to provide conceptual clarity in academic and social discourse, however, such characterizations often muddy the existing litany of terminology that describes sex and sexual conduct. Therefore, at the risk of oversimplifying and of alienating individuals who may rightly prefer not to be restricted by these

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⁶ See Eichner, *supra* note 1, at 315 (discussing Foucault).
⁷ See e.g., Greta Christina, *Loaded Words*, in *Pomosexuals: Challenging Assumptions About Gender and Sexuality* 29–35 (Carol Queen & Lawrence Schimel ed., 1997) (discussing issues with using words to describe individuals, such as “bisexual,” which are loaded with values and judgments that have both positive and negative ramifications for individual identity and political identity).
⁹ *Id.* at 23.
oversimplifications, I adopt a broad definition of queer, and I use it as an umbrella term to describe individuals who engage in marginalized and transgressive sexual conduct.

Defining Sexual Conduct (Sex)

Inherent in the definition of queer is a definition of sexual conduct. Hence, it is also necessary to form a working definition of sexual conduct (hereinafter “sex,” not to be confused with the same term often used to describe biological components of human bodies). The term must be broad enough to include that which is both queer and non-queer. Non-queer sex includes, but is not limited to, acts traditionally associated with procreation and titillating genital activities between men and women (e.g., intercourse, oral sex, mutual masturbation). A definition of sex must also include that which is queer, which includes non-procreative acts, opposite-sex acts, and myriad other acts that are outside the margins of social norms, such as S/M, voyeurism, cutting, fetish-play, and cross-dressing, so long as these acts are, at a minimum, titillating.

Defining sex is necessarily subjective, since sexual activities run the gamut from masturbation (a self act) to Bukkake (a group act) and from fantasy (arguably a non-act) to rape (a forced act). For purposes of this paper, I limit the definition of sex to consensual adult acts and self acts that are titillating. This definition presumes that consent is not in question.10

There is a liberating quality in queer theory’s sex-positive approach to sexual conduct, which allows self-identified queers to engage in any sort of consensual sexual conduct even if the conduct may be viewed by the majority as immoral or transgressive. As a theory of sexual citizenship (that is, a theory that affords individuals the full panoply of rights and freedoms irrespective of sexuality), queer theory encourages us to “fuck our way to freedom.”11 Not only is freedom found within the liberties to engage in transgressive sexual conduct, but also freedom is found in the openness in the public discourse about this conduct. Adopting an open, sex-positive approach to sexuality allows queers to expand the boundaries of what is sexually acceptable and, concomitantly, to gain greater social freedoms and legal parity.

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10 Defining “consensual” may be equally as problematic as defining sex. Consent is especially difficult to define when it involves children and animals.
11 Elisa Glick, Sex Positive: Feminism, Queer Theory, and the Politics of Transgression, 64 FEMINIST REV. 19, 19 (2000).
Formulating a Method for Critical Queer Theory

This paper proposes a nontraditional method of legal inquiry; hence, it is necessary to say a few words about methods and epistemology. For decades, scholars have debated the most useful approach to studying law and the courts. Every discipline has its method, and the legal discipline liberally borrows methods from other disciplines.12 I believe Martin Shapiro gets it right, when he suggests that the legal community will [should?] embrace any useful information about its profession regardless of whether the method of inquiry is qualitative or quantitative, or whether this information is informed by legal scholars, social science professionals, or professionals from other disciplines.13 Disciplines, like democracies, are healthiest when there is diversity of thought in the discourse, which includes competing views about scholarly inquiry. It is not the intent of this paper to rehash disputes about methods, however, since I use a nontraditional method rooted in the humanities, it is appropriate to frame the method within the context of this debate.

Consciousness raising, a feminist method, is the nexus of the queer method used here. Catharine MacKinnon argues that consciousness raising, a method of women sharing women’s experiences in environments devoid of men, is necessary in order to peel away women’s layers of false consciousness.14 False consciousness is the indoctrinated truths and realities that women have come to believe about women and about society because of millenniums of male domination.15 The method involves women talking with one another and accepting as true the things women say about themselves.16 The theoretical result of the method is a feminist worldview that challenges male-dominated legal approaches to law and society. Notwithstanding the heterogeneity of women’s experiences and attitudes, common themes that emerge from consciousness raising are greater emphases on care and cooperation and less emphasis on competition and domination.

What feminist epistemology does for women, a queer epistemology should also do for sexual minorities: peel back the layers of false consciousness and allow queer individuals to

12 See Mark A Hall & Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, 96 CAL. L. REV. 63, 63-64 (2008) (stating that legal scholars are the “great borrowers of scholarly methods” but that “content analysis … could form the basis for a uniquely legal empirical methodology”).
13 See MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE at 7(1964).
14 See CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987).
15 Id.
16 Id.
frame a worldview in their own way. As a method of inquiry, feminists’ consciousness raising is not sufficient for queer citizens. Consciousness raising is a group activity. This method has value only if queers talk with one another and allow queer themes and queer truths to emerge.

Consciousness raising cannot tap the lived realities of queer individuals who spend a considerable portion of their lives in isolation—in society’s closets. For many sexual minorities, being “out” is not possible, not thinkable, and, for some, not desirable. Unlike women, who have mothers, aunts, sisters, teachers, friends, and myriad other women who are visible to them, sexual minorities frequently are not visible to one another, especially in rural areas. In many instances where they are visible, sexual minorities are often precluded from associating with other sexual minorities for fear of being outed through that association. Hence, the opportunity to engage in consciousness raising is not available to all sexual minority citizens.

To be sure, the experiences of sexual minorities, like women, are not homogeneous. Many sexual minorities, especially younger generations and city dwellers, live a more open life. Others—for example, southern black gay men—find ways to “negotiate their sexual and racial identity with their southern cultural and religious identity.” Still, a substantial portion of sexual minorities live substantial portions of their lives in isolation, where the only meaningful expression of their hidden selves is through art—poetry, prose, painting, sculpting, singing, dancing.

The challenge is finding a method that allows queer voices to emerge in ways that consciousness raising allows women’s voices to emerge. Based on my own experiences of growing up gay in the rural south, it was apparent that there are a considerable number of sexual minorities who write poetry. In the introduction to The World In Us, a collection of contemporary gay and lesbian poetry, the editors write, “poetry, as the most personal of literary genres, has always appealed to [the queer] community—many of us having grown up in secrecy and isolation.” Looking to queer poetry could serve not only as personal accounts of the lived realities of sexual minority citizens, but also as fodder for queer theorists who develop legal concepts related to sexual citizenship.

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18 The World In Us xvi-xvii (Michael Lassell & Elena Georgiou eds., 2000).
Other scholars have used poetry as a medium to challenge social, political, and legal norms surrounding sexual minority communities. Adrienne Rich, a noted literary figure, essayists, and activist, uses this medium to advance queer and minority causes. She writes:

I see the life of North American poetry at the end of the [twentieth] century as a pulsing, racing convergence of tributaries—regional, ethnic, racial, social, sexual—that, rising from lost or long-blocked springs, intersect and infuse each other while reaching back to the strengths of their origins. (A metaphor, perhaps, for a future society of which poetry, in its present suspect social condition, is the precursor.)

