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Getting Off Off-Duty: The Impact of Dobbs on Police Officers' Private Sexual Lives

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Getting Off Off-Duty:

The Impact of *Dobbs* on Police Officers' Private Sexual Lives

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ABSTRACT

Upon its leak and subsequent official release, the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization shocked and worried the nation. Overnight, the Court overturned forty-nine years of precedent. Those forty-nine years of overturned precedent not only implicate the ability to obtain abortion, but also the ability to engage in relationships, marry, make decisions about our own body, and keep our personal lives private. As a result, many advocates worry about the status of fundamental rights since many of those rights relied on the now overturned cases Roe v. Wade and Planned Parenthood v. Casey as well as the legal reasoning within those cases.

As public employees with unique public safety duties, police officers are no strangers to department regulation of their conduct, both off- and on-duty. Officers previously challenged adverse employment actions taken against them for off-duty conduct by arguing that the police department violated their right to privacy. Now, with the right of privacy on shaky ground due to the Dobbs decision, the future of officer success in these actions is uncertain.

This note analyzes exactly how the Dobbs decision changes the legal landscape for securing fundamental rights. Following an analysis of the case, the note highlights the new challenges officers must overcome in order to successfully protect their private sexual lives from government intrusion.

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While this note argues that success is difficult, alternative strategies exist which may help secure off-duty sexual privacy for all.

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INTRODUCTION

For many, the art of initiating and keeping relationships is confusing. In the modern age, we try to decode the enigma of dating by turning to the internet and seeking the advice of others, even strangers, regarding romance and finding potential partners. On Reddit, a website that hosts thousands of forums on thousands of topics, conversations on dating abound. Within them are posts written by people with questions about relationships with police officers, with some wanting to know what police officers are like as partners, and other times wondering whether it's worth dating them at all. The author in one post wrote, "I'd like some insight into what it's like to date a cop… I hear that cops are NOTORIOUS CHEATERS."[1] Another says, "All of my

1. u/randomtakes, *What is it like dating a cop?*, REDDIT (Dec. 18, 2022, 1:55 AM), https://www.reddit.com/r/police/comments/zov4a7/what_is_it_like_dating_a_cop/ (last visited Mar. 20, 2024) [https://web.archive.org/web/20221218095521/https://www.reddit.com/r/police/comments/zov4a7/what_is_it_like_dating_a_cop/].

girlfriends are saying him being a cop [is] a red flag."[2] Police officers themselves also contribute to these forums with their own questions. One person, who at the time planned to become an officer after college and eventually a detective, asked, "Is being a police officer a turn off for women?" while acknowledging that "law enforcement is very controversial."[3] The most telling post, however, reads "Has law enforcement changed your dating life? I have only been in law enforcement for a year and a half now and this is something I never considered."[4] The post reveals a truth that few people outside this subsection of the dating scene know—how much law enforcement careers affect life outside of work, otherwise known as off-duty time.

Some employers are not interested in the activities their employees engage in outside of work. For example, whether their employees choose to watch pornography at home doesn't necessarily affect Walmart's operations. But other employers care a lot and may take an interest in a wide range of their employees' conduct outside of work. Some monitor their employees' social media accounts,[5] impose hair and grooming standards,[6] or even restrict their employees' private sexual lives. Law enforcement departments in particular have demonstrated a willingness to take disciplinary action against officers who engage in sexual activities their department deems undesirable. For example, a police department in Washington state suspended an officer for sending sexual texts to a coworker's wife.[7] Some officers have challenged these actions as infringements on their constitutional right to privacy

2. u/BRIELLNIN, *Is dating a cop risky???*, REDDIT (Feb. 9, 2022, 11:34 AM), https://www.reddit.com/r/dating_advice/comments/soludf/is_dating_a_cop_risky/ (last visited Mar. 20, 2024).

3. u/Strange_Joke_2374, *Is being a police officer a turn off for women?*, REDDIT (Nov. 7, 2022, 7:44 PM), https://www.reddit.com/r/dating/comments/ypa7mm/is_being_a_police_officer_a_turn_off_for_women/ (last visited Mar. 20, 2024).

4. u/bradgpa, *Single Officers, hows your dating life?*, REDDIT (Mar. 2, 2015, 6:19 PM), https://www.reddit.com/r/ProtectAndServe/comments/2xqp3a/single_officers_hows_your_dating_life/ (last visited Mar. 20, 2024).

5. *See* Sarah O'Brien, *Employers check your social media before hiring. Many then find reasons not to offer you a job*, CNBC (Aug. 10, 2018, 9:18 AM), https://www.cnbc.com/2018/08/10/digital-dirt-may-nix-that-job-you-were-counting-on-getting.html; Jim Wilson, *Tesla accused of monitoring employees online during union push*, HUM. RES. DIR. (June 10, 2022), https://www.hcamag.com/us/specialization/employment-law/tesla-accused-of-monitoring-employees-online-during-union-push/409195.

6. Brown v. F.L. Roberts & Co., 452 Mass. 674 (2008) (car business had a policy prohibiting facial hair and requiring trimmed hair); Harper v. Blockbuster Ent. Corp., 139 F.3d 1385 (11th Cir. 1998) (business implemented policy regulating hair length for male employees); Hebrew v. Tex. Dep't of Crim. Just., 80 F.4th 717 (5th Cir. 2023) (Department of Criminal Justice policy prohibited male officers from having beards or long hair); Kelley v. Johnson, 96 S. Ct. 1440 (1976) (police department policy imposed limitations on hair length for male officers).

7. Mike Carter, *Snoqualmie police officer suspended over affair, sexting with fellow officer's wife*, THE SEATTLE TIMES (May 1, 2016, 11:36 AM), https://www.seattletimes.com/seattle-news/eastside/snoqualmie-police-officer-suspended-over-affair-with-fellow-officers-wife/.

and won.[8] But in 2022, *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*, placing many constitutional rights at risk, including privacy protections for people in relationships.[9]

Police officers' off-duty conduct may be especially vulnerable to the loss of these rights because we regard police officers as "special." Officers interact with the public as enforcers and investigators. We expect them to follow the laws they enforce and to handle sensitive matters–such as gathering evidence, interviewing suspects, and comforting victims–with discretion and care. We hold officers to a higher standard than other professions because they are expected to be exemplary members of the community and to refrain from unethical and immoral conduct both on- and off-duty.

This note seeks to demonstrate three things: first, police departments should not punish police officers for legal sexual conduct performed while off-duty; second, police departments have historically not shied away from punishing officers for off-duty sexual conduct; and third, the *Dobbs* decision weakens the ability for officers to protect their civilian lives and strengthened the ability of departments to reprimand, suspend, and fire officers.

This note will only focus on legal off-duty sexual conduct. Criminal conduct is, by definition, against the law and not permitted. Departments can also punish conduct completed on-duty because during working hours, the department expects the officers to work. Conduct such as sexual assault or watching pornography on-duty is not within the scope of this paper.

