

1-1-2002

Sexual Ethics and Postmodernism in Gay Rights Philosophy

Carlos A. Ball

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371 (2002).Available at: <http://scholarship.law.unc.edu/nclr/vol80/iss2/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

SEXUAL ETHICS AND POSTMODERNISM IN
GAY RIGHTS PHILOSOPHY

CARLOS A. BALL*

In this Article, Professor Ball uses the writings of Michel Foucault on ethics as a care of the self to explore the meaning of a contemporary gay and lesbian sexual ethic. Professor Ball argues that the legal, medical, and moral decodification of same-gender sexuality that has taken place in the United States in the last forty years has led to the emergence of a gay and lesbian sexual ethic defined by values such as openness, mutuality, and pleasure. Professor Ball analogizes the emergence of this sexual ethic to the ethics as practices of freedom in ancient Greece and Rome as identified by Foucault. A gay and lesbian sexual ethic, Professor Ball argues, offers a powerful alternative to the traditional Christian sexual ethic that makes moral judgments based, in part, on the nature of particular sexual acts. Professor Ball also explores the role that the capacity for autonomy plays in the development of a gay and lesbian sexual ethic as he seeks to find a middle ground between postmodernist and liberal supporters of gay rights.

INTRODUCTION.....372

I. FOUCAULT AND SEXUAL ETHICS.....378

 A. The History of Sexuality, Volume I.....379

 B. Foucault's Shift.....385

 C. Sexual Ethics in Classical Antiquity.....394

II. CODES OF CONDUCT AND A GAY AND LESBIAN SEXUAL ETHIC.....401

* Professor, University of Illinois College of Law. I would like to thank participants at law school faculty workshops at UCLA and the University of Illinois for providing helpful comments on an earlier draft. I would also like to thank Jan Broekman, Chris Grant, Andrew Koppelman, and Richard Storrow for their insightful comments after kindly taking the time to read an earlier draft. Most of this Article was written in the summer of 2000 while I was a guest of the Texas Wesleyan University School of Law. I would like to thank that law school and its library staff for their assistance with the writing of this Article.

This Article is part of a larger project that explores the intersection of gay rights and political morality. The larger project will appear as a book titled *The Morality of Gay Rights* to be published by Routledge in 2002.

A. <i>Legal Codification and Partial Decodification of Same-Gender Sexual Conduct</i>	403
1. Foucault and the Law	403
2. Legal Codes and Homosexuality	405
B. <i>Moral Codification and Decodification of Sexuality</i>	415
C. <i>A Gay and Lesbian Sexual Ethic</i>	420
1. The Process of a Gay and Lesbian Sexual Ethic	421
2. The Substance of a Gay and Lesbian Sexual Ethic	424
a. Openness	424
b. Mutuality	425
c. Pleasure	433
3. Some Implications of a Gay and Lesbian Sexual Ethic	437
III. THE ROLE OF AUTONOMY IN A GAY AND LESBIAN SEXUAL ETHIC	442
A. <i>Agency Versus Autonomy in Foucault's Late Writings</i>	443
B. <i>Queer Theory and Individual Rights</i>	457
CONCLUSION	464

INTRODUCTION

Opponents of gay rights often dismiss the sexual practices of lesbians and gay men as being either immoral or morally worthless.¹ Many of these critics abide by a conception of sexual morality and ethics that limits the range of acceptable sexual conduct to that engaged in by individuals of different genders, preferably within the institution of marriage.² From this perspective, although society may

1. See, e.g., John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1063-76 (1994); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 313-18 (1995); see also Norman Podhoretz, *How the Gay Rights Movement Won*, COMMENT., Nov. 1, 1996, at 32, 41 (arguing that "promiscuity is an intrinsic and all but inescapable component of male homosexuality"); Symposium, *Sex and God in American Politics: What Conservatives Really Think*, POL'Y REV., Summer 1984, at 12, 24 ("[Homosexuality] is like prostitution. Nobody can stop you if you want to be a prostitute or to patronize a prostitute, but you are not going to force us to say that it is morally acceptable.") (quoting conservative activist Phyllis Schlafly).

In his recent study of the attitudes of middle-class Americans, the sociologist Alan Wolfe found that many of those he surveyed "had no trouble finding these words, all of which cropped up in [his] interviews when the subject of homosexuality was raised: 'abnormal,' 'immoral,' 'sinful,' 'unacceptable,' 'sick,' 'unhealthy,' 'untrustworthy,' 'mentally ill,' 'wrong,' 'perverted,' and 'mentally deficient.'" Alan Wolfe, *The Homosexual Exception*, N.Y. TIMES, Feb. 8, 1998, § 6 (Magazine), at 46. For a further discussion of Wolfe's findings, see ALAN WOLFE, ONE NATION, AFTER ALL 72-81 (1998).

2. See George & Bradley, *supra* note 1, at 302 (arguing that "'reproductive-type acts' of spouses . . . have . . . special value and moral significance"); see also John Finnis,

have prudential reasons for not criminalizing same-gender sexual acts, it should never view such sex as moral. In fact, opponents of state recognition of same-sex marriage often base their opposition on the perceived immorality of same-gender sexual conduct, which they argue constitutes a threat to the values system inherent in the traditional view of marriage.³

Conservatives, then, have largely monopolized the discussion of sexual morality and ethics in the context of gay rights. In the last few decades, however, lesbians and gay men have constructed a distinct sexual ethic with its own processes and values. These processes and values challenge the conventional notion held by opponents of gay rights that sexual morality and ethics are only on one (their) side of the gay rights controversies that are part of our nation's moral, political, and legal debates.

This Article explores the meaning, implications, and philosophical underpinnings of a gay and lesbian sexual ethic. I contend that the legal, medical, and moral decodification of homosexuality that has taken place in the United States over the last forty years has allowed for the emergence of a gay and lesbian sexual ethic. Legal, medical, and moral codes that address issues of sexuality inevitably link sexual (im)morality to particular sexual acts. A gay and lesbian sexual ethic, on the other hand, does not rely on a codified regime of sexual acts; instead, such an ethic is based on a process of self-definition and self-transformation as lesbians and gay men reflect and elaborate on the ethical meaning of their otherwise socially-marginalized sexual practices. This process of self-definition and self-transformation has led to the emergence of a gay and lesbian sexual ethic with a normative content based on the values of openness, mutuality, and pleasure in sexual relations.⁴

The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations, 42 AM. J. JURIS. 97, 97-98 (1997) (noting that "sex acts are immoral when they are 'against the good of marriage'"); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 135 (1997) (arguing "that sexual acts are morally right only within marriage").

3. See, e.g., Betsy Hart, Editorial, *An Attack on Marriage*, CHI. SUN TIMES, Dec. 27, 1999, at 35; Robert H. Knight, Editorial, *Say No to "Counterfeit Marriage,"* USA TODAY, Mar. 15, 2000, at 30A; Mark Paschall, Editorial, *Anything Other than One Man Marrying One Woman is Wrong*, DENVER POST, Apr. 9, 2000, at 10G. Congressman Henry Hyde, while arguing in favor of the Domestic Marriage Act of 1996, stated that whether society should recognize same-sex marriage "is a moral issue" and that "[p]eople don't think that traditional marriage ought to be demeaned or trivialized by same-sex unions." SAME-SEX MARRIAGE: PRO AND CON—A READER 225 (Andrew Sullivan ed., 1997).

4. See *infra* Part II.C, notes 249-322 and accompanying text.

The most convincing foundation for a gay and lesbian sexual ethic can be found in the writings and interviews⁵ of Michel Foucault, in particular Volume II (*The Use of Pleasure*)⁶ and Volume III (*The Care of the Self*)⁷ of his *History of Sexuality*. Academics in general and legal scholars in particular have for the most part ignored these two volumes.⁸ In fact, although no philosopher has had a greater impact on gay and lesbian studies than Foucault, that influence emanates largely from *The History of Sexuality*, Volume I,⁹ while those interested in gay issues have largely ignored the other two volumes.

