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Love Speech: The Social Utility of Pornography

Jeffrey G. Sherman*

Some feminist scholars have argued that all pornography instantiates male sexual supremacy and dehumanizes people of either gender who participate in scenes of sexual subordination. While traditional liberal theorists typically defend pornography as a category of First Amendment expression, they do so abstractly, implicitly accepting much of the critics' assessment of pornography's worth. In this article, Professor Sherman responds with an endorsement of one variety of pornography: that directed at gay males. Drawing largely on anecdotal data, Professor Sherman argues that gay male pornography is valuable because it enables its consumers to realize satisfying, self-affirming sexual lives. He criticizes antipornography feminists for failing to distinguish between the dynamics of heterosexual and homosexual relations, and for fostering a censorious climate in which representations of lesbian and gay sexuality are at greatest risk. Professor Sherman ends by suggesting that to the extent that achieving societal acceptance of gay male pornography requires ending homophobia, this victory will accompany the end of misogyny, since both forms of bigotry are rooted in hatred of femininity.

"I very clearly remember feeling depressed and isolated because I was the only one who was gay I thought I would never have any friends and would have to give up my family. The fact is that we are a minority group like no other. . . . [G]ay kids can't even count on having other gay friends."¹

[T]he past decade's anti-porn propaganda campaign [has been] carried out by a dubious alliance of right-wing Christians and . . . feminist . . . crusaders It is a sad comment on our time that a moral panic about sexual imagery is led by

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Work on this article was begun when I was a visiting professor at Harvard Law School, and I am most indebted to the Harvard faculty for the extraordinary interest and warm encouragement they accorded me when I presented a faculty workshop there on this topic. This article has also benefited immensely from the thoughtful suggestions and provocative questions of Professors Mary Becker, David Chambers, Linda Hirshman, Beverly Moran, Frederick Schauer, and Joan Steinman, and I am grateful to them for their insights. I must also thank my student research assistants—Caroline Cuthbert, Andrew Eres, Barbara Izzo, and Betty Jang—for their skill and resourcefulness. And I should like to thank the Marshall D. Ewell Research Fund for providing support for the writing of this article.

1. Chris Bull, *Suicidal Tendencies*, *ADVOCATE*, Apr. 5, 1994, at 35, 40 (quoting Jason Curry, a twenty-year-old Indiana gay man).

feminists; that their energy is channelled into an anti-sex backlash that hits queers first and hardest!²

I come to praise pornography,³ not to defend it. This may get me into trouble, since pornography is very much under attack these days, and even my anticensorship allies shrink from any warm endorsement of *Sex Kittens*⁴ or *Stud Daddy*.⁵ Instead, they prefer to disparage such material with a patronizing if indulgent sniff⁶ and then "defend" it with abstract invocations of supposed First Amendment values. But given the urgent critique of pornography developed by some feminist scholars over the last decade,⁷ this traditional liberal defense—grudging and unengaged—no longer responds adequately to censorship pressures.⁸ Because the feminist critique extends to gay male pornography,⁹ the inadequacy of the liberal response leaves such pornography, already controversial,¹⁰ in particular jeopardy. In this article, I shall argue not that pornography is to be "tolerated," the traditional liberal attitude, but that pornography—at least gay male pornography—is to be valued as serving a social good: It enables its consumers to realize satisfying, nurturing sexual lives.

This article is divided into seven Parts. In Part I, I summarize the principal views of pornography that have commanded attention in the debate. In Part II,

2. Chris Bearchell, *In Harm's Way: a calculated campaign takes aim at sexual imagery and free speech*, XS (Supp. to XTRA! MAG. (Can.)), 1992, at 37 quoted in Christopher N. Kendall, "Real Dominant, Real Fun!": *Gay Male Pornography and the Pursuit of Masculinity*, 57 SASK. L. REV. 21, 27 (1993).

3. The praise will be confined, on this occasion, to gay male pornography, for reasons discussed notes 38-47 *infra* and accompanying text.

4. Ronald Dworkin identifies this title as belonging to a pornographic film. RONALD DWORIN, A MATTER OF PRINCIPLE 335 (1985). I see no reason to doubt him.

5. Christopher Kendall likewise offers this title as belonging to a work of pornography. Kendall, *supra* note 2, at 31.

6. Robin West, in a critique of the feminist antipornography position, claims that "we all agree that it [pornography] is . . . of low value." Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 682. And rights champion Dworkin, though he devotes a whole chapter of one book to pornography and political liberal theory, characterizes "obscenity itself" as "relatively trivial." DWORIN, *supra* note 4, at 359 (evidently using "obscenity" in this particular passage as a synonym for pornography). Justice William O. Douglas, dissenting from a ruling that upheld restrictions on minors' access to pornography, protested that he found "the literature and movies which come to us for clearance exceedingly dull and boring." *Ginsberg v. New York*, 390 U.S. 629, 655 (1968) (Douglas, J., dissenting).

7. See, e.g., ANDREA DWORIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (paper ed. 1989) [hereinafter DWORIN, *PORNOGRAPHY*]; CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127-213 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *ONLY WORDS* (1993); JOHN STOLTENBERG, *REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE* (1990); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985) [hereinafter Dworkin, *Male Flood*]; Catherine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984). Perhaps the germinal work linking pornography with the subordination of women was a 1975 study by Susan Brownmiller. SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 394-95 (1975) (stating that "[t]here can be no 'equality' in porn Pornography, like rape, is a male invention, designed to dehumanize women, to reduce the female to an object of sexual access . . .").

8. See text accompanying notes 33-36 *infra*.

9. See text accompanying notes 152-161 *infra*.

10. Gay sexual imagery routinely encounters more resistance than heterosexual sexual imagery. See text accompanying notes 90-99 *infra*.

I develop the concept of "sexual integrity" as a necessary element of the flourishing life. In Part III, I discuss the particular barriers to achieving sexual integrity that gay men face. In Part IV, I discuss the ways in which gay pornography helps gay men overcome those barriers and find their own sexual integrity. In Part V, I explain how the feminist antipornography critique threatens gay pornography. In Part VI, I consider whether any types of pornography might be thought particularly undesirable, notwithstanding my general approval of pornography. And in Part VII, rather than offering a traditional "conclusion," I speculate about the future of pornography and suggest that women and gay men may have more interests in common than some feminist antipornography critics suppose.

I. INTRODUCTION: AN OVERVIEW OF THE COMPETING THEORIES

That pornography should be under attack is hardly new. Prosecutions under American law for disseminating pornography date back to 1815¹¹ and under British law to 1727.¹² What *is* new—very new, indeed—is the character of the attackers and the gravamen of their complaint.

Historically, the argument advanced most frequently against pornography has been the "conservative-moralist"¹³ argument. It begins with the principle that "society must have some model of approved and nonapproved, esteemed and nonesteemed sexual behavior which reflects ends broader than those of individual satisfaction."¹⁴ It goes on to assert that self-control and monogamous conjugal fidelity are uniquely conducive to a wholesome society, while sexual self-gratification and a preoccupation with sexuality are inimical to such a society. *Agreement* about such matters as the sanctity of monogamous marriage and the desirability of confining sexual expression to that privileged state is crucial to the orderly functioning of society. Pornography, by producing sexual arousal in a context wholly divorced from monogamous marriage, deadens the consumer's healthy aversion to certain societally condemned sexual behaviors, encourages him to question and even flout society's sexual rules, and thereby undermines the cohesive agreement on which the social order depends.¹⁵

By a process of slipshod argumentation, some conservative-moralists go beyond attacking pornography to attack pornography consumers, suggesting that they are pathetic, lonely sexual misfits. Margaret Mead provides an example of this mode of criticism:

11. *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815), is commonly thought to be the earliest reported American pornography case. See PORNOGRAPHY, OBSCENITY & THE LAW 7 (Lester A. Sobel ed., 1979). The decision upheld an indictment for exhibiting an "obscene painting, representing a man in an obscene, imprudent and indecent posture with a woman." *Sharpless*, 2 Serg. & Rawle at 91-92.

12. *Rex v. Curl*, 2 Strange 789 (K.B. 1727) (involving a book entitled *A Nun in Her Smock*).

13. I am indebted to Daniel Linz and Neil Malamuth for this term. DANIEL LINZ & NEIL MALAMUTH, COMMUNICATION CONCEPTS 5: PORNOGRAPHY 5-9 (1993).

14. HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 199 (1969).

15. See, e.g., *id.* at 187-99; LINZ & MALAMUTH, *supra* note 13, at 16.

Pornography does not lead to laughter; it leads to deadly serious pursuit of sexual satisfaction divorced from personality and from every other meaning. . . .

. . . The difference between the music hall in which a feeble carrot waves above a bowl of cauliflower while roars of laughter shake the audience of husband[s] and wives on their weekly outing, and the strip tease, where lonely men, driven and haunted, go alone, is the difference between the paths to heaven and hell¹⁶

Implicit in Mead's depiction is the unexamined judgment that being coupled is healthy while being unattached is neurotic. "Four legs good; two legs bad!"¹⁷ in other words. And unfortunately, the anticensorship forces likewise have taken up this dubious weapon of personal disparagement upon occasion, insinuating that antipornography feminists are simply bitter, ill-favored women who cannot find husbands and therefore inveigh against conspicuous images of women more alluring than they.¹⁸ This kind of vilification, whether employed by the pro- or the anticensorship forces, has no place in a reasoned discussion of the issue.

The feminist antipornography argument differs sharply from that of the conservative-moralists in that it condemns pornography not as an enemy of sexual rectitude, but as an enemy of sexual equality.¹⁹ "[P]ornography institutionalizes the sexuality of male supremacy, which fuses the eroticization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men

16. Margaret Mead, *Sex and Censorship in Contemporary Society*, 1953 NEW WORLD WRITING 7, 23-24; see also William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 67 (1960) ("To the normal, sexually mature person, hard-core pornography is repulsive, not attractive.").

17. GEORGE ORWELL, *ANIMAL FARM* 38 (1946).

18. "They used to say God gets the women men don't want, but now you could say the same for feminism. I mean, I can't bear to look at that Andrea Dworkin." Sir Kingsley Amis said this in an interview concerning his 1991 book *Memoirs*. See Kate Muir, *What's Amiss With Amis*, TIMES (London), Mar. 8, 1991, at 14. But see NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1990) (arguing that men use approved standards of beauty as a means of social control over women).

19. See West, *supra* note 6, at 700. "Anti-pornography feminists also [i.e., like the conservative-moralists] denounce mainstream depictions of sexuality, but they do so because of the inequality they depict and the misery they perpetuate, not the pleasure they promise." *Id.* at 706-07.

A common misreading of the feminist critique implicates only manifestly coercive or violent pornography in the maintenance of patriarchal subordination. In fact, the feminist critique is a good deal more radical; it concerns the social construction of sexuality, not violence, and a narrow focus on violent pornography trivializes the feminists' point. See, e.g., Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123 (1992). Under the feminist critique, so-called soft-core magazines, like *Playboy*, are no less implicated than violent pornography in the construction of gender hierarchy. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 134-45. "I think . . . that pornography eroticizes and thereby legitimizes forced sex, and that *Playboy* is pornography and makes pornography legitimate." *Id.* at 137. She also calls *Playboy* an "active oppressor[] of women."

From a feminist perspective, what exactly does *Playboy* do? It takes a woman and makes her sexuality into something any man who wants to can buy and hold in his hand for three dollars and fifty cents. His access to her sexuality is called freedom—his *and hers*. She becomes something to be used by him, specifically, an object for his sexual use.

Id. at 138.

treat women as who they see women as being. Pornography constructs who that is."²⁰ In a sense, the argument springs from the literal meaning of the Greek word from which "pornography" is derived: *pornographos*, or "writing about whores."²¹

The feminist perspective emphasizes that pornography depicts women as whores or prostitutes, and thus as receptacles for any sexual indignity and even rape and torture. . . . Through pornography men are able to force on women their notions of what appropriate sexual relations between men and women are and can shape how women perceive themselves. Thus, pornography may be thought of as the graphic, sexually explicit subordination of women[, . . . promoting] sexual abuse of individual women and the social subordination of women as a class.²²

Pornography "makes hierarchy sexy."²³ Pornography, by this analysis, does not merely reflect the subordination of women; it constructs women's sexuality as a sexuality of subordination,²⁴ so that sexual interaction between men and women becomes itself pornographic.²⁵

Some commentators doubt that contemporary data support the feminists' claim of a causal link between pornography and the subordination of women,²⁶ but these objections are not fatal. The radical feminist approach to pornography—like the conservative-moralist approach, the traditional liberal response, and the approach I offer in this article—is fundamentally a normative theory, reflecting judgments that contemporary social science has not yet found a way to test.²⁷ All of these theories must stand or fall on the basis of their moral weight, not their empirical demonstrability.

20. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 148 (footnote omitted).

21. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595.

22. LINZ & MALAMUTH, *supra* note 13, at 44 (footnote omitted). "Pornography is the material means of sexualizing inequality; and that is why pornography is a central practice in the subordination of women." Dworkin, *Male Flood*, *supra* note 7, at 15.

23. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 171.

24. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 136.

25. See Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 197, 213-14 (Douglas Crimp ed., 1988).

A further thread in the fabric of the feminist antipornography argument must be noted: the claim that women who appear in pornography are victims—victims in fact, not merely in metaphor—of rape or brutalization; that they appear in pornography only because of threats or coercion; and that the sex one sees in a pornographic scene of ostensibly consensual heterosexual coitus is in fact rape. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 179-81.

26. MARCIA PALLY, *SENSE & CENSORSHIP: THE VANITY OF BONFIRES* (1991); Larry Baron, *Pornography and Gender Equality: An Empirical Analysis*, 27 J. SEX RES. 363, 365-66 (1990); see also Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 745-60.

27. LINZ & MALAMUTH, *supra* note 13, at 5. One of the heaviest burdens faced by any experimenter intent on testing the feminist hypothesis—heavier even than measuring aggression or subordination in the laboratory—is demonstrating that attitudinal changes cause behavioral changes. In a study typical of those used to test the feminist hypothesis,

men are first exposed to depictions that show [a] female victim "enjoying" or reacting in a positive fashion to her mistreatment, and they are then asked to report on their attitudes and beliefs about rape victims and/or administer electric shocks or other forms of "punishment" to a female victim.

The contemporary liberal defense of pornography reflects liberalism's vision of a society in which autonomous individuals make rational choices from among alternatives that a neutral state has permitted to be placed before them.²⁸ Time has always wrought changes in accepted views of what is morally permissible in the sexual arena. Sometimes change moves us toward the more "permissive" (for example, ceasing to prosecute fornication²⁹), and sometimes it moves us in the opposite direction (eliminating the *droit du seigneur*³⁰). Books, too, are affected by these changes; works thought immoral yesterday are considered classics today.³¹ To the contemporary liberal, this mutability of

Daniel Linz, Steven D. Penrod & Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713, 719. Even if data thus obtained suggest a causal link between the violent pornography shown to the subjects and a reported deterioration in their attitudes towards women, the observation of such a link falls short of establishing that this change in attitude will endure or will produce a change in behavior. See Thelma McCormack, *Making Sense of Research on Pornography*, in WOMEN AGAINST CENSORSHIP 181, 198 (Varda Burstyn ed., 1985) (arguing that "[s]exual fantasy . . . is a poor predictor of behavior").

28. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 538 (1989).

The operative metaphor here is Justice Holmes' oft-quoted notion of the marketplace of ideas. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes' dissent in *Abrams* may mark the metaphor's first appearance in American jurisprudence, but the phrase is often associated with John Stuart Mill. See Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 268-72 (1978).

29. The last two reported successful American prosecutions for fornication were *State v. Lutz*, 57 N.J. 314, 272 A.2d 753 (1971), and *Commonwealth v. Moyer*, 232 Pa. Super. 120, 334 A.2d 764 (1975). The New Jersey fornication statute was subsequently declared unconstitutional, *State v. Saunders*, 75 N.J. 200, 219, 381 A.2d 333, 342 (1977), and the Pennsylvania statute was subsequently repealed. See *Commonwealth v. Smith*, 238 Pa. Super. 422, 426, 357 A.2d 583, 585 (1976).

30. *Droit du seigneur* ("the lord's right") was a feudal prerogative that belonged to the lord as an incident of his ownership of land: the right to sleep with a subject's bride on the first night of the marriage. "[T]he evidence of its existence in Europe is almost all indirect, involving records of redemption dues paid by the vassal to avoid enforcement, not of actual enforcement." 10 THE NEW ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 610 (15th ed. 1989).

31. Edmund Wilson's novel *Memoirs of Hecate County* was at one time successfully suppressed by local censors. See *People v. Doubleday & Co.*, 71 N.Y.S.2d 736 (App. Div.), *aff'd*, 297 N.Y. 687, 277 N.E.2d 6 (1947), *aff'd by an equally divided court*, 335 U.S. 848 (1948) (Frankfurter, J., did not participate). At the time of its publication in 1855, many considered Walt Whitman's *Leaves of Grass* to be obscene and immoral. See MORRIS L. ERNST AND ALAN U. SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE 36 (1964). Eugene O'Neill's play *All God's Chillun Got Wings* likewise was a censorship target, not because of any sexual explicitness, but because of the kiss between a black actor and a white actress that the production was rumored to include. See BROOKS ATKINSON, BROADWAY 198-99 (1970).