I. THE RIGHT TO PRIVACY VS. "CONDUCT UNBECOMING"

A. Regulating Through the Conduct Unbecoming Clause

Historically, states have permitted police departments to interfere with the off-duty conduct of officers, including their sexual conduct. This interference is carried out through department policies. The phrase "conduct unbecoming" often appears as a "catch-all" phrase departments use to regulate off-duty activities of officers, even if their actions are not illegal.[10] While

8. Thorne v. El Segundo, 726 F.2d 459, 471 (9th Cir. 1983).

9. 142 S. Ct. 2228, 2242 (2022); *id*. at 2301 (J., Thomas, concurring) (urging the Court to review other cases that relied on substantive due process to protect various forms of privacy including *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding the right for married persons to obtain contraceptives, *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding the right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (finding the right to same-sex marriage)).

10. *See* SAN FRANCISCO POLICE DEPARTMENT, GENERAL ORDER, GENERAL RULES OF CONDUCT, 2 (2005) [hereinafter SFPD, GENERAL RULES OF CONDUCT]; SAN DIEGO POLICE DEPARTMENT, POLICY MANUAL, 26 (2022); MIAMI POLICE DEPARTMENT, DEPARTMENTAL ORDERS, 76 (2022); TOPEKA POLICE DEPARTMENT, POLICY AND PROCEDURE MANUAL: 4.9 R RULES OF CONDUCT, 5 (2019); DURHAM POLICE DEPARTMENT, GENERAL ORDERS MANUAL, 668 (2020).

people can infer that the "conduct unbecoming" clause seeks to prohibit officers from unprofessional behavior or misconduct, the policies themselves generally do not explain what actions qualify as "unbecoming." For example, the Rules of Conduct of the Arizona State Police (ASP) reads:

> Officers shall conduct themselves at all times, both on and off-duty, in such manner as to reflect most favorably on the ASP. Conduct unbecoming an officer shall include that which brings the ASP into disrespect or reflects discredit upon the officer as a member of the ASP, or that which impairs the operations or efficiency of the ASP or officer.[11]

Case law spanning decades helps illustrate what courts and departments agree is "unbecoming." Unbecoming conduct can include driving erratically while in uniform,[12] failing to exercise appropriate social skills while interacting with civilians,[13] failing to obtain medical assistance for an obviously ill civilian,[14] and openly criticizing the department for their participation in an officer's death.[15]

Several courts have attempted to define "conduct unbecoming." The Appellate Court of Illinois described it as "conduct that is 'contrary to good order, efficiency or morale, or tends to reflect unfavorably upon [the] department or its members.'"[16] The Supreme Court of Pennsylvania held that "conduct unbecoming" is "any conduct which adversely affects the morale or efficiency of the bureau to which he is assigned… it is also any conduct which has a tendency to destroy public respect… and confidence"[17] The Court of Civil Appeals of Alabama acknowledged that "conduct unbecoming" would "tend to foster disrespect for the city police department and law enforcement."[18] These definitions illustrate that "conduct unbecoming" typically covers two qualities.

First, "conduct unbecoming" is conduct that tends to interfere with the workings of the department. Employers generally have an interest in maintaining efficiency and police departments are no exception. In *Perez v. City*

11. AZ. STATE POLICE POL'Y & P. MANUAL, RULES OF CONDUCT, § 4.080, ¶ 1.

12. In *re* Smith, No. A-1526-20, 2022 N.J. Super. Unpub. LEXIS 1080 (Super. Ct. App. Div. June 16, 2022).

13. Rogers v. Twp. of Neptune, No. A-3290-07T2, 2009 N.J. Super. Unpub. LEXIS 538 (Super. Ct. App. Div. Mar. 18, 2009).

14. Borough of Punxsutawney v. Punxsutawney Civ. Serv. Comm'n, 31 A.3d 1261 (Pa. Commw. Ct. 2011).

15. Carboun v. City of Chandler, No. CV-03-2146-PHX-DGC, 2005 U.S. Dist. LEXIS 21950 (D. Ariz. Sept. 27, 2005).

16. Scatchell v. Bd. of Fire & Police Comm'rs for Melrose Park, 2022 IL App. (1st) 201361.

17. Zeber Appeal*,* 398 Pa. 35, 43 (1959).

18. Guthrie v Civ. Serv. Bd., 342 So. 2d 372, 375 (Al. Civ. Ct. 1977).

of Roseville, the Roseville Police Department reprimanded two officers because of their extramarital relationship with each other.[19] The court upheld the department's decision because the conduct associated with their relationship, such as inappropriate cell phone use during working hours, interfered with the officers' ability to perform their duties.[20] When private off-duty conduct complicates or detracts from the performance of an officer's duties, police departments have an interest in issuing reprimands or orders to stop the conduct.[21]

Second, "conduct unbecoming" tends to reflect unfavorably upon the police department as a whole and can undermine the public's confidence and trust in the department.[22] That confidence and trust is essential because the public often alerts police to ongoing crime and provides information during investigations. Some departments explicitly forbid actions that could taint its credibility—such as the San Francisco Police Department, which prohibits its officers from committing insubordination and utilizing excessive force.[23] Case law provides more examples. In *Coker v. Whittington*, two officers from the same department separated from their wives around the same time.[24] While their divorces were pending, they exchanged spouses and lived in each other's homes.[25] The police department issued an order that they return to their own dwellings and live with their respective wives.[26] The officers refused, and the department removed them from their offices.[27] The court upheld their removal because such an open and visible violation of the legal parameters of marriage was likely to sully the reputation of the department.[28] Like the court in *Coker v. Whittington*, courts will likely find off-duty conduct as "conduct unbecoming" if it negatively impacts the reputation or credibility of the police department.

B. Challenges to the Conduct Unbecoming Clause

Case law shows courts and police departments find "conduct unbecoming" in vastly different off-duty actions despite recognition of the two

19. Perez v. City of Roseville, 926 F.3d 511, 515 (9th Cir. 2019).

20. *Id.* at 522.

21. Michael A. Woronoff, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REFORM, 195 (1984).

22. Philip Matthew Stinson Jr., et al., *Off-Duty and Under Arrest: A Study of Crimes Perpetuated by Off-Duty Police*, 23 CRIM. JUST. POL'Y REV., 141 (2012).

23. *See* SFPD, GENERAL RULES OF CONDUCT, *supra* note 10, at 2; *id*. at 6.

24. Coker v. Whittington, 858 F.3d 304, 305 (5th Cir. 2017).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 307.

considerations mentioned above. Differences emerge based on what type of challenge officers bring and the interpretative method courts choose to evaluate these cases.

