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Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century

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INTRODUCTION

The argument advanced here originated as I was explaining to a group of heterosexual law professor friends that their uncomfortable reactions to my matter-of-fact talk of sex and sexuality was due, perhaps, to more than just the residue of garden-variety homophobia.[1] Their discomfiture, I urged them, was the result of an internalized heterosexist and Anglo-puritanical norm: sex and sexuality are regarded as subjects of shame and secrecy.[2] Moreover, I argued, under this norm the expression of nonconforming desire, whether sexual or social, remains among the most shamed and secreted of domains. My casual and relatively frank talk, socially projecting a nonconforming sensibility of desire, transgressed this basic norm.

Yet my friends and others of the sexual majority express their sexuality socially in a myriad of ways—engagement or wedding rings, couple or family photographs, lifestyle anecdotes recounted in casual or workplace conversation, and what-we-did-this-weekend stories, all effectively signal, in social forms or settings, underling sexualities. Despite sexphobic norms, these social expressions of heterosexual identity and desire routinely are taken as unproblematic and permissible. Persons or groups identified with the sexual majority thus are more prone than the sexual minority to overlook or acquiesce to the dominant and majoritarian norm of shame, secrecy and allusion; their heterosexual identity is assumed, experienced and validated in all kinds of ways. On the other hand, minority identities are pervasively ignored, denied or attacked.

Thus, within this status quo, heterosexuals do, but need not, assert (hetero)sexual identity socially in order to claim or establish overt identification; theirs is the default and privileged category. Lesbians and gays, on the other hand, *must* talk proactively and conditionally about sexual identity not only to rectify casual assumptions to the contrary but also to connect with

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1. The term "homophobia" describes an irrational fear of persons or phenomena associated with same-sex desire. *See generally* WARREN J. BLUMENFELD, HOMOPHOBIA: HOW WE ALL PAY THE PRICE (1992).

2. This norm may be related to Victorian sexphobia. *See generally* RICHARD DELLAMORA, MASCULINE DESIRE: THE SEXUAL POLITICS OF VICTORIAN AESTHETICISM (1990); LINDA DOWLING HELLENISM AND HOMOSEXUALITY IN VICTORIAN OXFORD (1994); HUMPHREYS LAUD, OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION (1972). This norm, of course, coexists with pornography, obscenity and eroticism more generally, and the social attitudes it generates have been internalized by some lesbians, gays and bisexuals as well. *See generally* EDWARD EUGENE BASKETT, ENTRAPPED (1976); LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (1993).

like-oriented others.[3] Sex talk, in this context, consequentially has a more fundamental significance: it is a way of discerning, discovering and actualizing who we are; it is a key to self development and community formation; it is a means of expressing our selves, of projecting our ideas regarding the propriety of same-sex desire. Ultimately, social expression, rather than sexual expression, of desire is the means through which we communicate our assessment of and claim to our places in law and society. Therefore, the focus below is on "public" or social expression of sexual desire, personality, or identity.

The thesis of this essay is that social expression of sexual personality is the ultimate target and battleground of legal regulations and cultural interventions against sexual minorities because social expression of same-sex desire galvanizes the politics of self and group identification among lesbians and gay men by challenging the claimed superiority or actual hegemony of cross-sex desire. As countless "coming out" accounts and other current phenomena attest, social expression is a way of communicating to one another—and to the sexual majority—the fact of our existence, and of our self-esteem. Social expression of sexual desire constitutes both identity, as well as discourses about identity and identity politics.

The social expression of minority sexual identity thus serves as a key means of altering the dominant culture's political and legal misconceptions of lesbians and gays. It is a means of enriching the nation's mix of ideas and options regarding human sexuality in order to alter the status quo and advance (in)equality reform. And because social expression of same-sex desire is constitutive of both individual and collective sexual minority conciousness, its silencing is integral to the general oppression of sexual minorities. The suppression of same-sex desire, whether expressed socially or sexually, is

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3. I make no claims about bisexual, transgendered or transsexual populations, but suspect that much of my argument may apply to them as well. For readings on bisexuality and the law, see generally Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1 (1995) (discussing group based subordination in society); Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127 (1993) (arguing for the creation and acceptability of bisexual jurisprudence); RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996). For readings on transgendered and transsexual populations, see generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); GORDENE OLGA MACKENZIE, TRANSGENDER NATION (1994); FRANK LEWINS, TRANSSEXUALISM IN SOCIETY: A SOCIOLOGY OF MALE TO FEMALE TRANSSEXUALS (1995); WILLIAM A.W. WALTERS AND MICHAEL W. ROSS, TRANSSEXUALISM AND SEX REASSIGNMENT (1986). Nonetheless, my occasional use of the term "sexual minorities" in this essay is inclusive of these categories. *See infra* Valdes note 9, at 377 n.16.

integral to the maintenance of heterosexual and heteropatriarchal supremacy as authoritative state policy.

Indeed, the cases bear out this dynamic. The courts have approved state criminalization of same-sex acts of love or lust.[4] However, this criminalization additionally has been interpreted as being and operating as more than a means of repressing the sexual expression of desire "in private" between consenting adults.[5] The proscription of same-sex sexual expression also operates as a means of suppressing social expression and knowledge of sexual minority desire and personality by licensing societal acts of retaliation or discrimination against those who express same-sex desire socially.[6] Hence, the sexual minority personality is not only left constitutionally unprotected by the "privacy" doctrine, it is also supposed to stay unseen and unheard in *all* respects to keep lesbians and gays socially isolated, economically disempowered and politically subordinated.

Given this backdrop, I will survey privacy rulings, equality law and expression jurisprudence to critique the status quo, and to glean from it an approach to the social expression of sexual desire that is more politically egalitarian and intellectually honest. This endeavor will allow us to consider how the devaluation and criminalization of same-sex intimacy and expression are juridically rationalized via doctrines professedly designed to protect the individual from state-sanctioned regimentation. At bottom, this discussion will show how and why the law is crafted to mistreat sexual minority identities and relations in various kinds of social and legal contexts.

This critique also will reveal the larger hierarchy of values associated with different kinds of erotic desire, a hierarchy that devalues even dissident forms of cross-sex expression or intimacy. This discussion can, therefore, prompt a broader critical review of the hierarchal arrangement of different desires that valorizes and perpetuates the expression of only a form of eros that the traditionalist state deems instrumental: cross-sex desire that serves heteropatriarchal conceptions of family and life. I will make an effort to focus attention on this phenomenon, and thereby to advance a broader critical (re)consideration of the social and legal worth of erotic desire.

And so my contribution to this symposium is a few thoughts about sex, knowledge, expression, power and politics at the end of the twentieth century.

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4. *See infra* notes 67-69 and accompanying text.

5. *See id.*

6. *See infra* notes 70-74 and accompanying text.

With these thoughts, I question why the sexual majority is discomfited by *social* manifestations of sexual orientation—that is, "sex talk"—and why sexual minorities insist on "coming out" of the Closet in "public." In this way, I will examine the social and legal worth of desire and its *social* expression from the position of a gay man.[7] From this position, I will seek to focus attention on the ultimate target of legal regulation of same-sex sexuality—the social expression of nonconforming desire—which the traditionalist state views as disruptive of the heteropatriarchal status quo.

Doctrinally, I will first question the "instrumental" model of sexual regulation that prevails under the Fourteenth Amendment. This model focuses on "privacy" as if sexuality were experienced or expressed primarily in isolated settings. This model effectively measures the social or legal value of intimacy by reference to the interests, preferences or objectives of dominant societal forces. I will consequently critique the instrumental model as generally and needlessly suppressive of individual liberty because it sweepingly subordinates human agency regarding intimate relations to "state interests" or ideology.

As an alternative, I offer the "expressive" model of sexual regulation grounded in First Amendment values. Chief among these values are self-actualization and associational opportunity through a relatively deregulated exchange of ideas and beliefs about human life and love.[8] This model will better protect consensual agency in intimate relations more appropriately for a heterogenous democracy that supposedly values and respects individual liberty. It also will constructively promote knowledge of the self by the individual, by her/his communities, and by society as a whole. Furthermore, this expressive model brings into the legal regulation of sexuality the added

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7. For a different analysis from the subject position of a heterosexual feminist, see Joanna Calne, *In Defense of Desire*, 23 RUTGERS L.J. 305 (1992) (advancing a defense of heterosexual *sexual* expression, written in response to the work of Catharine MacKinnon). Though different in various respects, the Calne essay, like this one, "concludes that we can know nothing, least of all ourselves, without desire." *Id.* at 307. *See also* Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996) (discussing the construction of desire and heterosexuality from a woman-of-color perspective).

8. Of course, an expressive approach to the regulation of desire does not and cannot lead to the conclusion that every expression of desire merits the same legal or social treatment. However, a First Amendment analysis does make clear that the present dismissal of all disfavored desire as worthless is narrow-minded, simplistic, unjustifiable and overinclusive. What this first step toward a reevaluation of desire points to is a task too long deferred: a notion of instrumentality that accords to desire the weight and protection that First Amendment values and principles mandate. An expanded analysis thus moves us toward making the hard and nuanced decisions that can produce a careful and caring approach toward the regulation of forms of expression that are integral to the identity and well-being of us all. *See infra* notes121-22 and accompanying text.

virtue of more closely comporting with the basic ideals of equality, liberty, and privacy, which historically (and presently) have been attributed to the Fourteenth Amendment.

Though this alternative model stems from my critique of the ideological instrumentality that currently underpins constitutional law, my complaint is not about instrumentality per se. Indeed, the expressive model offered at the end of this essay retains and also depends on notions of instrumentality. The difference between the two models is nonetheless significant, if not fundamental, in the substantive and analytical consequences that flow from each of the two versions of instrumentality addressed below.

The shift away from "ideological instrumentality" that I urge in this essay results from a recognition that state enforcement of heteropatriarchy is not a legitimate end in itself. The structure and measure of "expressive instrumentality" under the alternative model introduced below thus replaces state valorization of heteropatriarchal ideology with state facilitation of self actualization as the end goal of desire's expression and of its regulation via law. This replacement, in turn, entails judicial recognition and enforcement of the principle that the maintenance of heteropatriarchy is neither a self-justifying constitutional value nor a legitimate "state interest" as such. This recognition is crucial because it effects a major shift in the substantive interests that the state can assert or pursue through instrumentality.