The metamorphosis in literary mores has received comic attention as well. The 1934 Broadway revue *Life Begins at 8:40* included a musical number by composer Harold Arlen and lyricist E.Y. Harburg, *Quartet Erotica*, in which four distinguished authors of the past who in their day had been noted for their sexual explicitness (Rabelais, de Maupassant, Boccaccio, and Balzac) lament that subsequent changes in taste have left their works rather tame:

The dirt we used to dish up

Sad to say

Wouldn't shock a bishop

Of today;

A volume like "Ulysses"

Makes us look like four big sissies . . .

See JOHN LAHR, NOTES ON A COWARDLY LION: THE BIOGRAPHY OF BERT LAHR 141-42 (1969).

sexual standards suggests that sexually explicit materials are best left unregulated so that individuals can judge for themselves.³²

As a response to the conservative-moralist position, liberalism not only suffices but persuades. As a response to the feminist position, however, liberalism fails. Liberalism's defense of free expression has always stopped short of protecting expression that does "real harm." For example, even the traditional defender of free expression is willing to proscribe defamation in certain circumstances,³³ copyright infringement,³⁴ and words that tend to provoke an imminent breach of the peace.³⁵ Beneath the liberal defense of pornography lies the assumption that pornography does no "real harm." Liberalism assumes that consumers of pornography distinguish between reality and pornographic fantasy and will not be moved to try a particular antisocial act merely because they have seen the act represented in pornography. The feminist critique directly contradicts this liberal assumption. It asserts that pornography *does* real harm³⁶ and that consumers do not distinguish between reality and pornographic representation. Indeed, the feminist critique asserts that pornographic representations *are* reality. If the feminist critique is correct, then to champion the marketplace of ideas in the face of the "real harms" caused by pornography is an empty and unresponsive argument. If pornography deserves to survive the feminist attack, a justification beyond that of liberal tolerance is required.

In this article, I offer a different justification; I argue that pornography serves a social good. Unlike liberalism's tolerance-based "defense," my argument embraces feminism's assumption that pornography has behavioral and psychological effects. Whether the good that I identify (the abatement of hierarchy based on sexual orientation) outweighs the harm identified by the feminist critics (the maintenance of hierarchy based on gender) is a judgment I leave to others, for I offer my argument exclusively in the context of gay male pornography.

To counter the feminist antipornography critique in the context of heterosexual or lesbian pornography requires challenging the assumptions about female sexuality underlying that critique.³⁷ In the absence of a latter-day

32. The United States Supreme Court has acknowledged that even "erroneous statement . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, *reh'g denied*, 376 U.S. 967 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (second omission in *Sullivan*).

33. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

34. *Harper & Row Publishers, Inc. v. Nation Enterps.*, 471 U.S. 539, 556-60 (1985).

35. *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-75 (1942).

36. Opponents of the feminist critique of pornography have warned that this feminist analysis, if accepted by courts, may impair rape or sexual murder prosecutions by affording defendants a defense of diminished capacity: "Porn made me do it." Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1157 (1993) (citing Nan D. Hunter, S. 1521: A Rapist's Exculpation Act (1992) (unpublished manuscript, on file with the *Virginia Law Review*)). So far, such attempts at mitigation or exculpation have proved unsuccessful. See *Schiro v. Clark*, 963 F.2d 962, 971-73 (7th Cir. 1992), *aff'd sub nom. Schiro v. Farley*, 114 S. Ct. 783 (1994).

37. At least some anecdotal evidence suggests that women can find in pornography a path to their own sexual liberation and autonomy.

Tiresias,³⁸ any such challenge should come from women scholars,³⁹ not from me. My reluctance to challenge the feminist view of women's sexuality is partly epistemological and partly political. Recent years have witnessed the development of a considerable body of so-called "voice" scholarship,⁴⁰ claiming on behalf of members of historically silenced, subordinated groups a "presumption of expertise" with respect to issues central to their group.⁴¹ This claim has been much disputed,⁴² but even one who disagrees with the "voice" scholars as to most matters must acknowledge that sexuality and sexual response are so personal and idiosyncratic,⁴³ and the sexual responses of men and women are so demonstrably different,⁴⁴ that each sex may be peculiarly ill-suited to make assertions about the other's sexuality. Politics, no less than epistemology, dictate caution. Critics of the radical feminists' view of men's sexual subordination of women have argued that feminists impute to women a misguided view of sex as degradation⁴⁵ and discount naively the "asymmetries of desire" that inform sexual interactions.⁴⁶ Such criticisms, if offered by men, could be interpreted as mere devices to preserve men's sexual access to women and adduced as evidence of men's powerful stake in the present gender hierar-

[W]hat pornography gave me years ago was a set of models antithetical to those offered by the Catholic Church, romantic fiction, and my mother. The "bad girls" it portrayed *liked* sex, even sex with women. Fearless and sensual, they scoffed at respectability, and were often as independent and aggressive as men. The images not only affirmed my budding desire but also gave me a first glimpse of freedom.

Lisa Orlando, *Bad Girls and "Good" Politics*, VILLAGE VOICE, Dec. 1982, quoted in Scott Tucker, *Radical Feminism and Gay Male Porn*, in MEN CONFRONT PORNOGRAPHY, 263, 268-69 (Michael S. Kimmel ed., 1990). "I was propelled toward the overt—toward pornography. I needed information not about sex but about sexual parameters, the bounds of the normal. . . . I needed permission." Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for Pornography*, HARPER'S MAG., Feb. 1992, at 37, 39.

38. Tiresias was a blind soothsayer of Greek mythology. Having once been transformed into a woman and then back into a man, he was called upon to settle a dispute between Zeus and Hera as to which sex derived more physical pleasure from lovemaking. Hera had contended that men enjoy it more, but Tiresias declared that women enjoy it 10 times more than men. Hera was so enraged by this appraisal that she struck Tiresias blind, whereupon Zeus, as compensation, gave him the gift of prophecy.

39. See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

40. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111 (1990).

41. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 564 n.15 (1984).

42. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

43. Cf. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 94-126 (1988) (discussing why sex is inherently private).

44. See, e.g., William B. Arndt, Jr., John C. Foehl & F. Elaine Good, *Specific Sexual Fantasy Themes: A Multidimensional Study*, 48 J. PERSONALITY & SOC. PSYCHOL. 472 (1985) (concluding that males' sexual fantasies are more likely than females' to involve details of one's partner's physical appearance); John F. Gottlieb, *Sex and Handedness Differences in the Use of Autoerotic Fantasy and Imagery: A Proposed Explanation*, 26 INT'L J. NEUROSCIENCE 259 (1985) (males' sexual fantasies are more likely than females' to contain visual imagery).

45. See Strossen, *supra* note 36, at 1147-51.

46. SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA* 73-74 (1987).

chy. Coming from women, however, these criticisms would not bear such an interpretation, although they might be rejected as the product of "false consciousness."⁴⁷

II. SEXUAL INTEGRITY AND THE FLOURISHING LIFE

To illustrate society's curiously disdainful attitude toward sexuality, I begin with a statement by Catharine MacKinnon: "This is not a 1st Amendment issue. It makes me feel dumb to have to keep saying it. Pornography is not speech, it's an aid to masturbation."⁴⁸ Well, undeniably it aids masturbation,⁴⁹ but why is it, for that reason alone, not speech? If, instead, Professor MacKinnon had said, "Cookbooks are not speech; they're an aid to gastronomic experimentation," we should have rejected her claim out of hand. Why, then, is her comment about pornography at least facially plausible? I hesitate to say that the difference lies in our attitude towards masturbation, although in a narrow sense I suppose that is what I mean. More profoundly, our willingness to accept MacKinnon's comment reflects our attitude toward what I shall call "sexual integrity."

I base the concept of sexual integrity on Aristotle's concepts of *eudaemonia* and the flourishing life.⁵⁰ *Eudaemonia* has been roughly translated as personal happiness or well-being⁵¹ but that translation, which suggests a purely hedonistic or at least utilitarian measure of value, hardly captures the word's essence. Rather, *eudaemonia* is the state of living the "flourishing life," a life of self-realization in which one's capacities are fully developed, one's potential fully realized, one's character fulfilled.⁵² A flourishing life allows one to grow toward the best person one is intended to be. The flourishing life is not a means of achieving *eudaemonia*, not a series of acts calculated to produce flourishing as a result. Rather, the flourishing life is the very performance of those self-realizing acts.⁵³

Realizing a satisfying, nurturing sexual life is one of the achievements constituting a flourishing life. We are, after all, social beings, the least self-sufficient of creatures.⁵⁴ As such, we crave connection with others—indeed, our

47. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1922-23 (1987) (arguing that false consciousness may explain some women's seeming acquiescence in gender hierarchy).

48. Stephanie B. Goldberg, *1st Amendment Wrongs: A New Approach to Fighting Pornography Says Free Speech Has Nothing to Do with It*, CHI. TRIB., Mar. 17, 1993, § 5 (Tempo), at 1, 2 (quoting MacKinnon's remarks at a 1993 antipornography conference).

49. Indeed, the French, with their characteristically mordant candor, at one time referred to pornographic literature as *livres lus avec une seule main* (books read with one hand).

50. See Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 391-92, nn.253 & 254 (1994), and the sources cited therein.

51. See 5 THE OXFORD ENGLISH DICTIONARY 432 (2d ed. 1989) ("eudemonic").

52. See Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1014 (1986).

53. *Id.* at 999 n.9.

54.

Man, said Aristotle, is the least self-sufficient of animals. But the human individual is not merely an animal who happens to lack self-sufficiency; he is an animal whose essence it is

sense of self emerges from and is forged by interaction with others—and sexual interaction is perhaps the most powerful and intimate connection one person can establish with another. Sexual exhilaration in the context of a mutually desired sexual connection may present the only circumstance in which one can achieve a complete submersion of self in another's being, transcending the leaden constraints of political obligation and rational discourse.

For sexual interaction to be a component of the flourishing life, rather than a mere sensual distraction, a person's sexuality must be integrated with the rest of his⁵⁵ life (hence the term "sexual integrity"). If, instead, a person regards his sexuality as a thing apart—base, disconnected, a separate component of his being to which he brings a sensibility completely divorced from his essential character—he may become alienated from his own body and suffer what Professor Margaret Jane Radin aptly calls "the pain of a divided self."⁵⁶ He may lose altogether the capacity for loving. And as we shall see, gay men⁵⁷ experience particular difficulty integrating their sexual with their nonsexual lives.⁵⁸

Government is not without a role in fostering sexual integrity. Indeed, Aristotle's notion of *eudaemonia* includes a role for the government: "[I]t is evident that that form of government is best in which every man, whoever he is,

to lack self-sufficiency. We need each other, and it is Aristotle's task to make, as it were, a virtue of this necessity. The life of belonging to a *polis* is not only a grudging dependence, but a positive and essentialist embrace of interdependence.

Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751, 767 (1992) (footnotes omitted).

55. Although the concept of sexual integrity applies to both men and women, in this article I confine my argument to gay men and their sexuality, and therefore I use masculine pronouns as indefinite gender pronouns to avoid confusing the reader.

56. Radin, *supra* note 47, at 1916.

57. This article assumes that all postpubescent males are *either* exclusively gay *or* exclusively heterosexual in their behavior. Obviously, this is a considerable oversimplification, inasmuch as sexual orientation, like height, is a continuum. Most of us are familiar with Dr. Kinsey's zero-to-six scale published in his 1948 study. ALFRED C. KINSEY, WARD B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-55 (1948). A "Kinsey zero" is an adult male who makes "no physical contacts which result in erotic arousal or orgasm, and make[s] no psychic responses to individuals of [his] own sex. [His] socio-sexual contacts and responses are exclusively with individuals of the opposite sex." *Id.* at 639. A "Kinsey six," at the other extreme of the scale, is "exclusively homosexual, both in regard to [his] overt experience and in regard to [his] psychic reactions." *Id.* at 641.

Kinsey's study, which regrettably surveyed only white males, found that only 50% of the male population were exclusively heterosexual after adolescence, and only 4% were exclusively gay. *Id.* at 650-51, 656. While that accounts for a majority, it nonetheless leaves a sizable minority (46%) lying elsewhere along the "one" through "five" continuum: a sizable minority that experiences, in varying degrees, both heterosexual and homosexual (overt or psychic) experiences during adulthood.

By expanding the endpoints somewhat, we can justify the assumption of exclusivity (that is, that everyone is either exclusively gay or exclusively heterosexual). We can expand the heterosexual endpoint by considering only overt experiences and disregarding psychic experiences; 63% of all males never have overt homosexual contact to the point of orgasm after the onset of adolescence. *Id.* at 650. And we can expand the homosexual endpoint by looking at short postadolescent time periods and disregarding inconsequential heterosexual experience. "[Ten] percent of the males are *more or less exclusively homosexual* (i.e., rate 5 or 6) for at least three years between the ages of 16 and 55." *Id.* at 651. Thus, the assumption of exclusivity reasonably comprehends 73% of the adult male population.

58. See note 63 *infra* and accompanying text. I assume throughout this article that no moral difference exists between gay sexual integrity and heterosexual sexual integrity. I encourage readers uncomfortable with this assumption to read MOHR, *supra* note 43.

can act best and live happily.”⁵⁹ If government is to foster its citizens’ flourishing, and if an integrated sexuality is part of that flourishing, it follows that political regimes must be conducive to sexual integrity. Few of us are inclined to acknowledge this governmental obligation, accustomed as we are to viewing government’s proper response to sexuality as one of chilly neutrality.⁶⁰ But a regime that through silence, indifference, or hostility systematically fails to allow its gay male citizens to achieve sexual integrity undermines their citizenship by denying them “the open personal associations and dialogue that enable one to test and transform one’s political self.”⁶¹ The silencing and subordination of gay men on account of their sexuality denies gay men the self-acknowledgment and self-definition that every group needs to participate fully in civic life.⁶²

A gay man’s quest for full citizenship is frustrated when he is compelled to choose between a satisfying professional life and a satisfying personal life.⁶³ A college student’s well-being is impaired when he can talk about his weekend recreation only after carefully adjusting his pronouns. A gay schoolteacher’s sense of integrity is compromised when she must instruct her pupils on the value of honesty while dissembling as to her primary associations.⁶⁴ The personal is, indeed, political.⁶⁵

59. ARISTOTLE, *Politics* bk. VII, ch. 2, in 2 THE COMPLETE WORKS OF ARISTOTLE 2100, 2101 (Jonathan Barnes ed., 1984).

60. A pronounced antihedonic bias characterizes our public discourse about sex, and government officials act at their peril when they disregard that bias. Kristine Gebbie caused considerable controversy when, as President Clinton’s national AIDS policy coordinator, she urged those confronting the problem of teenage sexuality to acknowledge that sex is an “essentially important and pleasurable thing.” The White House quickly tried to control the damage by releasing, in Gebbie’s name, a tribute to abstinence. Frank J. Murray, “Abstinence” Added to Sex Message; White House Seeks to Quiet Uproar Over Remark of Top AIDS Officer, WASH. TIMES, Oct. 22, 1993, at A1, available in LEXIS, News Library, Papers File.

61. Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2258 (1993) (citing Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1535-36 (1988)).

62. See Karst, *supra* note 24, at 116-22.

63. “Psychological studies indicate that gay persons who are forced to be secretive about their sexuality, or are isolated from larger gay or lesbian communities, experience significant emotional and psychological distress By contrast, gay persons who have come out show the highest degree of adjustment and self-esteem.” Evan Wolfson, *Civil Rights Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL’Y 21, 32 n.46 (1991). For another discussion of the effects of concealment on mental health, see 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, 595-99 (1992).

64. See MOHR, *supra* note 43, at 160. Michel Foucault may have had these conflicts in mind when, in a March 1982 interview, he commented on Freud’s statement that all homosexuals are liars (i.e., pretending to be something they are not): “[T]o call homosexuals liars is equivalent to calling the resisters under a military occupation liars.” Michel Foucault, *Sexual Choice, Sexual Act: An Interview*, SALMAGUNDI, Fall/Winter 1982-1983, at 10, 15 (James O’Higgins, interviewer & translator).

65. Perhaps the best, and certainly the most eloquent, response to traditional reservations about sexuality’s political claims comes from June Jordan, a bisexual African-American author and poet:

Recently, I have come upon gratuitous and appalling . . . pronouncements on sexuality. Too often, these utterances fall out of the mouths of men and women who first disclaim any sentiment remotely related to homophobia, but who then proceed to issue outrageous opinions like the following:

Much recent scholarship devoted to sexual orientation issues has noted, and often taken sides in, an emerging controversy between two competing understandings of homosexuality: essentialism and constructivism.⁶⁶ Because Aristotle is regarded as perhaps the essential essentialist,⁶⁷ my appeal to Aristotelianism in this discussion of sexual integrity might be seen as an entry into the debate on the essentialists' side. Accordingly, I offer the reader some thoughts about essentialism and constructivism. The debate concerns the nature and even the reality of sexual identity: Are there persons who *are* gay and persons who *are* heterosexual (in the sense that there *are* penguins and there *are* clouds), or are there merely persons whom society *chooses to call* gay or heterosexual (as it chooses to call people "professional" or "addicted")?

The essentialist regards gayness as an intrinsic, universal, and irreducible quality—the habitual experience of sexual desire for persons of one's own sex—that we understand as the basis for an identity category. Moreover, the essentialist argues that gayness transcends time and culture. All gay men of all times and cultures, says the essentialist, share certain fundamental, distinctive qualities, and all men who share these qualities are gay.