Some cases involve officers or law enforcement employees who allege that their conduct is not "conduct unbecoming" by focusing on the nature and impact of the conduct itself. In *Thorne v. El Segundo*, Thorne, originally hired as a clerk typist, applied for an open position on the force.[29] Thorne performed incredibly well on her examinations and tests, but to obtain the position, she had to pass a polygraph exam.[30] During the polygraph, the department questioned her about a past medical operation.[31] Thorne revealed that she had a miscarriage and the father was a married officer in the department.[32] Ultimately, the department did not hire Thorne despite her exemplary performance on her exams and agility test.[33] The court found that the department's questions and resulting decision not to hire Thorne was inappropriate and a violation of Thorne's privacy interests.[34] The court emphasized there was no evidence that Thorne's off duty conduct would impact her performance, bring disrepute to the department, or impact morale.[35] *Thorne* thus established that departments could not consider off-duty conduct if that conduct is unrelated to departmental concerns.[36]

However, the conclusion in *Thorne* is difficult to reconcile with the conclusion in *Coker v. Whittington*. The *Coker* court went further and considered the possible tension between employees at the department that could arise from off duty sexual conduct.[37] Nothing in the *Coker* case indicates that evidence existed of an already present tension. The Fifth Circuit in *Coker* rejected *Thorne* by allowing departments to consider off-duty sexual conduct as "conduct unbecoming" if it could possibly impact employee performance.

Some courts have determined whether an off-duty action is "conduct unbecoming" by evaluating whether the officer has a recognizable constitutionally protected right and weighing that right against the police department's interests. The court in *Perez*, which reviewed the termination of two police officers after both officers engaged in inappropriate cell phone use during work hours, acknowledged that officers generally do have a

29. 726 F.2d at 462.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id*. at 463.
34. *Id.* at 471.
35. *Id.*
36. *Id.*
37. *Coker*, 858 F.3d at 307.

constitutional right of privacy.[38] However, because the relationship in that case impacted the officers' job performance, the police department's interests in efficiency, good order, and reputation outweighed the interests of the officers.[39]

In *Seegmiller v. Laverkin City*, Officer Johnson, who was in the process of separating from her husband, engaged in an extramarital affair with an officer from another department while attending a work conference.[40] Upon learning of the affair, Johnson's estranged husband made several false allegations, including that Johnson had an affair with the police chief, Seegmiller.[41] Both officers were placed on administrative leave.[42] After Johnson's husband recanted the false allegations, Seegmiller and Johnson were removed from administrative leave, though the county's SWAT team did not reinstate Officer Johnson to her previous position.[43] She sued the City, claiming that the department violated her constitutional rights for orally reprimanding her for conduct she engaged in off-duty.[44] The 10th District Court of Appeals did not find that officers have a constitutional right to sexual privacy, citing the lack of heightened scrutiny from the Supreme Court in cases concerning sexual privacy.[45] The *Seegmiller* court instead applied rational basis review, a form of scrutiny that is highly deferential to the government and police departments.[46]

Lastly, in *Wolfe v. City of Town & Country*, Officer Wolfe started a relationship with an officer he held direct supervision over.[47] He was demoted shortly after, because the department did not want the relationship to "impair the efficiency of the department."[48] The court applied rational basis review because the unique role in ensuring public safety and order necessitates granting more deference to departments to ensure efficiency and discipline.[49] Applying rational basis review, the court found the department's decision to demote Wolfe did not violate his constitutional right to privacy.[50]

38. *Perez*, 926 F.3d at 522.
39. *Id.*
40. 528 F.3d 762, 765 (10th Cir. 2008).
41. *Id*.
42. *Id*.
43. *Id*. at 765, 766.
44. *Id*. at 766.
45. *Id*. at 771.
46. *Id.*
47. 599 F.Supp.3d 784, 787 (E.D. Mo. 2022).
48. *Id*. at 789.
49. *Id*. at 791–92.
50. *Id*. at 794.

Other cases involve officer and law enforcement employee challenges to the "unbecoming conduct" rule itself. Some officers have argued that department policies are void for vagueness.[51] In many cases, however, the courts rule that the conduct committed by the officer is well within the common understanding of "conduct unbecoming."[52] This assumption may be true for cases concerning thefts, driving violations, and assaults. However, officers may find it difficult to determine whether their sexual behavior and decisions while off-duty—such as engaging in bondage, discipline, sadism, and masochism (BDSM), serial dating, or cheating—will result in termination or discipline at work. Cheating, for example, is fairly common. About 20% of people will admit to having cheated on someone in the past.[53] Officers may not fully grasp how a common practice like cheating can put their job at risk, compared to other, worse actions like assault, which is a crime.

II. HOW DOBBS IMPACTS CHALLENGES TO OFF-DUTY SEXUAL INTIMACY PROHIBITIONS

In June of 2022, the Supreme Court decided in *Dobbs v. Jackson Women's Health Organization* that the Constitution does not provide a fundamental right to abortion, explicitly overruling *Roe v. Wade* and *Planned Parenthood v. Casey*.[54] This decision dealt with abortion, but its analysis revealed three important takeaways about how to identify fundamental rights that will impact the right to privacy for years to come. After reviewing these three takeaways, this note will show how they will complicate officer's privacy claims.

A. The Power of Standard of Review

In addition to challenging what is and isn't "conduct unbecoming," officers frequently challenge the corrective actions police departments take against them for off-duty sexual conduct, by arguing that the department

51. Erin van Natta, *LAWSUIT: Campus police officer claims unfair discipline for consensual affair*, THE COLLEGE FIX (May 27, 2022), https://www.thecollegefix.com/lawsuit-campus-police-officer-disciplined-for-consensual-student-affair/.

52. *See* Cranston v. City of Richmond, 40 Cal.3d 755, 759 (S. Ct. 1985); Stouffer v. Commw. Pa. State Police, 76 Pa. Commw. 397, 404-05 (1983); Milani v Miller, 515 S.W.2d 412, 419 (S. Ct. Mo. 1974).

53. *See* Alice Gibbs, *One-Fifth of Americans Admit to Cheating on Their Partner*, NEWSWEEK (Oct. 31, 2022, 7:55AM), https://www.newsweek.com/one-fifth-americans-admit-cheating-partner-1755713; Rachel Martin, *Sorting Through The Numbers On Infidelity*, NPR (July 26, 2015, 7:32 AM), https://www.npr.org/2015/07/26/426434619/sorting-through-the-numbers-on-infidelity.

54. *Dobbs*, 142 S. Ct. at 2242.

infringed on the officer's constitutionally protected right to privacy.[55] The right of privacy is a broad right, recognized by a long line of cases including *Griswold v. Connecticut*,[56] *Eisenstadt v. Baird*,[57] *Roe v. Wade*,[58] and *Planned Parenthood v. Casey*[59] —all of which the *Dobbs* decision acknowledged and jeopardized the validity of.[60]

To determine whether a right is fundamental and deserving of constitutional protection, the Supreme Court applies a framework. If the Constitution does not explicitly state that a right exists, then the purported right must satisfy two criteria: first, the right should be deeply rooted in the nation's history and tradition, and second, be implicit in the concept of ordered liberty.[61] When a court finds the right is fundamental, the government may only intrude on the exercise of that right so long as the government's actions survive strict scrutiny.[62] As the least deferential standard, strict scrutiny requires the government to utilize narrowly tailored means to achieve a compelling government interest.[63] For example, the Supreme Court has applied strict scrutiny and found a fundamental right to marry[64] and a fundamental right of parental control over a child's upbringing.[65] When there is no fundamental right, there is no constitutional protection. Instead, courts evaluate challenges to law or policy under rational basis review.[66] Rational basis review is highly deferential and only requires that the policy be rationally related to a legitimate government interest.[67] Education is an example of a service that is not a fundamental right.[68]

As a result of *Dobbs*, courts will likely defer to police departments and uphold actions taken against officers for "conduct unbecoming" related to

55. *See Thorne*, 726 F.2d at 461; Faust v. Police Civ. Serv. Comm'n, 22 Pa. Commw. 123, 128 (1975); *Perez*, 926 F. 3d at 514; *Wolfe*, 599 F.Supp.3d at 786.