Finally, two notes on terminology. By "social expression" of same-sex (or cross-sex) desire I mean the ways in which people or groups express sexual identity in everyday life. These ways include conversations, displays of photographs, wearing of commitment rings and other expressive acts by which people either communicate their, or learn of another's, lesbian or gay identity. To express or perceive lesbian or gay identity in any of these ways constitutes the social expression of desire because the identification as "lesbian" or "gay" *is* the normative identification of desire itself; the identities "lesbian" and "gay" effectively name same-sex desire, and they assert the existence and (potential) operation of this desire to the world. Of course, the social expression of desire sometimes takes place personally and directly from one person to other(s), and it sometimes takes place through media. Desire's "social expression" therefore encompasses more than literal "sex talk"—it encompasses verbal, visual, printed and physical acts of communication that convey or reveal an underlying sense of desire.

By "desire" I mean sexual personality. Though sexual personalities are multifaceted, I use the term specifically to describe the same-sex or cross-sex

aspect of sexuality. This aspect of personality, whether expressed socially or sexually, is a representation of desire, of its existence and of its orientation.

Part I will provide a general backdrop to this paper. Part II will show the role of desire in the creation of knowledge, community and power among lesbians and gay men. Part III will turn to the current configuration of law with respect to desire and to the valuation of its social and legal worth under the Fourteenth Amendment's privacy doctrine. Part IV will continue with a brief sketch of the history and ideology that the social and legal status quo both reflect and reinforce. Part V will provide an alternative framework for the valuation and protection of desire and its social expression. With this forward-looking ending, my aim is to focus specifically on—and to inspire greater resistance to—the suppression of sexual minority *social* expression, thereby helping to make sexual minority identities increasingly visible as legitimate cultural practice.

I. PROLOGUE: DESIRE'S SOCIAL EXPRESSION AT THE END OF A CENTURY

My innocuous but transgressive conversation reflects the larger events across American society regarding lesbians and gay men since the turn of the last century.[9] During this time, lesbians and gay men have established communities and discourses, which have made us culturally and politically more visible.[10] This visibility is akin to a collective "coming out" that is liberating and affirming. It emboldens the sort of talk about one's self and one's "lifestyle"[11] that before was tightly sealed in the Closet. This visibility,

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9. The history of lesbian and gay communities has been reclaimed in recent years. *See, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 36 n.86 (1995).

10. The best account of lesbian and gay history during this century in the United States is JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983). In this book, D'Emilio records the emergence of visible lesbian and gay life in this country, especially in the wake of World War II. In recent years, this visibility has continued to grow. *See, e.g.*, John J. O'Connor, *On TV, a Heightened Gay Presence*, N.Y. TIMES, Nov. 23, 1994, at C22 (discussing the growing visibility of gay men and lesbians in television entertainment); Debra Rosenberg, *Homophobia*, NEWSWEEK, Feb. 14, 1994, at 42 (describing the slow but discernible acknowledgment of lesbian and gay issues in small-town America).

11. Though I have previously critiqued the blanket use of this term to ascribe a uniform and collective manner of living to all lesbians and gays, I use it here descriptively to signify any given set of living arrangements. Francisco Valdes, *Sexual Minorities in the Military: Charting the Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 450-56 (1994).

I believe, is a key site of a continuing and expanding struggle for equality and dignity among oppressed groups. It effectively brings into question whether the social expression of lesbian and gay identity could—or should—occupy public spaces on terms "equal" to the social expression of heterosexual identity.

In juxtaposition to this new-found visibility of lesbian and gay expression is the insurgency of precepts and practices associated with the majoritarian norm of secrecy and shame, which generally travel under the rubric of "traditional morality." This insurgency is seen perhaps most vividly in the ongoing backlash against "rights" and "government" in American law and society.[12] It can also be seen in the surge of invocations regarding "family values" that have occasioned declarations of "cultural war" since the early 1990s.[13] Today's backlashers avowedly seek a restoration of ideological hegemony to drive lesbian and gay people back into the silence and isolation of the last century. The politics of backlash effectively, if not explicitly, seek to reclaim all "public" *and* "private" space for old-fashioned heteropatriarchy.[14] One observation to be drawn from the current social, political and legal landscape, therefore, is that suppression of *all* lesbian and gay expression is a primary objective of the backlash agenda.

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12. The notion seems to be that the federal government, and perhaps especially the federal courts, have generated "too many" rights; hence, the impulse to curtail rights is directed at a curtailment of federal programs, activity and power. *See, e.g., Too Many "Rights,"* NEWSDAY, Dec. 15, 1991, at 43 (discussing the danger of misplaced demands weakening our Constitution); Amitai Etzioni, *The Spirit of "We,"* ATLANTA J. & CONST., Jan. 16, 1994, at G1 (stating that too many rights are being claimed without any responsibility being assumed); Steve Berg, *Simmering Preferences Controversy Nears a Boil*, STAR TRIB., Mar. 12, 1995, at 1A (describing the backlash against federal affirmative action programs for minorities).

13. The seminal declaration was issued by Republican presidential aspirant Patrick J. Buchanan from the podium of the 1992 Republican National Convention, when he proclaimed: "There is a religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as the Cold War itself." Chris Black, *Buchanan Beckons Conservatives To Come Home*, BOSTON GLOBE, Aug. 18, 1992, at A12. The concept of cultural war most recently was invoked by Justice Scalia in his *Romer v. Evans* dissent. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting). *See generally* JAMES HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR (1994) (describing the conflict of the religious versus the secularist and calling for moderation before civil war erupts); JAMES HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (coining the phrase culture wars, from which Buchanan quoted).

14. Heteropatriarchy refers to a blending of androcentrism and heterocentrism to privilege men and masculinity both sexually and socially. *See* Valdes, *supra* note 9, at 8 nn.12-14.

This drive is captured by the insidious, albeit casual and familiar, admonition against "flaunting" lesbian or gay identity.[15] This admonition effectively communicates that "being" lesbian or gay is tolerable but that expressing those identities socially exceeds the limits of toleration. More recently, dominant socio-legal impulses yielded the so-called "Don't Ask, Don't Tell" compromise over the degree of discrimination that the military would be allowed to practice lawfully against the lesbian and gay population of this country.[16] This policy endeavors to make invisible the existence of lesbian and gay personalities by purporting to preserve subjective sensibilities regarding identity while stripping identity of all indicia or expression; it bifurcates identity from its social expression.[17] Given its substance and impact, the goal of backlash is to deprive lesbians and gays of opportunities to connect and grow.

However, as these examples illustrate, today's suppression is not only designed to keep lesbian and gay communities disempowered by depriving us of our sense of individual or collective self, but it also keeps the general populace in ignorance of us by inhibiting all manifestations—even non-sexual ones—of sexual minority identities. The arenas of backlash suppression are not limited to the inhibition of same-sex sexual *relations*, but to the creation of ignorance and disdain for *any* expression of identity or community involving same-sex desire or affinity. The obvious purpose of suppressing the *social* expression of lesbian or gay identity and desire is to deny knowledge and incite ignorant fear of such persons and desires both to the minority and to the majority; the goal is the suppression of ideas that challenge dominant arrangements hinging on the ideological hegemony of heteropatriarchal desire. In this context, social expressions of desire can be no less than acts of power while sexual expressions of desire remain no less than crimes of knowledge.

Thus, as this century draws to a close we have been witnessing a triumph of backlash politics that seek the contraction of all civil rights at

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15. One example is the military's current policy; *see* Jim Hoagland, *Colin Powell: This Debate Is Over*, WASH. POST, July 27, 1993, at A17.

16. For a more detailed discussion, see Valdes, *supra* note 11, at 465-74.

17. This distinction permits the assertion of a key conceptual and political fallacy that still reigns in the law: a distinction between status and conduct, or between desire and behavior. But this disguise, when identified and scrutinized, cannot entirely occlude the ultimate use of the criminal law and other cultural apparati to inhibit and distort more than conduct. For a more extended discussion of status/conduct issues, see Valdes, *supra* note 11. *See also* Francisco Valdes, *Between and Beyond Race, Gender and Sexuality: Constructing "Identity" As a Legal Concept in Equality Jurisprudence* (forthcoming).

precisely the same historical moment as we are experiencing the large-scale emergence of sexual minority cultures and communities. Could this be coincidence? Or is the arrival of lesbians, gays and other sexual minorities on the national scene the proverbial "last straw" that broke the national will and consensus over issues of (in)equality and discrimination? This timing, I suggest, is no coincidence: the arrival of lesbians, gays and other sexual minorties has fueled profound fears that further problematize the larger set of civil rights that many Americans already wish to diminish or abandon.

Overall, we live in curious times. A "liberal" government perceived as excessively benevolent to the historically subordinated members of its society, for the moment, has been repudiated by a "majority" of "angry (and putatively straight) white men"[18] who are set to restore "tradition" through backlash politics and "cultural war." But the backlashers' version of tradition and history is not all that linear or simple. The nation and its laws remain *formally* committed to the grand ideals that the Constitution embeds in American social and legal culture. Among these are the express textual guarantees of equality[19] and expression.[20]

Though the principles underlying these guarantees are often violated in practice, the traditions and histories of the past include formal and fundamental mandates that provide platforms for progressive agendas, even amidst backlash. The revitalization of enduring and potentially transformative constitutional principles or conceptions is an important battle to engage in the ongoing struggle against all forms of subordination.[21] These principles and conceptions cannot be abandoned to a hostile judiciary reshaped by professedly majoritarian backlash. Instead, they must be reclaimed and refashioned to prepare them for the time when the storm of backlash will have subsided.

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18. The term encapsulates the segment of society that is deemed to have fueled the electoral triumph of the "Contract with America" promoted chiefly by Representative Newt Gingrich in the 1992 congressional elections, which produced the first Republican majorities in decades. *Inside Politics: Contract with America Is Top Political Play of the Year* (CNN television broadcast, Transcript #727-4, Dec. 23, 1994). The passage of the anti-immigrant Proposition 187 in California has been associated with this type of voter sentiment. Jonathan Freedland, *The Whitelash Starts Here*, GUARDIAN, Jan. 13, 1995, at 24.