The constructivist, in contrast, views gayness as historically and culturally contingent. To the familiar observation that judgments concerning the morality

• That it is blasphemous to compare the oppression of gay, lesbian, or bisexual people to the oppression, say, of black people . . .

• That the bottom line about gay or lesbian or bisexual identity is that you can conceal it whenever necessary and, so, therefore, why don't you do just that? Why don't you keep your deviant sexuality in the closet and let the rest of us—we who suffer oppression for reasons of our ineradicable and always visible components of our personhood such as race or gender—get on with our more necessary, our more beleaguered struggle to survive?

...

. . . [N]o, I do not believe it is blasphemous to compare oppressions of sexuality to oppressions of race and ethnicity . . .

If you can finally go to the bathroom wherever you find one, if you can finally order a cup of coffee and drink it wherever coffee is available, but you cannot follow your heart—you cannot respect the response of your own honest body in the world—then how much of what kind of freedom does any one of us possess?

...

What tyranny could exceed a tyranny that dictates to the human heart, and that attempts to dictate the public career of an honest human body?

JUNE JORDAN, TECHNICAL DIFFICULTIES: AFRICAN-AMERICAN NOTES ON THE STATE OF THE UNION 189-90 (1992). I am indebted to my colleague Cheryl Harris for bringing Jordan's work to my attention.

66. See, e.g., John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915 (1986); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 546-56 (1994); RICHARD D. MOHR, *The Thing of It Is: Some Problems With Models for the Social Construction of Homosexuality*, in GAY IDEAS: OUTING AND OTHER CONTROVERSIES 221, 221-42 (1992); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993); Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 325 (Edward Stein, ed. 1990); Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in HOMOSEXUALITY, WHICH HOMOSEXUALITY? 13 (Dennis Altman, Carole Vance, Martha Vicinus & Jeffrey Weeks eds., 1989).

67. See, e.g., Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992); see also Waldron, *supra* note 54.

of behaviors vary among times and cultures, the constructivist adds the proposition that decisions to base identity categories on those behaviors likewise vary. Such decisions, argues the constructivist, are rooted in history and culture and, more often than not, serve to maintain a social hierarchy.⁶⁸ For example, our society's heterosexual/homosexual dichotomy would have made little sense in pre-1700 Europe, where men were expected to have sexual relations with both women and adolescent males. Although church doctrine branded as immoral all sexual relations outside of marriage, nonmarital male sexual behavior nonetheless was countenanced and even admired if such behavior was

conducted in ways that displayed adult male power. In most of Europe and certainly in England, this was achieved when adult males sexually penetrated adolescent boys, who existed in a transitional state between man and woman. All men were supposed to be capable of such acts with boys. . . . Adult men were deemed effeminate only when they allowed themselves to be sexually penetrated⁶⁹

No distinction was made between adult men who had penetrative sex with women and adult men who had penetrative sex (as the "active" partner) with adolescent males: that is, no distinction between "heterosexuals" and "homosexuals." And although the submission of an adult male to penetration was considered dishonorable, this stigmatization did not produce an identity category. Instead, the society regarded each such submission as an independent act: shameful, to be sure,⁷⁰ but not an act that distinguished one type of man from another; rather, a form of baseness of which any adult male was potentially capable.⁷¹

The debate between the essentialists and the constructivists does not concern etiology. Even a conclusive demonstration that sexual object preference was biologically determined would not refute the constructivists; the issue is not how a person comes to be oriented toward same-sex object preferences, but rather how a society assigns meaning to that orientation. The color of one's skin is clearly genetically determined, as is the ability to roll one's tongue, but though the latter has not served as the basis of an identity category, race certainly has. And race's role as an identity category is socially constructed: "A black person enjoys a completely different social role in early modern Africa than in contemporary American society. Like biological sex, however, race has a natural etiology. Although genes do not determine the content of racial roles, they do determine which role one falls into."⁷²

68. Postmodernism did not invent this idea. In the 1910s, for example, psychologist Leta Stetter Hollingworth, writing of supposed sex differences, warned her fellow social scientists "against accepting as a fact of human nature a doctrine which we might expect to find in use as a means of social control." CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE* 125 (1991).

69. Randolph Trumbach, *Erotic Fantasy and Male Libertinism in Enlightenment England*, in *THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800*, at 253, 254-55 (Lynn Hunt ed., 1993); cf. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 49-50 & n.18 (1980) (discussing Aristotle's likely views of males' sexual submission to males).

70. Cf. note 165 *infra*.

71. See D'Emilio, *supra* note 66, at 917.

72. Ortiz, *supra* note 66, at 1839. Harvard University professor Henry Louis Gates, Jr., explained an editorial decision as follows:

The constructivist analysis lends itself easily to ridicule, inasmuch as its suggestion that "meaning" lacks meaning has potentially no bottom to it. Is not the constructivist analysis itself a mere social construction?⁷³ And might we not regard La Rochefoucauld, with his tonic cynicism, as the first postmodern critic of sexuality: If men had never learned to read, no one would ever fall in love.⁷⁴

Despite these vulnerabilities, however, social constructivism can have a liberatory effect on gay men by encouraging them to seek definition beyond their erotic inclinations. If gay men feel defined by what they do with their genitals, they may be forced to assume an apologetic, assimilationist stance when they confront the rest of society.⁷⁵ Pleas that gays "are just like everyone else" except for an inconsequential behavioral difference are unlikely to persuade or even be taken seriously⁷⁶ given the queasiness, indeed revulsion,⁷⁷ with which many Americans view sexual acts between men. Constructivism furnishes gay men with two powerful and liberating ideas: first, that their "condition" is imposed from without by a homophobic society; it is a contextual, not

The editors . . . and I decided to bracket the word "race" in our title . . . to underscore the fact that "race" is a metaphor for something else and not an essence or a thing in itself

. . . . Our decision to bracket "race" was designed to call attention to the fact that "races," put simply, do not exist, and that to claim that they do, for whatever misguided reason, is to stand on dangerous ground.

Henry Louis Gates, Jr., *Talkin' That Talk*, in "RACE," WRITING, AND DIFFERENCE 402, 402-03 (Henry Louis Gates, Jr., ed., 1986).

73. See Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994). "Postmodernists are notoriously hard reading, and for good reason, because the powerful acid of postmodernist thought threatens to dissolve not only other philosophies but also itself." *Id.* at 655 n.49.

74. I have rendered the maxim as I remembered it. Research reveals, however, that the original was phrased less pungently: "*Il y a des gens qui n'auraient jamais été amoureux, s'ils n'avaient jamais entendu parler de l'amour*," which translates as, "There are people who would never have been in love if they had never heard talk of love." François, Duc de la Rochefoucauld, *Maximes* No. 136, quoted in THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN 1186 (Burton Stevenson ed., 6th ed. 1952).

75. The gay rights advocates' argument in *Bowers v. Hardwick* illustrates this risk. See Ortiz, *supra* note 66, at 1850-52.

76. In *Bowers*, the case upholding the constitutionality of Georgia's law banning sodomy, the Court rejected the respondent's contention that "sodomy" (the case in fact involved fellatio) was no less entitled to protection as a fundamental right than certain protected marital or procreative decisions. Indeed, the Court expressly repudiated any

connection between family, marriage, or procreation on the one hand and homosexual activity on the other Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, *facetious*.

Bowers v. Hardwick, 478 U.S. 186, 191, 192-94 (1986) (emphasis added) (footnotes omitted). Chief Justice Burger, in his concurrence, harked back to an even earlier time than that of the Republic's founders. He concluded, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

77. Popular culture, ever a sensitive barometer of social attitudes, provides striking evidence of this peculiar revulsion. In a recent film intended as a comedy, *Ace Ventura: Pet Detective*, when the title character, played by Jim Carrey, accidentally kisses another man, Carrey reacts by showering furiously, vomiting, and applying a toilet plunger to his mouth.

an essential, consequence of their sexual inclinations. And second, that their differentness is not merely one of genital behavior: It is a sensibility, a culture, a community from which the heterosexual world has much to learn and which is entitled to equal weight and deference.

On the other hand, the constructivist view makes historical comparisons anomalous. "If the categories 'homosexual/heterosexual' and 'gay/straight' are inventions of particular societies rather than real aspects of the human psyche, there is no gay history."⁷⁸ And a sense of gay history may be just what an emerging gay man needs to start feeling at home in the world. A young gay man discovering his sexual orientation in today's homophobic⁷⁹ American society is apt to focus first on gayness' genital manifestations, unable to connect those manifestations with anything so grand or intangible as a gay culture. For such a man, the comforts of gay history—that is, of essentialism—can be profound; not only are his erotic yearnings not unique, they are shared by warriors like Alexander the Great, sculptors like Michelangelo, nation builders like Frederick the Great, and composers like Tchaikovsky. While we have much to learn from constructivism, I hope that this article, since it deals with gay men's genital-sexual awakening and therefore with a time of life in which gay men often view their sexuality "essentially," may be permitted a somewhat essentialist tone and vocabulary.

III. OBSTACLES TO GAY SEXUAL INTEGRITY

[A]ntigay prejudice remains a publicly acceptable and expected form of bigotry and systematic subordination.⁸⁰

Sexual integrity requires self-acknowledgment. For a gay man to achieve sexual integrity he must first become aware of his sexuality, acknowledge it, accept it, and act upon it.⁸¹ But gay men face distinct obstacles on the road to their self-acceptance, obstacles that other minorities don't face.

Gay people are said to constitute an invisible minority,⁸² a phrase intended to suggest that a person's gayness, unlike his race, is not readily apparent to the casual observer. But the same can be said of a person's heterosexuality. It is not gayness specifically but rather sexual orientation that is invisible. Looking at a stranger on the street, one cannot tell for certain whether he is gay or

78. John Boswell, *Revolutions, Universals, and Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17, 20 (Martin Duberman, Martha Vicinus & George Chauncey, Jr., eds., 1989).

79. For a discussion of homophobia, see note 89 *infra*.

80. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 52 (1993). Ander Crenshaw, a Florida state senator who recently ran for governor, illustrated Byrne's point when he stated in an interview "that he doesn't knowingly socialize with gays and lesbians, doesn't like working with them, and won't hire them. . . . Asked if such a stance is intolerant, he replied, 'I guess, you know, you could view it as such.'" *Candidate embraces bias*, ADVOCATE, July 26, 1994, at 10, 10.

81. See text accompanying note 62 *supra*.

82. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729-31 (1985); Byrne, *supra* note 80, at 54; Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity*, 39 WAYNE L. REV. 121, 124 (1992).

heterosexual;⁸³ but because of our culture's presumption of heterosexuality, we speak of gayness, rather than sexual orientation, as being the invisible quality.

This presumption is born of heterocentrism: the ideology that prizes heterosexuality as the norm, holding it to be the only suitable context for overt sexual or romantic expression.⁸⁴ Heterocentrism manifests itself in many ways: in popular song lyrics that insist, with respect to love and marriage, that "[y]ou can't have one without the other";⁸⁵ in newspaper obituaries that describe a decedent with no surviving spouse or blood relations as having "no survivors," though he is survived by a domestic partner of long standing;⁸⁶ in materials prepared for an employer-sponsored workshop on sexual harassment that submit as hypothetical cases only interactions between men and women;⁸⁷ and in the consistent absence of same-sex couples from television advertising.⁸⁸

Our society's heterocentrism impedes a gay man's quest for self-acceptance by denying him a routine context in which to frame his sexuality. In a world where every man is presumed to want a woman, what is an incipient gay man to make of his wanting another man? But heterocentrism is not enough to explain the crippling isolation that most young gay men experience. Heterocentrism may disaffirm gay men, but it does not demonize them. Homophobia does *that*.

Our culture presumes, if it thinks about the question at all, that one is not a vegetarian or a Methodist. As long as the presumption is not coupled with contempt for vegetarians or Methodists, however, as long as they lie within the boundaries of permissible variation, the presumption may occasionally inconvenience or even embarrass but is unlikely to defeat efforts to develop a support network or an internal sense of rightness. Lesbians and gay men, however, face not only disregard (heterocentrism) but also hatred, a hatred that has come to be

83. One may rely on cues or gender stereotypes to form conjectures about a person's sexual orientation but one cannot be certain. A conspicuously pregnant woman might be a lesbian who conceived through alternative insemination.

84. See Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). Professor Herek uses the term "heterosexism" rather than "heterocentrism." I prefer the latter term, inasmuch as it suggests a value system that arrives at its estimation of heterosexuality not through condemnation of homosexuality but rather without considering homosexuality at all.

85. *Love and Marriage* (Sammy Cahn lyrics & Jimmy Van Heusen music), reprinted in SAMMY CAHN, I SHOULD CARE: THE SAMMY CAHN STORY 298 (1974). The song was written for the 1950s television broadcast of a musical version of Thornton Wilder's 1938 play *Our Town*. Myrna Oliver, *Sammy Cahn, Oscar-Winning Lyricist, Dies*, L.A. TIMES, Jan. 16, 1993, at A1, A25. A meditation on the inseparability of love and marriage might be intended as irony, but in the context of this play's paean to contented heterosexuality, Sammy Cahn's intentions must have been thoroughly earnest. The only irony here is that Thornton Wilder was gay.

86. See Herek, *supra* note 84, at 925-26.

87. At a workshop held at Illinois Institute of Technology on October 22, 1991, the facilitator distributed the materials I have described.

88. Gay images may be working their way slowly into television advertising. Early in 1994, IKEA, a Swedish-based chain of furniture stores operating in the United States, introduced a television commercial featuring two affectionate men shopping for furniture together. Jackie Spinner, *Cards Celebrate Life's Events from Gay View*, S.D. UNION-TRIB., June 7, 1994, at E1, E3. Because of anxiety over the public's reaction, however, the commercial has been aired only after 10 p.m. Paula Span, *ISO the Gay Consumer: Advertisers Are Coming Out in the Open and Finding a New Market*, WASH. POST, May 19, 1994, at D1.

known as homophobia.⁸⁹ Together, heterocentrism and homophobia create extraordinary barriers to gay people's self-awareness and self-acceptance.

Let us begin with art. In 1989, some conservative members of the United States Congress denounced the National Endowment for the Arts (NEA) for supporting a number of controversial projects. In particular, they objected to a retrospective of photographer Robert Mapplethorpe's work, which included a number of homoerotic images, and to a Cibachrome by Andres Serrano entitled *Piss Christ* that presented a plastic crucifix submerged in a liquid that Serrano declared was his own urine.⁹⁰ In response to conservative pressure, Congress amended the statutory rules that governed the awarding of NEA grants to deny funding to "obscene" art.⁹¹ Although the new law was declared unconstitutional (because of its vagueness, not because of its disparate treatment of homosexuality),⁹² its language illustrates how legislators hold homoerotic images to a stricter standard than heteroerotic images:

None of the funds authorized . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.⁹³

A heteroerotic work that does not involve children, sadomasochism, or explicit sexual acts would satisfy these NEA funding requirements even if it lacked "serious value." A homoerotic work, on the other hand, must satisfy the "serious value" requirement no matter what.

This exceptional resistance to homoerotic images stalks college campuses as well as legislative chambers. A recent article in *Lingua Franca* suggested that "photos of men kissing" provoked student protests of the same nature and intensity as those provoked by "a small replica of Michelangelo's *Pieta* . . .

89. Homophobia means the fear of homosexuality and aversion to lesbians and gay men. Though the word has now received widespread sanction, some question its aptness, since fear (the meaning of the Greek root *phobia*) may not be the source of this feeling of abhorrence. See Herek, *supra* note 84, at 924-25. Some commentators therefore have adopted the word "homo hatred." See MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s* xxii-xxiii (1989). Both words, however, are open to etymological challenge. The Greek prefix *homo* means "same," as in homogenous, homogenized, and so forth. Thus, homophobia and homohatred ought more properly to mean self-fear and self-hatred, rather than hatred of homosexuality. Some would argue that the notion of substituting "self-hatred" for "homophobia" is not so far from wrong, since expressions of homophobia may be a device for cloaking or denying one's own homosexuality. See notes 132-134 *infra* and accompanying text.

90. See, e.g., 135 CONG. REC. S5594-95 (daily ed. May 18, 1989) (statements of Sens. D'Amato and Helms); 135 CONG. REC. S5805-07 (daily ed. May 31, 1989) (statement of Sen. Gorton); 135 CONG. REC. H3637, H3640-42 (daily ed. July 12, 1989) (statements of Reps. Rohrbacher and Dannemeyer).

91. Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989).

92. *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-82 (C.D. Cal. 1991). In 1990, Congress added the so-called "decency rule" to the statute governing NEA grants. 20 U.S.C. § 95(d) (Supp. V 1993). The rule was declared unconstitutional, again on vagueness grounds. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1471-76 (C.D. Cal. 1992).