56. 85 S. Ct. 1678 (1965).

57. 92 S. Ct. 1029 (1972).

58. 93 S. Ct. 705 (1973).

59. 112 S. Ct. 2791 (1992).

60. *Dobbs*, 142 S. Ct. at 2329.

61. *Id.* at 2242.

62. State Constitutional Law: Rights and Protections § 10.01 (2024 ed. LexisNexis Matthew Bender).

63. *Id*.

64. *E.g.* Loving v. Virginia, 87 S. Ct. 1817 (1967) (interracial marriage); *Obergefell*, 135 S. Ct. at 2598 (same-sex marriage).

65. *E.g.* Meyer v. Nebraska, 43 S. Ct. 625 (1923) (parental right to select language curriculum); Pierce v. Society of the Sisters, 45 S. Ct. 571 (1925) (parental right to choose private over public schools).

66. Washington v. Glucksberg, 117 S. Ct. at 2271; State Constitutional Law Rights and Protections §10.01.

67. State Constitutional Law Rights and Protections § 10.01.

68. San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1299 (1973).

off-duty sexual intimacy unless the court finds the Constitution protects off-duty sexual conduct. Unfortunately, as the next section will show, the fundamental rights framework used in *Dobbs* presents a series of difficult challenges officers must overcome to obtain protection.

B. How Dobbs Changes the Legal Landscape of Fundamental Rights

In *Dobbs v. Jackson Women's Health Organization*, the Court sought to answer whether the constitution provides a fundamental right to abortion.[69] Advocates offered a variety of alternative narrow and broad definitions the court could have considered, including "whether all pre-viability abortions are unconstitutional"[70] and "whether an abortion law is necessarily unconstitutional… when it theoretically could prevent a small number of women from obtaining a previability abortion."[71] While the Court answered whether the Constitution confers a right to abortion,[72] not all of the justices in the majority wanted to answer the Court's broad question. Justice Roberts, stated in his concurrence that he would have preferred to define the question narrowly, considering only whether all pre-viability prohibitions on abortion are unconstitutional.[73] *Dobbs* suggests that the Court will consider questions of law, more broadly than necessary to decide the case but more narrowly than asserting, for example, a vague right to privacy.

Second, the *Dobbs* Court heavily embraced a textualist approach to interpreting the Constitution by highlighting the lack of reference to abortion in the Constitution.[74] The Constitution is silent on many things, but silence does not necessarily mean an unenumerated right does not exist or lacks protection. Silence may indicate the drafters of the Constitution did not conceive of the right or its extent. Courts can still interpret that silence—for example, then Tenth Circuit Judge Neil Gorsuch used textualist and

69. 142 S. Ct. at 2242.

70. Brief for the States of California, et al., as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (No. 19-1392) (arguing the Court should limit review to "whether 'all pre-viability prohibitions on elective abortions are unconstitutional'").

71. Brief for the States of Texas, et al., as Amici Curiae in support of Petitioners, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (No. 19-1392) (framing the question as "whether an abortion law is necessarily unconstitutional… when it theoretically could prevent a small number of women from obtaining a previability abortion"); Brief of Amici Curiae 375 Women Injured by Second and Third Trimester Late Term Abortions and Melinda Thybault, Individually and Acting on Behalf of 336,214 Signers of the Moral Outcry Petition, in Support of Petitions, 142 S. Ct. 2228 (No. 19-1392) (framing the question as "whether Mississippi can ban a small percentage of abortions in the second and third trimester when it is willing to shift all responsibility for the care of the children from the woman to society").

72. *Dobbs*, 142 S. Ct. at 2223.

73. *Id.* at 2310.

74. *Id.* at 2242, 2244.

originalist interpretations of the Fourth Amendment to find that emails are modern day "papers" and therefore merit the same fourth amendment protections.[75] Sometimes silence demonstrates an intent to let future leaders make policy decisions.[76] In the early 1900s, because the Constitution made no explicit reference to alcohol, this silence permitted politicians to enact and subsequently repeal prohibition based on the Nation's evolving sentiments.[77]

However, a silent Constitution can become a problem where a court narrowly defines the right in controversy. Textualist judges will not find the right in controversy is protected because the right is not likely enumerated. Instead, advocates fighting to expand fundamental rights rely on other ways to demonstrate that the Constitution includes and protects them—such as evidence that the unenumerated right flows from a different explicit right. In *Griswold*, Justice Douglas found "the First Amendment has a penumbra where privacy is protected from governmental intrusion[,]" and a long line of cases discussing the rights of privacy built on his finding.[78] The *Dobbs* Court took issue with this very method. Writing for the majority, Justice Alito stated that *Roe* found the abortion right, which is not enumerated in the Constitution, within the right of privacy, which is also not enumerated.[79] The majority found the claimed right to privacy itself was too broad, despite *Roe* finding the right to privacy rooted in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[80] Justice Alito alleged that such broad recognition "[w]ould find fundamental rights to illicit drug use, prostitution, and the like."[81]

Third, the *Dobbs* Court emphasized the importance of history in evaluating constitutional rights. If a right is not found in the Constitution, then the right must be "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition" to get constitutional protections—also known as the two-prong test created by *Washington v.*

75. United States v. Ackerman, 831 F.3d 1292, 1304 (10th Cir. 2016) (arguing that if "rummaging through private papers or effects" counts as a search and "if opening and reviewing 'physical' mail is generally a 'search'—and it is—[then] why not "virtual" mail [searches] too?").

76. *See* E. Llewellyn Overholt, Jr., *Statutes: Construction: The Legislative Silence Doctrine*, 43 CAL. L. REV. 5 (Dec., 1955).

77. U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

78. 381 U.S. 479, 483 (1965); *see, e.g.*, *Roe*, 410 U.S. 113 (1973), *Casey*, 505 U.S. 833 (1992), *Lawrence*, 539 U.S. 558 (2003); *Obergefell*, 576 U.S. 644 (2015).

79. *Dobbs*, 142 S. Ct. at 2244.

80. *Id.* at 2258.

81. *Id.* at 2236; *id.* at 2258 ("These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. *See* Compassion in Dying v. Washington, 85 F.3d 1440, 1444 (CA9 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc).").