19. U.S. CONST. amend. XIV, § 1.

20. U.S. CONST. amend. I.

21. Hence, the importance of coalition work. *See generally* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. L. REV. & WOMEN'S STUD. 25 (1995) (urging coalitional projects and scholarship).

II. KNOWLEDGE AND POWER: DESIRE IN SELF AND GROUP CONSTRUCTION

The role of desire in self knowledge and group consciousness is the starting point because it is the ultimate target of cultural and legal interventions regarding the social expression of sexual desire. Consider for a moment why the social expression of lesbian or gay identity takes the politics of backlash and suppression to a visceral and hysterical level. When expressed openly, lesbian and gay identities are experienced as profoundly threatening by dominant forces because these identities constitute paths to dissident knowledge, communication, identification and empowerment. The social expression of these identities enable self actualization, both individually and collectively, among those who enact and espouse a view of "family" life and human relations that the state formally and relentlessly disfavors. This part thus looks at contemporary phenomena that reflect desire and its role in the construction of self and group identities among lesbians and gay men.

A. Gay Liberation and the Social Expression of Desire

The significance of desire's social expression to "gay liberation" was understood by pioneering gay political leader Harvey Milk.[22] During the 1970s, Milk placed the act of "coming out" at the very center of his strategy for the political advancement and legal emancipation of lesbian and gay life in the United States.[23] In this way, the social expression and visibility of lesbian and gay identity became a key theme of individual and collective self empowerment for sexual minority activists.[24]

The individual yet communal act of coming out in countless and continuing ways to make sexual minority identities socially visible was the linchpin of Milk's anti-subordination vision because he understood the relationship of desire's social expression to gay liberation in a pervasively

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22. *See generally* RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1982).

23. "Harvey was the candidate who talked of the importance of coming out to parents and friends." *Id.* at 171.

24. But Milk did not invent this strategy: activists both here and abroad pursued similar strategies a century ago, making social expression and visibility a foundational strategy and tactic of sexual minority politics. *See* Valdes, *supra* note 9, at 56-71 and sources in accompanying footnotes.

sexphobic and homophobic society.[25] Milk declared, "If a bullet should enter my brain, let that bullet destroy every closet door."[26] In his "political will," he called for "every gay lawyer, every gay architect [to] come out, stand up and let the world know" of our presence.[27] "Only that way will we start to achieve our rights," he concluded.[28]

The role of social expression in self and group construction is further evidenced by the migration of lesbians and gay men to San Francisco, Los Angeles and New York in the years following World War II.[29] Time and again, the autobiographies of sexual minority migrants to these and similar locales identify the need to escape social isolation and enforced ignorance as the predicate for sexual minority self knowledge and group development.[30] Thus,

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25. Milk's insight is further confirmed by the countless coming out stories that since then have become part of sexual minority culture. *See, e.g.*, THE ORIGINAL COMING OUT STORIES (Julia Penelope & Susan J. Wolfe eds. 1989). *See generally* TESTIMONIES: A COLLECTION OF LESBIAN COMING OUT STORIES (Sarah Holmes ed., 1988); REVELATIONS: A COLLECTION OF GAY MALE COMING OUT STORIES (Wayne Curtis ed., 1988). These stories confirm the importance of desire and its social expression to the advancement of self awareness and actualization, and also to the creation of connection and community, among and between lesbians, gays and other sexual minorities. Our experience thus is that the social disclosure and expression of sexual desire is linked to the development of individual identity and to the formation of collective solidarity. *But see* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 602-618 (1997) (questioning the centrality to sexual minority identities of the coming out process, espcecially among sexual minorities of color or the poor). For sources on the interplay of sexual orientation, race and ethnicity and gender, see *id.* at 562-563 nn.9 & 12. *See also* Francisco Valdes, *Mapping New Margins: A Call To Account for Race and Ethnicity in the Law, Theory and Politics of "Sexual Orientation" Discrimination*, 48 HASTINGS L.J. -- (forthcoming 1998).

26. SHILTS, *supra* note 22, at 372.

27. *Id.* at 374.

28. *Id.*

29. *See generally* D'EMILIO, *supra* note 10, at 23-75 (discussing this migration and its causes).

30. *See, e.g.*, PAUL MONETTE, BECOMING A MAN: HALF A LIFE STORY (1992) (describing the author's journey toward self awareness and self acceptance in a social environment marked by isolation); MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1991) (recounting a similar journey and detailing the role of social institutions in the creation of isolation and ignorance to help suppress self awareness and self actualization). For accounts of similar issues in lesbian contexts, see JOAN NESTLE, A RESTRICTED COUNTRY (1987); DEL MARTIN & PHYLLIS LYON, LESBIAN/WOMAN (Twentieth Anniversary ed. 1991). *See generally* ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945-1990 — AN ORAL HISTORY (1992) (providing a series of personal accounts of these times); DONN TEAL, THE GAY MILITANTS (1971) (providing a history of the post-Stonewall Riots Gay Liberation Movement of the 1970s, which concentrated its efforts on visibility

the concentration of lesbians and gay men during this century in urban areas was driven precisely by the linkage of expression and knowledge to individual identity and community consciousness—in other words, by the need for an epistemological environment that facilitated social expression and connection as routes toward self realization and collective empowerment.[31]

Since then, a generation of "Queer" activists and theorists, like Milk, has sought to empower lesbians and gays culturally and politically. To do so, they have pursued a strategy of openly expressing sexual desire in social ways and scenarios.[32] Tactics like "kiss ins" and artwork like Robert Mapplethorpe's explicit photography increasingly charge the social expression of same-sex desire with a forthright challenge to the hegemony of cross-sex social expression.[33] Indeed, since Milk's time, the politics of lesbian and gay visibility

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issues). For a contemporary critique of sexual minority (in)visibility issues, see MICHELANGELO SIGNORILE, QUEER IN AMERICA: SEX, THE MEDIA AND THE CLOSETS OF POWER (1993).

31. As previously noted, this sort of environment is created through manifold means of expression and communication, which can include the representation of desire in sexually explicit materials. Thus, a similar point in the context of gay male pornography is made in Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995) (defending gay male pornography on the grounds that it enables its consumers to realize self-affirming sexual lives despite a general cultural climate of isolation and denigration). *See generally* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988) (positing pornography and its regulation as epistemological struggle); George P. Smith II, *Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire*, 4 J. CONTEMP. HEALTH L. & POL'Y 155 (1988) (cautioning against overzealous governmental regulation of sexual representations in the name of individual autonomy, expression and development).

32. *See generally* Valdes, *supra* note 9, at 346-54 (discussing Queer activism and cultural and legal studies).

33. For discussion of "kiss ins" see Valdes, *supra* note 11, at 464; for discussion of Mapplethorpe and his work, see generally PATRICIA MORRISROE, MAPPLETHORPE: A BIOGRAPHY (1995). Contemporary sexual minroity legal scholars also have noted the key role of desire and its expression bothin lesbian and gay identity formation and in sexual majroity perceptions of those identities. *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 65-67 (1994) (focusing on the subjective discovery of same-sex desire as elemental to lesbian consciousness); Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 520 (1992) (focusing on the importance of coming out both to self identification and to social perception). *But see* Hutchinson, *supra* note 25, at 602-18 (arguing that race and ethnicity impact identity formation and social perceptions in ways that downplay the centrality of sexual orientation among lesbians and gays of color).

and empowerment have been based on a recognition that the social or public expression of same-sex desire is indispensable to sexual minority equality.[34]

Perhaps the most controversial tactic to emerge in recent years emanates from a similar recognition of the role that social expression plays in the creation of self knowledge and community power. The practice known as "outing" is the public exposure of a Closeted lesbian or gay by another.[35] "Outing" is usually performed for the purpose of altering the cultural and political power relations which devalue and subordinate sexual minority identities and desires.[36] Though "outing" is controversial, it is plain that the practice of outing springs from a conviction that sexual expressions of same-sex desire "in private" between consenting adults is but a subaltern way-station toward the public acceptance and civic legitimacy of sexual minorities.

Each of these phenomena display the link between the social expression of same-sex desire and the larger contestation over the rights and roles of sexual minorities in American society. In each instance, the core dynamic is the linkage between social visibility and civic stature because social visibility provides the means through which the nation's mix of ideas regarding

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34. And these efforts perhaps prompted the California Supreme Court to apprehend this connection. *See* Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458 (1979) (holding that acts such as "coming out" constituted political activity and expression protected under state law). For a discussion of this case, see Douglas Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 GOLDEN GATE L. REV. 635 (1981).

35. *See* Mathieu J. Shapiro, Note: *When is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. REV. 587 (1995) (debating the ethics of outing); Barbara Moretti, *Outing; Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort As a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857 (1993) (situating outing in tort law); Jon E. Grant, Note, *"Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 CORNELL L. REV. 103 (1991) (analyzing outing in constitutional terms). *See also* LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (1993) (posing various questions as to outing in the 1990s); Michelle E. Hammer, *Coming Out or Being Dragged?*, NEWSDAY, Apr. 17, 1990, at 50; Jean Latz Griffin, *"Closet" Politicians Targeted by Faction of Militant Gays*, CHI. TRIB., Mar. 29, 1990, at DI (reporting on the use of outing as a political tactic).

36. *See* Marsha King, *Concerned About Privacy As Well As Hypocrisy, Gays and Lesbians Debate the Practice of 'Outing':—How Far Out?*, SEATTLE TIMES, June 22, 1990, at C1 (describing the recent trend of "outing" politicians); Afi-Odelia E. Scruggs, *"Outing" Becomes Election Strategy*, PLAIN DEALER, Oct. 21, 1996, at 1B (describing one State Representative's experience when political opponents attempted to "out" him and ruin his political career). See generally WARREN JOHANSSON & WILLIAM A. PERCY, OUTING: SHATTERING THE CONSPIRACY OF SILENCE (1994) (giving a historical analysis of outing).

sexuality can be changed. All of these phenomena, thus, illustrate the role of desire in self and group construction among lesbians and gay men.