93. Pub. L. No. 101-121 § 304(a), 103 Stat. at 741.

submerged in a tank of cow's blood and urine" and "a painting show[ing] a naked woman drowning in a pool of semen."⁹⁴

Resistance to gay-oriented literature has also proved particularly resilient despite profound changes in the standards of sexual "decency" that our society applies to literary works.⁹⁵ Even nonsexual gay literature continues to encounter extraordinary resistance. According to the American Library Association's Office for Intellectual Freedom, in 1993 "gay books and periodicals came under fire more than any other category of reading material: 111 of 697 reported library censorship attempts were anti-gay"⁹⁶ The book most frequently attacked was *Daddy's Roommate*, by Michael Willhoite, a picture book for young people about a boy, his gay father, and his father's male lover.⁹⁷ (The third most frequently targeted book also was gay-friendly: *Heather Has Two Mommies*, by Lesléa Newman.⁹⁸) *Daddy's Roommate* is not sexually explicit. Its language and situations would be right at home in any conventional works for the book's intended age group if daddy and his roommate were a married, heterosexual couple.⁹⁹

Family life is often a source of particularly intense pain for lesbians and gay men. In a short story entitled *No Kaddish for Weinstein*, Woody Allen recounted the obstacles faced during childhood by the preternaturally acute and angst-ridden Weinstein:

And as if his high I.Q. did not isolate him enough, he suffered untold injustices and persecutions because of his religion, mostly from his parents. True, the old man was a member of the synagogue, and his mother, too, but they could never

94. Liza Mundy, *The New Critics*, LINGUA FRANCA, Sept./Oct. 1993, at 26, 27, 32; see note 77 *supra* (dealing with a heterosexual film character's reaction to an accidental male-male kiss); note 103 *infra* (dealing with a television network's reluctance to broadcast a lesbian kiss); text accompanying notes 122-124 *infra* (dealing with television networks' refusals to broadcast male homosexual kisses); cf. note 31 *supra* (discussing the reaction to an interracial kiss in Eugene O'Neill's play *All God's Chillun Got Wings*).

95. See note 31 *supra*.

96. Deb Price, *When Censors Start Doing the Bunny Hop*, S.F. EXAMINER, Feb. 8, 1994, at B7 (paraphrasing Judith Krug, director of the American Library Association's Office for Intellectual Freedom).

97. *Id.*

98. *Id.*

99. *Daddy's Roommate*, a book intended for two- to six-year-olds, shows Daddy, his lover, and his son playing ball, cleaning, shopping and going to a movie, a ball game, and the zoo. Daddy and his lover read, shave, and sleep together, behaving discreetly as any sensitive couple would around its child. When the subject of gayness arises between father and son, the father responds, "Being gay is just one more kind of love." See *Daddy Is Out of the Closet*, NEWSWEEK, Jan. 7, 1991, at 60, 60.

Heather Has Two Mommies, intended for three- to eight-year-olds, is somewhat more controversial because it refers to alternative insemination, a topic that any parent might feel uncomfortable discussing with a three-year-old. Though the book does not detail the insemination process, it talks frankly about "semen" and "womb" and about changes in the "breasts" of Heather's birthmother caused by the pregnancy. The discussion is no more graphic, indeed somewhat less graphic, than other children's books designed to teach readers about reproduction. See, e.g., PETER MAYLE, *WHERE DID I COME FROM?* (1973) (describing heterosexual intercourse and illustrating male and female genitalia). In any event, the attacks on the book have focused on its general sanctioning of lesbianism, rather than its specific biological content. See, e.g., Anndee Hochman, *Love, Hate and Food Fetishes*, OREGONIAN, Apr. 21, 1993, at C1; Michele Landsberg, *Parents in Uproar Over Gay Textbooks*, ST. PAUL PIONEER PRESS, Jan. 27, 1993, at 12E.

accept the fact that their son was Jewish. "How did it happen?" his father asked, bewildered.¹⁰⁰

In this context, the passage is undeniably funny: *Of course* the child of Jewish parents is going to be Jewish! But in the context of homosexuality, isolation from one's parents is not a risible anomaly but rather a harrowing norm. Most young gay people's family lives emphatically confirm the heterocentric presumption of universal heterosexuality, and when parental heterocentrism combines with parental homophobia, the results can be devastating. Consider Vincenzo Mandanici, the fifty-eight-year-old father of a thirty-three-year-old gay man who was so revolted by his son's sexual inclinations that he was alleged to have hired a hit man to kill the son.¹⁰¹ Or consider Sharon Bottoms, a lesbian whose mother sued to get custody of Sharon's toddler son on the grounds that Sharon's lesbian lifestyle made Sharon an unfit mother.¹⁰²

These intrafamilial cases illustrate the peculiar¹⁰³ virulence of the hatred directed at gay people.¹⁰⁴ Homophobia's extraordinary vehemence extends, of course, beyond the confines of the family. The actions of the Reverend Fred Phelps, an antigay minister from Topeka, Kansas, who jeeringly pickets the funerals of gay men, illustrate that even the ancient principle of respect for the dead¹⁰⁵ yields to the virulence of homophobia. At a funeral service in San Francisco for gay journalist Randy Shilts, Phelps and nine followers picketed

100. WOODY ALLEN, *No Kaddish for Weinstein*, in *WITHOUT FEATHERS* 194, 194-95 (1975).

101. *Daddy Dearest*, *ADVOCATE*, Oct. 5, 1993, at 16. The son was indeed shot by the hitman on a sidewalk in a small Sicilian town and died of his wounds a month later. *Family Tragedy*, *ADVOCATE*, Nov. 2, 1993, at 18, 19.

102. Sharon's mother was successful at the trial level. B. Drummond Ayres, Jr., *Judge's Decision in Custody Case Raises Concerns*, *N.Y. TIMES*, Sept. 9, 1993, at A16. But a Virginia appellate court overturned the trial judge's decision and awarded custody to Sharon. *Virginia Court Returns Son to Lesbian Mother*, *CHI. TRIB.*, June 22, 1994, at 3.

103. Such hatred is often camouflaged by hypocrisy. At the request of a California state senator, the "gay flag," a multicolored rainbow flag, was flown above the state capitol in Sacramento in celebration of National Coming Out Day (commemorating the October 11, 1987, gay rights march in Washington, D.C.). Then-Governor George Deukmejian ordered the flag taken down because, said the Governor's spokesperson, "[f]lags are not to be flown over the Capitol that represent any kind of special-interest group, lifestyle or issue." Greg Lucas & David Tuller, *'Gay Flag' at the Capitol Ordered to Be Removed*, *S.F. CHRON.*, Oct. 13, 1990, at A4. That flags commemorating Earth Day, Black History Month, and prisoners of war had previously been allowed to fly above the Capitol, *id.*, reveals the inconsistency of the Governor's policy and the disingenuousness of his explanation.

Similar disingenuousness characterized the explanation offered by ABC vice-president Steve Weiswasser for the network's refusal to broadcast an episode of the popular television situation comedy *Roseanne* that included a mouth-to-mouth kiss between Roseanne and a lesbian character: "[That] is not a lifestyle most people lead." John Carmody, *The TV Column*, *WASH. POST*, Feb. 8, 1994, at C4 (quoting Weiswasser). The same might be said for a "lifestyle" that permits extraterrestrials to reside in one's home, yet *ALF* and *Mork and Mindy* were popular television series in spite of their presenting domesticated aliens.

It is worth noting that the disputed scene—kiss and all—was broadcast on March 1, 1994.

104. Less extreme—yet perhaps more shocking—intrafamily behavior are the numerous cases of parents who throw their teen age children out of the house, sometimes summoning the police for assistance, when they discover their children's homosexuality. See, e.g., Jim Merrett, *Young Blood: On-Line with Gay Prodigies*, *FRONTIERS*, May 20, 1994, at 48.

105. Western culture has always regarded dishonoring the dead as taboo. This ban goes beyond the mere sentimentality of the maxim, *de mortuis nil nisi bonum* (speak only good of the dead), insisting that we cannot dishonor the dead without losing something of our humanity. This notion is at least as old as Homer's *Iliad*: After countless days of cruel and barbarous fighting, in which the gods have taken

outside the church carrying signs that read "Fags Burn in Hell," "God Hates Fags," and a photo of Shilts with the words "Filthy Face of Evil Fag."¹⁰⁶ Phelps sent the Shilts family a fax of this last item. And these were not isolated incidents. One of Phelps' children told a reporter: "[W]e picket fag funerals."¹⁰⁷

Homophobia may inspire considerable efforts to avoid association with homosexuality as illustrated by an ironic letter to the editor of the *St. Louis Post-Dispatch*:

Brad Davis, a movie star of "Chariots of Fire" fame, died of AIDS. His wife says he contacted [*sic*] the deadly virus from drug use. You do not contract the virus from drug use; you contract it by sharing syringes. It is hard for me to picture a big-name star down in the gutter sharing needles with homeless druggies. But God forbid, we don't want the world to think he might have been gay or bisexual. Oh no, a gutter druggie sharing needles is so much more respectable.¹⁰⁸

Even judges regarded as liberal find homosexuality a challenge to their liberalism. United States District Court Judge Oliver Gasch is a case in point. Appointed to the bench by President Johnson in 1965, Gasch had a deserved reputation as a consistent champion of the underdog, speaking out in defense of the constitutional rights of juveniles and of federal employees dismissed as a result of "secret, coercive investigations" and "forc[ing] the Department of Agriculture to nearly double its spending on special nutrition programs for mothers and infants."¹⁰⁹ Yet in a suit by Joseph Steffan, a Navy midshipman who was forced to resign from the United States Naval Academy shortly before

eager part, Achilles binds the body of the slain Hector to the back of his chariot and drags the corpse about the ground; and it is at *this* act that the gods finally draw the line:

When, therefore, the morning of the twelfth day [of the defilement of Hector's corpse] had now come, Phoebus Apollo spoke among the immortals, saying: "You gods ought to be ashamed of yourselves; you are cruel and hard-hearted. Did not Hector burn you thigh bones of heifers and of unblemished goats? And now dare you not rescue even his dead body, for his wife to look upon, with his mother and child, his father Priam, and his people, who would forthwith commit him to the flames and give him his due funeral rites? So, then, you would all be on the side of mad Achilles, who knows neither right nor ruth? . . . [B]rave though he be we gods may take it ill that he should vent his fury upon dead clay."

HOMER, *THE ILIAD* 373 (Samuel Butler trans. & Louise R. Loomis ed., 1942).

106. Bob Getz, *Kindest Regards, Fred Phelps*, *WICHITA EAGLE*, Feb. 28, 1994, at 1C; David Tuller & Suzanne Espinosa Solis, *S.F. Farewell to Randy Shilts*, *S.F. CHRON.*, Feb. 23, 1994, at A1.

107. Brenda You, *A Holy War Against Gays*, *CHI. TRIB.*, Apr. 26, 1994, § 5, at 2.

108. *ST. LOUIS POST-DISPATCH*, Sept. 16, 1991, at 2B (letter to the editor). Davis did not altogether omit sexuality from his account of his contraction of HIV, but he mentioned sexuality only with a "drugs-made-me-do-it" perspective that clouded any acknowledgment of or responsibility for that sexuality. In a book proposal (the book was to deal with Davis' battle with AIDS and AIDS-phobia) made public by his wife after his death, Davis wrote, "I was a total drug addict—an alcoholic and I.V. drug user—a user of just about any kind of drug I could get. And I was sexually very promiscuous. I've never known any addicts who weren't." Victor F. Zonana, *Profile in Courage, Anger: Brad Davis Battled Aids, Hollywood Indifference*, *L.A. TIMES*, Sept. 11, 1991, at 1 (quoting the proposal). In fairness to Davis, it should be noted that during his career, he had the courage to accept a remarkable number of visible "gay" roles: Billy Hayes (a heterosexual man who has a sustained sexual relationship with another man while in prison) in *Midnight Express* (Columbia Pictures 1978), Querelle, in a film by the same name (RCA Columbia 1983), Mr. Sloane in the 1984 revival of Joe Orton's play *Entertaining Mr. Sloane*, and Ned Weeks in Larry Kramer's 1985 play *The Normal Heart*.

109. Greg Scott, *A Good Liberal Gone Sour*, *ADVOCATE*, Jan. 14, 1992, at 55.

graduation when his homosexuality came to the attention of the Department of Defense, in which he sought his diploma and a commission, Judge Gasch held for the Department of Defense on the startling ground that the Department's antigay directives were necessary to protect military personnel from the spread of AIDS, a ground that the Department had not argued at trial.¹¹⁰ Earlier in the proceedings, Judge Gasch had repeatedly referred to Steffan as a "homo."¹¹¹

IV. WHY PORNOGRAPHY¹¹² IS THE SOLUTION

The young gay male inhabits a world that teaches him to despise his most powerful feelings. This world isolates him from his parents, who are probably not gay themselves and who may be as homophobic as his tormentors; tells him that people like him are sick, contemptible, and justly despised; offers him no positive images of gay sexuality and no hope of integrating his sexuality with the rest of his life. He experiences sexual impulses but receives no encouragement or instruction about how to act upon those feelings in a healthy, self-affirming manner. His heterosexual contemporaries enjoy considerable encouragement from peers and family and find heartening models in the ubiquitous images of idealized or graphic heterosexual coupling that flood the airwaves and motion picture screens,¹¹³ but heterocentrism and homophobia leave the young gay man fearing that gay sexual encounters are necessarily furtive¹¹⁴ and debasing.¹¹⁵ Many gay men remember feeling as if they were "the only

110. *Steffan v. Cheney*, 780 F. Supp. 1, 13-16 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *rev'd on reh'g en banc sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. 1994) (en banc).

111. *Steffan v. Aspin*, 8 F.3d 57, 58 (D.C. Cir. 1993), *rev'd on reh'g en banc sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. 1994) (en banc).

112. Because models who perform sexual acts for pornographic films or photographs generally are paid to do so, the production of such materials probably satisfies the definition of "prostitution," as set forth in state criminal statutes. One might therefore ask whether a defense of pornography is necessarily a defense of prostitution. Regardless of the language of prostitution statutes, pornography is in substance a very different problem from prostitution, and such statutes have rarely, if ever, been invoked to suppress pornography. Even the Meese Commission, which was hardly favorably disposed toward pornography, declined to recommend such a use of prostitution statutes. "[T]he idea [of using prostitution statutes to suppress the production of pornography] is sufficiently novel and could affect so much commerce not directly within the purview of our charter that we merely offer it for consideration and debate." ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 895 (1986).

113. The models of heterosexual behavior offered by the mainstream entertainment media generally reflect our culture's partiality for dependent, subservient women and therefore may be less "heartening" to heterosexual women than to heterosexual men. They do serve, however, to reinforce all viewers' heterocentrist assumptions about the nature of love and sexuality.

114. The impression that most gay sexual encounters are furtive and ephemeral may not be altogether wrong. Because casual, anonymous sexual encounters are more easily hidden than a steady, committed sexual relationship, homophobia fosters gay sexual promiscuity and instability, much as medieval anti-Semitism, by denying Jews the right to own land or hire non-Jewish servants, drove many Jews into the unpopular business of moneylending. John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205, 223 (1989).

115. Widely read author David Reuben exhibits nothing but contempt for gay sexuality. "[B]asically all homosexuals are alike—looking for love where there can be no love and looking for sexual satisfaction where there can be no lasting satisfaction." DAVID REUBEN, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX (BUT WERE AFRAID TO ASK) 272 (1969). According to Reuben,

one."¹¹⁶ Even if they did not feel totally alone, they believed they were the only gay men who were not sly sexual predators.

For all of these reasons, a gay adolescent male's encounter with gay pornography is often a shattering discovery: "shattering" in a positive sense, in that it explodes negative stereotypes that the young man has internalized and offers him models of exuberant, affirming, unashamed sexual interactions between desirable men.¹¹⁷ A recent study of students at a private northeastern university confirms that pornography serves as an important source of information about sex for gay men.¹¹⁸ Respondents were asked to rank seven sources of information—books, church, friends, media, parents, pornography, and school—for the extent to which each contributed to their knowledge about sex. Pornography ranked only fourth for the men and last for the women.¹¹⁹ But when respondents were asked to report pornography's contribution to their knowledge of ten particular sexual topics, "oral-anal sex"¹²⁰ was the most common topic "for which pornography was . . . a significant source of information, both by women (41.5%) and by men (65.1%)."¹²¹ Oral and anal sex are topics of relatively more importance to gay men than to heterosexual men.

A. *The Importance of Sexual Explicitness*

One might ask, *Why must it be pornography?* If the goal is to enable gay men to achieve nurturing, passionate romantic lives, why not just provide representations of men showing physical affection, such as kissing? I offer two responses.

First, a homophobic establishment hinders gay men's access to positive images and information. The mainstream media, as opposed to the quasi-underground industry that produces pornography, are most unlikely to provide

gay people are "handicapped by having only half the pieces of the anatomical jigsaw puzzle. . . . [O]ne penis plus one penis equals nothing" *Id.* at 269.

116. See text accompanying note 1 *supra*.

117. One might object that these emotional gains are reaped primarily by middle- and upper-class males at the expense of working-class males. Such a critique assumes that pornography purchasers are primarily middle and upper class, while pornographic models are primarily working class. Such assumptions, though intuitively appealing, may not be sound. For instance, actors may indeed resort to pornography appearances out of economic compulsion, but the compulsion may result more from their personal circumstances than from their socioeconomic station. An actor with a middle-class background may migrate to California in hopes of starting a film career and, finding himself unable to obtain mainstream roles but wishing to remain in California until something better comes along, turn to pornographic acting as a way of marking time and putting food on the table. The principal fault with this class-based critique, however, is that it proves too much. The same argument might be made about passenger aircraft and hardcover books: that they are assembled primarily by the working class and enjoyed primarily by the middle and upper class. Our capitalist society generates widespread socioeconomic disparity, and I am reluctant to postpone gay men's affective emancipation until such time as we can solve the systemic problems of capitalism.

118. David F. Duncan & J. William Donnelly, *Pornography as a Source of Sex Information for Students at a Private Northeastern University*, 68 PSYCH. REP. 782 (1991).

119. *Id.* at 782.