As I explain in Part I, Foucault in *The History of Sexuality*, Volume I, argues that modern societies beginning in the eighteenth century defined sexuality through the operation of systems of discourse, power, and knowledge. Societal forces and dynamics created sexual subjects—including, but not limited to, homosexuals—by assigning sexual identities to them based on their sexual conduct and desires. In *The Use of Pleasure* and *The Care of the Self*, however, Foucault largely ignores modern societies and instead

5. Foucault gave many interviews throughout his professional life. Several of the interviews that he gave towards the end of his life elaborated on his conception of ethics. Most of those are included in MICHEL FOUCAULT, *ETHICS: SUBJECTIVITY AND TRUTH* (Paul Rabinow ed., 1997) [hereinafter *ETHICS: SUBJECTIVITY AND TRUTH*]. The most important of these interviews are MICHEL FOUCAULT, *On the Genealogy of Ethics: An Overview of Work in Progress*, in *ETHICS: SUBJECTIVITY AND TRUTH*, *supra*, at 253–80 [hereinafter FOUCAULT, *On the Genealogy of Ethics*], and *The Ethics of the Concern for Self as a Practice of Freedom*, in *ETHICS: SUBJECTIVITY AND TRUTH*, *supra*, at 281–302 [hereinafter FOUCAULT, *The Ethics of the Concern for Self*].

6. 2 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE* (Robert Hurley trans., 1985) [hereinafter FOUCAULT, *THE USE OF PLEASURE*].

7. 3 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE CARE OF THE SELF* (Robert Hurley trans., 1986) [hereinafter FOUCAULT, *THE CARE OF THE SELF*].

8. See David H.J. Larmour et al., *Introduction: Situating The History of Sexuality*, in *RETHINKING SEXUALITY: FOUCAULT AND CLASSICAL ANTIQUITY* 3, 34 (David H.J. Larmour et al. eds., 1997) (noting that “the last two volumes [of *The History of Sexuality*] have been relatively neglected and their provocative and stimulating theorization of sexuality, both ancient and modern, has remained unexplored and insufficiently analyzed”).

I have been able to find only one extended discussion of *The Use of Pleasure* in a law review article, see Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037, 1047–51 (1994), and no substantive discussion of *The Care of the Self*. As Hugh Baxter notes, “[m]ost of Foucault’s appearances in legal scholarship are in footnotes, where he stays just long enough to create the impression that the author is familiar with European theory, then disappears without doing any work.” Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449, 473 (1996) (book review) (footnote omitted).

9. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., 1978).

explores in great detail sexual ethics in ancient Greek and Roman cultures. As I explain in Part I, there are two main differences between ancient cultures and the modern cultures that Foucault describes in *The History of Sexuality*, Volume I. The first difference is the relative unimportance in antiquity of legal, religious, and moral codes in the formation and elaboration of sexual ethics.¹⁰ The second difference, which is related to the first, is that in antiquity there was a greater appreciation for the need to allow the individual to reflect and work through what society considered to be the difficult issues of sexual ethics.¹¹ This did not mean that the individual was free to determine his sexual ethics independently of societal norms.¹² Instead, the individual was constrained by his culture's distinct problematization of sexuality.¹³ But within the confines of that problematization, sexual ethics in ancient Greece and Rome encouraged the individual to reflect upon the meaning and use of sexual pleasure in order to transform himself.¹⁴ This perspective on the role of the individual in the elaboration of sexual norms differs from the one we see in *History of Sexuality*, Volume I where the sexual subject is little more than a byproduct of power relations and systems of knowledge, with little room for agency or autonomy.

In Part II, I explore the role that the legal codification of sexual norms in the United States has played in the creation of a sexual identity category known as "the homosexual." Foucault, for reasons that will be explained, pays insufficient attention to the role of the law in the simultaneous formation and marginalization of a homosexual identity.¹⁵ The law in the United States beginning in the late nineteenth century played an important role in the creation of a homosexual identity, a role that tracked the discourses of science and medicine that so interested Foucault in *The History of Sexuality*, Volume I.¹⁶

10. See *infra* notes 92–96 and accompanying text; *infra*, Part I.C, notes 104–44 and accompanying text.

11. See *infra* Part I.C, notes 104–44 and accompanying text.

12. I say "his" because sexual ethics in classical antiquity were largely viewed from the perspective of men. See *infra* note 104.

13. "'Ethical problematizations' pertain to the question of which part of someone, of his or her life and actuality, requires ethical care." Marli Huijter, *The Aesthetics of Existence in the Work of Michel Foucault*, PHILOSOPHY & SOCIAL CRITICISM, Mar. 1999, at 61, 70.

14. See *infra* Part I.C, notes 104–44 and accompanying text.

15. See *infra* Part II.A.1, notes 150–57 and accompanying text.

16. See *infra* Part II.A.2, notes 158–219 and accompanying text.

But our story is not only one of codification. It is also one of legal, medical, and moral *decodification*. This latter process has contributed to the emergence of a contemporary gay and lesbian sexual ethic, in the same way that the absence of universal codes of conduct that sought to distinguish between acceptable and unacceptable sexual acts in ancient Greece and Rome gave individuals the freedom they needed to create what Foucault categorizes as the personal crafting of a sexual ethic through an "aesthetics of existence."¹⁷ I argue in Part II that the partial decodification of homosexuality in the United States has permitted the emergence of a gay and lesbian sexual ethic characterized by the values of openness, mutuality, and pleasure.¹⁸ Unlike the conception of sexual morality held by the Christian tradition, and its secular variation found in new natural law philosophy,¹⁹ a gay and lesbian sexual ethic is not based on a codified regime of conduct that distinguishes morality from immorality on the basis, in part, of the nature of particular sexual acts.

Many academics have relied on *The History of Sexuality*, Volume I, to argue in favor of an antiessentialist conception of human sexuality.²⁰ This conception holds that sexual orientation—along with accompanying categories such as "the homosexual" and "the heterosexual"—is a social construction that has no correspondence to nature or truth. Postmodernist queer theory²¹ combines this

17. I discuss what Foucault means by an "aesthetics of existence" in *infra* notes 87–91 and accompanying text.

18. See *infra* Part II.C.2, notes 259–310 and accompanying text.

19. See *infra* Part II.B, notes 220–48 and accompanying text.

20. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 91–96 (1990); DAVID M. HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 38–48 (1995); LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 9–33 (1999); MOMIN RAHMAN, *SEXUALITY AND DEMOCRACY: IDENTITIES AND STRATEGIES IN LESBIAN AND GAY POLITICS* 17–47 (2000); JEFFREY WEEKS, *AGAINST NATURE: ESSAYS ON HISTORY, SEXUALITY AND IDENTITY* 33–37 (1991).

21. While queer theory, as a field of academic inquiry, is not subject to easy definitions, its origins can be traced to the dissatisfaction by many gay and lesbian academics with the identity politics of the gay rights movement. See ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 58–71 (1996). The problem, according to queer theorists, is that "[a] theoretical and political project which aims exclusively to normalize homosexuals and to legitimate homosexuality as a social minority does not challenge a social regime which perpetuates the production of subjects and social worlds organized and regulated by the heterosexual/homosexual binary." Steven Seidman, *Deconstructing Queer Theory or the Under-Theoretization of the Social and the Ethical*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 116, 126 (Linda Nicholson & Steven Seidman eds., 1995). Queer theorists, then, urge a shift away from identity-based politics to a focus on issues of discourse, knowledge, and power. As such, queer theory

antiessentialist conception of sexuality with an antifoundationalist moral and political philosophy that rejects universal norms and values that apply across time and cultures and that provide some measure of objectivity in making moral and political judgments.²² In Part III, I question whether an antifoundationalist conception of political morality must necessarily follow from an antiessentialist understanding of sexual orientation. I will argue that the universalist idea that we all share a capacity for autonomy is not inconsistent with the view that sexual orientation categories and the meaning of sexual acts are socially constructed. Even if our identities (sexual and otherwise) are nothing more than the effects of social discourses and power relations, we still retain, to some degree, a capacity to exercise our autonomy. The need to respect and promote the capacity for autonomy that all human beings share is a universal concern that can contribute to the development of an alternative sexual ethic for marginalized sexual minorities, even if the sexual identities of those minorities form themselves entirely through a process of social construction.

Postmodernists are quick to dismiss the concept of autonomy as illusory because to them it suggests a subject or a self (which are the terms they prefer to use rather than "individual") who exists apart from its social context.²³ As I argue in Part III, we need not view autonomy in such a way. In fact, some contemporary liberal theorists argue that a capacity for autonomy is recognizable and understandable only from within social relationships and public meanings that play crucial roles in defining the self.²⁴ I therefore argue that there are more similarities than differences between some

has been heavily influenced by Foucault's writings. As such, Foucault's writings have heavily influenced queer theory. See JAGOSE, *supra*, at 81–83.