B. Social Expression of Lesbian/Gay Identity and the State

The relationship between sexual minority self knowledge and group empowerment is not only evidenced by the political theorizing and activism of Harvey Milk or the personal autobiographies of countless lesbians and gay men. Awareness, and fear, of this relationship is also present in the most recent national controversy over the social visibility of sexual minorities. This controversy, spanning 1992-93, centered on the pledge of then presidential candidate Bill Clinton to reform the military's anti-gay policies if elected and on the increasingly clumsy efforts of president-elect and, ultimately, President Clinton to fulfill that pledge.[37] The Clinton pledge eventually produced the "Don't Ask, Don't Tell" compromise policy. The policy erects a distinction between "status" and "conduct" and purports to concern itself only with the latter.[38] Thus, under the new policy, lesbian or gay service members are formally protected from discharge only if they do not "express" their sexual personalities.

The important point for this essay is that during this controversy all sides acknowledged the existence of lesbians, gays and other sexual minorities within the armed forces; the question was never about altering this baseline reality. Rather, the controversy was about the permissible level of social visibility. This controversy was resolved by a patent appeal to mutual disengenuity and dishonesty: "we won't ask, and if you don't tell, we can all pretend." The gays-in-the-military tempest, as the new policy's moniker indicates, was about suppressing the social expression of same-sex desire in order to render us socially invisible. And, by coercing invisibility, the status quo need not respond to the challenge that we pose to dominant ideas or imperatives about sexual identities and relations.

Of course, the relationship between desire and sexual minority identity is a double-edged phenomenon. Though liberational when recognized by persons or groups to transcend oppression, the role of desire and its expression

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37. *See* David Usborne, *Clinton Firm on Lifting Ban on Gays*, INDEPENDENT, Jan. 26, 1993, at 9 (reporting Clinton's commitment to repeal the ban on lesbians and gays); Martin Kasindorf, *Gays in Military: Threat of Dismissal Still Real*, NEWSDAY, June 24, 1994, at A15 (explaining practical effect of Clinton's policy on gay military personnel).

38. *See* Valdes, *supra* note 11, at 465-74.

in shaping identity also can become a reductionist account of lesbian or gay personality and life. The coming out stories make clear that desire and its social expression are integral to the realization and celebration of lesbian and gay identities, but the rhetoric of backlash makes it obvious that a focus on desire can threaten to reduce lesbian and gay people to that single dimension of our personhoods. Indeed, this reductionist approach is at the heart of several courts' misunderstanding and mistreatment of lesbian or gay litigants.[39] The challenge, then, is to liberate desire without reducing personhood to a single dimension.[40]

From this discussion, it becomes clear that desire's sexual expression is not the sole issue in the fight for sexual minority justice. A key site of struggle is the social manifestations of identities that implicate feared or disfavored desires. Unregulated social expressions of desire are deemed dangerous because acts of intimacy remain integral to personal and collective knowledge. The knowledge sought to be suppressed by the creation of sex crimes and laws remains culturally and legally forbidden to both sexual minorities and the majority precisely because of its transformative and subversive potency. Recognition of this potency in turn leads us to the second part of this essay: the way in which political and cultural fear of nonconforming desire, and of its potential for the subversion and transformation of the status quo, is replicated and reinforced by existing legal rules and paradigms designed to suppress both social and sexual expression of nonconforming ideas or relations regarding desire.

III. "PRIVACY" AND IDEOLOGY: SUPPRESSIVE INSTRUMENTALITY AND THE LAW

Given the potential of socially expressed desire to create a sense of self and group awareness and empowerment, its regulation through the creation and application of law might be regarded as predictable. Indeed, the body of law most explicitly concerned with the regulation of desire, the privacy doctrine under the Fourteenth Amendment, manifests an "instrumental" approach to sexual personality and expression that is pervaded by heteropatriarchal

39. Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (holding that lesbians and gays as a group are constituted by the common commission of "conduct" that, though unspecified, refers apparently to "sodomy").

40. As I have urged previously, I see the validation of desire as part of the agenda for Queer legal theory. *See* Valdes, *supra* note 9, at 368.

ideology, and that is therefore designed to overlook the social and legal worth of nonconforming desires in sexphobic and homophobic terms.

When I refer to the "instrumental model" of sexual regulation, I thus mean an approach that conceives and evaluates the social and legal worth of desire in ideological terms and, specifically, in reference to state interests in heteropatriarchy.[41] This model is integral to and evident in the very architecture and articulation of modern privacy law. A sketch of this suppressively instrumental approach to desire under extant privacy doctrine thus takes us to a brief return through five illustrative cases: *Griswold v. Connecticut*,[42] *Eisenstadt v. Baird*,[43] *Carey v. Population Services*,[44] *Hardwick v. Bowers*[45] and *Bowers v. Hardwick*.[46] In these key cases the courts careened through various desire scenarios and each time opted for an ideological analysis. While adjudicating these cases, the Supreme Court thus brought into being a body of privacy law that is thoroughly suppressive in its sense and measure of ideological instrumentality.

The first subsection examines privacy doctrine and its ideological outlook as crafted by the Supreme Court in cases involving the sexual expression of cross-sex desire. The second reviews the application of that approach to the sexual expression of same-sex desire. The next subsection addresses the additional use of privacy doctrine to validate more generally the

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41. This instrumental model is inimical not only to same-sex desire and intimacy, but to all nonconforming desires and relations as measured by dominant lifestyle ideology. The lesson of this broader experience is that *any* expression of desire deemed to flout Euro-American heteropatriarchal preferences is vulnerable to cultural denunciation, legal interdiction and social suppression. For instance, notions of instrumentality that today reduce same-sex desire and intimacy to criminalizable aspects of personhood reduced cross-race desire in similar ways but a generation ago. Moreover, the anti-miscegenation regime not only outlawed the sexual expression of sexual desire, it also suppressed the visibility of cross-race desire; in other words, the miscegenation regime, like the sodomy regime, feared both actual intimacy in "private" as well as social expression of the desires that drove such intimacy. *See generally* A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989). The "miscegenation analogy" has been elaborated by Andrew Koppelman in Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law As Sex Discrimination*, 98 YALE L.J. 145 (1988), and in Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

42. 381 U.S. 479 (1965). *See infra* notes 50-57 and accompanying text.

43. 405 U.S. 438 (1972). *See infra* notes 58-60 and accompanying text.

44. 431 U.S. 678 (1977). *See infra* notes 61-64 and accompanying text.

45. 760 F.2d 1202 (11th Cir. 1985). *See infra* notes 67-74 and accompanying text.

46. 478 U.S. 186 (1986). *See infra* notes 75-77 and accompanying text.

suppression of same-sex social expression. Though outcomes vary wildly, the facts and reasoning of the courts reveal the consistent influence of heteropatriarchy in American constitutional law.

A. Deregulating the Sexual Expression of Cross-Sex Desire

The right of privacy has experienced a slow and fitful history.[47] However, the present-day principles of privacy jurisprudence are generally viewed as stemming from the 1960s and 1970s.[48] It was then that the Court adjudicated a series of cases that congealed into the body of law that today is under the rubric of "privacy" under the Fourteenth Amendment doctrine.[49] It is this legacy that concerns and confronts us today.

In the first of these rulings, *Griswold v. Connecticut*, the Supreme Court struck down a statute prohibiting the use of contraceptives as applied to a married couple.[50] The statute impermissibly intruded into marital intimacy, the Court held.[51] The ban on contraceptives was intolerable in this instance, the Court explained, because marriage "is an association that promotes a way of life."[52] In doing so, the Court interposed its power between a state and its people, thereby striking a relatively "activist" or "liberal" stance.[53] However,

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47. *See generally* DAVID M. O'BRIEN, PRIVACY, LAW AND PUBLIC POLICY (1979) (discussing the historical origins of individual privacy and the creation of constitutional protection); FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM (1992) (relating privacy, social freedom, and human social nature).

48. For further readings on modern privacy jurisprudence, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Steven J. Schnably, *Beyond* Griswold*: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

49. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302 (1988); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 14.26-.30 (1991).

50. 381 U.S. 479.

51. *Id.* at 485-86.

52. *Id.* at 486.

53. Opinions like *Griswold* have fueled an ongoing debate over judicial "restraint" and "activism," which is beyond the scope of this essay. For some readings on the topic, see STEPHEN C. HALPERN & CHARLES M. LAMB, SUPREME COURT ACTIVISM AND RESTRAINT (1982); STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (1996).

the Court's direct reliance on the marital aspect of the *Griswold* facts indicates an ambivalent judicial posture regarding state control of sexual desire and its sexual expression.

The Court's specific referencing to marriage throughout the opinion,[54] followed by the explicit connection of that institution to "a way of life,"[55] squarely situates the *Griswold* holding in rather conventional perceptions of ideological instrumentality. In *Griswold*, the Court substituted its perception of the instrumental value of the desires being expressed (and policed) for that of the legislature to invalidate the state's assessment of those desires. Whereas the state had concluded that the sexual expressions of cross-sex desires had no instrumental value unless they were at least potentially procreational, the Court concluded that the expression of *marital* sexual desire, even if expressed recreationally, possessed instrumental value because it was part and parcel of an "association" that represents and "promotes" a particular ideology of lifestyle.[56]

The "way of life" so valorized in this reasoning was the living arrangements formatted by traditional cross-sex marriage, the holy grail of today's backlash agenda. *Griswold's* unpacking consequently yields a basic finding. The state had outlawed contraceptives to protect its interest in "traditional family" arrangements geared towards procreation.[57] In other words, the state had concluded and decreed that desire expressed with contraception possessed no instrumental value vis-a-vis "state interests" in sexual expression and the "way of life" preferred by the state. The *Griswold* Court did not quarrel with the state's interest in lifestyle ideology, nor with the substance or slant of the ideology itself; instead, the Court limited itself to disagreement on the instrumental value of desire expressed with contraception in light of this ideology, always staying mindful of the "state interest" in the perpetuation of heteropatriarchy. The opinion's ideology confirms the state's basic sexual

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54. *Griswold*, 381 U.S. at 486.