If Rich is correct, it behooves scholars, including legal scholars and queer legal scholars, to include queer poetry as a source of social inquiry. This paper attempts to do that.

**The Method is Footnoted Poetry**

When used as a method of social inquiry, queer poetry is part art and part method, but first, it is art. Yet, art, however expressive and however insightful, does not a legal argument make. The method, as I conceptualize it, is footnoted poetry. Queer expressions, concepts, and personal truths emerge in the poetry. Analyses of the concepts are in the footnotes.

This method serves a couple of purposes. It legitimizes individual queer expressions and communications and allows queers to do so in mediums familiar to them. Tongue in cheek, this method also allows queer concepts to be communicated to legal scholars using a language they understand—footnotes. The footnote is essential because it allows the art to stand on its own without the distractions of disclaimers and interferences of tangents and analyses. Footnotes allow queer expression (the poetry) to be primary and analysis to be secondary.

As legal scholars are aware, it is not always clear where procedure ends and substance begins. The same is likely true for footnoted poetry as a method. As I suggested in the introduction of this paper, one of the problems with theories of sexual citizenship is separating what is said about sexual citizenship from those who say it and how it is said. Footnoted poetry, from a methodological standpoint, fosters integrity in all three: who says it (queers), how they say it (poetry), and what is said (the poetry, itself, and the footnotes). In this regard, it may not be possible to separate substance (what is said) from procedure (how it is said). Footnoted poetry allows queers, first, to be. Then, it allows queers to be understood. This structure is desirable, both methodologically and symbolically.

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Applying the Method

I surveyed a sample of queer poetry. I included in my survey a range of poets, with the hope of gaining insights from the feasibly broadest cross-section of the queer population. I limited my survey to recent poetry. No work is older than twenty years. With assistance from a local librarian, I chose a queer poet who has prominent commercial and critical literary success—John Ashbery. I surveyed a contemporary collection of gay and lesbian poetry published in 2000, which contains hundreds of poems from more than forty poets, all of whom the editors selected based on the diversity of their writings. I also visited my own bookshelf, which contains a number of queer poetry works that have shaped my own queer ideas.

Additionally, I wanted to include in the sample works from emerging poets. I attended a queer literary performance group in Chicago, Homolatte, which includes local queer poets reading their own works.20 I visited a Chicago bookstore, Quimby’s, which sells on consignment local poets’ independently published zines and related swag.21 I include, somewhat reluctantly, poetry that I, myself, wrote. Since much of my poetry is informed by studies of sexual citizenship, I recognize that including my own poetry may compromise the integrity of the method. Nonetheless, I include it here, since it adds to the diversity of authors represented in the work (a self-identified queer, southern, political scientist and legal scholar). I begin with John Ashbery.

PART TWO: QUEER POEMS AND CONCEPTS OF SEXUAL CITIZENSHIP

Ashbery’s Philosophy of Life: A Model for Sexual Citizenship

John Ashbery aspired to write the poem that the critique could not talk about.22 His poems are sometimes described as difficult to discuss because they do little more than invoke a feeling. One literary critic notes the difficulty in talking concretely about Ashbery’s poetry because his subject is aesthetic consciousness:

At the center of an Ashbery poem isn’t usually a subject (à la Philip Larkin) but a feeling (à la Jackson Pollock). . . . The best thing to do, then, is not to try to understand the poems but to try to take pleasure from their arrangement, the way you listen to music.23

21 For examples of such works, see www.quimbys.com
22 See Meghan O’Rourke, How to Read John Ashbery, Slate (March 9, 2005) available at www.slate.com/id/2114565/.
23 Id.
This suggests that scholarly interpretations of Ashbery’s work are not only difficult, but also, necessarily, subjective. Scholars also comment that John Ashbery leaves himself and his homosexuality out of his poetry.\footnote{See \textit{John Shoptaw, On the Outside Looking Out: John Ashbery’s Poetry}, 4 (1994).} Rather than hiding or revealing homosexual content, his poems “behave” differently no matter what their subject.\footnote{\textit{Id.}} Scholars have dubbed this distorted behavior “homotextual.”\footnote{\textit{Id.}} One poem, \textit{My Philosophy of Life}, invokes decidedly homotextual images and concepts, which are useful to inform a queer approach to sexual citizenship.


\begin{quote}
Just when I thought there wasn't room enough for another thought in my head, I had this great idea—call it a philosophy of life, if you will. Briefly, it involved living the way philosophers live, according to a set of principles. OK, but which ones?

That was the hardest part, I admit, but I had a kind of dark foreknowledge of what it would be like. Everything, from eating watermelon or going to the bathroom or just standing on a subway platform,\footnote{A philosophy of life, as with a legal theory of citizenship, necessarily must acknowledge the physical self, including biological functions such as eating and going to the bathroom. Such a philosophy must also acknowledge basic freedoms of movement, such as the ability to use a subway.} lost in thought for a few minutes, or worrying about rain forests, would be affected, or more precisely, inflected by my new attitude. I wouldn’t be preachy, or worry about children and old people, except in the general way prescribed by our clockwork universe. Instead I’d sort of let things be what they are\footnote{Ashbery’s philosophy of life allows him to step out of his cerebral mind, a mind that is concerned with worldly problems such as the depletion of the planet’s natural resources and rain forests, a mind that can become preachy about society’s role to care for children and the elderly. Ashbery’s philosophy acknowledges the importance of self and the individual. “Letting things be what they are” speaks to an awareness of individual limitations. No matter how much one may want to change the environment or social conditions, one must understand his or her place in the world (standing on a subway platform) and be able to find peace within that world.} while injecting them with the serum of the new moral climate I thought I’d stumbled into, as a stranger accidentally presses against a panel and a bookcase slides back,
\end{quote}
revealing a winding staircase with greenish light somewhere down below, and he automatically steps inside and the bookcase slides shut, as is customary on such occasions. At once a fragrance overwhelms him—not saffron, not lavender, but something in between. He thinks of cushions, like the one his uncle's Boston bull terrier used to lie on watching him quizzically, pointed ear-tips folded over. And then the great rush is on. Not a single idea emerges from it. It's enough to disgust you with thought. But then you remember something William James wrote in some book of his you never read—it was fine, it had the fineness, the powder of life dusted over it, by chance, of course, yet still looking for evidence of fingerprints. Someone had handled it even before he formulated it, though the thought was his and his alone.

It's fine, in summer, to visit the seashore. There are lots of little trips to be made. A grove of fledgling aspens welcomes the traveler. Nearby

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30 This living-in-the-moment philosophy permits the individual to take in scents and fantasies and to enter into the hidden thoughts of one's mind (as if entering into hidden rooms behind bookshelves).