22. Antifoundationalism and a rejection of metanarratives are the main characteristics of postmodernist theory. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, at xxiv (Geoff Bennington & Brian Massumi trans., 1984); see also DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 10 (1997) (noting that postmodernists "deny the existence of a neutral and objective faculty of reason which can be used to generate first principles of morality and law"); MICHAEL LUNTLEY, *REASON, TRUTH AND SELF: THE POSTMODERN RECONDITIONED* 9 (1995) (noting that "[t]he critical point of postmodernism is an attack on the idea that reason, truth and self can be understood abstracted from history"); Steven Seidman & David G. Wagner, *Introduction: The Postmodern Challenge*, in *POSTMODERNISM AND SOCIAL THEORY* 1, 6 (Steven Seidman & David G. Wagner eds., 1992) ("Central to postmodernism is its critique of the claim that scientific knowledge is universal and can be justified in a noncontextual way. Postmodernists contend that standards of truth are context-dependent.").

23. See *infra* notes 329–34 and accompanying text.

24. See *infra* notes 342–54 and accompanying text.

liberal conceptions of autonomy and the postmodernist conception of agency.

As I do in the earlier parts of the Article, I in Part III rely heavily on Foucault's conception of ethics as presented in his writings and interviews from the later period of his life. In my estimation, Foucault's later work can lead to greater understanding between postmodernists and liberals. Instead of dismissing postmodernism as relativistic about human values and pessimistic about the possibility of freedom,²⁵ or alternatively, viewing liberal values as sources of oppression and domination,²⁶ the later Foucault can help us focus on common ground. On the one hand, I want to reach out to postmodernists by relying on the work of one of their philosophical heroes (or saints)²⁷ to explain how the conception of agency held by many of them is not terribly different from some liberal conceptions of autonomy. On the other hand, by emphasizing that Foucault, at least in his later years, believed that we can contribute to our own conditions of freedom and that we are, as a result, not always the helpless pawns of power relations beyond our control, I hope to convince liberals that there is real value in Foucault's writings.

I. FOUCAULT AND SEXUAL ETHICS

While academic commentators interested in issues of sexual orientation have paid enormous attention to *The History of Sexuality*,

25. This accusation has been a standard one leveled at Foucault by some of his critics. See, e.g., Charles Taylor, *Foucault on Freedom and Truth*, in FOUCAULT: A CRITICAL READER 69, 69 (David Couzens Hoy ed., 1986) [hereinafter FOUCAULT: A CRITICAL READER]; Michael Walzer, *The Politics of Michel Foucault*, in FOUCAULT: A CRITICAL READER, *supra*, at 51-52; see also Nancy Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions*, 1 PRAXIS INT'L 272, 281-86 (1981) (arguing that Foucault posits a conception of power that refuses to take normative positions). It is interesting that in North America, it is communitarian philosophers such as Taylor and Walzer who have criticized Foucault for his supposed rejection of notions such as freedom and truth. American liberal philosophers, such as John Rawls and Ronald Dworkin, have not even attempted to engage Foucault.

26. See, e.g., HONI FERN HABER, BEYOND POSTMODERN POLITICS: LYOTARD, RORTY, FOUCAULT 1 (1994) (arguing that the liberal values of objectivity and rationality are often "used to justify the dominance of white, patriarchal, classist, and racist regimes"); HALPERIN, *supra* note 20, at 123 (noting that "lesbians and gay men . . . far from having been beneficiaries of liberal, humanist notions of freedom, truth, and rationality, have tended rather to be the targets of a new kind of terror carried out in the[] name" of those ideals); Allan C. Hutchinson, *The Three "Rs": Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 564 (1989) (book review) (arguing that "liberal institutions . . . have helped to create [a cumulative state of affairs]" characterized by "patriarchy, racism, economic inequality, and the continual threat of nuclear holocaust and environmental destruction").

27. See HALPERIN, *supra* note 20.

Volume I,²⁸ they have paid much less attention to Foucault's writings on sex and sexuality that followed the publication of that book. In Part I.A, I summarize Volume I and explain its implications for an antiessentialist understanding of sexual orientation. In Part I.B, I describe Foucault's post-Volume I shift on issues of sexuality from a focus on pervasive and hegemonic power relations and systems of knowledge to a focus on the ability of the subject to transform itself through practices of freedom. For Foucault, practices of freedom are the constitutive elements of an ethical life. In Part I.C, I explore what Foucault takes to be the practices of freedom that constituted sexual ethics in ancient Greece and Rome.

A. The History of Sexuality, *Volume I*

In *The History of Sexuality*, Volume I, Foucault explains how the discourse on sexuality in Western countries went through a transformation in the seventeenth century. At the beginning of that century, "sexual practices had little need of secrecy."²⁹ People discussed sexual matters openly and "[c]odes regulating the coarse, the obscene, and the indecent were quite lax."³⁰ By the end of the century, however, what we can characterize as the modern era of sexuality began. Two principal phenomena defined this era. First, areas of enforced silence were established where matters of sexuality were not to be discussed; these areas included the relationship "between parents and children, for instance, or teachers and pupils, or masters and domestic servants."³¹ At the same time, a second phenomenon took place, namely, an explosion of discourses concerning sex. Through discourses of science, medicine, and psychiatry, so-called experts began to study and analyze sex at a great level of detail. Different disciplines sought to schematize human sexuality through an endless discussion and cataloging of sexual desires, tendencies, and acts. That schematization centered around four different axes: (1) the hysterization of women's bodies; (2) the pedagogization of children's sex; (3) the socialization of procreative behavior; and (4) the psychiatrization of pleasure that was deemed to be perverse.³² As Foucault notes, "[u]nder the authority of a

28. See BUTLER, *supra* note 20, at 91–96; HALPERIN, *supra* note 20, at 38–48; MCWHORTER, *supra* note 20, at 9–33; RAHMAN, *supra* note 20, at 17–47; WEEKS, *supra* note 20, at 33–37.

29. FOUCAULT, *supra* note 9, at 3.

30. *Id.*

31. *Id.* at 18.

32. See *id.* at 104–05.

language that had been carefully expurgated so that it was no longer directly named, sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite."³³

It is possible to view the two phenomena mentioned above, namely, the establishment of areas of silence and of intense discourse, as dichotomous and contradictory. In fact, however, the two were very much interrelated. This relationship is perhaps clearest in nineteenth century Victorian sexual norms that simultaneously silenced and incited sexuality. In the Victorian bourgeoisie home, "silence [was] the rule. The legitimate and procreative couple laid down the law. The couple imposed itself as model, enforced the norm, safeguarded the truth, and reserved the right to speak while retaining the principle of secrecy."³⁴ At the same time, however, well-established institutional discourses regarding sexuality represented "a political, economic, and technical incitement to talk about sex. And not so much in the form of a general theory of sexuality as in the form of analysis, stocktaking, classification, and specification, and of quantitative or causal studies."³⁵ Studies of populations, of birthrates and the appropriate age to marry, of fertility and infertility, of childhood sexuality, of sexual normality and abnormality, of sexual crimes and other infractions against nature, and of debilitating and frustrating sexual desires all created a discourse on sexuality that was extensive and multifaceted.³⁶ "What is peculiar to modern societies," Foucault writes, "is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*."³⁷

In *The History of Sexuality*, Volume I, Foucault seeks to show—as he had done earlier with mental illness,³⁸ medicine,³⁹ and penal discipline⁴⁰—the hegemony of power.⁴¹ His objective is:

33. *Id.* at 20.

34. *Id.* at 3.

35. *Id.* at 23–24.

36. *See id.* at 23–26.

37. *Id.* at 35.

38. *See* MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., 1973).

39. *See* MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* (A. M. Sheridan Smith trans., 1973).