55. *Id.*

56. The Court's opinion attempts to draw a distinction between a "way of life" and "causes" but many efforts to suppress sexual minority social expression and life are attributed precisely to the connection between "lifestyle" and moral, religious or cultural causes. *See, e.g., supra* note 13 and sources cited therein on cultural war. For an example of such intertwining, see Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) (defending the superiority of relationships modeled on heteropatriarchal traditions).

57. *Griswold*, 381 U.S. at 496.

heteropatriarchy. The opinion's ideology confirms the state's basic sexual policy while letting the state know that, in this instance, it had wrongly measured the heteropatriarchal instrumentality of the desires underlying the expressions at issue. *Griswold*, in sum, vindicates instrumentality as measured by the norms and tenets of heteropatriarchy as the standard by which to assess legal protection or suppression of desire's expression.

The Court then proceeded to navigate through facts increasingly attenuated from the ideal and ideology of traditional marriage. In the subsequent cases, the Court effected a relaxation of heteropatriarchal instrumentality, while expanding constitutional protection for the sexual expression of only cross-sex desire. This expansion, though based on a generous imputation of instrumentality in several instances, was nonetheless, and somewhat ironically, justified repeatedly on ideologically instrumental grounds.

In *Eisenstadt v. Baird*, the Court extended the *Griswold* holding to unmarried persons because "rights must be the same for the unmarried and for married alike."[58] The Court declared, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[59] With this declaration, the *Eisenstadt* Court widened the scope of the *Griswold* reasoning while adhering substantively to its ideological anchoring. Hence, while expanding *Griswold's* protection to recreational expressions of sexual desire in nonmarital (but apparently cross-sex) couplings, the Court chose to single out "the decision whether to bear or beget a child"[60] as the touchstone of the law.

In result and rationale *Eisenstadt*, like *Griswold*, mixed reform and tradition. The Court once again substituted its evaluation of instrumentality for that of the legislature, producing another relatively "liberal" result. But the reasoning continued to invoke procreation-related activities and interests as a core standard for measuring the instrumentality of sexual expression. As in *Griswold*, this unpacking reveals that the Court upheld "state interests" in heteropatriarchal lifestyle as the touchstone of constitutional analysis. In retaining procreation as the basic paradigm and measure of instrumental value, the *Eisenstadt* Court not only continued but extended the ambivalence of

58. *Eisenstadt*, 405 U.S. at 453.

59. *Id.*

60. *Id.*

Griswold. Most germane to this discussion, this ambivalence also helped to embed within modern privacy doctrine the perceived ideological instrumentality of desire as the basic rationale for judicial supervision of sexual expression and its regulation by the state.

In *Carey v. Population Services*, the Court further extended *Griswold* to minors.[61] The Court in *Carey* announced that "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[62] These decisions, the Court specified, included those relating to marriage, procreation, contraception, family relationships, child rearing and education.[63] *Carey*, like *Griswold* and *Eisenstadt*, thus continued to push the privacy envelope beyond the limits of electoral politics while adopting this version of instrumentality as the basic approach and rationale of its opinions, therby affirming once again the lifestyle ideology of heteropatriarchy as the substantive measure of instrumental value.

These opinions established a privacy record that validated (only) the sexual expression of cross-sex desire. The great advance was judicial attribution of ideological instrumentality to cross-sex desires expressed in nonprocreational and even nonmarital couplings.[64] But this attribution was accomplished by repeated and specific analogies to traditional marriage, the ideal of procreation, and the interests or imperatives of heteropatriarchy. What the Court's modern privacy jurisprudence pried open was the right of those who experience cross-sex desire to express it more recreationally, namely beyond the strict confines of traditional marriage and compulsory procreation, while nonetheless singling out traditional marriage and its perceived analogs as the "way of life" that the constitution would protect.

Despite its loosening of state strictures over some forms of cross-sex intimacy, "privacy" thus amounts to the jurisprudence of hegemonic heteropatriarchy; it is a jurisprudence of ideology, crafted by (apparently) heterosexual men, that privilege themselves and their preferences regarding

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61. *Carey*, 431 U.S. 678.

62. *Id.* at 687.

63. *Id.* at 685.

64. A caveat is in order: *Carey* additionally involved the criminalization of promotions or advertisements featuring contraceptives, and in this sense this case also was about the social or public expression of sexual desire. *See Carey*, 431 U.S. at 681 (noting the statute at issue made it criminal for "anyone, including licensed pharmacists, to advertise or display contraceptives"). However, the opinion focused on, and has been viewed primarily, as an extension to minors of *Griswold's* and *Eisenstadt's* privacy guarantees.

makes clear that the state need not accept or celebrate unions other than traditional marriage. This jurisprudence furthermore signals that the state need only tolerate sexual desires and expressions that approximate heteropatriarchy. This impoverished iteration of "privacy" not only leaves unchallenged the androsexist orthodoxy of patriarchal marriage and its traditions,[65] it also leaves intact the heterosexist premises and imperatives of that ideological institution.[66] This bedrock point is made plain by subsequent juridical choices, where an explicit halt was declared to privacy law when the men of the 1986 Supreme Court reached the Rubicon of same-sex desire and its sexual expression.

B. Repressing the Sexual Expression of Same-Sex Desire

The record established with these three opinions sets the stage for the next step—judicial assessment of state efforts to suppress the sexual expression of same-sex desire. The prior cases made clear what the bottom-line inquiry would be: ideological instrumentality. Would the same-sex variety of nonmarital desire and its expression be viewed as instrumentally valuable? Given the mixed signals to date, it was plausible to predict either the Eleventh Circuit's ruling in *Hardwick v. Bowers*[67] or the Supreme Court's ruling in *Bowers v. Hardwick*.[68]

In *Hardwick*, the Eleventh Circuit applied *Griswold* and its progeny to invalidate a state sodomy statute in a same-sex context.[69] The Eleventh Circuit's ruling used *Griswold*, *Eisenstadt* and *Carey* as its point of departure,

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65. For a classic critique of patriarchy in modern society, see KATE MILLETT, SEXUAL POLITICS (First Touchstone ed. 1990). *See also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

66. For an analysis of the connection between androsexism and heterosexism in traditional marriage, see Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991). Current privacy doctrine therefore fails to protect non-traditional heterosexual identities and relations as well. *See, e.g.*, Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991) (discussing how privacy doctrine leaves poor and/or single mothers vulnerable to ideological regulation and supervision). *Cf.* Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993) (questioning the anti-patriarchal potency of same-sex marriage).

67. *Hardwick*, 760 F.2d at 1212 (holding that Georgia's sodomy statute infringed upon fundamental constitutional rights).

68. *Bowers*, 478 U.S. 186 (holding no fundamental right to commit homosexual sodomy).

69. *Hardwick*, 760 F.2d at 1211.

Circuit's ruling used *Griswold*, *Eisenstadt* and *Carey* as its point of departure, arriving at its conclusion by extending the basic analogy developed in the three cases.[70] In doing so, the Eleventh Circuit's *Hardwick* ruling followed the instrumental approach of privacy precedent, concluding that the sexual expression of same-sex desire is analogous to cross-sex expression because, "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage."[71]

To arrive at this conclusion, however, the Eleventh Circuit's analysis required another expansion of the substantive instrumentality imparted to marriage in *Griswold*. Because both *Griswold* and *Eisenstadt* had made clear that "the intimate associations protected by the Constitution are not limited to those with a procreative purpose," the Eleventh Circuit reasoned that procreation was not the only benefit of marriage and, further, that the "benefits of marriage can inure to individuals outside the traditional marital relationship."[72] Among these benefits, the Eleventh Circuit continued, is "the unsurpassed opportunity for mutual support and self-expression that [traditional marriage] provides."[73] Because for "some" the expression of same-sex desire is akin to the expression of desire deemed occurring within a traditional marital relationship, the Eleventh Circuit judged these expressions instrumentally valuable.[74]

In *Hardwick*, the Eleventh Circuit thus continued the judicial practice of framing privacy analyses to fit the "traditional marital relationship" while finding that the actual relationship at issue was sufficiently analogous to that paragon to imbue it with sufficient instrumental value and, therefore, to warrant constitutional protection from state interdiction. The analytical methodology remained fundamentally ideological and instrumental. In this way, another result deemed relatively progressive for its time was supported by a rationale that exemplified heteropatriarchy. The main innovation of *Hardwick* was its daring to imbue same-sex sexual expression with instrumentality analogous to

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70. *Id.* at 1211-12.

71. *Id.* at 1212.

72. *Id.*

73. *Id.* at 1211-12.

74. The court also took into account that these desires were being expressed "in private" and that "the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home." *Id.* at 1212. For more on the spatial and other aspects of privacy doctrine, see Thomas, *supra* note 48, at 1443-50.

cross-sex sexual expression in light of the "state interests" previously embraced in *Griswold*, *Eisenstadt* and *Carey*. As the reasoning of the Eleventh Circuit in *Hardwick* demonstrates, the instrumental value of same-sex desire and intimacy under the Fourteenth Amendment privacy doctrine may be measured more affirmatively than the Supreme Court chose to do in the next stage of the litigation, even when ideology is employed as the measure of worth.

In *Bowers*, the Supreme Court reversed the Eleventh Circuit's *Hardwick* ruling.[75] Distinguishing its privacy precedent in expressly heteropatriarchal and instrumental terms, the *Bowers* Court thought it "evident that none of the rights announced in those cases bears any resemblance" to the sexual expression of cross-sex desire.[76] More patently, the Court opined that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[77] In short, the Supreme Court decided that the Eleventh Circuit had over-estimated the ideological instrumentality of the desire and expression at issue. The limits of privacy concerns thus coincided with this supreme (re)assessment of social and legal (non)instrumentality.

With this holding and reasoning, the *Bowers* Court brought into sharp relief the dangers that inhered in the Court's earlier use of heteropatriarchal lifestyle ideology as the substantive measure of instrumentality: not only did the prior cases adopt an instrumental model or approach to the regulation of sexual desire and its sexual expression, they also employed a particular lifestyle ideology as the substantive measure of worth. Taken as a set, the privacy cases display a judicial understanding of instrumentality regarding the sexual expression of only cross-sex desire, even if nonmarital. The deregulation of cross-sex desire and its sexual expression effected via the prior cases thus was a matter of degree, not of kind. From this perspective, *Bowers* may well be viewed as *Griswold's* kin, if not progeny.