31 "Chance" is a core underpinning to Ashbery’s philosophy of life. It is also a core underpinning of a queered jurisprudence of citizenship. How one responds to sexuality (whether positively or negatively as in “disgust”) necessarily depends on the frames of reference available to the individual. One’s frames of reference are informed by one’s education, religion, and life experiences. Here, Ashbery describes a frame of reference as “something William James wrote in some book of his that you never read.” This particular frame of reference is highly personal and not universal. A philosophy of life should be broad enough to understand the myriad personal points of reference that citizens have, many of which (if not nearly all) are based entirely on chance. One’s biological sex, race, ethnicity, religion, and ethnicity exist by chance. Arguably, whether one is heterosexual or homosexual is also by chance. But, there is not a bright line designating where chance stops and choice begins. Being born a girl to a family that is poor and fundamentalist Christian does not mean that one will die in that same condition. One can choose to peel away layers of religion and ethnicity, one can choose to educate oneself in nuclear physics, one can choose to navigate the socio-economic ladder, and one can change one’s gender. The tension between chance and choice exists in every life. Ashbery’s acknowledgement of chance emphasizes that frames of reference depend entirely on one’s chance experiences, including how one might ground a fleeting moment in a thought shared by William James.

William James is an American psychologist and philosopher, trained as a medical doctor. See http://en.wikipedia.org/wiki/William_James. Brother of the gay novelist, Henry James, he wrote prolifically about a number of topics including pragmatic theories of truth, which purport that the value of any truth depends on its use to the person who holds it. Id. “James’s pragmatism includes the view that the world is a mosaic of diverse experiences that can only be properly interpreted and understood through an application of ‘radical empiricism.’ Radical empiricism . . . asserts that the world and experience can never be halted for an entirely objective analysis, if nothing else the mind of the observer and simple act of observation will affect the outcome of any empirical approach to truth as the mind and its experiences, and nature are inseparable. James's emphasis on diversity as the default human condition . . . has maintained a strong influence in American culture, especially among liberals.” Id.

Ashbery alludes to a William James thought, but there is no way of knowing which one. Curiously, the interpretation of Ashbery’s inclusion of “chance” in his philosophy of life is consistent with the spirit of William James’ writings about the pragmatism of truth. There is no single truth to which every person has a frame of reference. Frames of reference are necessarily based on the chance experiences of the individual. Hence, like a legal theory of sexual citizenship, a philosophy of life must situate that which is chance alongside that which is not chance. Such a philosophy must be broad enough to encompass the diversity of chance life experiences, including queer experiences. A libertarian theory of sexual citizenship is likely the only theory that can accommodate such diversity of chance.
are the public toilets where weary pilgrims have carved their names and addresses, and perhaps messages as well, messages to the world, as they sat and thought about what they’d do after using the toilet and washing their hands at the sink, prior to stepping out into the open again.32 Had they been coaxed in by principles,

32 This is an allusion to queer sexual behavior. It is queer because of the transgressive nature of engaging in a presumed private sexual act in a public space. Queer poets frequently write about sex in public places. See Melinda Goodman, New Comers, THE WORLD IN US 119 (women having sex in a church basement bathroom); Wayne Koestenbaum, Tea Dance, THE WORLD IN US 152 (young men exposing themselves on a train, men masturbating on stoops at Fire Island, boy watching a man soaping himself in the shower, men drilling holes in the walls between toilet stalls).

Queer sex in public places is an important analogy for the public-private discourse of sexuality. Courts have indicated a willingness to protect queer rights to sexual autonomy based on privacy doctrine. See e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (“The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct.”). One reading of Lawrence suggests that state anti-sodomy laws are unconstitutional because they infringe on citizens’ privacy rights rooted in the liberty clause of the Fourteenth Amendment. The problem with this reading is that it relegates queer sexuality to only private places. It keeps gays and lesbians in the “closets” of their private homes.

It is not possible, nor desirable, to cabin sexuality in the private home. Sexuality is and should be displayed publicly. Two examples illustrate. First, better court decisions have recognized that expressions of sexuality in public may be protected as a First Amendment right if the expression is a political one. See e.g., Fricke v. Lynch, 491 F. Supp. 381 (RI 1980) (holding that a student’s right to attend his high school prom with his gay date is protected by the First Amendment). Second, marriage is a commonly accepted display of sexuality, since the marriage ceremony is often celebrated publicly. Courts have protected marriage (or marriage-like) rights for same-sex couples based on equal protection grounds. See e.g., Varnum v. Brien, 763 N.W.2d 862 (2009). Notably, courts that uphold marriage (or marriage-like) rights for same-sex couples have not based their decisions on citizens’ rights to display sexuality publicly in a marriage ceremony. However, the corollary to protecting marriage rights is that same-sex couples will be able to be more public about sexuality. These examples of publicly displaying sexuality are relatively noncontroversial. What is more controversial is engaging in sexual conduct in public spaces. Privacy doctrine and equal protection doctrine do not provide legal means for securing such a right. It may not even be desirable to find space in the U.S. Constitution for guaranteeing such a right, but a queer approach to sexual citizenship should include tenets that make sexuality more public.

Queer sexual conduct is unlikely to result in procreation, so we need to think about queer sexual conduct for what it is—a physical act. It is a physical act comparable to eating, urinating, and defecating. Society provides public spaces for these three physical acts, and may also need to provide public spaces for sexual conduct. Queer culture suggests that this is possible, since queers frequently have sex in public places, including bathrooms, bathhouses, locker rooms, showers, bookstores, bars, alleys, theaters, beaches, and parks. The world has not come to an end because of this behavior. Instead, public sex could improve the lives of citizens because it is convenient. This convenience allows people to release more regularly sexual tension and aggression, which further enables them to focus on more important tasks of the day—work, school, parenting. If we view sexual conduct in the same light as other physical activities, such as eating, urinating, and defecating, it becomes irrational to create a legal theory of citizenship based on trivial characteristics such as how and where one has sex. It would be just as untenable to discriminate against a person who has oral sex with men in public restrooms as it would be to discriminate against a person who eats vegan food with men in public restaurants.

Ashbery also notes the experience of engaging in sexual behavior and then ritually (symbolically) sanitizing oneself of that experience before appearing in public. This suggests that it is no more unsanitary to have sex in a public restroom than it is to urinate. Health concerns are not viable reasons to ban public sex. Society can promote healthy public sex acts in ways similar to providing wash basins, toilet paper, and tampon dispensers.

This argument deviates from sex-positive queer theories; it is a sex-neutral argument. Sex-positive arguments may advocate sex in public places based on the liberty to do what feels good. Here, the aim is to promote an environment that de-emphasizes sex. Humans are animals. We fuck like animals. We should treat sex the same way we treat our other animalistic needs (e.g., eating)—neither positive nor negative. Current social mores make it
and were their words philosophy, of however crude a sort? I confess I can move no farther along this train of thought—Something’s blocking it. Something I'm not big enough to see over. Or maybe I’m frankly scared. What was the matter with how I acted before? But maybe I can come up with a compromise—I'll let things be what they are, sort of. In the autumn I’ll put up jellies.

imprudent to discuss sex publicly and more imprudent to engage in sex publicly. This poses problems for those who are perceived to engage in transgressive sexual behavior, since, as Ashbery questions, there is no reason to impose such a moral judgment. If the social norm becomes one that views sex neutrally, based upon norms of open sexuality, it may be that this same sex-neutral approach inadvertently stigmatizes those who choose not to have sex. That is, nonsexual persons become the transgressors. However, stigmatizing nonsexual persons is unnecessary, since the liberty to have sex includes the liberty not to have sex. Nonsexual persons do not become marginalized under this model, since the ultimate goal of sex-neutrality is to de-emphasize sex. In a society where sex is neutral and de-emphasized, it will matter little whether a person has sex or not.