40. *See* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1979). Foucault was interested in "the relations between experiences (like madness, illness, transgression of laws, sexuality, self-identity), knowledge (like psychiatry, medicine, criminology, sexology, psychology), and power (such as the power which is wielded in psychiatric and penal institutions, and in all other institutions which deal with individual control)." Michel Foucault, *Omnes et Singulatum*:

to locate the forms of power, the channels it takes, and the discourses it permeates in order to reach the most tenuous and individual modes of behavior, the paths that give it access to the rare or scarcely perceivable forms of desire, how it penetrates and controls everyday pleasure—all this entailing effects that may be those of refusal, blockage, and invalidation, but also incitement and intensification: in short, the “polymorphous techniques of power.”⁴²

According to Foucault, observation, surveillance, and classification by scientists and social scientists alike create regimes of discipline from which emanate diffuse and noncentralized sources of power. Medical hospitals, mental hospitals, prisons, schools, and other institutions develop their own disciplinary techniques that are reflected in the power relations used to train, regulate, and control people.⁴³ The liberal fixation with the abuse of power by the state and the Marxist fixation with the abuse of power by the ruling classes are unsatisfying for Foucault because they largely ignore the dispersed regimes of power found everywhere in society. “Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points, in the interplay of nonegalitarian and mobile relations.”⁴⁴ From this perspective, individuals are constituted by systems of knowledge (such as medicine and psychiatry) and power relations; there is nothing to the individual—including his or her sexuality—that is

Towards a Criticism of “Political Reason,” in THE TANNER LECTURES ON HUMAN VALUES 223, 239 (Sterling M. McMurrin ed., 1981).

41. Foucault’s earlier works were archeological and genealogical. The former entails the study of truth as a form of representation and discourse. The latter entails the study of truth as a form of domination, subjugation, and power. See Arnold I. Davidson, *Archaeology, Genealogy, Ethics*, in FOUCAULT: A CRITICAL READER, *supra* note 25, at 221–27. In his later work, Foucault was interested mostly in ethics, which he conceived to be “a study of the self’s relationship to itself.” *Id.* at 228. I discuss Foucault’s conception of ethics in *infra* Parts I.B and I.C, notes 63–144 and accompanying text.

42. FOUCAULT, *supra* note 9, at 11.

43. See generally FOUCAULT, *supra* note 38 (discussing mental institutions); FOUCAULT, *supra* note 39 (discussing medical hospitals); FOUCAULT, *supra* note 40 (discussing prisons). David Halperin explains Foucault’s conception of power as follows:

Power is not a possession of the Monarch or the Father or the State, and people cannot be divided into those who “have” it and those who don’t. Instead, power is what characterizes the complex relations among the parts of a particular society—and the interactions among individuals in that society—as relations of ongoing struggle. Power is thus a dynamic *situation*, whether personal, social or institutional: it is not a quantum of force but a strategic, unstable relation.

HALPERIN, *supra* note 20, at 16–17.

44. FOUCAULT, *supra* note 9, at 94.

either natural or true.⁴⁵ What we consider to be natural or true about ourselves is nothing more than the effects of societal forces as reflected in systems of knowledge and power relations.⁴⁶

As a result, according to Foucault, the promise of liberation from repression, proposed by psychiatry in general and Freud in particular offers a dangerous hope. The possibility of overcoming repression suggests the possibility of liberation, of being outside of relations of power. But Foucault argues that such a liberation is impossible.⁴⁷ In fact, there is in *The History of Sexuality*, Volume I, little sense that the subject is its own agent; there is very little hope that the self can be anything but one that is defined and constrained by the discourses that are themselves effects of power relations. Neither truth in a universal sense nor individual agency provides any solace or hope for liberation from power relations.

Foucault's view of power, as well as his rejection of philosophical metaprinciples of truth and justice in *The History of Sexuality*, Volume I (as well as in his earlier work), places him firmly in the postmodernist camp⁴⁸ and subjects him to criticism by those who find

45. As Foucault notes:

Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.

FOUCAULT, *supra* note 9, at 105–06; *see also* HALPERIN, *supra* note 20, at 40 (“In *The History of Sexuality*, Volume I, Foucault . . . treats sexuality not as a thing, a natural reality, but as the necessary instrument and determinate effect of an entire series of discursive and political strategies.”).

46. Foucault in *Discipline and Punish* provides the following explanation of the connection between knowledge and power:

We should admit . . . that power produces knowledge (and not simply by encouraging it because it serves power or applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations . . . [T]he subject who knows, the objects to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power/knowledge and their historical transformations.

FOUCAULT, *supra* note 40, at 27–28.

47. *See* FOUCAULT, *supra* note 9, at 5–10.

48. “Foucault induces skepticism about post-Kantian dogmas of universalist history, anthropological foundation, and master schemes. . . . In the place of universalist narrative, he looks for the plurality and singularity of our origins; in the place of unified science or rationality, he looks for many changing practices of knowledge.” JOHN RAJCHMAN, MICHEL FOUCAULT: THE FREEDOM OF PHILOSOPHY 3 (1985); *see also* MADAN SARUP,

his vision overly pessimistic and relativistic.⁴⁹ While Foucault remains a controversial figure among non-postmodernist philosophers, queer theorists openly embrace his conception of sexuality as presented in Volume I.⁵⁰ It is no coincidence, they argue, that the term "homosexual" first appeared at the end of the nineteenth century, when the modernist discourses of sexuality were at their apogee.⁵¹ In an effort to categorize, analyze, and schematize human sexuality, political, religious, scientific, and medical systems of power and knowledge imposed an identity (and a discourse) on those individuals who engaged in same-gender sexual conduct. What before had been viewed simply as sexual acts (such as sodomy) now became the basis for a socially constructed identity. As Foucault quips, "[t]he sodomite had been a temporary aberration; the homosexual was now a species."⁵²

Queer theorists argue that because sexual identities such as the "homosexual" arise from particular societal contexts and discourses, sexual orientation cannot be an essential or constitutive part of human beings that is in any way natural or universal.⁵³ Society both creates the category of "the homosexual" and then seeks to marginalize it by contrasting its supposed perversity to the normality of the other socially constructed category, namely, "the

IDENTITY, CULTURE AND THE POSTMODERN WORLD 69 (1996) (noting that Foucault "objects to historicism and western humanism to the extent that they assume a continuous development, progress and global totalisation").

49. See Taylor, *supra* note 25, at 69; Walzer, *supra* note 25, at 51.

50. "While relatively mainstream philosophers, historians, and political theorists insisted that Foucault's work could never form the basis for or even aid any successful political movement, queer readers were making Foucault a part of their intellectual lives." MCWHORTER, *supra* note 20, at xv.

51. See DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 (1990); JONATHAN NED KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY 147-50 (1983).

52. FOUCAULT, *supra* note 9, at 43. Foucault argued that while under "ancient civil or canonical codes, sodomy was a category of forbidden acts . . . [in t]he nineteenth-century [the] homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology Nothing that went into his total composition was unaffected by his sexuality." *Id.*

53. David Halperin summarizes the constructionist position as follows:

Sexuality . . . is not, as it often pretends to be, a universal feature of human life in every society [S]exuality does not refer to some positive physical property—such as the property of being anatomically sexed—that exists independently of culture; it does not rightly denote some common aspect or attribute of bodies. Unlike sex, which is a natural fact, sexuality is a cultural production: it represents the *appropriation* of the human body and of its erogenous zones by an ideological discourse.

HALPERIN, *supra* note 51, at 25 (citations omitted).

heterosexual."⁵⁴ Queer theorists, therefore, follow Foucault in contending that there is no objective essence and no universal truth to human sexuality. The perceived abnormality of homosexuality is the result of contemporary power struggles for domination of the discourse on sexuality. The focus, queer theorists argue, needs to be on recasting the discourse with the understanding that stepping outside of the power relations that determine the nature of the discourse is impossible.⁵⁵

Some scholars take issue with the antiessentialism of postmodernist queer theory.⁵⁶ These thinkers believe "that there are objective, intrinsic, culture-independent facts about what a person's sexual orientation is."⁵⁷ For these writers, there have always been homosexuals, even if different societies have perceived them in different ways at different times.⁵⁸ Studies suggesting the possibility of a biological or physiological basis for sexual orientation have added some support to the essentialist position,⁵⁹ though the meaning of those studies remains highly controversial.⁶⁰

54. See HALPERIN, *supra* note 20, at 44-48; MCWHORTER, *supra* note 20, at 32-33. The relationship between homosexuality and heterosexuality is a dynamic one that goes beyond the simple binarism of one dominating and marginalizing the other. Instead, each category is defined by the other in an ongoing and fluid process. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 9-10 (1990); see also JONATHAN DOLLIMORE, *SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT* 28 (1991) (noting that "the negation of homosexuality has been in direct proportion to its symbolic centrality; its cultural marginality in direct proportion to its cultural significance").