120. Duncan and Donnelly presumably use the phrase "oral-anal sex" to refer to anal sex, fellatio, and cunnilingus rather than to sexual contact between the mouth of one person and the anus of another (a practice gay men call "rimming").

121. Duncan & Donnelly, *supra* note 118, at 782.

images of passionate physical affection between men, even if they are willing to present gay characters. A simple kiss between gay partners seems to exceed the limits of television broadcasters' tolerance. Recently, on the Fox television network's immensely popular series *Melrose Place*, two gay men were shown *about* to kiss, but before their lips touched, the camera cut away to another character, who observed the (presumed) kiss through his window and reacted with a shocked "Oh my God."¹²² The scene that followed showed a passionate heterosexual kiss, with no diversion of the camera.¹²³ Several weeks earlier, in another popular television series, *Northern Exposure*, the CBS network was admirably willing to present a gay "marriage" ceremony, but "the camera cut away after [the] two men were pronounced married, and returned after the pair apparently had embraced. The producers said they avoided the kiss so it wouldn't cause controversy and detract from the story."¹²⁴

Even potentially lifesaving clinical information about homosexuality may be kept from adolescents. Holt, Rinehart and Winston, a publisher of high school textbooks, decided against selling a health textbook to Texas public schools when the Texas Board of Education demanded extensive revisions as a condition of the purchase. Among the revisions the board had sought was the deletion of toll-free numbers for gay and lesbian groups and for teenage suicide-prevention groups.¹²⁵ A board member who had demanded the deletions said, "I didn't think this stuff should be part of the public schools. They were promoting homosexuality as an acceptable alternative life style and promoting sex as being O.K. if you use a condom."¹²⁶

Second, the issue in a young gay man's quest for self-acknowledgment and self-acceptance is not holding hands or hugging or kissing or running through a meadow in slow motion. The issue is the sexual act. A gay adolescent encounters many examples of male-male "affection," but they fail to provide the validation he needs if they do not explicitly acknowledge male-male sex. Otherwise, *Moby Dick*, read, however unwillingly, by virtually every American high school student, would be a notable liberating force in the lives of gay men, as it contains the following passages. The speaker-narrator is Ishmael.

122. Alan Pergament, "*Melrose Place*" Season Finale Backs Off on Gay Kiss Scene, *BUFF. NEWS*, May 18, 1994, at 12.

123. *Id.*

124. *Footnotes: Fox Turns Out to be Chicken*, *HARTFORD COURANT*, May 20, 1994, at C1.

125. It is not uncommon for the isolation that gay teens feel to produce suicidal tendencies: If you refuse me, all I will have left is suicide. I am a gay teen. When my friends found out, they all disowned me. Some even come together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my own father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the only person talking to me. You guys are my only hope. I beg of you to help.

Bull, *supra* note 1, at 42 (quoting a letter from a fifteen-year-old boy in Jackson, Mississippi, to the Indiana Youth Group after that gay and lesbian support group was featured on an ABC television program).

126. Sam Dillon, *Publisher Pulls a Textbook in Furor on Sexual Content*, *N.Y. TIMES*, Mar. 17, 1994, at B10 (quoting the board member).

I [awakened in bed and] found Queequeg's arm thrown over me in the most loving and affectionate manner. You had almost thought I had been his wife. . . .

. . .

. . . [H]e pressed his forehead against mine, clasped me round the waist, and said that henceforth we were married; meaning, in his country's phrase, that we were bosom friends

. . .

Thus, then, in our hearts' honeymoon, lay I and Queequeg—a cosy, loving pair.¹²⁷

In these passages, the lack of explicit sex and the emphatic exoticism with which Melville treats Queequeg deny Queequeg's statements their conventional effect and render them powerless to embolden gay male adolescents.

Anyone who watches professional sports teams observes plenty of inter-athlete hugging and fanny patting, but the viewer, gay or straight, knows full well that this affection will not be given sexual expression. Indeed, that is the point of the exercise; the athletes engage in the fanny patting precisely because their athletic prowess shields them from inferences of homosexuality.¹²⁸ These displays constitute a form of boasting: a way of saying, "I'm so conspicuously heterosexual that I can do what you dare not; I can publicly pat another man on the ass."¹²⁹

127. HERMAN MELVILLE, *MOBY DICK* 52, 84, 86 (Charles Feidelson, Jr., ed., 1964) (1851). See generally LESLIE FIEDLER, *Come Back to the Raft Ag'in, Huck Honey!*, in *AN END TO INNOCENCE* 142 (1955) (observing that almost all the classic "boys' books" of American fiction—*Huckleberry Finn*, *Moby Dick*, *Two Years Before the Mast*, Cooper's *Leatherstocking Tales*—celebrate an idealized homoerotic male bonding between social unequals).

128. That athletic ability and homosexuality are mutually exclusive is a persistent myth. The late Olympic figure-skating champion John Curry had been open about his homosexuality since 1991. Richard O'Brian, *Figure of Grace*, *SPORTS ILLUSTRATED*, Apr. 25, 1994, at 12, 12. Olympic gold-medalist diver Greg Louganis competed in the 1994 Gay Games as an openly gay man. Anna Quindlen, *Gays in Mainstream Make Homophobic Critics Look Paranoid*, *CHI. TRIB.*, June 27, 1994, at 13. Other examples include former New York Giants offensive tackle Roy Simmons and Los Angeles Dodgers and Oakland A's outfielder Glenn Burke. Barry Meisel, *Last Great Taboo; Gays in Sports Still Out of Bounds Despite Society's Increasing Tolerance*, *HOUS. CHRON.*, Aug. 22, 1993 (Sports), at 14.

129. Tom Wolfe has reported an analogous phenomenon in his essay *Mau-Mauing the Flak Catchers*. Observing the routine at conferences between 1960s "poverty program" bureaucrats and inner-city figures he dubs the "pimp-style aristocrats" who sport "the look of hip and super-cool and so fine," Wolfe mischievously contrasts the former's nervous affectations of masculinity with the latter's flamboyant self-assurance:

[The bureaucrats] tried to walk in like football players, like they had a keg of beer between their legs. They rounded their shoulders over so it made their necks look bigger. . . . When they sat down, they gave it that Honcho wide-open spread when they crossed their legs, putting the right foot . . . on the left knee, as if the muscles in their thighs were so big and stud-like that they couldn't cross their legs all the way if they tried. But the pimp-style aristocrats had taken the manhood thing through so many numbers that it was beginning to come out through the other side. To them, by now, being hip was striking poses that were so cool, so languid, they were almost feminine. It was like saying, "We've got masculinity to spare." We've been through so much shit, we're so confident of our manhood, we're so hip and so suave and wise in the ways of the street, that we can afford to be *refined* and not sit around here trying to look like a bunch of stud brawlers. So they would not only cross their legs, they'd cross them further than a woman would. They would cross them so far, it looked like one leg was wrapped around the other one three or four times.

The struggling gay adolescent or young gay man requires sexual images,¹³⁰ not images of locker room buddy-buddy bonding.¹³¹ Only sexual images possess the liberatory power to counteract society's heterocentrism and homophobia and offer young gay men models of affirming and unashamed sex between men. Without such models, a gay man may never take those crucial first steps towards self-acknowledgment and liberation. I stress the importance of exuberant, unashamed sex because liberation comes not from sexual gratification as such but from sexual gratification in an affirming context. Furtive, back-alley sex, with its implicit self-rejection, not only fails to counteract but actually reinforces society's homophobia. A man who acts openly and proudly in his professional and nonsexual personal life, yet confines his sexual life to anonymous, affectless encounters in bathrooms, experiences a painful dissociation between his sexual life and the rest of his life. This dissociation, or lack of integrity, gives concrete expression to society's condemnation of homosexuality and establishes that condemnation within the man's psyche. One of the saddest and most conspicuous exemplars of the hypocrisy and self-destructiveness of a furtive, nonintegrated sexuality was Robert Bauman, at one time a conservative congressman from Maryland. Bauman had an antigay voting record¹³² and an inclination to make such public statements as, "I would not want my children taught or influenced by gay people,"¹³³ until his arrest for propositioning a sixteen-year-old male prostitute brought his legislative career to an abrupt end.¹³⁴

TOM WOLFE, *Mau-Mauing the Flak Catchers*, in *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS* 97, 133-34 (1970).

130. "Sexual images" include more than images of men performing sexual acts with each other. Even a photograph of a naked man alone, if he is presented in circumstances that suggest sexual availability, can have a liberatory effect. Seeing such photographs, a gay teenager who had thought himself "the only one," see text accompanying note 1 *supra*, would realize that there were others out there with sexual feelings for men: indeed, enough of them to create a market for such photographs.

Lest one assume that photographs of naked solitary persons are too benign to be threatened by the feminists' attack on pornography, recall that feminist antipornography advocates implicate magazines like *Playboy* no less than "violent" pornography in the subordination of women and maintenance of gender hierarchy. See note 19 *supra*.

131. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Supreme Court considered a 1st Amendment challenge to a Federal Bureau of Prisons regulation that served to bar prison inmates from receiving explicit gay male pornographic magazines. The Court upheld the ban, echoing the ban's defenders by noting that an inmate's receipt of gay pornography would identify him as gay and thus mark him as a target for sexual assault. *Id.* at 412-13. But this rationale hardly persuades, inasmuch as the Bureau's regulation permitted the receipt of nonsexual gay periodicals, which would likewise reveal the recipient's sexual orientation. *Id.* at 406 n.6. The disingenuousness of the proffered rationale underscores the Court's and the Bureau's tacit acknowledgment of the distinctive power of explicit sexual imagery.

132. "On roll call votes on the gay issue I twice voted against homosexuals['] receiving equality of treatment under the law that all American citizens deserve." ROBERT E. BAUMAN, *THE GENTLEMAN FROM MARYLAND: THE CONSCIENCE OF A GAY CONSERVATIVE* 196 (1986).

133. *Id.* at 198.

134. Elizabeth Kastor, *The Cautious Closet of the Gay Conservative*, WASH. POST, May 11, 1987, at B1; Ron Shaffer, *Citizens' Groups Declare War on Bars Serving Minors*, WASH. POST, Oct. 30, 1980, at DC2.

B. *Adolescents' Access to Pornography*

The argument that pornography fosters gay sexual integrity rests in part on the controversial assumption that teenagers have access to pornography.¹³⁵ The United States Supreme Court has construed the First Amendment to allow greater regulation of protected speech when directed at minors than when directed at adults,¹³⁶ but the two reasons the Court offered in support of its decision restricting minors' access to certain speech seem peculiarly bankrupt in the context of gay adolescence. First, the Court declared that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."¹³⁷ Experience, however, cautions against assuming that parental authority of heterosexual parents over their gay sons and lesbian daughters is necessarily wholesome.¹³⁸ Second, the Court noted that "[t]he State also has an independent interest in the well-being of its youth."¹³⁹ More specifically, it has an interest in seeing "that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" ¹⁴⁰ Yet the Court's decision, by isolating gay adolescents from affirming explicit acknowledgments of gay sexuality, prevents the very "growth into free and independent" spirits that the Court sought to foster. Although special restrictions on minors' access to pornography may be constitutional, they are not necessarily beneficial. Or, indeed, effective. That teenagers are expected to have access to pornography was conceded frankly by Larry Baron in his empirical study of the relation between pornography and gender equality:¹⁴¹ Baron's "sex magazine circulation index" measures magazine "circulation per 100 Males Age 15+."¹⁴²

Minors are not a monolithic group. They do have First Amendment rights,¹⁴³ and it is reasonable to suppose that older minors merit access to more

135. I do not refer to pornography in whose creation adolescents participate. On the contrary, only pornography representing adults is likely to have the salutary effects I have described. Because teenagers often hear homosexuality disparaged as an adolescent "phase," pornography presenting teenage models would reinforce that debilitating misrepresentation. Adult pornography, on the other hand, enables teenagers to see gay sexuality as a permanent alternative to heterosexuality: an alternative that offers them the prospect of a healthy, integrated sexuality throughout their lives.

136. *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a New York law banning the sale of pornography to minors). Ten years later, the Court, relying on *Ginsberg*, upheld the banning of a radio broadcast of an "indecent" (but not "obscene") George Carlin monologue in part because the afternoon broadcast would be "uniquely accessible to children." *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978). At the time the regulation was promulgated, the FCC defined "children" as minors *under the age of twelve*. See *Action for Children's Television v. FCC*, 11 F.3d 170, 178-79 (D.C. Cir. 1993), *reh'g en banc ordered and judgment vacated*, 15 F.3d 186 (D.C. Cir. 1994).

137. *Ginsberg*, 390 U.S. at 639.

138. See text accompanying notes 101-104 *supra*.

139. *Ginsberg*, 390 U.S. at 640.

140. *Id.* at 640-41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

141. Baron, *supra* note 26.

142. *Id.* at 371.

143. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (upholding the right of public school students to wear armbands in protest of the Vietnam war).

material than younger minors.¹⁴⁴ In striking down a congressionally mandated ban on the broadcast of "indecent" material between the hours of six a.m. and midnight, a ban defended in part on the alleged need to shield unsupervised minors from such material, the Court of Appeals for the District of Columbia Circuit noted the ban's objectionable, and indeed fatal, failure to distinguish between older and younger minors:

While a child's ability to make decisions is presumed to be inferior to an adult's, the capacity for choice does not remain dormant throughout childhood until appearing *ex nihilo* upon the arrival of a person's 18th birthday [T]he confident abrogation of a minor's First Amendment rights by a protective government must proceed by a less rigid line than the legal age of majority.¹⁴⁵

C. Anecdotal Evidence of Pornography's Beneficial Effects

Consider some evidence of pornography's beneficent role in young gay men's¹⁴⁶ achievement of sexual integrity. Although statistical substantiation is unavailable for reasons previously discussed,¹⁴⁷ here are three examples of the considerable anecdotal evidence that exists:

(1) A gay male teenager who worked at a luncheonette described his awakening to an entirely new world.

144. By way of analogy, the law deems older minors (but not younger minors) to possess sufficient judgment and maturity to drive a car, surely an undertaking with more significant risks and externalities than viewing pornography.

145. *Action for Children's Television v. FCC*, 11 F.3d 170, 179-80 (D.C. Cir. 1993), *reh'g en banc ordered and judgment vacated*, 15 F.3d 186 (D.C. Cir. 1994).

146. The role of pornography in the sexual development of bisexual men may be different. A "purely" gay male adolescent (that is, a "Kinsey six," see note 57 *supra*) experiences his gayness in two ways. First, he notices that he does not feel the same attraction to females that his hetero- and bisexual male classmates announce. Second, he notices that he *is* attracted to males. For such an adolescent, whose peers tend to regard sexual acts as a matter of "performance" rather than of intimate connection, the first of these manifestations may be the more alarming. Aaron Fricke, recalling his adolescence, talks about this first manifestation, albeit in lighthearted terms:

The concept of heterosexuality did not immediately sink in. I didn't reject it, I just found it difficult to swallow. *This* was the alternative that had somehow eluded me through my childhood years. *This* was the thing that separated me from the beasts. Could this difference be the origin of all the pressure I was feeling? Surely it didn't have anything to do with me; I had no desire to try any of these heterosexual techniques. It all seemed like just conjecture; I didn't believe it could ever affect *me*.

Reality struck when Bob Cote [a bisexual friend with whom Aaron had a sexual relationship] began to talk about his interesting fantasies involving females. He seemed surprised when I had no comments to add to his discussions and instead stared blankly into space. . . .

Finally, I began questioning Bob about his feelings. He couldn't really answer questions about why and how he had these feelings. My inquiries eventually led him to give me a copy of *Playboy*. I leafed through the magazine, not understanding how anyone but a professional contortionist would take any interest in the pictures. . . . I must have worn the pages thin trying to arouse the interest that I knew I would have felt if the photographs had been of men—but no dice.

AARON FRICKE, REFLECTIONS OF A ROCK LOBSTER 22-23 (1981). A bisexual teenager, on the other hand, does not experience the anxiety of first manifestation. As long as he experiences heterosexual attraction, he may be less alarmed by his homosexual attractions than would a strictly gay teen.

147. See text accompanying notes 26-27 *supra*.

The magazine rack at Nick's was determinedly macho, *Strength and Health* coming about as close as it got to male erotica, assuming steroids turned you on. But recently the distributor had started sending . . . a pocket-size photo mag called *Tomorrow's Man*. Black-and-white pictures of young guys in their twenties, either striking heroic poses on their own or paired with another in a wrestling clench. The studio backdrops were heavy on the satin drapery, with maybe a Greek column to lean against. But what seized the gaze was the state of undress: a pouch of cloth that barely covered the genitals, held in place by an invisible string about the waist, what's called in the trade a "posing strap."

Impossible to describe the hypnotic charge for a fifteen-year-old It wasn't just the beauty of the specimens, ripe but not overmuscled, squeaky clean as surfers. It was an attitude of showing off, a sassy wink of something I'd never seen before. When they were shot from the back, they shucked the strap and posed butt-naked, sometimes almost shaking it in your face. I was staring at men who wanted to be admired. And who clearly got down and did it as soon as the shutter stopped clicking.

It was the first clue I ever had that being queer existed out there in the world, with men as real as the shower parade at school.¹⁴⁸

(2) A Rhode Island teenager who knew he was gay but had not yet acknowledged it to anyone else visited the home of an openly gay teenager. It was gay pornography—not gay journalism—that gave the author the opportunity to come out to his friend.