The core of Ashbery’s philosophy of life is likely to be found in the “crude” philosophies written on bathroom walls. These philosophies, sexual in nature, suggest a validity to queer theorists who “encourage us . . . to fuck our way to freedom.” See Glick supra note 11, at 19. Philosophically, we must acknowledge that we are animals and that we have a sexual self. Animals engage in sexual conduct. There is a biological need to engage in sexual conduct. Queers, by openly engaging in sexual behaviors and openly and honestly discussing physical desires (e.g., writing “crude” sexual sayings on restroom walls) push the boundaries of what is considered transgressive sexually. By pushing these boundaries, society’s attitudes about sex can change, although it would be naïve to expect this change to occur quickly. Current discourse concerning the rights of same-sex couples to marry serves as an example.

Some gay and lesbian rights activists push for total marriage equality in the face of many citizens viewing homosexual behavior as transgressive. In this discourse, courts and society have been forced to think about why same-sex sexual behavior is transgressive, and, indeed, the majority opinion has shifted in favor of viewing same-sex sexual activity as less transgressive. This increased acceptance helps explain the shift in judicial philosophy from the 1986 Bowers v. Hardwick decision (same-sex sodomy is morally wrong and states have the right to regulate this immoral behavior) to the 2003 Lawrence v. Texas decision (overturning Bowers and stating that the “continuance [of Bowers] demeans the lives of homosexual persons”). Pushing the limits of sexuality in society helps move society in a direction that accepts what was once considered transgressive. Today, the majority of citizens in the United States would likely agree that it is morally unacceptable to beat a homosexual and leave him for dead tied to a post, evidence by the 2009 passage of the Matthew Shepard Act, which criminalizes hate crimes against sexual minority groups.

There exists the possibility of backlash when gay activists foist their agendas on society too quickly. For example, there was a rash of states that passed mini DOMAs (Defense of Marriage Acts) refusing to recognize same-sex marriages performed in other states after the Hawaii Supreme Court poised it state to allow same-sex couples to marry. See Baehr v. Lewin, 74 Haw. 645 (1993). By passing mini DOMAs, many states drew a line in the sand regarding “marriage” for same-sex couples. But, it was necessary to push the limits of what is acceptable sexually in society so that in 2010 the majority of citizens are willing to accept or tolerate civil unions or domestic partnerships for same-sex couples.

These examples suggest that it is possible to fuck your way to freedom. By engaging in transgressive behavior, and discussing it, including writing it on the walls in public restrooms, the public is forced to acknowledge that the behavior exists. A precursor to sexual liberty is the acknowledgement that certain sexual behaviors are not criminal, immoral, and, perhaps, transgressive. Hence, it may be that Ashbery’s philosophy of life can be reduced to crude principles carved on the walls of public restrooms.

The train of thought that Ashbery is unable to advance is the thought that a philosophy of life may be rooted in the crude messages on bathroom walls as discussed supra, note 33. He admits that he cannot pursue this thought because of something bigger than him (internalized homophobia? false consciousness? majoritarian moral beliefs? religion? tradition?) or because of fear (fear of ostracism? fear of criminal stigma in a pre-Lawrence society where same-sex sodomy is outlawed in many states?). Yet, he legitimately questions why his actions (interpreted as engaging in sexual acts in a public toilet) are viewed as immoral.
and preserves, against the winter cold and futility, and that will be a human thing, and intelligent as well.\textsuperscript{35}

I won't be embarrassed by my friends' dumb remarks, or even my own, though admittedly that's the hardest part, as when you are in a crowded theater and something you say riles the spectator in front of you, who doesn't even like the idea of two people near him talking together. Well he's got to be flushed out so the hunters can have a crack at him—this thing works both ways, you know.\textsuperscript{36} You can't always be worrying about others and keeping track of yourself at the same time.\textsuperscript{37} That would be abusive, and about as much fun.

\textsuperscript{35} Ashbery's solution to reconciling his perceived immoral behavior in a public restroom is to compromise. Here, the compromise is to balance transgressive sexual behavior in a public restroom with non-transgressive behavior of putting up jellies and preserves against the cold of winter—a sensible and human thing that advances his own human condition. Ashbery's compromise is pragmatic. Transgressive behavior cannot stand alone as a philosophy of life. Having sex in a public restroom symbolizes difference between citizens based on sexual behavior. Putting up jellies symbolizes sameness. This sameness-difference distinction also exists in feminist jurisprudence, where liberal feminists and formal equality feminists emphasize how women are similar to men and radical feminists emphasize how women are different from men. Ashbery's compromise is to "let things be as they are, sort of." This philosophy is similar to pragmatic feminists' approach to addressing the double-bind of the sameness-difference distinction, where both alternatives have negative consequences. For pragmatists, the solution is to choose the alternative that hinders empowerment the least and incrementally advances the group toward ideal justice. See e.g., Margaret Radin, \textit{The Pragmatist and the Feminist}, 63 S. CAL. L.REV. 1699 (1990). Pragmatism may work well for a theory of sexual citizenship, where, as Ashbery describes, the correct solution in a given situation may be having the wisdom to know when to push the envelope and when to "let things be as they are, sort of." This philosophy acknowledges the limits of imposing change too quickly in law and society, and it also acknowledges the realities of the limitations of a minority group changing the views of a majority.

\textsuperscript{36} It is easier to understand these phrases if you imagine that the person in the theater is with his or her date (partner, spouse, lover, significant other), who is of the same gender. Imagine that the couple's sexuality is made obvious through their own discussions, and "something you say riles the [homophobic] spectator in front of you." Ashbery's response is that the homophobe must be flushed out, so the hunters can have a crack at him. Ashbery's response is similar to the jurisprudence in \textit{Hurley v. Irish-American GLB Group of Boston}, 515 U.S. 557, and \textit{Boy Scouts of America v. Dale}, 530 U.S. 640—flush out the intolerants so the hunters can find them. That is, force people to admit their prejudices instead of allowing them to hide behind the status quo of ethnicity (Irish), religion (duty to god), and patriarchy (morally straight). The solution is not to shoot the homophobes like quail. Instead, American jurisprudence aims to preserve and protect these rights of association under the First Amendment. To preserve First Amendment rights, homophobic associations need only to hang a banner across their establishment stating, "This is the Boy Scouts of America, a homophobic organization that discriminates against queers." Queer jurisprudence embraces the preservation of these rights, since such a banner allows non-homophobic individuals to dissociate from such organizations. Too, society can dissociate by insisting that these organizations not benefit from taxpayer dollars (except, of course, that these organizations may still qualify for 501(c)(3) tax status, which means that contributions to these organizations may still be tax deductible).