In sum, the Court sought to elaborate principles of constitutional law that it experienced and described as "privacy" because they concerned the sexual expression of sexual desire. That is, the facts involved "bedroom" activities. The Court repeatedly attributed to privacy doctrine the task of protecting individual expressions and associations based on sexual desire from overly zealous state intrusiveness. Nonetheless, the social and legal worth of

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75. *Bowers*, 478 U.S. 186.

76. *Id.* at 190.

77. *Id.* at 191.

desire or its expression was measured by reference to the state's interest in the ideological regulation of sexualities, with the only real dispute being whether the state's measure or the Court's measure would prevail. In this way, the continued dominance of state-sanctioned heteropatriarchal ideology over "family" relations and desire's expression became the ultimate object of concern, the only question being whether the state had become too ideologically aggressive in the promotion or preservation of its preferences.

Moreover, in emphasizing constructs like "family, marriage, or procreation" as privacy's baseline, the *Bowers* ruling asserted more than the social and legal worthlessness of all same-sex desire. This emphasis also narrows the constitutional protection potentially available to cross-sex desire when it is judicially deemed attenuated from those baseline constructs. Bringing privacy full circle, *Bowers* invites or accommodates not only state suppression of same-sex desire but state suppression of all dissident desire.

In the end, we are left with a body of law that protects only the desires that further the state's preference for "traditional" sexual expression and interaction. Principles and rules of law purportedly the bulwark of individual liberty and agency over "private" or sexual life now became a vehicle for harnessing intimacy and containing its expression to state and judicially approved venues and goals. On its own terms, privacy jurisprudence was rendered a perverse enterprise because it became a tool for validating a basically suppressive and ideological constitutional paradigm.

C. Suppressing the Social Expression of Same-Sex Desire

Because these cases involved the "private" expression of desire, they did not occasion a careful or conscious consideration of the public or social dimensions of sexual desire. Nonetheless, other courts subsequently have held that these pronouncements on the *sexual* expression of desire under privacy law settled the question of regulating *social* expression under other fields of constitutional inquiry, namely, equal protection law; subsequent cases have held that the lack of instrumental worth attributed to the sexual expression of same-sex desire in the privacy cases mandated a similar and corresponding lack of worth in social expression equality cases. Thus, the constitutional analysis and regulatory treatment of the social expression of desire under equal protection has been collapsed into the analysis and (mis)treatment of the sexual expression of desire under the instrumental model of privacy doctrine.

For example, in *Padula v. Webster*,[78] one of the first appellate decisions issued after *Bowers*, the D.C. Circuit held that *Bowers*' privacy ruling effectively precluded anything but minimal scrutiny in equal protection cases which involved sexual minority social identity. The *Padula* court posited that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[79] *Bowers*, in the court's view, had blessed precisely that state of affairs. Thus, a woman with a lesbian social identity was denied employment with a federal agency because *Bowers* had upheld the criminalization of the sexual expression of same-sex desire.

Federal courts have followed *Padula* as an example weighing on the relationship of *Bowers*' privacy ruling to the social expression of lesbian or gay identity. For instance, cases like *Woodward v. United States*,[80] *Pruitt v. Cheney*[81] and *High Tech Gays v. Defense Industrial Security Clearance Office*[82] raised similar issues and yielded similar opinions and outcomes.[83] The result has been that social expression of same-sex desire is deemed valueless under equality law because its sexual expression was held non-instrumental and thus criminalizable under privacy doctrine. Consequently, sexual minority *social* identity and expression is today devalued, discouraged and suppressed through a network of judicially permitted discriminatory attitudes and practices that span the range of everyday life, including employment, housing and benefits.[84]

As a set, these cases display the dispositive role of heteropatriarchal ideology in adjudicating the social and legal worth of desire in varied factual

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78. Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

79. *Id.* at 103.

80. Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (upholding suppressive action; gay male identity expressed socially by naval reserve officer through the act of accompanying a known gay man to a military club).

81. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992) (upholding suppressive state action; lesbian identity expressed socially through a newspaper article identifying U.S. Army Reserve officer as a lesbian and reporting that she had twice participated in same-sex marriage ceremonies).

82. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding suppressive state action; gay male identity expressed socially by employees of defense contractors through the act of membership in gay-identified organizations).

83. Many but not all of the post-*Bowers* cases were litigated in the military context, which had become a flashpoint due to the intensified homophobia of military policies instituted during the two Reagan administrations. *See generally* Valdes *supra* note 11, at 395-444.

84. *See generally Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989).

and doctrinal settings. In each of these cases, the state had decreed that some aspect of the sexual expression at issue vitiated its ideological instrumentality, even in traditional marital settings. And in each instance the courts either struck down or upheld the suppression based expressly on the perceived instrumentality of the desire under state attack. At all times, therefore, the constitutional scheme remains tied to the promotion of state-sanctioned lifestyle ideology, even though the rules applied formally are said to protect the individual from state regimentation.

IV. POLITICS AND HIERARCHY: THE HISTORY AND IDEOLOGY OF SUPPRESSION

This jurisprudential history and current doctrinal regime in turn perpetuate a broader historical and ideological paradigm regarding the regulation of sexuality. This paradigm is deeply implanted in American society both temporally and substantively. Historically, the genesis of this status quo is traceable back to ancient Greek attitudes and practices regarding desire, power and politics. Ideologically, the substance of existing hierarchies represents a commingling of Greek androcentrism and Christian heterosexism. This history and ideology of suppression thus yield politics and hierarchies that systematize heteropatriarchy. This part therefore sketches this backdrop to historicize the doctrinal status quo and to highlight its thoroughly ideological and hierarchical character over time.

A. Ideological Instrumentality in Antiquity

Fear and regulation of desire are endemic today because they are firmly rooted in history. Euro-American customs and concepts regarding desire and its regulation may be traced to the ideology of sex/class power relations established by classical Greece, and by the Greek's use of sexuality to construct these power hierarchies. In this setting, as in so many others, the Greeks are the political and cultural antecedents of today's suppressive status quo.

The ancient Greeks organized society around a quartet of socio-sexual norms calculated to regulate desire in a manner that would represent and

reinforce androsexism both in sexual and social relations.[85] These were calculated to channel power and privilege toward the re-production of power and privilege, already concentrated in the "masculine" men of the citizen class.[86] The Greeks thus joined sex to politics and enlisted desire in the infrastructure and maintenance of power hierarchies.

More particularly, there was an "active/passive paradigm" that accorded to masculine men of the ruling citizen class exclusive prerogatives over sexual desire and expression and, concomitantly, over social or public life.[87] In both sexual and social relations, this active/passive paradigm conceptually and materially elevated the male or masculine over the female or feminine and, hence, men over women. This allocation of privilege employed androsexist conceptions of sex and gender as the chief imperatives of Greek power hierarchies.

At the same time, Greek society not only permitted but mandated certain expressions, both sexual and social, of same-sex desire.[88] This aspect of Greek arrangements, however, was rooted in their notions of ideological instrumentality.[89] To the Greeks, the regulated expression of same-sex desire was a key means of transferring power inter-generationally, from older members of the male citizen class to younger ones.[90] In this social and sexual context, cross-sex desires and relations were instrumental to the reproduction of humans while same-sex desires and relations were instrumental to the re-production of sex/class consciousness and solidarity.

As this brief description indicates, Greek arrangements were instrumental in nature, though the ideology of lifestyle differed in several substantive respects. Most notable among these differences is that Greek antiquity recognized some instrumental worth in the expression of same-sex

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85. For a more detailed account, see Francisco Valdes, *Unpacking Heteropatriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 177-79 (1996) (describing classical Greek sex/gender arrangements generally, and the four antinomies of socio-sexual life specifically).

86. *Id.*

87. Valdes, *supra* note 85, at 179-80.

88. *Id.* at 182-96 (describing same-sex arrangements in ancient Greece).

89. Valdes, *supra* note 85, at 182-88 (identifying the instrumental nature of Greek same-sex sexuality and its expression).

90. *Id.* at 189-93 (recounting the practices that amounted to a form of institutionalized homosexuality in the form of Greek *paiderastia*).

desire, whereas modern-day Euro-American ideology tolerates no such recognition. Nonetheless, both the ancient Greeks and the modern Euro-Americans conceived and approached sexual desire and its expression in chiefly instrumental terms, as measured by the sex/class/gender ideology of culturally dominant groups or forces; in other words, as measured by the state and those in control of its apparati.

This arrangement intensified ideologically in the transition of power from the pagan Greeks to the Christians, who introduced the glorification of procreation to existing Greek sex/power ideology. In short, Christian ideology grafted heterosexism onto Greek androsexism and promoted a righteous sense of sexphobic asceticism throughout social and sexual life.[91] Hence, the instrumental value of desire and its expression would be measured not only by reference to androsexist lifestyle ideology but by a more rigid reference to both androsexist and heterosexist lifestyle imperatives. Over time, this fusion of Greek and Christian sex/gender ideology paved the way for the rise of Euro-American heteropatriarchy and its sexphobic, homophobic mindset.[92]

B. Ideological Instrumentality in Modernity

By the end of the last century, this blending of Greek and Christian conceptions and traditions had become firmly embedded in western culture as sexphobic and homophobic Victorian heteropatriarchy.[93] Necessarily, the instrumental value that ancient Greek society had accorded to same-sex desire had become a censored and hidden feature of history.[94] Heteropatriarchal lifestyle ideology thus was positioned to claim and assert control over the modernist panacea known as "Science."

At and around the turn of the century, "Sexology" emerged to devise and classify sexes, genders, and sexualities at roughly the same time that the Uranian movement coalesced to combat the continuing denigration and

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91. Valdes, *supra* note 85, at 199-202 (summarizing the ideological transition from Greco-Roman supremacy to Christianity).

92. *See* FRANCISCO VALDES, QUEERS, SISSIES, DYKES AND TOMBOYS: HOW LAW AND SOCIETY (MIS)USE SEX, GENDER AND SEXUALITY (forthcoming, New York University Press, 1998).