55. See, e.g., MCWHORTER, *supra* note 20, at 97-98; David M. Halperin, *Historicizing the Subject of Desire: Sexual Preferences and Erotic Identities in the Pseudo-Lucianic Erotics*, in FOUCAULT AND THE WRITING OF HISTORY 19, 21-23 (Jan Goldstein ed., 1994).

56. See, e.g., RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 221-42 (1992); John Boswell, *Categories, Experience and Sexuality*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 133-73 (Edward Stein ed., 1990) [hereinafter *FORMS OF DESIRE*].

57. Edward Stein, *Introduction*, in *FORMS OF DESIRE*, *supra* note 56, at 5.

58. See Boswell, *supra* note 56, at 158-67.

59. See, e.g., J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 *ARCHIVES GEN. PSYCHIATRY* 1089, 1090-95 (1991); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 *SCI.* 321, 321-26 (1993); Simon LeVay, *A Difference in the Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 *SCI.* 1034, 1034-36 (1991).

60. Many scholars question the validity and significance of the studies. See, e.g., MCWHORTER, *supra* note 20, at 13-34; EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 190-228 (1999); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503, 529-46 (1994).

I do not here take a position on the constructionism versus essentialism debate on matters of sexual orientation. That debate has received sufficient attention elsewhere.⁶¹ I assume for purposes of this Article that queer theorists are correct that sexual orientation categories are socially constructed and that there is nothing of essence or universal about them.⁶² I make this assumption because I do not think it undermines my broader point, namely, that even if discourses and power relations define a subject's sexuality, it is still possible to promote a sexual ethic that leaves a significant role for him or her as an autonomous agent who can engage in self-defining and self-transformative practices. In order to begin supporting this view, I turn now to Foucault's later writings and interviews on sexual ethics.

B. Foucault's Shift

After Foucault published *The History of Sexuality*, Volume I, it took him an additional eight years to publish Volume II (*The Use of Pleasure*)⁶³ and Volume III (*The Care of the Self*).⁶⁴ During those intervening years, Foucault redirected his philosophical interests. He spoke about the change shortly before his death in a 1984 interview titled "*The Ethics of the Concern for Self as a Practice of Freedom*."⁶⁵ Foucault's inquiries shifted away from a study of the hegemony and coercive practices of disciplines and professions and towards an interest in asceticism, "not in the sense of a morality of renunciation but as an exercise of the self on the self by which one attempts to develop and transform oneself, and to attain . . . a certain mode of

61. For extensive discussions of this issue from many different perspectives, see the essays collected in *FORMS OF DESIRE*, *supra* note 56; DENNIS ALTMAN ET AL., *HOMOSEXUALITY, WHICH HOMOSEXUALITY?: INTERNATIONAL CONFERENCE ON GAY AND LESBIAN STUDIES* (Anja van Kooten & Theo van der Meer eds., 1989). The essentialist/constructionist debate in the context of sexual orientation has also received considerable attention in the law reviews. See, e.g., William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 365-75 (1992); Halley, *supra* note 60, at 546-66; Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 932-46 (1989); Daniel R. Ortiz, *Creating Controversy: Essentialism, Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1843-50 (1993).

62. Scholars such as Halperin take this position, arguing that "sexuality is not lodged in our bodies, in our hormones, or in our genitals, but resides in our discursive and institutional practices as well as in the experiences which they construct." Halperin, *supra* note 55, at 33. Halperin adds, rather bluntly, that "there is no orgasm . . . without ideology." *Id.* at 34.

63. See FOUCAULT, *supra* note 6.

64. See FOUCAULT, *supra* note 7.

65. See FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5.

being.”⁶⁶ Individuals in ancient Greek and Roman civilizations practiced this care of the self to a much greater extent than those in the modern era;⁶⁷ for this reason, Foucault turned his attention to antiquity, writing Volumes II and III of *The History of Sexuality* about an era that came centuries before the one he discussed in Volume I.

In the interview, Foucault makes clear that power is omnipresent (a point he had made many times before), but such omnipresence is not inconsistent with freedom (a point he did not emphasize previously). For Foucault, power exists in all human relationships, including those not directly connected to political or social institutions.⁶⁸ Power relations exist whenever “one person tries to control the conduct of the other,”⁶⁹ which encompasses just about any form of human interaction, including “amorous, institutional, [and] economic relationships.”⁷⁰ But we should not despair about the omnipresence of power relations because those relations are “mobile, reversible, and unstable.”⁷¹ Power relations have these characteristics precisely because the individuals who are their subjects retain some freedom.⁷² Foucault explains this as follows:

[I]n power relations there is necessarily the possibility of resistance because if there were no possibility of resistance (of violent resistance, flight, deception, strategies capable of reversing the situation), there would be no power relations at all. This being the general form, I refuse to reply to the question I am sometimes asked: “But if power is

66. *Id.* at 282.

67. Foucault notes that when discussing issues of morality and ethics, we are much more comfortable today with the concept of “knowing oneself” than we are with “caring for oneself.” But the latter “was, for the Greeks, one of the main principles of cities, one of the main rules for social and personal conduct and for the art of life.” MICHEL FOUCAULT, *Technologies of the Self*, in ETHICS: SUBJECTIVITY & TRUTH, *supra* note 5, at 223, 226 [hereinafter FOUCAULT, *Technologies of the Self*]. In contrast, today “[w]e find it difficult to base rigorous morality and austere principles on the precept that we should give more care to ourselves than to anything else in the world.” *Id.* at 228. For the Greeks, as for the later Foucault, however, “th[e] critical function of philosophy derives from the Socratic injunction ‘Take care of yourself,’ in other words, ‘[m]ake freedom your foundation, through the mastery of yourself.’” FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 301.

68. “[W]hen one speaks of power, people immediately think of a political structure, a government, a dominant social class, the master and the slave, and so on. I am not thinking of this at all when I speak of relations of power.” FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 291.

69. *Id.* at 292.

70. *Id.* at 291.

71. *Id.* at 292.

72. *See id.* at 291–92.

everywhere, there is no freedom." I answer that if there are relations of power in every social field, this is because there is freedom everywhere.⁷³

Domination—as opposed to power relations—exists when there is no possibility of resistance, that is, when resistance proves to be “only stratagems that never succeed[] in reversing the situation.”⁷⁴ The main difference between power and domination is that the former allows for freedom while the latter does not.⁷⁵ Domination exists when the relations of power are “perpetually asymmetrical and allow an extremely limited margin of freedom.”⁷⁶ As an example, Foucault points to the domination of women by men “in the conventional marital structure of the eighteenth and nineteenth centuries.”⁷⁷ Foucault, however, emphasizes that “[t]he idea that power is a system of domination that controls everything and leaves no room for freedom cannot be attributed to me.”⁷⁸

While Foucault in *The History of Sexuality*, Volume I, had noted that resistance is a constitutive element of power,⁷⁹ he was by 1984 much more explicit in his acknowledgment that the possibility of resistance means the possibility of *freedom*. This new focus on the possibility and practices of freedom calls for a different (or perhaps more complete) view of the self. The self in Foucault's prior

73. *Id.* at 292.

74. *Id.*

75. As Foucault notes:

Power is exercised only over free subjects, and only insofar as they are free. By this we mean individual or collective subjects who are faced with a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized. Where the determining factors saturate the whole there is no relationship of power; slavery is not a power relationship when man is in chains.

Michel Foucault, *Afterword: The Subject and the Power*, in HUBERT L. DREYFUS & PAUL RABINOW, *BEYOND STRUCTURALISM AND HERMENEUTICS* 208, 221 (2d ed. 1983).

76. FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 292.

77. *Id.*

78. *Id.* at 293; see Huijer, *supra* note 13, at 66 (noting that for Foucault “[f]reedom in the form of resistance is a condition for exerting powers”).

Taylor and Walzer, among others, have charged that Foucault rejected the possibility of freedom. See, e.g., Taylor, *supra* note 25, at 69; Walzer, *supra* note 25, at 51. For defenses of Foucault on the charge, see, for example, Andrew W. Lamb, *Freedom, the Self, and Ethical Practice According to Michel Foucault*, 35 INT'L PHIL. Q. 449, 462–63 (1995) (explaining that, according to Foucault, although power is present in every relationship, it contributes to freedom by allowing for the possibility of overcoming limits); Barry Smart, *On the Subjects of Sexuality, Ethics, and Politics in the Work of Foucault*, BOUNDARY 2, at 201, 215–18 (1991) (noting weaknesses in the arguments of Foucault's critics). I return to this issue in Part III.A, *infra* notes 326–87 and accompanying text.