Flushing out the faggot (or flushing out the [insert racial expletive] who hides in forests after escaping from the master's plantation) so the hunters can have a crack at them works both ways. Not only must we flush out the transgressors, but also we must flush out the bigots, sexists, and homophobes who hide behind the status quo. Queers and homophobes, alike, must be subjected to the same "flushing out" in society. It is no more appropriate for a homophobe to hide in public theaters than it is for queers to hide in theater's public toilets. Flushing out encourages an openness in society, a public discourse. One of the notable differences between a queer jurisprudence and racial-minority jurisprudence is that queers lack visibility. In addition to demanding that intolerants avail themselves publicly, "flushing out" serves as a euphemism for increasing queer visibility. In order for Ashbery's queer philosophy to work, queers must come out of the closet.

\textsuperscript{37} Stated differently, mind your own business. Stated differently, live and let live. Admittedly, there is danger in this philosophy of life. A libertarian ideal requires that citizens have the freedom to engage in behavior without
as attending the wedding of two people you don’t know.\textsuperscript{38}

Still, there’s a lot of fun to be had in the gaps between ideas.

That’s what they’re made for! Now I want you to go out there and enjoy yourself, and yes, enjoy your philosophy of life, too.

They don’t come along every day.\textsuperscript{39} Look out! There’s a big one...

\textsuperscript{38} Attending weddings of people you know is not fun when you are always the bride’s maid and never the bride. Queer translation: gay men and pear-shaped fag hags are relegated to the groups designated as bachelors and bachelorettes, at whom grooms and brides fling garter belts and bouquets of flowers. Swooning and dreaming: If only I could be so lucky to have someone sweep me off my feet, I, too, could waltz down the aisle and register for shiny kitchen appliances at Macy’s Department Store. Attending weddings \textit{might} be tolerable if you are nine years old and the wedding is for your mother and your new step-father. It might even be joyful, peaceful and, perhaps, fun if you are the gushing mother of the bride. Attending the wedding of two people you do not know teeters on abuse, especially for queers who are denied this right.

\textsuperscript{39} Two points are notable here. First, Ashbery acknowledges that there is no one truth to life. He expounds \textit{his} philosophy but recognizes that the particulars of his philosophy are as unique as the chance life experiences he uses to frame them. Part of his philosophy is acknowledging other philosophies, encouraging individuals to pursue \textquote{their} philosophies. This necessarily suggests that Ashbery’s philosophy of life is broad enough to accommodate potentially competing philosophies. Again, the only philosophy capable of meeting the objective of accommodating multiple life philosophies is a libertarian one.

Second, Ashbery underscores the idea that life is a string of fleeting moments. Recognizing individual limitations, one should not be overly consumed with, for example, the spiraling condition of rain forests, the elderly, and children. An integral part of his philosophy understands our human limitations as animals. We eat. We fuck. We die. When we are too consumed with righting all the world’s wrongs, we risk savoring the scant few epiphanies in life, epiphanies that should consume us while we are standing on subway platforms waiting for a train. Philosophies of life and legal theories of sexual citizenship that deny us these moments are not worth considering.
Melinda Goodman On Loving a Woman: Negotiating Sexuality

Open Poem\textsuperscript{40} (excerpt)
that loving a woman
can sometimes mean
knowing when not to fuck her
that what is truly erotic
is the power we each have
to stop
this
pain inflicted
harder than any dick
because it comes from the ones
who knew us
and loved us
and could stick it to us
best. \textsuperscript{41}


\textsuperscript{41} This poem represents a common theme in queer poetry that addresses gender roles. Scholars who discuss gender roles in same-sex relationships suggest that same-sex couples can serve as models for gender equality in relationships. For example, since there is no dominant gender in the relationship (both are the same), divisions of labor are not automatically assigned. Instead, they are negotiated, which leads to a more equitable division of labor.

Goodman’s poem alludes to negotiation in sexuality. “Loving a woman can sometimes mean knowing when not to fuck her” suggests that sexual conduct is negotiated in a relationship. That is, a person’s sexuality depends on the sexuality of the person with whom they are having sex. Goodman suggests that dominant sex roles (fucking) can be fluid. Loving a woman can sometimes mean not fucking her implies a corollary; sometimes it means fucking her. This type of negotiation of sexuality is not unique to same-sex couples. However, examining same-sex relationships allows us to see the fluidity and mutability of sexuality more clearly than in opposite-sex relationships, since the latter relationships are conflated with gender roles. Goodman suggests that sexuality between women should be negotiated, in part, in order to avoid abuses of power in relationships. Hence, negotiating sexuality includes understanding the power dynamics inherent in sexual relationships and not abusing that power.

How legal theorists view the rights of sexual citizenship may depend on whether sexuality is mutable. Two points about mutable sexuality are notable. First, in the nature-nurture debate within the queer community, the debate often divides along sex lines. Gay men tend to suggest that sexuality is determined by nature. Lesbians tend to suggest that sexuality is determined by choice. These are, of course, generalizations. It could be that both are correct. What causes a man to be gay could be different from what causes a woman to be a lesbian. If this is true, the legal result is that we may be forced to treat men and women differently. This may not be a desirable legal result in equality jurisprudence. Second, if sexuality is mutable (in ways that Goodman’s poem suggests), sexuality is likely mutable for gay and non-gay people alike. If sexuality is mutable for everyone, then the legal issue of sexuality’s mutability should be moot, since it is undesirable to discriminate against those who choose not to be gay. In sum, if sexuality is mutable for some, the division may occur along gender lines, and the law should not recognize disparate treatment based on sex, unless there is a compelling government interest to do so. Such an interest is not readily cognizable. If sexuality is mutable for all, law should not privilege those who choose to be heterosexual.
Edict
We have dashes for lineage,
gashed appendages
that drip
like master’s images
of European messiahs.

We got paddy wagons and radio flyers,
media town criers howling hysteria
to sellers and buyers.
We got liars with plumes
and pins and needles,
sins and feeble-shouldered
self-assuming moguls
sitting at the top of totems and
we owe them taxes.

We got AIDS and rashes but we don’t have potions.
We got buses and cards but we don’t have tokens
We got million-dollar houses but our homes still broken
We leave no child behind but our schools are closing.

We are the few, the proud, the chosen the smothered
We got pillows but we don’t have comfort.
We got rabbits and dildos but we don’t use rubbers
We got clinics but we don’t have blue shields or blue crosses.

We got boys in blue that put black boys in coffins.
We don’t hear about it often but sometimes we do,
over our morning coffee, during our daily commute …

We got traffic, so sometimes we’re tardy.
Sometimes we’re absent cuz the night before we partied
We are truant but we aint true,
been wearing masks since before swine flu

We are fluent.
We are movement.
We are diasporas of black music.
We are jazz and rap and blues.
We chase green, but see red like bulls.

42 KRISDELARASH, Edict, VISCERAL (2009, self published). The insights of this poem, for purposes of informing a
legal theory of sexual citizenship, are not found by dissecting individual lines and phrases. Rather, this poem speaks
broadly to the theme of diversity. I reserve comment until the end of the poem.
But we try to be better.