In school one day, after I had known Paul for several weeks, he invited me over to his house. Paul was a little nervous when I arrived that evening. His parents were not home, and he asked if I would like to see some homosexual pornography. My blood pressure skyrocketed. I nodded and tried to conceal my enthusiasm as Paul pulled some periodicals from his dresser drawer. The first magazine he pulled out was not pornography; it was the *Gay Community News* from Boston, a newspaper that includes literature and play and movie reviews, so it was of some interest to me. But it must have been obvious to Paul that I was anxious to see some smut. He pulled out a few magazines that could satisfy my curiosity.

At this point, my hands were so sweaty they were sticking to the pages as I crept through each magazine. I suddenly realized how ridiculous this was. I had gone beyond the point of being dishonest; I was being farcical. A one-man situation comedy. It was time to save my integrity, so I turned to a now-smirking Paul and said, "If you haven't guessed, I'm gay, too."¹⁴⁹

(3) A final example describes the feelings of a high school student in the small town of Amethyst, Texas, when he first encountered the word "homosexuality" in a lurid article in *Cosmopolitan*.

Cosmo set me searching for more tawdry glimpses into a world of possibilities that seemed very remote from Amethyst. The information I could get from books was fragmentary, contradictory, and always tainted with condescension and squeamishness—clinical disdain in something called *A Marriage Manual* among my mother's books, vicious jokes in Dr. Reuben's *Everything You Al-*

148. PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY* 82-83 (1992).

149. FRICKE, *supra* note 146, at 43.

ways *Wanted to Know About Sex*, the lurid cover painting of two nude men on a paperback edition of Mishima's *Forbidden Colors* in a catalogue of paperbacks.

Then, from a convenience store in a town thirty miles away that sold liquor to underage customers as well as porn paperbacks, I acquired a copy of a novel called *Pretty Boys Must Die*. It satisfied my curiosity about what homosexuals did in a way that the *Britannica* had not. I was excited out of my mind. Next came *The Corporal's Boy*, and then *Military Chicken*. As a sophisticated reader, I knew there must be a difference between pornography and real life, just as there was a difference between Middle Earth [the mythical land where J.R.R. Tolkien's *Lord of the Rings* novels take place] and Dallas, but I also knew that somewhere out there, beyond Amethyst, someone had to be doing something remotely like what leather hustler Riley Jacks did to naive young David (the "Pretty Boy") for it to have ended up in a book. I was ready¹⁵⁰

V. WHY THE FEMINIST ANTIPORNOGRAPHY ARGUMENT THREATENS GAY MALE PORNOGRAPHY

If the feminist antipornography argument were confined to heterosexual pornography, there would be no need for this article: No need to praise gay male pornography when the traditional liberal defense would serve.¹⁵¹ But the climate of opinion the antipornography feminists have created and the language of the debate they have engendered suggest that the feminist indictment extends to gay male pornography as well. In this Part I address the injustice of such a blanket indictment.

A. *The Failure To Distinguish Between Women and Gay Men*

Many feminist antipornography advocates conflate the female experience with the gay male experience, treating gay men as just another form of wo-

150. Michael Bronski, *Cambridge, Massachusetts*, in *HOMETOWNS: GAY MEN WRITE ABOUT WHERE THEY BELONG* 173, 174-75 (John Preston ed., 1991).

151. Whether and to what extent the feminist antipornography argument should apply to lesbian pornography is a question that ought to be addressed—in the first instance, at least—by lesbian scholars. See text accompanying notes 43-44 *supra*.

Chris Bearchell, a Canadian lesbian activist, has offered her own story as one illustration of the role pornography can play in a lesbian's coming out.

My erotica "habit" began when I was coming out in a small Canadian city in the late '60s. It was hard admitting that I was sexually attracted to other women, but it got a lot easier when I saw pictures of women having sex.

I squirrelled away copies of soft-core men's magazines and eventually coffee-table books with "lesbian spreads" in them. I was vaguely disappointed by the lack of authenticity in much of what I saw, and by the meagreness of my collection, but I never gave up hope of finding more and better (juicier) images.

Eventually, I moved to the big city—Toronto—and grew from a baby dyke into a gay activist and journalist.

Then, what seemed to be a miracle happened. Largely fuelled by the feminist sex debates, lesbians began to make and distribute sexual imagery of our own. My mood went from barely hopeful to downright enthusiastic.

Chris Bearchell, *Gay Porn Is Getting Skinned Alive*, *TORONTO STAR*, Jan. 15, 1993, at A23.

men¹⁵² and gay sex as just another form of vaginal coitus, very much as traditional homophobes regard a man who has sex with another man as somehow feminized by the experience. *Leviticus* makes the same reductionist error when it condemns the "abomination" of "[l]ying] with mankind as with woman-kind,"¹⁵³ but it is the feminist forms of this error that concern us here.

Perhaps the most important victory that antipornography feminists have won to date has been the Canadian Supreme Court's decision, in *Regina v. Butler*,¹⁵⁴ upholding Canada's antiobscenity statute¹⁵⁵ against a challenge that it violated the Canadian constitution's Charter of Rights and Responsibilities.¹⁵⁶ The Court upheld the statute on the feminist ground that pornography is a form of hate speech¹⁵⁷ that perpetuates a gender hierarchy that subordinates and degrades women,¹⁵⁸ not on the traditional conservative-moralist¹⁵⁹ ground that pornography breeds immorality.¹⁶⁰ Shortly after the *Butler* decision was announced, Kathleen E. Mahoney, who had represented the Women's Legal Education and Action Fund (LEAF), a feminist law reform organization, as an intervenor in *Butler*, exultantly explained LEAF's successful strategy:

How did we do it? We showed them the porn—and among the seized videos were some horrifically violent and degrading gay movies. We made the point that *the abused men in these films were being treated like women*—and the judges got it. Otherwise, men can't put themselves in our shoes.¹⁶¹

152. See text accompanying note 189 *infra*.

Sometimes this conflation is not so much callous as naive. Referring to a notorious pornographic film featuring heterosexual fellatio, Catharine MacKinnon said, "[B]efore 'Linda Lovelace' was seen performing deep throat, no one had ever seen it being done in that way, largely because *it cannot be done without hypnosis* to repress the natural gag response." MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 181 (emphasis added). Professor MacKinnon either exaggerates human dimensions or underestimates human perseverance.

153. *Leviticus* 18:22.

154. 89 D.L.R.4th 449 (1992).

155. Section 163 of Canada's Code prohibits the distribution or circulation of "obscene" matter. It states that "[f]or the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." Criminal Code, R.S.C., ch. C-46, § 163(1)(a), (8).

156.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . .

CAN. CONST. (Constitution Act, 1982) pt. 1, §§ 1, 2(b).

157. 89 D.L.R.4th at 479, 482.

158. *Id.* at 470-71, 477. The Court divided pornography into three categories: "(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing." *Id.* at 470.

159. See text accompanying notes 13-15 *supra*.

160. 89 D.L.R.4th at 476.

161. Michele Landsberg, *Canada: Antipornography Breakthrough in the Law*, MS., May/June, 1992, at 14, 14 (quoting Mahoney) (emphasis added). For a vigorous criticism of this use of S/M pornography, see note 214 *infra*.

Professor Mahoney's tactics were indisputably shrewd; she successfully engaged the judges' sexual prejudices to elicit from them the desired repugnance for heterosexual pornography.¹⁶² But the accuracy of her descriptions must be challenged. The men in the gay pornographic films were not being treated like women; they were being treated like gay men. In part, Professor Mahoney's claim is insulting because it marginalizes gay men by denying the uniqueness of their experience. And in part, the claim is simply erroneous and misrepresents the content and message of gay pornography. A woman brings to any sexual encounter with a man the experience of having been a member, since birth, of the subordinated gender. A gay man does not share that background; he is aware of his maleness (and the privileges it brings) before he becomes aware of his gayness. For women, consequently, the conflict between autonomy and intimacy may be more powerful than for gay men.¹⁶³ A heterosexual man brings to any sexual encounter with a woman an internalized sense of gender hierarchy: an innate perception of his sexual partner as his subordinate. Consequently, the heterosexual act can become for the heterosexual man a physical expression of hierarchy and of his privileged position in it. Sexual acts between gay men involve persons of the same station within the hierarchy; each man comprehends that his partner is neither his subordinate nor his superior, so gay sexuality is nonhierarchical in a way that heterosexual sexuality is not.¹⁶⁴ When a heterosexual man speculates about or engages in homosexual sex, he brings with him his internalized sense that sex is hierarchical: One partner (the "man") must dominate and the other (the "woman") must be subordinated by the experience; one partner must win and the other lose, hence heterosexual men's insistence on the roles of "pitcher" and "catcher."¹⁶⁵ Professor Mahoney, when she invited the *Butler* judges to "imagine how you would feel if this happened to you," correctly supposed that those judges would

162. My assumption, perhaps unwarranted, is that the male judges in *Butler* were heterosexual.

163. "[W]omen suffer in ways that men do not . . ." West, *supra* note 39, at 81-82.

164. This is not to say that gay men cannot be sexist: merely that their sexism does not inhere in their sexuality.

165.

A colleague remarked to me that the major failing of [my book] *Christianity, Social Tolerance, and Homosexuality* was its lack of reference to "catchers" and "pitchers." People are not really disturbed, he noted, simply by same-gender sexuality; it is the fact of a man's being a "catcher" that bothers everyone, in all societies, because it makes a man "effeminate." "Catchers" and "pitchers" is prison slang, referring to the parties in homosexual encounters who pass (the pitcher) or receive (the catcher) semen. It is "catching," he argued, that is "abnormal" and troubling to people, not the fact of males being sexually interested in each other.

My colleague's point reveals more than he intended. The majority of the prison population is heterosexual. Most heterosexual males regard "pitching" as normal sexual activity, and would consider it degrading if they had to "catch." In prisons and jails, moreover, many men are in fact forced to "catch" against their wills, and it is degrading and offensive to them. But in the population at large, especially in tolerant societies, many men "catch" because they wish to do so and find it satisfying, and those who "pitch" to them presumably value them in part for the complementarity of the relationship. Moreover, a large percentage of gay men enjoy both roles . . .

Boswell, *supra* note 114, at 224-25; cf. MOHR, *supra* note 43, at 26 ("[I]n many cultures with overweening gender-identified social roles (like prisons, truckstops, the armed forces, Latin America, and the Islamic world) only passive partners in male couplings are derided as homosexual.").

view the gay pornography through heterosexuality's hierarchical lens and be receptive to her suggestion that one of the gay participants was experiencing the kind of subordination that no real man (and therefore, argued Mahoney, no woman) ought to endure. But by suggesting that the gay men in the film were "being treated like women" (that is, experiencing what women would experience), she committed that marginalizing error of conflation. Professor MacKinnon, in her introduction to *Feminism Unmodified*, states that the "methodological secret" of feminism "is that feminism is built on believing women's accounts of sexual use and abuse by men."¹⁶⁶ Gay men's accounts of their own sexuality and their own pornography are entitled to no less belief.

Many feminist antipornography advocates take the extreme position that the act of penetration is necessarily an act of subordination.¹⁶⁷ Andrea Dworkin, for example, has asserted that "[i]ntercourse remains . . . *the* means of physiologically making a woman inferior"¹⁶⁸ and she airily extends her critique to gay male sex, using almost the very words of *Leviticus*: "In sodomy, men can be used as women are used."¹⁶⁹ Moreover, according to Dworkin, "Fucking requires that the male act on one who has less power . . . the one who is fucked is stigmatized as feminine during the act even when not anatomically female."¹⁷⁰ The feminist critics have argued forcefully that the significance of vaginal penetration cannot be assessed by viewing it merely as a physical act divorced

166. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 5.

167.

Embedded in [the feminist antipornography] view are several . . . familiar themes: that sex is degrading to women, but not to men; that men are raving beasts; that sex is dangerous for women; that sexuality is male, not female; that women are victims, not sexual actors; that men inflict "it" on women; that penetration is submission; that heterosexual sexuality, rather than the institution of heterosexuality, is sexist.

Lisa Duggan, Nan Hunter & Carole S. Vance, *False Promises: Feminist-Antipornography Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP*, *supra* note 27, at 142-43.

168. ANDREA DWORKIN, *INTERCOURSE* 137 (1987) (emphasis added).

169. DWORKIN, *supra* note 168, at 156. On another occasion, Dworkin does recognize that gay male sex differs from heterosexual sex in that the former does not deprive the "submissive" partner of the power he enjoys in the nonsexual sphere: "[I]n no sense is the beloved [in a gay sexual encounter] annihilated. His virility continues to animate his own behavior, either in relation to others or in the sphere of social power." DWORKIN, *PORNOGRAPHY*, *supra* note 7, at 43. Yet, she then turns her back on this insight and asserts that gay male pornography objectifies women just as heterosexual pornography does:

Without the presence of the female, masculinity cannot be realized, even among men who exclusively want each other; so the female is conjured up, not just to haunt or threaten, but to confirm the real superiority of the male in the mind of the reader. . . . The feminine or references to women in male homosexual pornography clarify for the male that the significance of the penis cannot be compromised, no matter what words are used to describe his (temporary) position or state of mind. . . .

. . . [S]uperiority means power and in male terms power is sexually exciting. In pornography, the homosexual male, like the heterosexual male, is encouraged to experience and enjoy his sexual superiority over women.

Id. at 44-45. This latter statement profoundly misapprehends gay men's experience of their masculinity. Conceivably, heterosexual men, whose experience of masculinity differs from gay men's, might derive from gay pornography, if they were exposed to it, the kind of misogynistic message that Dworkin describes. See text accompanying notes 162-165 *supra*. But heterosexual men tend not to consume gay male pornography. At issue here is gay men's response to gay pornography, and that response is not as Dworkin describes.

170. DWORKIN, *PORNOGRAPHY*, *supra* note 7, at 23.

from the gendered context in which men and women have been conditioned to relate to each other. Sadly, these critics fail to extend that insight to male-male penetration; instead, their comments suggest the erroneous view that penetration is penetration and that two gay men having sex with each other must necessarily be aping the sexist heterosexual norm.¹⁷¹ In fact, studies reveal that gay male relationships involve less gender role playing than the relationships of heterosexual couples.¹⁷²

This erroneous view that gay men respond and are treated like women in a sexual interaction—or that, in any gay sexual encounter, one partner must necessarily play “the man” and the other “the woman”—is merely one manifestation of a larger and more pervasive error, what one commentator has called the “cross-gender stereotype”: the belief that gay men display the characteristics and experience the reactions of women and that lesbians act and respond like men.¹⁷³ In the years after World War I, psychoanalysis

linked proper sexual development to notions of femininity and masculinity. As a result, homosexuality became associated with “mannishness” in women and effeminacy in men as descriptions of both physical appearance and personality. The medical profession contributed to a popular stereotype of gay men and women as generally exhibiting the characteristics of the opposite sex.¹⁷⁴

The cross-gender stereotype enjoys considerable popularity as a tool for mocking and subordinating gay people. In the 1961 film *A Pocketful of Miracles*, for instance, Bette Davis, playing the down-and-out Apple Annie, waits to have a complete Cinderella makeover so she can present herself as a rich matron to her daughter’s fiancée.¹⁷⁵ Glenn Ford, as Annie’s friend, has assembled a crew of professionals to work this transformation. As the crew stride into the hotel room with Annie to perform the eponymous miracle, Ford notices that one of the crew is a man, a somewhat prissy and affected one. “He can’t go in there,” protests Ford, presumably because of the impropriety of allowing a male to be present when Bette Davis will be undressing. “Believe me, it’s all right,” says one of the women while making a faint limp-wristed gesture, implying that a gay man does not really count as male.¹⁷⁶

The cross-gender stereotype hurts women as well as men. The discharge rate under the military’s antigay policy has been substantially higher for lesbi-

171. Indeed, a gay male feminist critic of pornography seems to share this view that heterosexual gender hierarchy animates gay sexual penetration. “[W]hile your anatomy might allow you to take turns at being the person who ultimately penetrates, the fact remains that in order to do so, you must assume certain acts, practices, and attitudes, all of which are the very source of inequality and non-mutuality.” Kendall, *supra* note 2, at 47. I am not sure what Kendall means by “in order to do so.”

172. Jeanne Marecek, Stephen E. Finn & Mona Cardell, *Gender Roles in the Relationships of Lesbians and Gay Men*, 8 J. HOMOSEXUALITY 45, 46 (1982); see also DAVID P. McWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 231 (1984).

173. Fajer, *supra* note 63, at 607-08.

174. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 17 (1983).

175. *A POCKETFUL OF MIRACLES* (Columbia Pictures 1961).