79. See FOUCAULT, *supra* note 9, at 95–96.

writings—including in *The History of Sexuality*, Volume I—was passive, as he emphasized how power relations and systems of knowledge constitute it.⁸⁰ While Foucault had recognized the possibility of resistance, he was in his earlier work not particularly explicit (or optimistic) about the nature of such resistance. The later Foucault, however, became explicitly interested in the concept of freedom and in how “the subject constitutes itself in an *active* fashion through practices of the self.”⁸¹ Foucault’s later work focuses on ethics, which he defines as “the kind of relationship you ought to have with yourself . . . and which determines how the individual is supposed to constitute himself as a moral subject of his own actions.”⁸² What *does* remain constant in Foucault’s writings is the view that the practices of freedom do not arise from within the self. Instead, the practices “are models that [the self] finds in his culture and are proposed, suggested, imposed upon him by his culture, his society, and his social group.”⁸³

Foucault, in another interview, argues that “human beings understand themselves” through “truth games” or “technologies,” of which there are four major types:

(1) technologies of production, which permit us to produce, transform, or manipulate things; (2) technologies of sign systems, which permit us to use signs, meanings, symbols, or signification; (3) technologies of power, which determine the conduct of individuals and submit them to certain ends or domination, an objectivizing of the subject; (4) technologies of the self, which permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct,

80. See FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 290–91.

81. *Id.* at 291 (emphasis added). “Whereas in his earlier work the subject is examined indirectly through the analysis of various constitutive practices, e.g., penal, medical, etc., later works highlight the constitution of the subject in its active dimension, i.e., in the ways it chooses certain practices in order to become a moral subject.” Derek D. Nikolinakos, *Foucault’s Ethical Quandary*, 83 TELOS 123, 134 (1990).

82. FOUCAULT, *On the Genealogy of Ethics*, *supra* note 5, at 263.

83. FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 291. Foucault in another interview explained it this way: “I believe . . . that the subject is constituted through practices of subjection, or, in a more autonomous way, through practices of liberation, of liberty, as in Antiquity, on the basis, of course, of a number of rules, styles, inventions to be found in the cultural environment.” MICHEL FOUCAULT, *An Aesthetics of Existence*, in MICHEL FOUCAULT: POLITICS, PHILOSOPHY, CULTURE 47, 50–51 (Lawrence D. Kritzman ed., 1988) [hereinafter FOUCAULT, *An Aesthetics of Existence*].

Part III.A, *infra* notes 326–87 and accompanying text, discusses how it is possible to read Foucault as believing in a capacity for autonomy, even if the ways in which that capacity is exercised and expressed are determined by social practices and power relations.

and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection or immortality.⁸⁴

Whereas the earlier Foucault wrote primarily about the third technology, the later Foucault wrote almost exclusively about the fourth. All four technologies go to the definition of the self, but the first three are entirely external to it. The fourth set of technologies differs; it understands the self as playing an active role in its own constitution and transformation.

By focusing on the technologies of the self, Foucault explores the relationship between freedom and ethics and how an individual can lead a life that is both free and ethical if he or she engages in a process of reflection with the ultimate goal of self-transformation. As he puts it, "[f]reedom is the ontological condition of ethics. But ethics is the considered form that freedom takes when it is informed by reflection."⁸⁵ Foucault here can be understood as making "two important claims: first, ethics is what gives a coherent form to the exercise of freedom, and second, coerced practice can never be strictly speaking, ethical practice (which, importantly enough, Foucault refers to as the practice of *freedom*)."⁸⁶ It was the practices of freedom that intrigued Foucault during the last years of his life, in particular those engaged in by individuals in ancient Greece and Rome who sought to care for themselves through an aesthetics of existence.

An aesthetics of existence is made of "those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an *oeuvre*, that carries certain aesthetic values and meets certain stylistic criteria."⁸⁷ While today we tend to equate art with objects, the concept of art or aesthetics for the Greeks was much broader than that, and included living one's life as a work of art.⁸⁸ As David Halperin puts it, "What

84. FOUCAULT, *Technologies of the Self*, *supra* note 67, at 225.

85. FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 284.

86. Lamb, *supra* note 78, at 456.

87. FOUCAULT, *supra* note 6, at 10–11.

88. FOUCAULT, *On the Genealogy of Ethics*, *supra* note 5, at 261:

What strikes me is the fact that, in our society, art has become something that is related only to objects and not to individuals or to life. That art is something which is specialized or is done by experts who are artists. But couldn't everyone's life become a work of art? Why should the lamp or the house be an art object but not our life?

Foucault understood by an 'art of existence' . . . was an ethical practice that consisted in freely imposing on the form of one's life a distinctive shape and individual style, and thereby transforming oneself in accordance with one's conception of beauty or value."⁸⁹

Foucault views an aesthetics of existence as a process of self-transformation whereby the subject seeks (some) freedom from its socially constructed self. Thus, in matters of sexuality, we "practice freedom . . . by liberating our desire [so] that we will learn to conduct ourselves ethically in pleasure relationships with others."⁹⁰ This conception of ethical practices is consistent with Foucault's more general view of philosophy, which he sees as the attempt "to learn to what extent the effort to think one's own history can free thought from what [one] silently thinks, and so enable [one] to think differently."⁹¹

Sexual ethics in ancient Greece and Rome were problematized in such a way that the focus was on the practices of the self and not on codes of conduct (whether legal, scientific, or religious). In fact, the problematization of sex in antiquity raised issues of ethics and not of morality. Morality for Foucault "means a set of values and rules of action that are recommended to individuals through the intermediary of various prescriptive agencies such as the family (in one of its roles), educational institutions, churches, and so forth."⁹² While the sources of moral values can be quite varied, those values are usually represented in codes of conduct. When we speak of morality, according to Foucault, we compare "the real behavior of individuals in relation to the rules and values that are recommended to them" by the codes of conduct.⁹³ But when we speak of ethics, we speak of "the manner in which one ought to 'conduct oneself'—that is, the manner in which one ought to form oneself as an ethical subject acting in reference to the prescriptive elements that make up the [moral] code[s]."⁹⁴

Id.; see also *id.* at 262 ("From the idea that the self is not given to us, I think that there is only one practical consequence: we have to create ourselves as a work of art.").

89. HALPERIN, *supra* note 20, at 69–70.

90. FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 284.

91. FOUCAULT, *supra* note 6, at 9; see also MICHEL FOUCAULT, *Truth, Power, Self, in TECHNOLOGIES OF THE SELF 9* (Luther H. Martin et al. eds., 1995) ("The main interest in life and work is to become someone else that you were not in the beginning.").

92. FOUCAULT, *supra* note 6, at 25.

93. *Id.*

94. *Id.* at 26. Foucault distinguishes between a history of moral codes, namely, a history of "the different systems of rules and values that are operative in a given society or group, the agencies or mechanisms of constraint that enforce them, the forms they take in

Morality, then, is a codification of normative principles understood as universal rules of general applicability that are "meant to embrace every area of behavior."⁹⁵ Ethical precepts, on the other hand, are not universal rules of behavior; instead, they are determined by "what is required of the individual in the relationship he has with himself, in his different actions, thoughts, and feelings as he endeavors to form himself as an ethical subject."⁹⁶ Different periods in the history of sexuality have seen the presence of both morality and ethics, though there have been marked differences in the emphasis of one over the other. To be schematic about it, we can divide the history of sexuality in the West into four parts. Chronologically we begin with Greek and Roman antiquity, where the problematization of sexuality was based on the practices of the self (ethics) rather than on a codification of rules of universal applicability (morality). Thus, Foucault argues that in antiquity there were few references to codes that sought to prescribe morally permissible—and proscribe morally impermissible—sexual conduct. Instead, the focus was on the practices of freedom through which the self defined itself as an ethical (and thus a free) subject. I explain all of this in more detail in Part I.C below.

The second period was the Christian period when the emphasis in matters of sexuality shifted from ethics and the practices of the self to "a very strong 'juridification'—more precisely, a very strong 'codification'—of the moral experience."⁹⁷ In the transition "[f]rom Antiquity to Christianity, we pass from a morality that was essentially

their multifariousness, their divergences and their contradictions," and a history of ethics. *Id.* at 29. The latter is:

[A] history of the way in which individuals are urged to constitute themselves as subjects of moral conduct [and is] concerned with the models proposed for setting up and developing relationships with the self, for self-reflection, self-knowledge, self-examination, for the decipherment of the self by oneself, for the transformations that one seeks to accomplish with oneself as object.