We got levers and pulleys.
   We have digital warfare and cyber-bullies
   We ask Jeeves, query Google but they never answer fully …

We got full moons and empty bellies
We got gowns and teddies and hooker boots but there is no good night.
We support our troops but there is no “good” fight.
We have rights except when it comes to fags and dykes.
We don’t like them.
   We are them.
   We are at war against, with and for them.
   We take it all or have nothing
cuz table scraps will never be enough when
we know we could have it all.

We got stonewalls and bricks,
cliffs and precipices,
coups and kisses,
clues but no mystics
to decipher what comes after the
-ellipses-
   We have critics but we say fuck’em,
   We don’t listen.
   We have iPods.

We have many gods but we don’t know we’re pagan.
We got Obama but we almost had Palin.
We don’t expect smooth sailin, but we aint stayin the course
We don’t just shoot the messenger.
We kill the source.
   We got the torch, but it aint passin thru here.
   We got about ten thousand of them flashin blue spheres…

We are voyeurs.
We are kinks.
We are the links that bind and break for closure.
We got composure…

But we don’t got peace.
We got pieces on the street
but we don’t got slices.
We don’t get raises,  
but we get higher prices  
We sing the lord’s praises,  
Then return to our vices…

We are wicked.  
But we could march close-fisted,  
lead a resistance so monolithic  
that radars can’t even pick it up.  
We have the world in our hands  
and we can lift it up.

We have potential.  
We can progress,  
We could be the prophecy  
and the prophetess.  
We could have so much more if we took so much less.  
We can be the generation without regrets.

We can resolve.  
We can evolve.  

43 The overarching theme in KrisDeLaRash’s edict is that the queer community is not homogeneous. In this poem, she addresses numerous themes related to race, ethnicity, religion, class, sexuality, political ideology, health, education, war, and technology. Collectively, these themes suggest that a theory of sexual citizenship should be broad enough to encompass the vast heterogeneity that cuts across sexualities.

These themes point to the tensions that exist between essentializing characteristics and the intersectionality of these characteristics. Essentialism is the notion that there exists within a person or group an experience that can be described independently from other aspects of the person, that there is an “essence” to that experience. See Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House, 10, 16–30 BERKELEY WOMEN’S L.J. (1995) (arguing that essentializing characteristics often used to describe individuals and groups such as race and gender are not simply additive but interactive). Intersectionality suggests that queer experiences may not be separable from the experiences of race, sex, gender, class, religion, and so forth, as KrisDeLaRash describes them. A queer theory of sexual citizenship fails if it attempts to separate out the sexual experiences of queers from these other characteristics. Again, this suggests that a comprehensive theory of sexual citizenship must incorporate the heterogeneous experiences of queer and non-queer individuals. If theorists insist on essentializing the queer experience, they are unlikely to move beyond the definitional difficulties described in Part One of this paper, since no one will agree on what that essentializing experience is. There is no single essence to being queer.

KrisDeLaRash’s edict also demands that queers not settle for anything less than full equality of citizenship. As she notes, “cuz table scraps will never be enough when we know we could have it all.”

She concludes with the suggestion about change. Rather than a revolution, she suggests an evolution. Like Ashbery’s philosophy, which suggests a compromise, an evolution is consistent with queer pragmatism. Rather than calling for sweeping, revolutionary change, KrisDeLaRash’s evolution implies that an elevated queer consciousness can evolve out of the status quo. Whether this evolution is created out of necessity from power imbalances or out of a separate philosophical desire for how to effect change, evolution is nonetheless pragmatic in its nature. A queer legal theory of sexual citizenship benefits from acknowledging the effectiveness of change when change evolves incrementally.
See the gay man in  
His natural habitat:  
Bed Bath & Beyond.  

Your CD rack has  
No Barbra, Britney, or Cher.  
Are you sure you’re gay?  

We just met – I think  
We might be going too fast.  
So I won’t swallow.  

How can we fix us?  
The fights, the silence . . . I know!  
Let’s get a puppy!  

These haikus highlight stereotypical behaviors of gay men who shop and decorate their homes, listen to music by divas, adopt pets, and have active sex lives. They are stereotypes. This means that many gay men do none of these things and many non-gay, non-male people also do them. Stereotypes can be dangerous, but they can also reveal threads of truth about groups of people. I include these haikus about stereotypes because they exemplify a substantial portion of the lives of queer citizens that scholars often overlook—happiness.

What we can learn from these poems is that the lives of gay people are mischaracterized, not by these stereotypes, but by denying that gay people can (and do) live happy lives. Legal theories of sexual citizenship may benefit from acknowledging that queer identities are not defined solely by sexual activity. Queer identities include music, homemaking, engaging in commerce, building families that includes pets, and unabashedly taking care of physiological needs.

The primacy of happiness should be elevated in queer theory discussions. Philosophical thinkers and legal scholars are incorrect when they lose sight of the quintessential philosophical question, which is how to achieve the “good life.” For example, John Finnis suggests that marriage ought to be denied to same-sex couples because homosexual conduct cannot actualize the good of friendship, which he sees as essential to the marriage relationship. See John Finnis, Disintegrity, reprinted in Is Homosexual Conduct Wrong? A Philosophical Exchange, THE NEW REPUBLIC, Nov. 15, 1993 at 12. He also suggests that masturbating and other non-procreative sexual activity is worthless gratification and disintegration of oneself. Id. On this point, I may not disagree. However, rather than taking a sex-negative approach to sexuality as Finnis does or taking a sex-positive approach as other queer theorists have taken, we will be better served by taking a sex-neutral approach to sexuality. Sexual activity is, as Finnis suggests, “merely animal.” Id. But, we should not view sex any more negatively than we view other bodily functions such as eating, sleeping, or urinating. Sex is neither positive nor negative. Rather than focusing on whether sex is good or bad (physically or morally), legal models of citizenship should focus on the quintessential philosophical question about how best to achieve happiness.

If Derfner’s poetry is instructive, it suggests that through the shreds of truth in stereotypes that gay men often lead model, coveted lives if the model life consists of happiness. Rather than focusing on how best to deny people rights, policymakers should focus on how best to duplicate the gay man’s model and how to strengthen it. A double-income, no-kid (DINK) household is a legitimate model for happiness. Rhetorically, why would someone not want the extra time and money to shop for things that enrich her life (music and down comforters)? And, by the way, aren’t people with pets shown to be healthier and happier because of reduced stress? This queer idea is consistent with economists (and Nicolas Sarkozy) who suggest that better economic models should include
Jerry Thomas’ Queer Theory Redux

Queer\(^{48}\)

Queer is an ideology—the feeling from an Ashbery poem.\(^{49}\)

Where there is no feeling, smoke pot.\(^{50}\)

Only, don’t smoke it with me because I get too paranoid from your judgment.\(^{51}\)


Happiness themes in queer poetry stand in stark contrast with other themes in queer poetry including isolation, loneliness, abandonment, and death. In particular, AIDS poetry is a common theme. Yet, if we look beyond the obvious negative themes in AIDS poetry, we see that this queer experience is instructive in two ways related to happiness. First, it exemplifies the best of the human spirit, exemplifying community building that occurred among groups of people who were ostracized by mainstream society. See Michael Lassell, How to Watch Your Brother Die, in THE WORLD IN US 170–72 (describing the role of biological family members as secondary to the role of the lover of a person dying of AIDS). When society turned its back on gay men, it was the queer community (lesbians, in particular) that learned to care for itself by creating, funding, and sustaining community organizations. See Joan Larkin, Inventory, in THE WORLD IN US 164–65 (accounting personal characteristics and incidents related to people who died of AIDS). In the introduction to The World In Us, the editors of the volume write that the title (and the collection of poems) represents not only “an invitation to enter the world that our minority poetry has become . . . but a statement that by ourselves we contain the world. They go on to say that “[gays and lesbians] hardly need a place at anyone else’s table, when [their] own dining room is full to bursting.” See LASSELL & GEORGIOU supra note 18, at xv.