93. *See* Valdes, *supra* note 9, at 44-45 (summarizing Victorian sex/gender norms).

94. *See* Valdes, *supra* note 85, at n.58 (describing the breakthrough publication of Kenneth Dover's GREEK HOMOSEXUALITY (1978) and the reclamation of this history since then).

isolation of "inverts" or "homosexuals."[95] During this time, the mainstream efforts of sexology overlapped with the political and theoretical campaigns of the Uranians to construct new categories of identities that would help explain the existence of humans with desires and personalities unlike the dominant lifestyle of the heteropatriarchy. The mission was to create a fit between nonconforming identities and ideological imperatives.[96] Thus, both sexology and the Uranians were preoccupied with theorizing the existence and expression of desires directed at same-sex rather than cross-sex objects.[97]

Both efforts sought to rationalize the perceived anomaly of same-sex desire within the framework of dominant lifestyle ideology. Sexologists devised a clinical theory of same-sex desire that created an identity category labeled as the "invert."[98] The invert, sexology posited, was an individual who for some reason had suffered an "inversion" of gender identity, resulting in, among other things, the inversion of her or his desires from (correct) cross-sex objects to (incorrect) same-sex objects.[99] Uranians originated the Third Sex theory, which posited that inverts were humans with the bodies of one sex but the psyche of another sex.[100] Under this theory, members of the Third Sex "naturally" directed their desire toward the same sex physically.[101] The purpose of both theories was accommodation, if not assimilation, of same-sex desire into the heteropatriarchal framework.

At their base, these efforts confined themselves to the lifestyle ideology of the status quo, which was based on and gave value to both the androsexist and heterosexist tenets of the past. In both instances, the proponents of the various theories candidly acknowledged their purpose as being the reconciliation of same-sex desire with the heteropatriarchal status

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95. *See* Valdes, *supra* note 9, at n.150 (recounting the "Uranian" sexual minority movement and the origins of the term "homosexual").

96. *Id.* at 68-71 (describing the efforts of both mainstream sexologist's and Uranian activists).

97. Among sexologists, the direct line of concern was sex and gender, with sexuality as a component of that larger frame. Among Uranians, sexuality was the direct concern, with sex and gender as tools of theory and politics. Valdes, *supra* note 9, at 51-71.

98. However, same-sex desire was not the hallmark of the invert. The invert category included effeminate but heterosexual men, for instance. *See* Valdes, *supra* note 9, at 51.

99. *Id.* at 51-54.

100. Valdes, *supra* note 9, at 59-64.

101. *Id.* at 64.

quo.[102] Both sexologists and Uranians thus accepted beliefs that valorized masculinity over femininity, that preached cross-sex couplings as the only or ideal form of sexual union and that depicted nonconformity to these beliefs as diseased, tragic or both.[103] These efforts consequently amounted to a modern justification of the ideology underlying the suppressive instrumentality of heteropatriarchal state interests. These efforts, in turn, set the tone and trajectory of lifestyle ideology and politics regarding same-sex desire for the balance of the century.[104]

Though only briefly sketched here, this history and ideology of suppressive instrumentality has generated a normative and constitutional framework that today formally permits only one form of desire to be expressed openly and protected constitutionally: cross-sex desire, especially if deemed related to or in furtherance of traditional marriage. Rather than promote individual liberty and dignity over intimate relations as a means of promoting self knowledge and realization, this history and ideology demand blind conformity to traditional roles regarding sex, gender and sexuality in order to satisfy state-sanctioned lifestyle preferences.

For this reason, the basis for the continuing hegemony of traditional heteropatriarchal arrangements has been exposed as intellectually bankrupt within a society that formally espouses principles of liberty and equality for all.[105] Nonetheless, the cases reviewed above clearly show that, as a formal social and legal framework, suppressive instrumentality anchored to heteropatriarchal ideology continues to facilitate and protect self actualization and self knowledge only in severely limited ways. This cramped conception of instrumental desire, as constructed first by Greek and then by Christian precepts, is still reflected in and reinforced by the law, as exemplified in modern privacy doctrine. Thus, the political and hierarchical structure of suppressive instrumentality continues to reign both socially and legally at the end of this century.

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102. *See generally* Valdes, *supra* note 9, at 44-70.

103. *Id.*

104. Valdes, *supra* note 9, at 71-110.

105. *See generally* Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994).

V. AFFIRMATION: TOWARD AN EXPRESSIVE MODEL OF SEXUAL REGULATION

Thus far we have seen that the social expression of sexual desire is integral to self and group knowledge, coalescence and empowerment. We also have seen that the legal status quo is designed to suppress connection and expression unless the desire involved is deemed to satisfy state ideology. Finally, we have seen how this status quo is tied to a larger historical and political context that over time has institutionalized a bias against acts, persons or communities that express or connote same-sex desire. Given this background, an "expressive" model of sexual regulation that is more attentive to the justice claims of sexual minorities would appear long overdue in a nation professing adherence to overarching ideals of equality and liberty. The sweepingly suppressive nature of the instrumental model thus bring us to the fifth part of this essay: the liberational potential of an expressive model of sexual regulation.

When I refer to an expressive model of regulation, I mean an approach that considers the social and legal worth of desire and its expression by reference to individual and group interests in self actualization through self expression. Such a model would proceed from the recognition that sexual desire and its expression both socially and sexually is valuable, if not indispensable, to self development and community formation. This expressive model incorporates and projects three principles.

The first is that exploration of desire is critical to self and society. The second is that expression of sexual identity comprises more than physical intimate relations. The third is that legal regulation of such expressions should be measured by reference to individual and group interests in self development through communication and expression, rather than state ideology. The recognition and application of these three principles in turn reveals that sexual identity and its expression implicate First Amendment values more than seems to be presently appreciated by the courts.

The architecture of First Amendment doctrine generally is kinder to individual and group interests in self and community because self awareness or actualization, as well as associational opportunity, are well-established values and goals under First Amendment law.[106] Indeed, much of First Amendment law is concerned with the protection and promotion of expressive

106. *See generally* JAMES E. LEAHY, THE FIRST AMENDMENT: TWO HUNDRED YEARS OF FREEDOM (1991).

and associational interests that the state might seek to suppress in the name of superior "state interests." Thus, as its name suggests, the expressive model is anchored to First Amendment values, concepts and principles designed to foster opportunities for expressions and associations that disseminate ideas or knowledge that challenge the status quo.

The affirming tone and sensibility of First Amendment doctrine resonates from multiple judicial pronouncements in a rich variety of factual scenarios on the values and principles that underlie the amendment and the body of law it has generated.[107] In *Kingsley International Pictures v. Regents*,[108] for instance, the Court rejected efforts by a university to ban the showing of a film depicting adultery in a positive light. The Court stated:

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by (the) majority. It protects advocacy of the opinion that adultery may sometimes be proper . . . .[109]

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107. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 531 (1945) (holding that rights of free speech "are not confined to any field of human interest" in a case involving the regulation of union organizers); Healy v. James, 408 U.S. 169, 181 (1972) (holding that "the right of individuals to associate to further their personal beliefs" protected the formation of a dissident student group at a university); Pacific Gas & Elec. v. Public Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) (affirming in commercial speech that the First Amendment "serves significant societal interests" by ensuring that a "broad range of information and ideas" is expressed publicly).

An early and landmark exposition of this rationale is Justice Brandeis' influential concurrence in *Whitney v. California*, 274 U.S. 357, 372 (1927). In that concurrence, Brandeis declared, "Those who won our independence believed that the final end of the State was to make men [sic] free to develop their faculties." *Id.* at 375.

Moreover, First Amendment law also recognizes the nexus between expression and association. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958). In this case, the Court explained, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . ." *Id.* at 460.

108. Kingsley Int'l Pictures v. Regents, 360 U.S. 684 (1959).

109. *Id.* at 688-89. The Kingsley passage could be applied literally to the social expression of same-sex desire today, with the substitution of "homosexuality" for "adultery."

Commentators likewise have recognized self knowledge and development within a proverbial "free marketplace of ideas" as one of the basic values underlying the First Amendment and the jurisprudence that has evolved from it.[110]

This expressive approach to the social regulation of sexual desire thus necessitates honest recognition of a threshold linkage: that same-sex "sex talk"—the manifestation of minority sexual identities in various conversational or social ways—is a vehicle for the "expression of ideas" about same-sex desires and the persons or populations that experience and exchange them. Both the social and the sexual expression of same-sex desire embody the fundamental idea that "traditional marriage" is not and should not be the only "way of life" that law and society permit or protect. This idea is dissident in a society historically and presently guided by generally sexphobic and specifically homophobic tenets, which is why a First Amendment-based model is particularly apt.

This linkage, moreover, requires no leap of faith. The link between desire's social expression and the role or place within society of persons and groups defined by same-sex desire is evidenced by the cultural record to date. As discussed above, "coming out" of the Closet—defying suppression to express desire socially and openly—has been a hallmark of "gay liberation" and "queer nationality" for years.[111] Likewise, recognition of this link was behind the nation's recent fit over gays in the military, a controversy effectively about the social visibility of persons associated with same-sex desire.[112] This expressive model thus calls upon the law to recognize and act upon a link between sexual desire, its social expression and First Amendment values that our culture already has perceived or documented in numerous other forms and settings.

As this discussion indicates, an expressive model of sexuality and its expression necessarily expands the analysis of desire's social regulation beyond the Fourteenth (or Fifth) and toward the First Amendment. This

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110. *See, e.g.*, David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (discussing the importance of autonomous self-determination as a value underlying freedom of expression); CHARLES FRIED, AN ANATOMY OF VALUES (1970). *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND L.J. 1, 25 (disputing self-fulfillment/autonomy as a "neutral" or legitimate First Amendment value).

111. *See supra* notes 23-28 and accompanying text.