Glucksberg.[82] Justice Alito rejected arguments about the Fourteenth Amendment's Due Process Clause as the origin for the right to privacy because the country adopted the Amendment at a time when a majority of states criminalized abortion.[83] According to the Court, the Fourteenth Amendment's timeline cannot cover a right to abortion. Justice Alito therefore concluded that to stay true to the drafters' intentions regarding the Fourteenth Amendment, the Court had to overturn *Roe*.[84]

In his concurrence, Justice Thomas also urged the Court to revisit all past cases that found fundamental rights through the Substantive Due Process Clause of the Fourteenth Amendment.[85] This choice would put many fundamental rights concerning relationships and sexual conduct in jeopardy.[86] The *Dobbs* dissent also stresses that both *Roe* and *Casey* align with other cases protecting personal choices from government intrusion.[87] With *Roe* and *Casey* overturned, any rights determined after the cases are at risk.[88] Though the majority distinguished abortion as "fundamentally different" from sexual relations because abortion "destroys what [the Roe and Casey] decisions called 'fetal life,'"[89] the dissent argues that other rights we recognize today, such as contraception, similarly did not exist in America's early history.[90] They write:

> The Constitution, of course, does not mention [contraception]. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. If the majority is serious about its historical approach, then Griswold and its progeny are in the line of fire too. Or if it is not serious, then… what is the basis of today's decision?[91]

The *Dobbs* Court's approach freezes the Fourteenth Amendment in time, aggressively restricting the rights the Amendment can recognize.

82. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
83. *Id.* at 2242, 2248.
84. *Id*. at 2242–43 and 2252–53.
85. *Id*. at 2301.
86. *Id*. at 2442–43.
87. *Id*. at 2329.
88. *Id*. at 2329–30.
89. *Id*. at 2243.
90. *Id*. at 2319.
91. *Id*. at 2332.

III. IMPLICATIONS FOR CHALLENGES BROUGHT BY OFFICERS

Police officers who seek to challenge their department's decision based on their off-duty sexual conduct need to account for the challenges brought by the *Dobbs* decision. First, the officers must appeal to the *Dobbs* majority by narrowly defining the rights they want protection for. Ideally, officers should find that right in the text of the Constitution. Where the Constitution is silent, officers must return to the two-prong *Glucksberg* test: history must show that when Congress passed the constitutional provision, that Congress intended to protect that right, and the country has continued to recognize and protect that right since.[92] With this framework in mind, advocates can assess how *Dobbs* will impact cases concerning police officers' off-duty sexual conduct.

A. Circuit Splits

The *Dobbs* Court emphasized that fundamental rights must come from the text of the Constitution, not derived from another right. There is no explicit textual reference to an officer's right of privacy in their off-duty sexual conduct. Instead, advocates must begin by persuading lower courts that the right to privacy exists and passes the *Glucksberg* test to become a recognizable fundamental right. Courts across the country have yet to uniformly agree on whether case law grants a constitutional right to privacy.[93] The Ninth Circuit *Perez* court derived a constitutional right to privacy and intimate association from the text of the Constitution.[94] In contrast, the Tenth Circuit *Seegmiller* court found no case law supported that conclusion.[95] The Eighth Circuit in *Sylvester v. Fogley* asserted in its "review of numerous cases involving police-department investigations of their members' sexual conduct reveals that police officers generally have a right of privacy in their private sexual relations."[96] No matter the standard, the *Dobbs* majority confirmed privacy rights are not absolute, and the Court failed to clarify further.[97] The *Dobbs* majority's limited finding of personal privacy, our circuit split, and the Constitution's failure to explicitly reference privacy presents an uphill battle for officers who seek constitutional protection for their private relationships.

92. *Glucksberg*, 521 US at 721.

93. *See* Sofya Bakradze, *Let Go of Your Sexual Privacy or Be Let Go? The Woe of Public Employees*, 21 MARQ. BENEFITS SOC. WELFARE 39 (2020).

94. *Perez*, 926 F.3d at 518.

95. *Seegmiller*, 528 F.3d at 770–71.

96. 465 F.3d 851, 859, n.6 (8th Cir. 2006).

97. *Dobbs*, 142 S. Ct. at 2257.

B. The Problem with Defining a Fundamental Right

Officers and their advocates must decide how narrowly or broadly to define the privacy rights for off-duty sexual conduct. Both directions present problems. As seen in *Dobbs*, the "right to privacy" itself is entirely too broad.[98] One could narrow the right as one to "sexual privacy", a right the Court in *Lawrence v. Texas* contemplated. However, the *Lawrence* court applied rational basis review, not strict scrutiny, which allowed the justices to avoid deciding whether a fundamental right to sexual privacy exists.[99] Officers may also consider narrowing their inquiry to "sexual privacy for police officers," but some courts have addressed this already. The *Coker* court noted that relationships involving officers "even if loving and consensual…take on a different color" because they must enforce laws.[100] Circuit Court Judge Jones observed that "Obergefell is expressly premised on the unique and special bond created by the formal marital relationship" and the *Coker* case "do[es] not create rights based on relationships that mock marriage."[101] This express bias for acceptable relationships may prevent officers from enjoying intimate relationships that paint outside the lines of traditional relationship structures. If the people who are supposed to be neutral decisionmakers are willing to display their biases so clearly, then police departments may feel empowered to rely on these biases as well.

Relatedly, how we distinguish private from public conduct further complicates how we define privacy rights for police officers. An unpublished opinion from Kentucky, *Murphy v. City of Richmond Government*, involved several officers engaged in sadomasochistic group sex.[102] While the department found their sexual conduct was not criminal, the department still fired the officers because their actions "showed poor judgment; could have a negative impact on morale; and would diminish the view [that] the public had of the Police Department."[103] Murphy challenged his dismissal by arguing the department punished him not for the conduct, but for the negative publicity from the local newspapers.[104] The Court of Appeals agreed the department likely dismissed the officer because of the negative publicity.[105] But the court also found that the officer risked his position when he decided to engage in this type of sexual conduct because there existed a possibility that

98. *Id.* at 2258.

99. *Seegmiller*, 528 F.3d, at 771.

100. *Coker*, 858 F.3d at 306–07.

101. *Id.* at 307 (citing *Obergefell*, 576 U.S. at 2594–95).

102. Murphy v. City of Richmond Gov't, No. 2011-CA-001710-MR, 2013 Ky. App. Unpub. LEXIS 260, at *3 (Ct. App. Mar. 22, 2013).

103. *Id.* at *4–5.

104. *Id.* at *12.

105. *Id.*

the conduct may negatively affect the department's reputation, whether or not it actually did.[106] Murphy also argued that the court should protect his private conduct because he was not responsible for publicizing his conduct.[107] The judges dismissed this argument, believing that doing so would render police departments' policies "meaningless."[108]

Murphy demonstrates that private behavior receives little to no protection if it becomes or carries a possibility of becoming public. *Murphy* potentially allows courts to dismiss an officer's claim if the department successfully shows *any* off-duty sexual conduct coming to light at *any* time that *might* harm its operations and reputation. This private-to-public argument may permit judges to ignore the question regarding whether the officer's conduct itself merits constitutional protections at all.