176. That treating this presumed gay man as a woman should be regarded as an insult is a telling illustration of the link between homophobia and misogyny. See text accompanying notes 227-239 *infra*. After all, if being a woman were not considered a degraded state, would calling a gay man “effeminate” be insulting?

ans than for gay men,¹⁷⁷ in part because when charges of homosexuality are leveled against a soldier or sailor who presumably exhibits such prized military qualities as assertiveness and physical strength, the charges are more readily believed when the target is a woman.¹⁷⁸

[C]harges of lesbianism are most often directed at servicewomen who work in traditional "men's jobs," servicewomen who are assertive and in good shape . . . and especially servicewomen who rebuff the sexual advances of servicemen. Servicewomen know this, and the threat of investigation serves as a way for some servicemen to harass them and put them down.¹⁷⁹

B. *The Particular Threat to Gay Pornography*

The feminist antipornography campaign touches gays and lesbians more than heterosexuals.¹⁸⁰ First, as we have seen, the campaign strengthens political groups that may be expected to be overtly hostile to the aspirations of gays and lesbians.¹⁸¹ It not only lends credence to their position, it furthers their agenda by imperiling the dissemination of sexual information. As long as pornography remains unsuppressed, even homophobia will not altogether suppress gay self-realization because the marketplace will assure gay men access to stimulating images of gay sexuality. The gay pornography market

has become a guarantee, at least until legal equality is won, that the existence of sexual minorities and their struggle for sexual rights remain in the realm of public visibility. More often than not, the first to suffer from any moral regulation of the sexual marketplace are those sexual minorities who survive, for lack of civil legitimacy, on its margins¹⁸²

177. See GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS 84 (Kate Dyer ed., 1990). Indeed, in the Marine Corps, the rate of discharge on grounds of homosexuality is eight times as high for women as for men. *Id.*

178. See Eskridge, *supra* note 66, at 350-51.

179. *Id.* at 350 (footnotes omitted). "[Thus,] assertiveness and failure to conform to gendered stereotypes is punished by lesbian-baiting, whether the victim is or is not in fact a lesbian." *Id.* at 350 n.85 (citing Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 216 (1990)).

180. A commentator on the *Butler* case noted that the case "allow[ed] restrictions on violent and degrading pornography, while leaving the category of 'erotica' untouched. 'But one of the first things they did under the act was raid a lesbian and gay bookstore.'" Goldberg, *supra* note 48, at 1 (quoting ACLU president Nadine Strossen). For substantiation of the claim that a gay and lesbian bookstore was "one of the first" targets, see Bearchell, *supra* note 151, at A23.

181. In Suffolk County, New York, for instance, an antipornography statute based on a model antipornography law crafted by Catharine MacKinnon and Andrea Dworkin, *see* text accompanying notes 186-189 *infra*, was "put forward by a conservative anti-ERA male legislator who wishe[d] to 'restore ladies to what they used to be.'" Duggan et al., *supra* note 167, at 133 (quoting the legislator). The statute "emphasized its conservative potential—pornography was said to cause 'sodomy' and 'disruption' of the family unit, in addition to rape, incest, exploitation and other acts 'inimical to the public good.'" *Id.* Note that homosexuality is one of the targets of the antipornography feminists' allies. *See* text accompanying note 2 *supra*; *see also* Strossen, *supra* note 36, at 1143-47.

182. ANDREW ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE 189 (1989), *quoted in* Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 897 n.102 (1992).

A general campaign against sexual imagery, a campaign in which the radical right has joined enthusiastically, jeopardizes this access and is bound to have a disparate impact on gay men.

[T]he obligation to secrecy is radically inequitable in its application against gays. Sometimes the inequality is blatant, as when only signs of heterosexual behavior are socially or legally allowed, like public kissing. Sometimes it is more subtle, as when seemingly neutral pressures not to talk of *any* sexual matters have a radically disparate impact against gays. Since social institutions are already tooled to promote heterosexuality, any general bar to discussing sexual matters simply further entrenches the dominant culture.¹⁸³

Second, and perhaps more important, the feminists' argument sets forth a rigid model of what constitutes "correct" and "incorrect" sexual interactions.¹⁸⁴ If society accepts that model and restricts permissible sexual images according to that vision, gays and lesbians are likely to feel the lash disproportionately.¹⁸⁵

Dworkin and MacKinnon codified their views in a model antipornography law that condemns as actionable sex discrimination the production, sale, exhibition, or distribution of pornography.¹⁸⁶ The statute defines pornography as "the graphic sexually explicit subordination of women through pictures and/or words,"¹⁸⁷ where the materials in question also present one or more of nine elements listed in the statute:

(i) women are presented dehumanized as sexual objects, things, or commodities; . . . or (iv) women are presented as sexual objects tied up . . . ; or (v) women are presented in postures or positions of sexual submission, servility, or display; . . . or (ix) women are presented in scenarios of degradation, injury, torture . . . in a context that makes these conditions sexual.¹⁸⁸

Most tellingly for our purposes, the statute then states, "The use of men . . . in the place of women in [the above-described materials] is pornography for pur-

183. MOHR, *supra* note 43, at 100.

184. Some feminist antipornography commentators call for a utopian, disembodied sexuality without concrete acknowledgment of gender. Andrea Dworkin, for example, has written:

Any sexual coming together which is genuinely pansexual and role-free, even if between men and women as we generally think of them (i.e., the biological images we have of them), is authentic and androgynous. Specifically, *androgynous fucking requires the destruction of all conventional role-playing, of genital sexuality as the primary focus and value, of couple formations, and of the personality structures dominant-active ("male") and submissive-passive ("female")*.

ANDREA DWORKIN, WOMAN HATING 184-85 (1974).

185. "Censorship of 'pornography,' defined by Dworkin and MacKinnon as the sexually explicit depiction of women's 'subordination,' necessarily vests in government officials the power to impose on others their views about what forms of sexuality are politically or morally correct." Strossen, *supra* note 36, at 1144.

186. The text of this model statute is set forth as an appendix to Dworkin, *Male Flood*, *supra* note 7, at 24-28.

In 1983 and 1984, the City Council of Minneapolis passed a similar ordinance drafted by MacKinnon and Dworkin, but it was vetoed on two occasions by Mayor Donald Fraser. *Id.* at 13 (ed. note). The Indianapolis City Council passed a similar ordinance in 1984, but it was declared unconstitutional by the United States Supreme Court. *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986), *summarily aff'g* 771 F.2d 323 (7th Cir. 1985).

187. Dworkin, *Male Flood*, *supra* note 7, at 25.

188. *Id.*

poses of this law.”¹⁸⁹ This last provision represents a surprising embrace of liberalism’s gender-blind universalism and a retreat from feminism’s gender-conscious particularism.¹⁹⁰ It was liberalism’s gender-blindness that prompted the United States Supreme Court to hold in *General Electric Co. v. Gilbert* that an employer’s refusal to include pregnancy benefits in its disability benefit plan was not prohibited sex discrimination¹⁹¹ because the plan denied such benefits to pregnant men as well as to pregnant women.¹⁹² The MacKinnon-Dworkin statute’s failure to acknowledge gender difference should be as unwelcome to feminists as to gay men.

The MacKinnon-Dworkin statute is notably vague and overbroad. Consider first the application of the statutory language to a specific case of heterosexual pornography: imagine a photograph of a woman lying on her back while performing fellatio on a man who is propping himself up above her. Does the photograph present the woman in a “position of sexual submission”? Certainly she is “submitting” to performing fellatio, but if that constitutes sexual submission as defined in section (1)(v) so would every act of oral penetration. Let us consider a narrower construction. Does the woman’s “submission” consist in her lying *beneath* the man in the photograph? That interpretation would trivialize the statute by suggesting that the acceptability of fellatio depends upon which partner is supine. Suppose we define “submission” more broadly, holding that the woman’s allowing herself to be so photographed constitutes her “submission.” Under that definition, what explicit photograph would not manifest submission? The effect of the statute thus turns on how one defines subordination, and the drafters of the statute have, on other occasions, defined that term very broadly indeed.¹⁹³

189. *Id.*

190. It has been asserted that the drafters of the model statute intended this provision to serve a very narrow purpose: “[W]ithout it, pornographers could circumvent the ordinance by producing the exact same material using models other than adult biological females, i.e., men, children, and transsexuals, to portray women.” Appellants’ Brief at 45, *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff’d summarily*, 475 U.S. 1001 (1986). I take that statement as a claim that the drafters were targeting only materials presenting men (or children or transsexuals) so disguised as to persuade the consumer that he was looking at biological women. If such material were all the provision affected, it would be of no interest. In fact, however, the drafters’ words go considerably beyond this claimed intent, as the reactions of other commentators demonstrate. See, e.g., Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 298 n.8 (1988) (“MacKinnon and Dworkin are chiefly concerned with the nature of the female social role [T]o the extent [that the role is] filled by persons other than women, the claim that the role is in fact that of the female gender becomes problematic.”). The remarks the drafters have made on other occasions likewise invite a broader reading. See, e.g., text accompanying notes 168-169 *supra*.

191. The specific statute involved was the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988).

192. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976) (noting that the benefit plan “covers exactly the same categories of risk [for men and women], and is facially nondiscriminatory in the sense that ‘[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.’”) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

193. See, e.g., note 19 *supra* (quoting comments of MacKinnon regarding *Playboy* magazine).

To understand how the courts might apply such a law, let us consider the analysis used in the *Butler* decision,¹⁹⁴ which gave judicial approval under Canadian law to the MacKinnon-Dworkin analysis (though not to their model statute, which was not involved in the case). The Canadian Supreme Court divided pornography into three categories,¹⁹⁵ and it is the second that concerns us: "explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing"¹⁹⁶ Such pornography, said the Court, may be banned if the risk of "harm" from exposure to such material is "substantial."¹⁹⁷ "Harm in this context," it continued, "means that [the material] predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning."¹⁹⁸

Let us now apply the *Butler* ruling to the photograph of heterosexual fellatio. Is this photograph degrading and dehumanizing? If so, why? Because fellatio is an inherently degrading act? I doubt that judges, most of whom are male, could be persuaded to make such a sweeping condemnation of oral sex. Is it degrading because the woman has permitted herself to be photographed? Again, if that were the proper analysis, no sexually explicit photograph could fail to be degrading.

Now let us apply the *Butler* standard to gay pornography. Suppose that the photograph of fellatio shows two men instead of a man and a woman. Judges may be presumed more likely to regard homosexual fellatio as "degrading" than heterosexual fellatio.¹⁹⁹ Of course, under the *Butler* standard, degrading pornography cannot be banned unless it also causes "harm."²⁰⁰ Well, under the *Butler* definition, has society "formally recognized" homosexual fellatio to be "incompatible" with society's "proper functioning"?²⁰¹ The widespread criminalization of consensual private oral and anal sex between adults²⁰² and the leniency of courts toward defendants charged with murdering gay men²⁰³ suggest that an affirmative answer to that question would not be unlikely.

194. *Regina v. Butler*, 89 D.L.R.4th 449 (1992); see text accompanying notes 154-158 *supra*.

195. *Butler*, 89 D.L.R.4th at 470.

196. *Id.*

197. *Id.* at 471.

198. *Id.* at 470-71.

199. In a recent congressional hearing on the question of permitting lesbians and gay men to serve in the armed forces, Senator Strom Thurmond, Republican of South Carolina, shouted, "Heterosexuals don't practice sodomy." *Senators Loudly Debate Gay Ban*, N.Y. TIMES, May 8, 1993, at A9 (quoting Thurmond).

200. See text accompanying note 197 *supra*.

201. These phrases are taken from the *Butler* court's definition of "harm." See text accompanying note 198 *supra*.

202. See notes 204-205 *infra* and accompanying text.

203. Courts have allowed male defendants charged with murdering gay men to use the "homosexual advance defense," a claim that the killing was in "self-defense" against a nonviolent homosexual advance by the victim, or the "homosexual panic defense," a claim that the defendant has latent homosexual tendencies that caused an "extreme and uncontrollably violent reaction when confronted with a [nonviolent] homosexual proposition." *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542-48 (1989); see also Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 82 (1992) (discussing the use of the defense to reduce murder

Five states criminalize homosexual but not heterosexual "sodomy."²⁰⁴ While a larger number of states (seventeen) criminalize both homosexual and heterosexual "sodomy,"²⁰⁵ even these facially neutral statutes may be expected to affect gay sex disparately, not only because of selective enforcement²⁰⁶ but because of the greater relative importance of oral and anal sex to gay people, who do not have the option of vaginal coitus. Moreover, facially neutral sodomy statutes have been construed in a manner that disadvantages gay people. For instance, when the Supreme Court of Rhode Island, in upholding a conviction under that state's sodomy statute,²⁰⁷ announced that "the right of privacy is inapplicable to . . . private unnatural copulation [anal intercourse] between unmarried adults,"²⁰⁸ the court effectively created a marital exemption from enforcement of the sodomy statute: an exemption for which gay people do not qualify.²⁰⁹ Similarly, when faced with a constitutional challenge to a statute

to manslaughter); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992) (same).

204. ARK. CODE ANN. § 5-14-122 (Michie 1987); KAN. STAT. ANN. §§ 21-3501, 21-3505 (1988); MO. ANN. STAT. §§ 566.010, 566.090(1.)(3) (Vernon 1979); MONT. CODE ANN. §§ 45-2-101(20), 45-5-505 (1993); TENN. CODE ANN. §§ 39-13-501(7), -510 (1991). Although "sodomy" is popularly thought to refer to anal rather than oral penetration, all of these statutes treat anal and oral penetration identically.

205. ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1989); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. ANN. CODE art. 27, §§ 553, 554 (1992); MASS. ANN. LAWS. ch. 272, § 34 (Law. Co-op. 1992) (prohibiting anal but not oral sex); MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.338a, 750.338b (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1973); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1995); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie Supp. 1994); see also 10 U.S.C. § 925 (1988) (Uniform Code of Military Justice).

In addition to its original statute prohibiting the "crime against nature," MICH. COMP. LAWS ANN. § 750.158 (West 1991), the State of Michigan has enacted three statutes prohibiting "gross indecency." *Id.* §§ -338, -338a, -338b. Although the original statute does not distinguish between genders, the more recent statutes do. Section 750.338 prohibits gross indecency between men, § 750.338a between women, and § 750.338b between a man and a woman. The need for three different "gross indecency" statutes is unclear, since the prescribed penalties under all three are identical.

206.

Where sodomy statutes apply to both homosexual and heterosexual behavior, patterns of law enforcement differ depending on the gender of those accused. Prosecution of two people of the same sex is ordinarily triggered by an undercover officer. Police do not patrol singles bars in search of adults willing to engage in heterosexual sodomy. Where heterosexual sodomy is a crime, it is apt to be prosecuted as a lesser included charge against a man accused of rape or aggravated assault.

Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 189 (footnotes omitted).

207. R.I. GEN. LAWS § 11-10-1 (1981).

208. *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980).

209. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that the state's prohibition of same-sex marriage does not violate the state constitution); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding that the state's failure to provide for same-sex marriages does not raise "constitutional issues"); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (finding that state prohibition of same-sex marriages does not violate the federal constitution), *appeal dismissed*, 409 U.S. 810 (1972). But see *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (holding that a statute restricting marriage to different-sex couples may violate state constitutional equal protection principles and remanding the case to the lower court to apply "strict scrutiny" analysis to evaluate the equal protection claim). In response to *Baehr*, the Hawaii legislature passed a bill banning same-sex marriages which was signed into law by Hawaii's governor on June 22, 1994. *Hawaii: Gay Marriages Banned*, NAT'L L.J., July 4,

criminalizing “unnatural or perverted sexual practice[s],”²¹⁰ Maryland’s highest court—hoping, by means of a narrow construction, to keep the statute within constitutional bounds—held that the statute did not apply to “noncommercial, heterosexual acts between consenting adults in the privacy of the home.”²¹¹ Thus, if a court were to evaluate pornography under the *Butler* test and look to state criminal law for guidance as to what conduct had been “formally recognize[d] as incompatible with [the] proper functioning [of society],” gay pornography would stand in particular jeopardy.

VI. IS THERE “BAD” GAY PORNOGRAPHY?

A. Child Pornography

Many years ago, I heard a group of friends discussing the approaching marriage of a white woman we knew to an African-American man we had heard about. One of the friends recited a list of the prospective bridegroom’s intellectual accomplishments and then remarked, “He’d be a good catch even if he were green or purple.” This intended compliment bore an insult at its core. It suggested that whiteness was the standard and that being black was merely one of several ways of deviating from that standard.

In his 1960 play *The Best Man*, Gore Vidal put a similar condescending insult into the mouth of one of his characters, an insult more closely linked to the topic under discussion here. Conferring with an ally about rumors of a political opponent’s homosexuality, the character remarks: “Bill, I, like you, am a tolerant man. I *personally* do not care if Joe Cantwell enjoys deflowering sheep by the light of a full moon.”²¹² To treat homosexuality as just another of those aberrant sexual behaviors, like bestiality or necrophilia or pedophilia, utterly misconceives homosexuality. This misconception is especially dangerous given the popular homophobic canard that gay men are child molesters by nature.²¹³ Being gay is closer to being heterosexual than to being sexually drawn to quadrupeds or eight-year-olds. I am not going to discuss child pornography.

1994, at A8. But inasmuch as the prior law considered in *Baehr* likewise restricted marriage to different-sex couples, the new law changed nothing and cured no “equal protection” infirmities.

210. MD. ANN. CODE art. 27, § 554 (1992).

211. *Schochet v. State*, 580 A.2d 176, 184 (Md. 1990) (emphasis added). The Maryland statute in question provides:

Every person who is convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined . . . or . . . imprisoned.

MD. ANN. CODE art. 27, § 554 (1992). Because the sexual act at issue in *Schochet* was fellatio, it is curious that the indictment referred only to the vague “unnatural or perverted sexual practice[s]” language of the statute rather than the specific “placing . . . in the mouth” language, for the latter was clearly applicable and less vulnerable to challenge on vagueness grounds. See *Schochet*, 580 A.2d at 178.