In addition to showing the spirit of community building, AIDS poetry instructs us that we should enjoy life, because it is fragile and fleeting. Similarly, Derfner’s haiku instruct us to focus on the positive aspects of queer life and happiness. It should not be surprising that the themes that emerge consistently in queer poetry echo the themes that form the basis for a social contract—life, liberty and the pursuit of happiness. It is as if queer poetry brings us full circle in the development of a model of citizenship. Any model of citizenship, including sexual citizenship, should embody Lockean ideals that citizens must have the right to life, liberty, and the pursuit of happiness.

\(^{48}\) Unpublished poem by Jerry Thomas.

\(^{49}\) As previously discussed, John Ashbery aspired to write the poem that the critique could not talk about. See Meghan O’Rourke, How to Read John Ashbery, Slate (March 9, 2005) available at www.slate.com/id/2114565/.

O’Rourke states, “[a]t the center of an Ashbery poem isn’t usually a subject (à la Philip Larkin) but a feeling (à la Jackson Pollock.” As with an Ashbery poem, queerness is difficult to define and describe. The difficulty is that society places the responsibility on minority populations, such as queers, to define and defend their positions. Non-queers enjoy a position of privilege by not having to think about who and what they are, nor must non-queers describe or defend who or what they are to others. See e.g., Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177, 192–202 (Ann Snitow et al. eds., 1983) (describing heterosexuality as having been both forcibly and subliminally imposed on women). In a queer utopia, one might be able to say simply that “queer” is an ideology, the feeling from an Ashbery poem. In a queer utopia, others would understand this simplicity.

\(^{50}\) Drugs are a common theme in queer poetry and queer culture. One reason for this may be that drugs are an unhealthy medium by which queers cope with their internalized homophobia. An alternate explanation is that marijuana use promotes peace and camaraderie. See Charly Boyce Taylor, ‘Round Irving High School, in THE WORLD IN US 313 (“Marijuana joints make circles / hand in hand / like a collection plate / at Sunday service brother to brother); Robyn Selman, Exodus, in THE WORLD IN US 291–99 (“I befriended Mike with the good hash pipe.”). A further explanation, though not a competing one, is that drug use in the queer community may reflect efforts to replicate fleeting epiphanic moments, such as the one described in Ashbery’s My Philosophy of Life.

\(^{51}\) A pervasive assumption in queer theory is that queers have a radical, in-your-face attitude concerning sex and sexuality. In contrast, a common theme in queer poetry, which is not often expressed in queer theory, is fear. A considerable portion of the queer population may be reluctant to publicize their sexual experiences with people who do not share their queer attitudes. This poem represents queer reluctance to come out of the closet, because there are repercussions for doing so, such as queer bashing and ostracism. But, there are also repercussions for staying in the closet such as decreased political efficacy and societal distrust. See Bruce A. Ackerman, Beyond Carolene Products,
Queer Citizen

F*ck, f*ck, f*ck your boy — liberates semen only.

Manhandle yourself.

98 HARV. L. REV. 713, 728-31 (1985) (describing the relative ease of homosexuals, as non-discrete minorities, to “exit” when faced with conflict, which diminishes homosexuals’ political efficacy); also see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162–64 (1980) (suggesting that distrust of homosexuals stems from invisibility).

Unpublished poem by Jerry Thomas. This poem is inspired by Japanese haiku, although I am aware of the dangers of methodologists who bastardize haiku as an art form. See STEPHEN T. ZILIAK & DEIRDRE N. MCCLOSKEY, THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES, at 226 (2008) (summarizing their views of one scholar, “Here’s a scientist, Who sank the world with a t, 5 percent per cup.”). Once critic of Ziliak and McCloskey suggests, “[j]ust as a significance level of .05 does not mean a relationship matters, so encapsulating a thought in seventeen syllables in a 5-7-5 syllable per line arrangement does not a lovely Japanese haiku make.” Richard Lempert, The Significance of Statistical Significance: Two Authors Restate an Incontrovertible Caution, 34 LAW & SOC. INQUIRY 225, 247 (2009).

Queer theorists promote a pro-sex view to sexual citizenship. See Maxine Eichner supra note 1, at 317 (suggesting that there must be more to a theory of sexual citizenship beyond “if it feels good, do it.”). The problem with this queer view is that overemphasizes the importance of sex.

A common theme in queer culture is daddy-boy relationships. These roles may be an alternative to describing dominant-passive sex roles without having to describe these roles using ill-fitted gender terms. Too, the daddy-boy language may have undertones of Foucaultian notions of child sexuality and/or it may invoke S/M roles.

Fucking, however crass, is animalistic. Generally, the only thing that fucking liberates is semen that is clogged up in the testicles. Western society, including many of its religions, overemphasizes the importance of sex for reasons I do not elaborate here; however, in so doing, they de-emphasize homo sapiens as animals. Sex becomes a proxy for that which is greater than the two (or three or four) who are engaging in the sexual act. For some heterosexuals, sex is procreation. These acts of procreating are fairly viewed as more than simply liberating semen.

For others, sex is often described as mystical and magical, although reasons for these attitudes are seldom explained beyond mere physical shivers. Sex liberates nothing other than semen when it involves using another person to create friction against genitalia, merely for purposes of ejaculation. To suggest that this action is liberating beyond anything physical, overemphasizes the importance of sex; it wrongly places sex on a pedestal. Instead, these sexual acts promote dominance and patriarchy. See Allan Johnson, Why Patriarchy?, in THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 53, 56-66 (2005) (arguing that patriarchy is not about controlling women, rather, it is about men controlling men’s standing as men). Patriarchy is competition among men, which includes boasting sexual access privileges that one man may have to another woman (person), which other men do not have. Id This is not mystical or magical. It is sex role perceptions rooted in false consciousness that perpetuate the legitimacy of one person dominating another for mere sexual gratification. Patriarchy legitimizes the sexual objectification of others.

Instead of compartmentalizing segments of society based on sex (or gender), it is more sensible to harmonize citizens based on behavior that everyone does—masturbation. Commonly in society, sexual orientation is defined as heterosexual if the people involved in the sexual conduct are of opposite sexes, homosexual if the people involved are of the same sex, and bisexual if people engage in sexual relationships with both sexes. Society places too much emphasis on sex and gender when defining sexuality: definitions of sexuality are based on an individual’s sex and the sex of the person(s) with whom that individual has sex. Rather than focusing on the primacy of sex (gender) to classify sexual orientation, we should consider other characteristics of sexual conduct, such as whether one masturbates.