112. *See supra* notes 15-17 & 33-34 and accompanying text.

expansion would permit us to view the social and legal worth of desire through a relatively affirming and egalitarian doctrinal lens. However, just as important is that, by regulating desire in a more egalitarian manner, this expansion also would help vindicate the basic Fourteenth (and Fifth) Amendment values of liberty and equality. An expressive model, in other words, additionally would promote liberty and equality more effectively than the suppressive paradigm of modern privacy law.[113]

Perhaps more important is that this shift also points us in the direction of recognizing the complex nature of sexual desire because an expressive model focuses our attention and analysis on the *social* expression, rather than limit us to the *sexual* expression, of desire. Of course, both social and sexual expression are valuable to self knowledge and group formation. Indeed, it is impossible to ultimately separate the two.[114] Though both types of expression merit respect and protection, this emphasis on social expression foregrounds the fact that sexual identity and desire are expressed in continua of ways, both sexual or private and social or public. This emphasis thus can help cure the law's specific failure to recognize the particularized and politicized issues surrounding the social expression of sexual desire.[115]

This expansion in turn invites focused discussion of the political dimensions of sexual desire,[116] which the "privacy" category is rhetorically and conceptually suited only to obscure. A shift to First Amendment analyses of

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113. *See supra* notes 78-82 and accompanying text.

114. This explains the importance of the doctrine of intimate association, which provides First Amendment protection for sexual expression of desire outside the confines of traditional marriage. *See, e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). Not coincidentally, Karst identifies the same or similar values as important to the protection of sexual expression through the doctrine of intimate association, including "self-identification." *Id.* at 635.

115. As noted at the outset, desire's social expression takes place through manifold means, ranging from pure speech to symbolic conduct, which the Court has recognized is the case for expression more generally. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (recognizing expressive conduct as a form of protected speech); NAACP v. Button, 371 U.S. 415 (1963) (recognizing civil rights litigation as a form of political expression). Constitutional protection of expressive conduct was affirmed recently in *Texas v. Johnson*, 491 U.S. 397 (1989), the famous "flag burning" case. *See generally* William E. Lee, *Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court*, 15 COLUM.-VLA J.L.& ARTS 495 (1991).

116. In this essay I have focused primarily on "social" rather than "political" expression. The two, of course, are related, if not indistinct. *See generally* Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). *See also* Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991).

desire's social expression allows us to highlight how sexual desire and expression have multiple cultural and legal meanings. In a polarized society currently engaged in "cultural war," these meanings include the starkly political.[117] Events like the recent referenda in Oregon [118] and Colorado [119] on social discrimination against minority sexual orientations make undeniable the "political" nature of sexual desire and its social expression, even when we conceive of "politics" in the most conventional of current ways.[120] The repeated use of same-sex desire—and specifically of suppressing its social expression—as a "wedge" strategy during recent electoral campaigns puts the political and politicized nature of desire's social expression beyond any doubt.[121] This move to an expressive model therefore is both intellectually and politically legitimate.[122]

Ultimately, the shift to a First Amendment expressive model also would enable a substantive social celebration of same-sex love because this shift would set the stage for a freer exchange of ideas about desire and its diversities. Presently, as mentioned earlier, privacy doctrine is tied to tolerance

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117. *See supra* notes 12-14 and accompanying text.

118. *See* Lisa Keen, *Referendums and Rights*, WASH. POST, Oct. 31, 1993, at C3 (describing the electoral politics in Oregon and elsewhere over sexual minority rights); *Death, Lotteries and Taxes All on Poll Agenda*, FIN. TIMES, Nov. 3, 1992, at 6 (discussing right-wing Christian sponsorship of the Oregon referendum).

119. *See* David W. Dunlap, *The Gay Rights Ruling in Colorado*, N.Y. TIMES, May 21, 1996, at A21 (reporting on the ultimate demise of Colorado's Amendment 2); Maralee Schwartz & Kenneth J. Cooper, *ACLU Seeks To Bar Anti-Gay Initiative*, WASH. POST, Nov. 15, 1992, at A10 (discussing ACLU strategy to combat the Colorado Amendment); *Gay Rights and Colorado Voters*, WASH. POST, Oct. 26, 1995, at A30 (explaining why Colorado's Amendment 2 should fail on equal protection grounds).

120. *See generally* Bork, *supra* note 110 (defining various rights narrowly).

121. *See, e.g.*, *"Gay Rights," Public Prayer Are Two of Most Divisive Social Issues*, SUN-SENTINEL, Oct. 14, 1996, at 12A (citing gay rights as a "wedge issue" of the 1996 presidential race); Tom Teepen, *A Family at Odds: Creeping Bias Treats Gays like Poor Relatives*, PHOENIX GAZETTE, July 19, 1994, at B13 (explaining how right-wing candidates attempt to trap their opponents into appearing to be pro-gay); Elaine Ciulla Kamarck, *Nailing Down a Trap-Proof Platform*, L.A. TIMES, July 9, 1992, at B7 (describing Vice President Dan Quayle's use of "family values" as a wedge issue in the 1992 election).

122. *See generally* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (applying a similar analysis, but focused on sexual expression); Thomas Kleven, *Free Speech and the Struggle for Power*, 9 N.Y.L. SCH. J. HUM. RTS. 315 (1992) (noting the reclamation of expression to power and politics).

of intimate activities that occur behind closed doors, and then only if they approximate heteropatriarchal marriage. But such tolerance falls far short of acceptance or celebration of sexual equality and diversity. In effect, privacy describes, oftentimes in minimalist terms, the activities that the constitution requires that the state tolerate, typically because they are taken to occur in hidden venues. Expression jurisprudence, on the other hand, invites the public manifestation of dissent and diversity. It can help to elevate the discourse over desire beyond the defense and toward the praise of same-sex love. The expressive model therefore is better suited to a public articulation of the substantive reasons why same-sex desire and unions ought to be affirmatively accepted and openly celebrated by society as a whole.[123]

In closing, it bears repetition that, of course, this alternative model is also "instrumental" in some respects. Most notably, an expressive approach to desire and its social manifestation entails an assessment of desire under First Amendment values. Thus, some governmental regulation would still be deemed constitutional. However, this measure of value is relatively positive; generally speaking, a principled application of First Amendment law would permit as a legitimate state interest neither the government's promotion of a particular message regarding "ways of life," nor its suppression of dissident ideas and expressions, through the coercive power of law.[124] Under the First Amendment, instrumentality would include the ideals of self development, associational autonomy and dissemination of alternative ideas, rather than be trained narrowly on the ideological conventions of heteropatriarchal marital arrangements. This revaluation of the social and legal value of desire under the First Amendment can yield a more affirming and less suppressive body of law because it provides a substantively different measure by which to understand and protect sexual desire and its social expression.

Finally, it probably is prudent to anticipate and calm foreseeable fears of sexual anarchy. Therefore, let me hasten to add that this revaluation of desire under the First Amendment would not mean that every social expression of every desire has or should be given "equal" worth and constitutional

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123. *See generally* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996) (discussing defensive strategies based on tolerance versus proactive strategies based on substantive good).

124. *But see* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (framing a First Amendment analysis of a nude dancing ban around state interests in public morality). This case thereby demonstrates that even an expressive model may be rendered subservient to "state interests" and heteropatriarchal ideology. For further discussion of this point, see Valdes, *supra* note 86. *See generally* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994).

protection, as is the case already with expression generally. Yet, and at the least, this revaluation would make clear that the current approach to social expression of sexual desire under privacy doctrine is unjustifiably ideological, simplistic and suppressive.

Though a definitive articulation of an expressive model is impossible here, I hope to have made clear through this critique that our regulation of desire and its social expression requires a more considered, nuanced and sophisticated analysis, an approach that is operationally designed to produce a more affirmative socio-legal environment for all. Because the instrumental status quo is not suited to this reform, the shift to the First Amendment is vital; the move toward a First Amendment expressive model urged above is important because it affirms individual agency and group interests in the social experience, expression and communication of desire. This shift comports to the basic ideals and values that American law and society profess to hold dear because it signals a positive concern for, and accommodation of, the diversity of desire among us.

CONCLUSION

I began this essay with the social and legal worth of desire because I believe that human development through erotic experience, expression and connection is the true and ultimate target of social and legal interventions in the regulation of sexual relations and personality. Though the regulation of sexuality is often times characterized as the regulation simply of conduct, the full and elaborate panoply of social and legal pressures (or rewards) regarding erotic correctness can be explained only if we acknowledge that dominant forces are interested in more than behavior. This more is desire itself. Therefore, a focused discourse on desire and on the legal valuation of its social expression is long overdue.

To help initiate this discourse, I have endeavored in this essay to decouple existing analyses of the sexual expression of sexual desire from potential approaches to and analyses of the social expression of sexual desire. This decoupling shifts the focus of our analysis from "private" acts of intimacy and toward "public" expressions or dicourses about the social or legal worth of sexuality and desire. This decoupling is strategic. It is intended to reduce the existing tendency of legal institutions to declare that careful consideration of same-sex *social* expression is foreclosed by privacy rulings condoning the suppression of same-sex *sexual* expression.

At the threshold, this decoupling entails a clearer understanding of supressive or ideological instrumentality, and of the grip it exercises on judicial and legislative efforts to regulate both the social and sexual expression of desire, than is presently the case within legal culture. In short, instrumentality today is a means of ensuring that "state interests" in lifestyle ideology remain at the center of privacy analysis. The state interest consistently asserted from case to case has been enforcing conformity to compulsory heteropatriarchy and its "moral" imperatives: the state interest is simply the perpetual hegemony of the "traditional family" as a means toward evermore procreation. Rather than protect the most vulnerable from state intrusion, the Court's privacy doctrine aids the suppression of sexual and social expression that is deemed as too far from heteropatriarchal dictates.

This understanding of instrumentality in Fourteenth Amendment law, when juxtaposed against First Amendment doctrine, should help prompt a revaluation of same-sex desire and its social expression. This is because established First Amendment values recognize the worth of self actualization and group formation through the social expression of sexual desire. The shift to the First Amendment therefore switches the doctrinal terrain from the suppressive status quo associated with privacy to the relatively affirming sensibilities underlying well-settled expression law. In doing so, this shift also brings to bear a more affirming and egalitarian sense of expressive instrumentality to the analysis.

Because an expressive model of regulation still would be grounded in certain values, the reform urged above would not divest the law of instrumentality. Nor would this reform "liberate" every expression of any desire. However, an expressive model grounded in First Amendment values would replace the excessively suppressive regime of the day with an affirmative appreciation of desire's contribution to individual and societal development.