212. Gore Vidal, *The Best Man* (1960), in *BEST AMERICAN PLAYS* (1957-1963) 635, 657 (John Gassner ed., 1963).

213. One study showed, in fact, that heterosexual men are more aroused physically by pictures of female children than are gay men by pictures of male children. Kurt Freund, Ron Langevin, Stephen Cibiri & Yaroslav Zajac, *Heterosexual Aversion in Homosexual Males*, 122 BRIT. J. PSYCHIATRY 163,

B. *Sadomasochistic Pornography*

We are in what appears to be a subway station in San Francisco. Suddenly, the ground begins to vibrate violently. Roaring noises surround us. Walls crack, electrical cables explode first in sparks, then in flames, and a subway train, out of control, threatens to crush us to a pulp. We scream with delight, enjoying a thrilling *frisson* of fear here in the utterly safe, controlled environment of the *Earthquake* attraction at the Universal Studios Hollywood theme park. We admire the skill and assurance of the theme park's masterly technical wizards, we trust them to keep us safe from injury, and we are confident that if the special effects become too intense for us, we can always reach for the discreetly marked emergency exit and find our way to more familiar terrain.

Sadomasochistic (S/M) images, like flaming electrical cables, are highly contextual.²¹⁴ To the untutored eye, a photograph or film of an S/M encounter does seem to present a case of genuine physical abuse. Of course there are couples in which one partner truly terrorizes and controls the other through physical force or threats, but such is not the nature of S/M as understood by those who practice it or are drawn to the possibility of practicing it.²¹⁵ Some S/M couples may experience real bruises (though S/M probably causes far fewer

164 (1973). For a discussion of the relative frequency of child sexual abuse by gay men, see Fajer, *supra* note 63, at 541 ("[T]he vast majority of child abuse incidents involve men abusing girls, and . . . many men who abuse boys self-identify as heterosexual."); A. Nicholas Groth, *Patterns of Sexual Assault against Children and Adolescents*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 3, 4-5 (Ann Wolbert Burgess, A. Nicholas Groth, Lynda Lytle Holmstrom & Suzanne M. Sgroi eds., 1978) ("[T]he belief that homosexuals are particularly attracted to children is completely unsupported by our data. The child offenders [in our sample] who engaged in adult sexual relationships as well were heterosexual. Those offenders who selected underage male victims either have always done so *exclusively* or have regressed from adult *heterosexual* relationships. There were no homosexual, adult-oriented offenders in our sample who turned to children.") (footnote omitted); Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 880-81 (1985) ("Research on the sexual abuse of children . . . shows that offenders are, in disproportionate numbers, *heterosexual* men.").

214.

Feminist anti-pornography ideology has always contained an implied, and sometimes overt, indictment of sado-masochism. . . . All of the early anti-porn slide shows used a highly selective sample of S/M imagery to sell a very flimsy analysis. Taken out of context, such images are often shocking. This shock value was mercilessly exploited to scare audiences into accepting the anti-porn perspective.

A great deal of anti-porn propaganda implies that sado-masochism is the underlying and essential "truth" towards which all pornography tends. Porn is thought to lead to S/M porn which in turn is alleged to lead to rape. This is a just-so story that revitalizes the notion that sex perverts commit sex crimes, not normal people. There is no evidence that the readers of S/M erotica or practicing sado-masochists commit a disproportionate number of sex crimes. Anti-porn literature scapegoats an unpopular sexual minority and its reading material for social problems they [the minority] do not create.

The use of S/M imagery in anti-porn discourse is inflammatory. It implies that the way to make the world safe for women is to get rid of sado-masochism.

Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE & DANGER: EXPLORING FEMALE SEXUALITY*, 267, 298 (Carole S. Vance ed., 1989).

215. One commentator has described a relationship characterized by genuine fear and control, such as battered women may experience, as "lived s&m." But the commentator acknowledges the distinction between a strictly abusive relationship and one in which both partners derive sexual pleasure from the punishment inflicted. Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195, 2218 (1993).

injuries than professional football) while others may merely engage in role-playing "threats" of bruising, but in both cases the "practice will involve specific rules and boundaries, i.e., certain agreed upon times when the activity will occur and specific code words that either partner can utter to bring the activity to an immediate stop."²¹⁶ Fundamentally, it is the "masochist" or "bottom" who controls any S/M encounter through his inherent power to set limits. He can bring the proceedings to a halt by uttering the code word, by physically withholding himself from further contact, or by deflating his partner's assumed authority with a well-timed, "You've got to be kidding!"

S/M is not about domination and submission. It is about trust.²¹⁷ It is about the intimacy and exhilaration that flow from putting (or playing at putting) your body's welfare completely at the disposal of your lover or from having your lover place his body's welfare at your disposal: from relinquishing (or playing at relinquishing) all control over and responsibility for your own actions or from assuming such control and responsibility over a lover's actions. Many men experience an extraordinary erotic and romantic charge from such interactions, and because the resulting eroticism is not focused on the genitals but instead renders the entire body capable of erogenous response,²¹⁸ S/M encounters are among the least "gendered" of sexual interactions.²¹⁹

S/M techniques can also revivify a flagging relationship. Michel Foucault gives the following account of S/M's appeal:

S/M is not a relationship between he (or she) who suffers and he (or she) who inflicts suffering, but between the master and the one on whom he exercises his mastery. What interests the practitioners of S/M is that the relationship is at the same time regulated and open. It resembles a chess game in the sense that one can win and the other lose. The master can lose in the S/M game if he finds he is unable to respond to the needs and trials of his victim. Conversely, the servant can lose if he fails to meet or can't stand meeting the challenge thrown at him by the master. This mixture of rules and openness has the effect of intensifying sexual relations by introducing a perpetual novelty, a perpetual tension and a perpetual uncertainty which the simple consummation of the act lacks.²²⁰

While heterosexual couples undeniably benefit from sexual novelty, gay couples often depend on novelty as a securing force in their relationship. In-

216. *Id.* at 2219. The code words are unlikely to be "no" or "stop," for the pretense of unwillingness often enhances the stimulation of S/M interactions.

217. A popular technique used to develop trust among members of consciousness-raising workshops involves each group member, in turn, falling backwards from a standing position while two other group members stand behind to catch him. The goal of the exercise is to foster feelings of trust among the group members by placing them in a situation where they must rely on each other to prevent physical injury.

218. Michel Foucault extolled S/M for enabling its practitioners "to make of [their] bod[ies] a place for the production of extraordinarily polymorphic pleasures, while simultaneously detaching [them] from a valorization of the genitalia, and particularly of the male genitalia." JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* 269 (1993) (quoting Foucault).

219. It will be recalled that Andrea Dworkin, in describing her vision of a nonexploitative, nonhierarchical sexuality, stated that "genital sexuality" was not its "primary focus and value." See text accompanying note 184 *supra*.

220. Foucault, *supra* note 64, at 20.

deed, many gay male couples have discovered that the introduction of S/M techniques into their sexual repertoire, or the conversion of their sexual interactions into an exclusively S/M pattern, has "saved" their relationships. Heterosexual marriages are cemented by the sentimental but powerful societal blessing, by the financial²²¹ and legal²²² advantages that flow from living in a married state, by the bonds created by shared parental obligations, and by the difficulty of dissolving the marriage. Gay couples cannot rely for security on any of these factors (except, perhaps, children). To the extent our society seeks to encourage enduring, intimate love relationships, we should regard S/M pornography as a beneficial instrument insofar as it may stimulate gay men to try this alternative mode of relating and may educate them about what techniques they might employ.

S/M pornography portraying women presents additional issues since, as we have seen, women's experience of violence and subordination is different from men's.²²³ Consequently, the level of "acceptable violence" may be higher in gay male pornography than in lesbian or heterosexual pornography. Any pain experienced in an S/M encounter arises as part of a ritual established through negotiation, and the pain is consensual where, as in a gay male relationship, the negotiation involves persons of equal sexual bargaining power. Because of women's subordinate place in the gender hierarchy, their consent to such ritual pain might not be freely given. In any event, concerns about violence against women should not serve as pretexts for restricting gay male S/M pornography.

C. *Hierarchical Pornography*

The feminist critics of pornography view pornography as complicit and even instrumental in the construction of a gender hierarchy that subordinates women. Gay male pornography that constructs a hierarchy of sexual orientation can be equally harmful to gay men. Some gay pornography presents heterosexual men as more "masculine" and therefore more desirable than gay men. Some gay pornography portrays heterosexual men sodomizing gay men while ridiculing and vilifying them for being gay. This kind of pornography, rather than nourishing gay sexual integrity (as even S/M pornography can do), perpetuates internalized homophobia and the hierarchy of sexuality that treats gay men as inferior to and justly scorned by heterosexual men. I cannot praise this kind of pornography.

VII. CONCLUSION ON A UTOPIAN NOTE

At present, gay male pornography is a necessary tool in gay men's struggle to attain sexual integrity. A time may come, however, when gay pornography

221. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991) (arguing that lesbian and gay relationships ought to be accorded the same favorable treatment under the Internal Revenue Code as marital relationships).

222. See, e.g., MCCORMICK ON EVIDENCE §§ 78-86 (John William Strong ed., 4th ed. 1992) (discussing the evidentiary privilege accorded "marital communications").

223. See West, *supra* note 39, at 85 (arguing that women's experience of pain differs from men's, and that what women find painful is different from what men find painful).

will not be needed for that purpose. The relative importance of pornography in the gay male imagination results from the suppression of other forms of gay expression: not only artistic expression but *lived* interpersonal expression. In an interview some twelve years ago, Michel Foucault was asked why homosexual writing describes sexual encounters graphically while heterosexual writing describes them reticently and obliquely. Foucault replied that ancient Greek descriptions of homosexual encounters were just as reticent as their descriptions of heterosexual encounters; the suppression of homosexuality in subsequent ages, he said, explains the present difference in the level of reticence.

The experience of heterosexuality, at least since the middle ages, has always consisted of two panels: on the one hand, the panel of courtship in which the man seduces the woman; and, on the other hand, the panel of the sexual act itself. Now the great heterosexual literature of the west has had to do essentially with the panel of amorous courtship, this is, above all, with that which precedes the sexual act. All the work of intellectual and cultural refinement, all the aesthetic elaboration of the west, were aimed at courtship. This is the reason for the relative poverty of literary, cultural, and aesthetic appreciation of the sexual act as such.

In contrast, the modern homosexual experience has no relation at all to courtship. This was not the case in ancient Greece, however. For the Greeks, courtship between men was more important than between men and women. (Think of Socrates and Alcibiades.) But in western Christian culture homosexuality was banished and therefore had to concentrate all its energy on the act of sex itself. Homosexuals were not allowed to elaborate a system of courtship because the cultural expression necessary for such an elaboration was denied them. The wink on the street, the split-second decision to get it on, the speed with which homosexual relations are consummated: all these are products of an interdiction. So when a homosexual culture and literature began to develop it was natural for it to focus on the most ardent and heated aspect of homosexual relations.²²⁴

The eradication of homophobia will not occur in isolation. Rather, it will coincide with the eradication of misogyny, for the two are simply different aspects of the same hatred: hatred of femininity. "Femininity" is a social construction, a classification to which a patriarchal Western culture assigns many of the qualities it deems undesirable. Determinations of undesirability may vary from decade to decade and from society to society, but the stigmatization as "feminine" of those qualities thought to be of subordinate merit remains surprisingly constant.

For example, in nineteenth century Jewish communal life in Eastern Europe, the study of the Torah and the Talmud ranked higher in the hierarchy of human endeavors than the conduct of business.²²⁵ Accordingly, community business life was relegated to women, so that men could devote their waking

224. Foucault, *supra* note 64, at 18.

225. See NAOMI SHEPHERD, A PRICE BELOW RUBIES: JEWISH WOMEN AS REBELS AND RADICALS 43-46 (1993) (describing the limited role women were permitted in religious scholarship). I am indebted to my colleague Linda Hirshman for calling my attention to this fascinating book.

hours to religious study and contemplation.²²⁶ Business competence, thought by our society to be uniquely masculine, was treated as feminine by these communities.

In our society, qualities such as softness, sensitivity, nurturance, cooperativeness, and domesticity are disparaged, while toughness, dispassionateness, aggressiveness, competitiveness, and self-sufficiency are valued and therefore transformed into masculine qualities.²²⁷ So powerful is the need to masculinize²²⁸ these valued qualities that they have become sexualized, "gendered"; as a result, heterosexuality institutionalizes masculinity's dominance and femininity's subordination.

The "infamous crime against nature" is in effect a crime against the presumed nature of people with penises: *They do not get fucked*. That is masculinity's line of defense against gender blending—its bottom line, so to speak—and therein lies the nub of social prejudice that we know as cultural homophobia.²²⁹

Hatred of women and hatred of gay men thus serve as the chief weapons of an embattled masculinity seeking to define itself *in terms of what it is not*.²³⁰ "In the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all the others: don't be a girl."²³¹ Gay men, by conspicuously breaking ranks with heterosexual male solidarity and thereby cracking the armor of gender hierarchy, are viewed as betrayers who must be punished.²³²

Enduring gay coupled relationships particularly threaten the hierarchy by offering an example of committed, stable loving that requires neither procreation nor gender-based subordination. Such relationships offer a model of inti-

226. *Id.* at 5-6 ("Though Jewish tradition excluded women from the scholarly elite, it loaded them with responsibilities which far exceeded those borne by women in the corresponding . . . non-Jewish society. . . . In Eastern Europe in the nineteenth century, women in the Jewish working class formed a quarter of the entire workforce.").

227. Oscar Wilde, in *The Importance of Being Earnest*, blasts received gender wisdom with a fusillade of ironic inversions:

Gwendolen. . . . You have never heard of papa, I suppose?

Cecily. I don't think so.

Gwendolen. Outside the family circle, papa, I am glad to say, is entirely unknown. I think that is quite as it should be. The home seems to me to be the proper sphere for the man. And certainly once a man begins to neglect his domestic duties, he becomes painfully effeminate, does he not? And I don't like that. It makes men so very attractive.

OSCAR WILDE, *The Importance of Being Earnest* (1899), in *THE PLAYS OF OSCAR WILDE* 46, 99 (Modern Library n.d.).

228. For example, Robert Brustein, the drama critic of *The New Republic*, praised Joseph Papp's New York Shakespeare Company in the following gendered terms: "Joseph Papp has built this company into an ensemble comparable to any in the world, a group so virile that it makes the Old Vic look like a collection of Bennington girls doing their junior year field work." ROBERT BRUSTEIN, *O For a Draught . . .*, in *SEASONS OF DISCONTENT: DRAMATIC OPINIONS 1959-1965*, at 224, 225 (1965) [hereinafter *SEASONS*] (review written in 1960).

229. John Stoltenberg, *Gays and the Propornography Movement: Having the Hots for Sex Discrimination*, in *MEN CONFRONT PORNOGRAPHY*, *supra* note 37, at 250.

230. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991).

231. *Id.*

232. SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 18 (1988).

macy with autonomy that confounds and frightens those who speak longingly of "restor[ing] ladies to what they used to be."²³³

[S]ociety seems to find gay love even more threatening than gay sex. The latter society might excuse as an aberrant compulsion but the former is surely a matter of choice that shows a commitment and indicates that the homosexual does not view her or his condition as some sort of permanent flaw. In turn, this choice shows that more usual couplings are not a matter of destiny but of personal responsibility. And *that* society finds scary: the so-called basic unit of society—the family—turns out not to be a unique immutable atom, but can adopt different parts, be adapted to different needs, and even improved.²³⁴

Love and marriage are separable, but misogyny and homophobia go together like a horse and carriage.²³⁵

Misogyny and homophobia are different manifestations of the same evil;²³⁶ the eradication of one means the eradication of the other.²³⁷ If ever there comes a time when gay pornography is no longer necessary for the achievement of a flourishing gay life, it will be a time when heterosexual pornography will no longer threaten women. Pornography may continue to serve the cause of sexual pleasure, but it will no longer serve the cause of sexual hierarchy, for there will no longer be a sexual hierarchy to be served.

233. See Duggan et al., *supra* note 167, at 133 (recounting the debate over an antipornography statute in New York).

234. MOHR, *supra* note 43, at 44.

235. Robert Brustein, the critic who used the word "virile" to compliment an acting company that included Jane White and Barbara Ann Barrie, *see* note 228 *supra*, offered these remarks about gay playwright Edward Albee's dramatization of Carson McCullers' novella *The Ballad of the Sad Cafe*: If [Albee] wants to talk—God save the mark!—about unnatural love, then I suggest he find a less quavering voice than that of Carson McCullers; but if unnatural love is all he wants to talk about, then I suppose any voice will do. At that level of sound, all voices fade into one shrill chorus of self-pitying squeaks.

ROBERT BRUSTEIN, *The Playwright As Impersonator*, in SEASONS, *supra* note 228, at 155, 158 (written in 1963).

236. Andrea Dworkin, to the contrary, seems to place gay men among her oppressors rather than among her fellow victims. "Male homosexuals, especially in the arts and in fashion, conspire with male heterosexuals to enforce the male-supremacist rule that the female must be that made thing against which the male acts to experience himself as male." DWORKIN, *supra* note 170, at 128.

237. "It has been shown that people who hold negative attitudes toward homosexuals are likely to support the maintenance of traditional sex roles, are more likely to stereotype the sexes than those who hold positive attitudes, and favor preserving the double standard between men and women." Mary E. Kite, *Sex Differences in Attitudes Toward Homosexuals: A Meta-Analytic Review*, in BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 69, 69 (John P. De Cecco ed., 1985) (citations omitted).