There are numerous societal benefits to masturbation. See Carrie Levine, Health Benefits of Self Cultivation, available at www.womentowomen.com/sexualityandfertility/healthbenefitsofmasturbation.aspx. Masturbation is healthy mentally, physically, emotionally, and socially. It lowers testosterone levels in men (and lowers male aggression). Masturbation is an alternative to using another person as a sexual object, and therefore, reduces the extent to which women (and men) are objectified. It helps control the spread of sexually transmitted diseases. Masturbation may reduce the risks of cervical and testicular cancer. It prevents unwanted pregnancies.
PART THREE: TOWARD A MORE COMPLETE MODEL OF SEXUAL CITIZENSHIP

In this paper, I have used the writings of queer poets to develop and flesh out concepts related to theories of sexual citizenship. Past theories, namely the extant status quo model based on patriarchy and tradition leaves sexual minority citizens wanting for legal equality and inclusion. Other theories are also incomplete. Some feminist models couch sexual citizenship in terms of gender inequality, but these theories fail to account for sex-positive attitudes among women. Queer theories are incomplete because they lack a utopian vision for society to justify if-it-feels-good-do-it attitudes. The concepts of sexual citizenship that grow out of themes in queer poetry may be helpful to fill some of these gaps. In particular, a sex-neutral approach to sexual citizenship may help bridge the differences between existing queer and feminist models.

In a sex-neutral utopia, there is no need to provide legal protections for citizens based upon their sexualities. If sex and sexuality are less important, it may be unnecessary to recognize (or deny) citizens’ rights or freedoms based upon, for example, choice of partner. Since such a sex-neutral utopia does not yet exist, it may be necessary in the interim to provide legal protections to individuals who are marginalized because of their sexualities. Part of the de-emphasis process may require public policies that prevent public actors (and to a limited degree, private actors) from discriminating against persons whose sexualities do not fall within mainstream social norms. These interim policy solutions are analogous to legal protections based upon race. In a race-neutral utopia, race would be so unimportant that there would be no need to have laws protecting racial minorities. However, since there is a history of racial discrimination in the United States, it is still necessary for policymakers, including courts, to encourage society toward race-neutrality.\^57 For example, by protecting citizens’ rights to marry persons of their choice irrespective of race, policymakers encouraged a more tolerant society where race becomes an issue less stigmatizing and marginalizing.\^58 The U.S. still has a considerable way to go before a race-neutral utopia is achieved.

The same is true for a sex-neutral utopia. There is a considerable way to go before it is achieved. In the interim, sexual minorities may require protection to ensure that their rights and

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Masturbation can be more satisfying than sexual conduct with another person, since individuals know best what feels good to their own bodies. Concomitantly, a masturbating sex life means that many people, namely women, no longer have to pretend to enjoy sex and to fake orgasms. As a society, we should encourage people to masturbate more and to use other people less for mere sexual gratification.

\^57 See \textit{e.g.}, \textit{Loving v. Virginia}, 388 U.S. 1 (1967) (outlawing state anti-miscegenation laws).

\^58 \textit{Id.}
liberties are protected until such a time as sexuality is sufficiently de-emphasized so that sexuality-based policies are no longer needed.

In summary, a legal theory of sexual citizenship should consider and incorporate the following concepts and themes.

1. Libertarianism is Essential to Accommodate Diversity
   Live-and-let-live attitudes are necessary precursors for full sexual citizenship. There is no essence to being queer, and diversity may be the only commonality. Only a libertarian model is broad enough to encompass sexuality’s diversity and the myriad characteristics that cross-cut sexuality, including race, ethnicity, gender, sex, class, religion, and age.

2. We Can Fuck Our Way to Freedom
   Pushing the boundaries of what is acceptable in society helps desensitize society about the taboos surrounding sex and sexuality. Once taboos are dismantled, the gross overemphasis on sex and sexuality diminishes, which paves the way for models of citizenship that can be extended to all persons irrespective of unimportant sexual orientations or sexual behaviors.

3. Pragmatic Feminism is Instructive
   When faced with a dilemma in sexual citizenship decisions, affected individuals are best served by choosing the alternative that least hinders empowerment and advances ideal justice. Pragmatism may include choosing to advocate policies that protect the rights of sexual minorities until sex-neutrality and sexuality-neutrality become hegemonic.

4. Sexuality is Public
   This is an extension of fucking your way to freedom and suggests there are problems associated with granting rights to citizens based on privacy doctrine. Equality is best achieved if queers elevate their visibility and if they work toward the goal of de-privatizing (de-stigmatizing and de-mystifying) sex.

5. Gender Theories are Instructive
   Although not discussed in the present paper, sexual orientation discrimination is gender discrimination squared. Sexual orientation and gender are invariably conflated. A theory of sexual citizenship should continue to disentangle gender and sexual orientation.

6. Sexuality is Negotiated
   Sexuality, like gender, is constructed. How one engages in sexual conduct (or not) depends on how sexuality is negotiated with sex partners. This negotiation implies fluidity in sexuality.
7. **Understanding Chance is Essential**  
Acknowledging diverse frames of reference that determine our philosophies of life (and attitudes about sex and sexuality) are imminently influenced by our individual (chance) life experiences. Whether sexuality is a product of choice or chance may or may not be a productive discourse.

8. **Masturbation is Healthy**  
It solves many problems. Society should encourage it.

9. **Humans are Animals**  
We eat. We fuck. We die. It may be futile to attempt to transcend animal instincts, but overemphasizing these instincts obstructs full sexual citizenship.

**CONCLUSION**

Critical queer theory can help us address theories of sexual citizenship. By analyzing the content of what sexual minorities say about themselves, we may be able to give broader meaning to a queer legal theory of sexual citizenship that accepts more fully the validity of libertarian ideals, especially if sexual conduct is viewed in sex-neutral terms.

This paper underscores the need for further critical queer legal scholarship. Legal scholars should not shy away from alternative methods of social inquiry, especially if those methods can help uncover new ways of addressing contemporary socio-legal issues that extant methods may fail to address. At a minimum, a queer method allows a thousand flowers to bloom within the legal discipline.

This paper is not without limits. As the title suggests, this paper moves us toward a more comprehensive theory of sexuality citizenship. The themes discussed here are limited to themes that emerged in the analysis of queer poetry, which was not an exhaustive sample of queer poetry. The method, however objective I tried to apply it in the analysis, is partially and unavoidably subjective. Critical thinkers may want to broaden theories of sexual citizenship beyond consensual (or self) sex acts and consider how other sexual activities (rape, incest, bestiality, prostitution) may fit within such a theory. This paper is intended to illuminate common themes of sexual citizenship in queer poetry that may fill gaps left by extant queer and gender theories. With this purpose in mind, I do not suggest supplanting these theories; rather, this paper should complement them. Finally, queer is an ideology. Future scholarship will benefit from focusing on how to apply a queer ideology to the development of a queer policy program.