C. Overcoming the Glucksberg Test

The next concern is whether officers can satisfy the *Glucksberg* test by demonstrating the right they seek to protect, is "implicit in the concept of ordered liberty" and "deeply rooted in this nation's history and tradition."[109] *Dobbs* shows the Court favors narrowly defined rights, but the narrower the right, the fewer chances of finding cases and history to support it. While an extensive history regarding the privacy rights of police officers and their relationships exists, it does not weigh in the officers' favor.

Generally speaking, America has regulated intimate relationships for hundreds of years. California enacted its bigamy law in 1872.[110] Georgia's statute dates back to 1833.[111] Some states still prohibit adultery, including Oklahoma, which outlawed the practice in 1910.[112] Other relationship laws have grown with our society. Some states, including Michigan, deemed marriage with someone who had epilepsy as void as late as 1956.[113] In 2014, the year before the Supreme Court decided *Obergefell v. Hodges*, all states had the right to prohibit same sex marriage, and sixteen states had laws banning it until the *Obergefell* decision.[114] While all fifty states prohibit polygamy,[115]

106. *Id.*

107. *Id*. at *11.

108. *Id.*

109. *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

110. Cal. Pen. Code § 281.

111. Off. Code of Ga. Ann. § 16-6-20.

112. 21 Okl. St. § 871.

113. *History*, EPILEPSY AGENCY OF THE BIG BEND, https://eabb.org/history/ (last accessed May 19, 2023); 1951 Mich. Op. Att'y Gen. 1450.

114. *Same Sex Marriage, State by State*, PEW RSCH CTR. (June 26, 2015), https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1/.

115. *Legality of Polygamy*, ENCYCLOPEDIA (Dec. 6, 2022), https://encyclopedia.pub/entry/37734.

some localities have passed ordinances protecting polyamorous relationships.[116]

American history also supports departments' ability to reprimand and fire officers for "conduct unbecoming" because of their relationships, with one case going as far back as 1911.[117] In that case, the Seattle chief of police fired a police officer, alleging that the officer was in a "compromising position with a respectable married woman."[118] The court found the officer did not have such a relationship and his termination therefore violated the removal process laid out in the city's charter.[119] However, by "cultivating the acquaintance," of a married woman, the court ruled that the officer did engage in "conduct unbecoming" and that the decision to remove him was proper.[120] *State v. Seattle* shows a history of disciplining officers for "conduct unbecoming" related to off-duty personal connections, but also provides case law to support job termination on the basis of those relationships—even if the original characterization of the relationship proves false. Officers are therefore unlikely to fulfill the first *Glucksberg* prong, and consequently, the *Glucksberg* test, based on the historical precedent.

IV. WHY PROTECTING POLICE OFFICERS' OFF-DUTY SEXUAL CONDUCT AFFECTS US ALL

Before venturing into possible solutions, it's important to establish why the general public should care about protecting off-duty sexual conduct for officers.

First, while police officers have a unique job involving handling weapons, testifying in court, and enforcing the law, they are part of a much larger group of people employed by the government. Approximately twenty-four million people work for our state, local, and federal governments.[121] As representatives of the government, public employees may be subject to regulations regarding their conduct. Lawyers are a great example of this heightened regulation. While not all attorneys work as government employees, society and the profession itself apply additional ethics rules and enforces greater legal consequences on lawyers because of their proximity to

116. *See, e.g.,* Jeremy C. Fox, *Somerville recognizes polyamorous relationships in new domestic partnership ordinance*, BOS. GLOBE (July 1, 2020, 11:21 PM), https://www.bostonglobe.com/2020/07/01/metro/somerville-recognizes-polyamorous-relationships-new-domestic-partnership-ordinance/; *Three's Company, Too: The Emergence of Polyamorous Partnership Ordinances*, 135 HARV. L. REV. 1441 (Mar. 10, 2022).

117. State ex rel. v. Seattle, 65 Wash. 645 (S. Ct. 1911).

118. *Id*. at 646.

119. *Id*. at 648–49.

120. *Id*.

121. Fiona Hill, *Public service and the federal government*, BROOKINGS INST. (May 27, 2020), https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/.

confidential information and their important advocacy work.[122] We also heavily scrutinize politicians for their conduct off and on the job because of their power, access to information, and special mission to serve the public interest.[123] Teachers must adhere to high ethical standards, even when they draw a clear boundary between their work and their personal life, because they educate and care for our children. If a police officer cannot protect their private life from government intrusion, then neither can politicians, teachers, and others who serve the American public at all levels.

Second, because departments fail to define "conduct unbecoming," police departments and communities may impose their own biases when punishing officers. As one can imagine, non-traditional relationships and conduct—like participating in the BDSM community, creating pornography, or engaging in polyamorous relationships—still carry significant stigma often because people do not know what these relationships are actually like or why people participate in this conduct. Even as we become a more accepting and understanding society, police departments may punish officers for conduct related to sex, even if fundamental to the officer's identity. One Philadelphia-area officer, who identifies as pansexual, allegedly heard negative comments regarding his Wiccan tattoos, dress, and eyeliner during his disciplinary hearing for driving under the influence.[124] He agreed that while the department had valid grounds for disciplining him, he believed his suspension and discharge were related to his gender expression and sexual orientation because the department did not discipline two other officers who also drove under the influence.[125]

Even conduct that occurred prior to the officer joining the force isn't safe from scrutiny, despite the ruling in *Thorne*. In New Jersey, the Hudson County Sheriff's Department suspended a new recruit just six days before her academy graduation because she allegedly failed to disclose her history as a dominatrix in bondage films.[126] The sheriff's office claims her past made the department "the subject of inquiry and ridicule among law

122. *See Model Rules of Professional Conduct: Preamble*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (last visited Apr. 11, 2024).

123. *See House Ethics Manual*, COMMITTEE ON ETHICS 2 (Dec. 2022).

124. Patrick Dorrian, *Cross-Dressing, Wiccan-Tattooed Police Officer Advances Bias Suit*, BLOOMBERG L. (Oct. 26, 2020, 2:12 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XBTF87QC000000?bna_news_filter=daily-labor-report#jcite.

125. *Id*.

126. *New Jersey Police Officer Loses Her Job Over Dominatrix Past*, CBS NEWS (Feb 8, 2018, 6:49 AM), https://www.cbsnews.com/news/kristen-hyman-former-dominatrix-fired-hudson-county-new-jersey-sheriffs-officer/.

enforcement."[127] A judge rescinded her suspension, permitting her to graduate, but the department subsequently placed her on paid administrative leave until completion of her disciplinary hearing.[128] After the hearing, the sheriff's office formally terminated her.[129] The former officer sued the department and the county attorney's office, but did not succeed in obtaining reinstatement.[130] This result is particularly disheartening considering the police's reputation for currently and historically harassing and abusing sex workers.[131]

The conduct resulting in the termination of the former Hudson County and Philadelphia-area officers involves sexual and gender expression, not their ability to serve on the force. Prohibiting people from serving because of their off-duty conduct limits the people who can serve and who feel comfortable serving. The limited pool of candidates impacts diversity on the force. Diversity doesn't just refer to increasing employment of people from different racial groups and gender identities. Diversity can, and should, include diversity in experiences because police departments succeed in better serving their increasingly diverse communities if their officers reflect the community.[132] When our police departments hire open-minded individuals with diverse histories and identities, then everyone, including victims of domestic violence, LGBTQ+ folks, and sex workers, feel safer when interacting with police and asking for assistance when needed.