Id. Mark Bevir summarizes the distinction that Foucault makes between morality and ethics as follows:

Morality refers to sets of rules that specify what individuals should or should not do. Ethics, in contrast, refers to the ways in which individuals conduct themselves in relation to such sets of rules. Whereas a morality seeks to impose certain requirements and restrictions on the individual, an ethic constitutes a practice through which an individual can negotiate his relationship to such requirements and restrictions.

Mark Bevir, *Foucault and Critique: Deploying Agency Against Autonomy*, 27 *POL. THEORY* 65, 75 (1999).

95. *FOUCAULT*, *supra* note 6, at 29.

96. *Id.* at 30.

97. *Id.*

the search for personal ethics to a morality as obedience to a system of rules."⁹⁸ Those rules, as they relate to sexuality, were best exemplified by the penitentials of early Christianity, which were codes of conduct—used by priests during confessions—that set forth in great detail the sexual sins (as defined by the Church) and their corresponding penances.⁹⁹

Although Foucault does not elaborate on Christian sexual morality in great detail,¹⁰⁰ his work is sprinkled with references to the differences in the problematization of sexuality between antiquity and Christianity. In addition to the already mentioned codification, Christian sexual morality called not for the self-transformation of the ethical subject but instead for the self-renunciation of impure desires.¹⁰¹ Christian sexual morality was dominated by the idea of

98. FOUCAULT, *An Aesthetics of Existence*, *supra* note 83, at 49.

99. The penitentials "came to embody a virtually all inclusive register of proscribed sexual acts." PIERRE J. PAYER, *SEX AND THE PENITENTIALS: THE DEVELOPMENT OF A SEXUAL CODE 550-1150*, at 5 (1984). "For five hundred years [from the sixth century through the twelfth] the penitential literature [was] the principal agent in the formation and transmission of a code of sexual morality." *Id.* The penitentials were quite explicit in their codification. In terms of homosexual acts, sodomy was the most serious sin and received the longest period of penance, but other acts such as fellatio and mutual masturbation between men, and fornication between women, were also proscribed. *See id.* at 40-44.

100. When Foucault died, he was working on a fourth volume of the *History of Sexuality*, which was to cover the Christian period that followed antiquity and preceded modernity. The manuscript of the fourth volume remains unpublished. *See* Davidson, *supra* note 41, at 27.

101. In the Christian sense of moral conduct,

the ethical subject was to be characterized not so much by the perfect rule of the self by the self in the exercise of a virile type of activity, as by self-renunciation and a purity whose model was to be sought in virginity. This being the case, one can understand the significance that was attached, in Christian morality, to two opposite yet complementary practices: a codification of sexual acts that would become more and more specific, and the development of a hermeneutics of desire together with procedures of self-decipherment.

FOUCAULT, *supra* note 6, at 92.

As Smart explains it,

With the advent of Christianity, the ethical constitution of the subject changes as follows. The ethical substance is not the *aphrodisia* but the "flesh," concupiscence, a form of desire; the mode of subjection is no longer the cultivation of (aesthetic) styles of existence or conduct embodying morally valorized uses of pleasure but rather divine law; . . . the *telos* of moral action is no longer moderation but purity and immortality.

Smart, *supra* note 78, at 211; *see also* Peter Brown, *Bodies and Minds: Sexuality and Renunciation in Early Christianity*, in *BEFORE SEXUALITY: THE CONSTRUCTION OF EROTIC EXPERIENCE IN THE ANCIENT GREEK WORLD 479, 489-90* (David M. Halperin et al. eds., 1990).

lustful desires and the need to atone for those desires, mainly through confession.¹⁰²

The modern period, described by Foucault in the *History of Sexuality*, Volume I, emphasized the codification of sexual rules—much like the Christian era that preceded it. Religious codes, however, became less hegemonic (though they retained considerable influence) and scientific, medical, and psychiatric codes became more important.¹⁰³ Modern discourses on sexuality focused on the debilitating effects (physical, psychological, and moral) of sexual desire. There was continuity from the earlier Christian period in the sense that the focus remained on the need to control improper desires and to avoid sexual acts that were considered immoral or abnormal. This focus differed from the one in antiquity, which emphasized learning how to use sexual pleasures in order to transform oneself.

Although Foucault was never explicit on this issue, I think it is possible to speak of our contemporary era as a fourth period in the history of sexuality in the West. There is continuity between the modern period and the contemporary period (as there was between the Christian period and the modern era) given that legal, medical, and moral codes retain some importance in determining the discourses of sexuality. But the contemporary era is characterized by a *partial* decodification that has allowed a return of sorts to a focus on

[In the early] Christian world, forms of ascetic radicalism that had once hinted at the possibility of transcendence of sexual desire, even of sexual differences, were condemned by bishops and by Imperial laws. . . . By the end of the fourth century, [the idea of] sexuality as a symbol of reversibility . . . had lost much of its momentum.

Id.

102. In early Christianity, the evil and dark side of the human condition was associated with sexual desires. "What is distinctive is the speed and tenacity with which that dark spot came to be identified, in Christian circles, with specifically sexual desires, with unavowed sexual strategems, and . . . with the lingering power of sexual fantasy." Brown, *supra* note 101, at 481.

Before the sixth century, the only way to be forgiven for one's sins (sexual or otherwise) was to engage in a complicated ritual of public penance, an opportunity that was available only once during one's lifetime. See PAYER, *supra* note 99, at 7. Beginning in the sixth century, a system of private penance or confession developed and it was then that the penitentials—with their codification of proscribed sexual acts—began to be used by priests as codes of sexual morality. See *id.* at 6–7. Foucault associates the "development of confessional techniques" with the Lateran Council of 1215. FOUCAULT, *supra* note 9, at 58. That Council for the first time required annual confessions from all Christians. See *id.* at 60. Payer argues, however, that "[p]enance was codified and confessional techniques developed well before 1215," namely, with the penitentials of the sixth century. Pierre J. Payer, *Foucault on Penance and the Shaping of Sexuality*, 14 *STUD. RELIGION* 313, 315–16 (1985).

103. See *supra* Part I.A, notes 29–62 and accompanying text.

the practices of the self, albeit to very different practices from the ones found in Greek and Roman antiquity. I will in Part II discuss the contemporary process of decodification of sexual morality and its implications for the emergence of a gay and lesbian sexual ethic. Before I do so, however, it is necessary to have a better idea of how Foucault interprets the practices of the self that were common in antiquity in order to fully understand what I mean above by "a return of sorts to a focus on the practices of the self."

C. *Sexual Ethics in Classical Antiquity*

In classical antiquity, according to Foucault, sexuality for privileged individuals, that is, for free male citizens,¹⁰⁴ was problematized around the subject's ethical work on itself.¹⁰⁵ This self-formative process is one through "which the individual delimits that part of himself that will form the object of his moral practice, defines his position relative to the precept he will follow, and decides on a certain mode of being that will serve as his moral goal."¹⁰⁶ I explore below how Foucault conceives of this self-formative process. I pay particular attention to it in the context of the problematization in antiquity of male homosexual conduct. The point of doing so is not to argue that there should be a return to the way in which ancient societies dealt with homosexual conduct. Instead, the point is to see the similarities between antiquity and the contemporary period in their emphases on the ethical practices of the self and their deemphases on codes of conduct that seek to construct a sexual morality based on universal distinctions between acceptable and unacceptable sexual acts.

104. See FOUCAULT, *supra* note 6, at 22 (noting that sexual ethics in Greece were "ethics for men: an ethics thought, written, and taught by men and addressed to men—to free men [as opposed to slaves], obviously"); see also HALPERIN, *supra* note 51, at 31 ("The extraordinary polarization of sexual roles in classical Athens merely reflects the marked division in the Athenian polity between the socially superordinate group, composed of [male] citizens, and various subordinate groups (all lacking full civil rights, though not equally subordinate), composed respectively of women, foreigners, slaves, and children."). Foucault, however, has been criticized for "present[ing] us with a vision of ancient sexual systems that is even more male-centered than what his sources present." Amy Richlin, *Foucault's History of Sexuality: A Useful Theory for Women?*, in *RETHINKING SEXUALITY: FOUCAULT AND CLASSICAL ANTIQUITY*, *supra* note 8, at 138, 148; see also Kate Soper, *Productive Contradictions*, in *UP AGAINST FOUCAULT: EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM* 29, 41 (Caroline Ramazanoglu ed., 1993) (criticizing Foucault for not addressing the "feelings of women" and "the role of [male-female] interpersonal relations" in bringing changes to the "masculine ethics" of ancient Greece).