V. OFFICER PRIVACY AND ACCOUNTABILITY MUST WORK TOGETHER

We can respect officers' off-duty sexual privacy and also hold them accountable for their off-duty activities if they veer into illegal or dangerous conduct. However, we must draw a line between rooting out abuses of power and ostracizing non-traditional relationships and sexual conduct.

127. CBS NEWS, *N.J. Sheriff's Officer Fired Over Dominatrix Past* (Feb. 7, 2018, 11:16 PM), https://www.cbsnews.com/newyork/news/n-j-sheriffs-officer-dominatrix/.

128. *Id*.

129. A.P. NEWS, *Former dominatrix loses fight to keep job as police officer* (Feb. 8, 2018, 10:10 AM), https://www.northjersey.com/story/news/hudson/2018/02/07/former-dominatrix-loses-fight-keep-job-police-officer/317728002/.

130. Michaelangelo Conte, *Lawsuit filed by former dominatrix sheriff's officer tossed*, THE JERSEY J. (July 30, 2019, 6:24 PM), https://www.nj.com/hudson/2019/07/lawsuit-filed-by-former-dominatrix-sheriffs-officer-tossed.html.

131. *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 231 (Danielle Auguston and Alyssa George eds., 2015).

132. B. Rose Hubber, *Diversity in policing can improve police-civilian interactions, say Princeton researchers*, PRINCETON UNI. (Feb. 11, 2021, 2:08 PM), https://www.princeton.edu/news/2021/02/11/diversity-policing-can-improve-police-civilian-interactions-say-princeton.

A. Why and When We Need Disciplinary Action for Sexual Conduct

In *Faust v. Police Civil Service Commission*, a court reviewed the dismissal of an officer for his participation in an adulterous affair.[133] The court upheld the officer's dismissal, arguing that adultery can limit the officer's ability to perform their jobs by breeding insecurity between the spouses police interact with.[134] Even if the stereotype or perception about a form of conduct is not rooted in truth, we must acknowledge that some conduct inspires negative reactions from the public. Some may believe the officer from *Murphy*, who practiced BDSM is violent or sexually perverse. Given that officers often respond to domestic violence calls and are one of the first points of contact for people who have been sexually assaulted, it makes sense that departments and communities want officers they perceive as safe and protective, rather than perverse or prone to violence.[135] Furthermore, instances exist where officers initiated relationships with domestic violence victims shortly after responding to their calls for help.[136] Ultimately, to prevent abuses of power over vulnerable citizens, police departments should see it fit to punish officers for engaging in abusive, manipulative, non-consensual, or illegal sexual conduct.

B. Why and Where We Should Draw the Line

While communities should remain vigilant of officers and their off-duty behavior, there are several reasons why police departments should not have the capability to control an officer's private life.

First, punishing an officer for the attitudes of the public sets a dangerous precedent for discrimination. If departments can punish officers for the biases some percentage of the public holds, then officers who fail to fit the image of that group will not join or be able to stay on the force. For example, police departments might feel pressure to punish officers who do drag or dress in clothes not traditionally associated with their gender, given the

133. 22 Pa. Commw at 124–26.

134. *Id*. at 130–31.

135. *See* Emily Ekins, *Policing in America: Understanding Public Attitudes Toward Police. Results from a National Survey*, CATO INST. (Dec. 7, 2015), https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national (showing that Americans with less favorable opinions of police, including having a lack of confidence in police, are less likely to report crimes).

136. *See* Ryan Simms, *SPD officer punished for inappropriate relationship*, KREM (Jan. 14, 2016, 3:17 PM), https://www.krem.com/article/news/local/spokane-county/spd-officer-punished-for-inappropriate-relationship/293-22148935; Christine Vendel, *Suspended Harrisburg cop criticized for dating rape victim after crime*, PENNLIVE (Sept. 11, 2015, 5:44 PM), https://www.pennlive.com/midstate/2015/09/harrisburg_police_officer_date.html; *see generally Murphy*, No. 2011-CA-001710-MR.

recent and increasing opposition to drag queens and transgender people.[137] Holding police officers hostage to the biases of particular groups creates a situation where officers themselves perpetuate that group's behaviors, identities, and attitudes for decades. No change in police behavior will occur if the officers themselves are unchanging.

Second, while worries about adulterous and sexually perverted police officers exploiting vulnerable people are understandable, the data shows a bigger problem: domestic violence perpetuated by police officers. Studies show that 40% of domestic violence victims never contact the police.[138] While each victim has different motivations for staying silent, police have been known to escalate situations, and may even arrest the victim instead of the perpetrator.[139] Furthermore, several studies confirm that families with police officers experience domestic violence at rates higher than families without officers.[140] One statistic places domestic violence perpetrated at the hands of officers at 28%.[141] If the public truly worries about adulterous, sexually promiscuous, or kinky police exploiting their positions of power, the public should display this same worry, if not more so, towards the significant portion of officers actively involved in domestic violence. Officers who have engaged in domestic violence show that they are violent, angry, controlling, and unstable individuals—far more concerning behavior than whether someone wears makeup or engages in a consensual loving relationship pending their imminent divorce from another spouse. If off-duty conduct is truly a concern for the department, then we should first address domestic violence complaints against officers.

Some argue that if departments can regulate other types of conduct, then they can equally restrict and punish sexual conduct. In *Doggrell v. City of Anniston*, a police department took corrective action against Officer Doggrell after he spoke at an event held by a white supremacist organization.[142] *Doggrell* is distinct from situations involving sexual conduct because Doggrell explicitly named himself as an officer of the city's force and attributed

137. *UPDATED Report: Drag Events Faced More than 160 Protests and Significant Threats Since Early 2022*, GLADD (Apr. 25, 2023), https://www.glaad.org/blog/anti-drag-report; *2023 anti-trans bills tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/.

138. Carly Stern, *Domestic Violence Survivors Often Don't Want to Call the Police. California Tries A New Approach*, CAL.HEALTH REP. (Dec. 21, 2021), https://www.calhealthreport.org/2021/12/21/domestic-violence-survivors-often-dont-want-to-call-the-police-california-tries-a-new-approach/.

139. *Id.*

140. Joshua Klugman, *Do 40% of police families experience domestic violence?* (July 20, 2020), https://sites.temple.edu/klugman/2020/07/20/do-40-of-police-families-experience-domestic-violence/.

141. *Id.*

142. 277 F.Supp.3d 1239, 1245 (N.D. AL 2017); *id*. at 1250; *id*. at 1258.

statements to his coworkers which painted the white supremacist organization in a positive manner.[143] This direct identification tied Doggrell's off-duty activities to the police force, which the department did not authorize him to do.[144] In another case, *City of San Diego v. Roe*, the City of San Diego Police Department reprimanded an officer for creating and starring in pornography, in which he took deliberate steps to link his sexual content to his position on the force.[145] Former Officer Roe also sold official police uniforms on his site in addition to featuring his videos.[146] The Court described the content as a "debased parody of an officer performing indecent acts while in the course of official duties."[147] Roe's off-duty sexual activity included himself explicitly identified as a member of the San Diego Police force.[148]

These cases illustrate that some off-duty conduct directly affects the force, particularly where the officer makes an explicit connection from himself to the department he works for. Such an explicit connection potentially changes the officer into a spokesperson for the department and could imply that the department approves of such activities. Such approval could negatively affect the public trust in police. Outside of these situations, however, departments should not be able to infringe upon the private lives of their employees. As stated earlier, employees are people first, with their own lives and ambitions outside of work. If the law continues allowing departments to restrict officers' off-duty conduct, sexual or not, then we place officers in a position where their job controls them 24/7, instead of just the hours they work. If the department wants to control officers outside of working hours, we should require departments to compensate officers accordingly, but for some, the price of their privacy and liberty is too great to name.

VI. NEW APPROACHES TO DEFEND OFFICERS' PRIVACY WHILE OFF-DUTY

The legal landscape officers face has started to shift away from protecting privacy rights. The "conduct unbecoming" clause has not sided with officers. Different courts will protect privacy rights while others will not. Now, the Supreme Court is turning its back on case law that has historically protected a right to privacy. This note ends by proposing potential solutions that could help officers challenge and push against this trend.

143. *Id.* at 1245, 1259.

144. Id. at 1259.

145. 125 S. Ct. 521, 522–24.

146. *Id.* at 522.

147. *Id.* at 524.

148. *Id.* at 522–23.

First, officers can advocate for a clearer policy regarding the "conduct unbecoming" clause. When the clause is vague, departments will interpret the clause through their own biases and interpretations of "unbecoming." Courts and police departments should provide a list of behavior that could land an officer into trouble, so officers can anticipate whether their conduct is in line with department policy. For example, in Harrisburg, Pennsylvania, after an officer began a relationship with a victim he had previously assisted during an emergency, the mayor declared the "unwritten policy" forbidding relationships with victims involved in investigations would now be explicit.[149] In addition to putting officers on notice about explicitly prohibited behavior, clarity helps officers advocate for change. Officers could petition their departments to remove prohibitions on styles of dress, who they can associate with, and what sexual conduct they can engage in. However, this solution is only a minor one. No guarantee exists that departments will change their policies when officers protest. Furthermore, some departments may find it cumbersome to list every prohibited action in their policies and may claim that such a requirement is an unrealistic expectation.

Another solution focuses on changing the relationship between the police and the public instead of the department. The fact that officers can get into trouble with their employer appears to be common knowledge; but if *what* departments can reprimand officers for is not so clear to the officers themselves, the public is likely confused as well. Increasing awareness regarding police policies has several benefits. Increasing awareness allows incoming recruits to make an informed decision regarding whether to proceed with their employment or not. Officers, of course, do not exclusively have sex with other officers. If the lovers and sexual partners of officers know their conduct could cost their partner their job, these partners too may advocate for local government leaders to stop intruding into officers' lives. Public education regarding police policies and their prohibitions could spark a larger conversation about where we should draw the line between private life and employment. If the public can keep their personal life private—whether they're visiting BDSM dungeons, writing erotica, or joining swingers' clubs—while still holding employment, officers should be able to do the same and still serve as competent and exemplary members of the force.

Lastly, officers could engage their entire community to push for legislative change. If *Dobbs* placed the constitutional privacy right into doubt while giving states deference to decide how best to regulate the public, then the public can direct their activism towards changing state constitutions. Where the Constitution of the United States fails to protect us, state

149. Christine Vendel, *Suspended Harrisburg cop criticized for dating rape victim after crime*, PENNLIVE (Sept. 11, 2015, 5:44 PM), https://www.pennlive.com/midstate/2015/09/harrisburg_police_officer_date.html.

constitutions can pick up the slack. Some states constitutions guarantee a right of privacy, such as California.[150] Shortly after *Dobbs*, California also passed a state constitutional amendment guaranteeing the right to reproductive freedom.[151] If officers want to protect their right to privacy, then enshrining such a protection in their states' constitution is a step in the right direction. The amendment process could also give officers a greater say in how to phrase the amendment to best protect their privacy sexual lives and those of others. An explicit privacy amendment with careful wording would in turn pressure courts to rule more often in the officer's favor. In light of these amendments, police departments, as state actors, may rethink punishing officers for private sexual conduct. Departments have a duty to keep the public safe and keep operations functioning smoothly, but they also have a duty to respect, enforce, and follow the law. A privacy amendment in a state constitution sends a clear message to departments about what priorities the public sees as important to preserve.

CONCLUSION

This note strives to spark conversation about how *Dobbs* could influence how courts, police departments, and officers understand what is and is not "conduct unbecoming" in regard to officers' private off-duty sexual conduct. The *Dobbs* decision shocked many, and as time goes on, we see the full impact of the *Dobbs* decision has not yet finished revealing itself. The majority opinion, the concurrences, and dicta all indicate a movement away from a constitutional right to privacy and a movement toward more state sovereignty. This shift towards state power could impact officers who challenge actions taken against them for consensual, non-criminal, off-duty sexual conduct because this increased deference gives even more power to states interests in preserving efficiency and positive reputations.

However, the *Dobbs* decision is not the final death knell for officers and their private sexual lives. If officers and the public unite in creating explicit and clear department policies, raising awareness, and amending state constitutions to provide privacy protections, officers might have a fighting chance in preserving their sexual conduct and relationships.

While this note focused on police officers' consensual non-criminal off-duty sexual conduct, officers still have many other questions and concerns. Police may worry about whether their employers can use their social media profiles against them. LGBTQ+ officers may wonder how departments will

150. *See* Cal. CONST. art. 1, § 1; FLA. CONST. art. 1, § 12; HAW. CONST. art. 1, § 6.

151. *Historic California Constitutional Amendment Reinforcing Protections for Reproductive Freedom Goes Into Effect*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 21, 2022), https://www.gov.ca.gov/2022/12/21/historic-california-constitutional-amendment-reinforcing-protections-for-reproductive-freedom-goes-into-effect/.

draw a line between sexual conduct and sexual identity, given that the law protects identity but likely not their conduct. The public may wonder why departments reprimand officers for some conduct but not others, and whether this varies from jurisdiction to jurisdiction. With a more sex positive and sex curious generation, my hope is that more people will take up this essential work to protect the private sexual lives of everyone, including former dominatrixes, swingers, pornography actors, and officers who "get off" off-duty.

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