105. See FOUCAULT, *supra* note 6, at 27–28.

106. *Id.* at 28.

In *The Use of Pleasure*,¹⁰⁷ Foucault identifies “four great axes of experience” that for the Greeks represented the most important areas where there was a need to establish an ethical relationship with the self. The axes were “the relation to one’s body, the relation to one’s wife, the relation to boys, and the relation to truth.”¹⁰⁸ In these different contexts, Foucault discusses at some length the “notion of *aphrodesia*, through which one can grasp what was recognized as the ‘ethical substance’ in sexual behavior.”¹⁰⁹ “The *aphrodesia* are the acts, gestures, and contacts that produce a certain form of pleasure.”¹¹⁰ For the Greeks, as I explain below, the “ethical substance” of that pleasure was not linked to particular sexual acts or to the objects of sexual desire (male or female); what mattered instead were two criteria: (1) moderation and (2) an active and reflective approach to sex.

The Greeks associated excess in matters of sexuality with a failure to care for the self. They viewed sex as just another form of appetite that needed to be controlled.¹¹¹ They also thought that being a master of oneself and living one’s life as a work of art required moderation and restraint. The purpose of sexual ethics was not, as it would become in Christianity, to resist desire. The Greeks were not subjects of sexual desire (i.e., their sexuality was not defined or constrained by the need to understand or control sexual desire). Instead, the key to their sexual ethic was to *use* sex in certain acceptable ways.

The discouragement of particular sexual practices in ancient Greece was not justified in terms of their abnormal nature or the improper desires that led individuals to want to engage in them; rather, the sexual practices that were condemned were those that resulted from immoderation and a lack of self-restraint.¹¹² The importance of moderation as a norm of sexual ethics, in fact, runs throughout *The Use of Pleasure*.¹¹³ What constituted means of self-

107. *See id.*

108. *Id.* at 32.

109. *Id.* at 37.

110. *Id.* at 40.

111. Foucault in *The Use of Pleasure* discusses at length how Greeks treated other forms of pleasurable appetites such as food, drink, and sleep. *See id.* 97–139. David Halperin notes that “Foucault’s first major conceptual breakthrough” in *The Use of Pleasure* was “his ability to specify so clearly the ground of the Greeks’ consistent assimilation of sexual desires to the other appetites . . . as qualitatively interchangeable ‘necessities,’ or compulsions, of human nature.” HALPERIN, *supra* note 51, at 68.

112. *See* FOUCAULT, *supra* note 6, at 44–45.

113. There are nineteen entries under “moderation” in the index to *The Use of Pleasure*. *See id.* at 287–88.

restraint for the Greeks were not codes of conduct, but were instead voluntary and self-imposed limitations on the uses of sexual pleasure.¹¹⁴ Sexual ethics were not, as they would become under Christianity, about rules of conduct based on the distinction between natural (or good) and unnatural (or bad) sexual acts; instead, it was about "prudence, reflection, and calculation in the way one distributed and controlled [one's sexual] acts."¹¹⁵ The crucial point to understand is that individuals were not expected to comply with norms of sexual moderation and austerity as universal prescriptions and proscriptions; rather, the norms were understood as "principle[s] of stylization of conduct for those who wished to give their existence the most graceful and accomplished form possible."¹¹⁶ Whether an individual led an ethical sexual life, then, was not determined by his faithfulness towards a code of conduct but by the way in which he fashioned and used his sexuality to exercise control over his sexual appetites while leading a graceful and stylized existence.

The absence of codes of conduct that distinguished between acceptable and unacceptable sexual acts explains why same-gender sexual intimacy was not problematized in antiquity at the level of gender. In other words, nothing about the *gender* of two males who were sexually intimate with each other made that intimacy ethically

114. "[M]oderation [did] not take the form of an obedience to a system of laws or codification of behaviors; nor could it serve as a principle for nullifying pleasures; it was [instead] an art, a practice of pleasures that was capable of *self-limitation* through the use of those pleasures." *Id.* at 57 (emphasis added); see also Smart, *supra* note 78, at 206 (noting that "in classical antiquity the demands of austerity were dispersed rather than unified within a coherent, authoritarian moral system—they proposed rather than imposed moderation, self-control or mastery").

Halperin notes that Foucault's study of ancient Greece leads him to the following "startling and acute conclusion":

The general requirements of Greek morality radically underdetermine the definition of proper conduct for an individual in any particular situation; they leave room for a self-imposed (though no doubt communally enforced) ethic of sexual restraint within the larger field of a Greek male's moral freedom. Greek morality, in other words, doesn't concern itself so much with the forbidden as with the voluntary (in principle, at least): morality is therefore not a matter of obedience to specific prescriptions but a regulated usage... of morally unrestricted pleasures.

HALPERIN, *supra* note 51, at 68.

115. FOUCAULT, *supra* note 6, at 54. For the Greeks, the focus was "the relation one has to one's self . . . rather than on . . . a prescriptive model based on the binary opposition of good and evil, healthy and pathological, normal and abnormal." C. Colwell, *The Retreat of the Subject in The Late Foucault*, 38 PHIL. TODAY 56, 65 (1994).

116. FOUCAULT, *supra* note 6, at 250–51. "Sexual morality [for the Greeks] is thus subsumed by the more general practice of self-regulation with regard to enjoyment that constituted for free upperclass Greek males an art of living, a technique for maintaining personal equilibrium, 'an aesthetics of being.'" HALPERIN, *supra* note 51, at 69.

or morally suspect.¹¹⁷ It would be too easy, however, to conclude that ancient Greek culture was simply tolerant of homosexual conduct.¹¹⁸ The Greeks did problematize homosexual acts; they just did it differently than contemporary Western societies do.

In ancient Greece there was little interest in sexual relations between men of similar ages or between boys.¹¹⁹ The problematization was instead of relationships between adult men and boys: "A male relationship gave rise to a theoretical and moral interest [only] when it was based on a rather pronounced difference on either side of the threshold separating adolescence from manhood."¹²⁰ The older man was expected to play the active role, not

117. As Martha Nussbaum notes, "in [ancient] Greek culture and practices, the gender of the partner assumes far less importance than it does in our society, and is usually taken as less salient than many other facts about a sexual act." Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1544 (1994).

The view that neither Greek law nor customs prohibited or penalized homosexual conduct (as long as certain norms were followed, see *infra* notes 120–32 and accompanying text) is supported by the leading book in the field. See K.J. DOVER, *GREEK HOMOSEXUALITY passim* (1978). While some scholars have argued that this is an incorrect assessment of the historical record, see David Cohen & Richard Saller, *Foucault on Sexuality in Greco-Roman Antiquity*, in *FOUCAULT AND THE WRITING OF HISTORY*, *supra* note 55, at 35, 37–39, the Dover/Foucault position on this issue is accepted by most classicist scholars. See, e.g., HALPERIN, *supra* note 51, at 4–7.

118. See *FOUCAULT*, *supra* note 6, at 191–92.

119. See *id.* at 193–95. These relationships "were not an object of moral solicitude or of a great theoretical interest. Without being ignored or nonexistent, they did not belong to the domain of active and intense problematization." *Id.* at 195; see also JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* 28 (1980) (noting that while the relationship between adult males and boys in ancient Greece may have been "an idealized cultural convention," this does not mean that those kinds of relationships—as opposed to relationships between male adults—were more prevalent).

The silence regarding sexual relationships between adult men may have been caused by the implications of the passive role in the sexual act. As discussed below, this role was associated with immoderation and femininity. See *infra* notes 126–27 and accompanying text. "It is doubtless the existence of this difficulty that explains both the silence in which this relationship between adults was actually enveloped, and the noisy disqualification of those who broke this silence by declaring their acceptance of, or rather, their preference for this 'subordinate role.'" See *FOUCAULT*, *supra* note 6, at 220.

120. *FOUCAULT*, *supra* note 6, at 195. As Martha Nussbaum notes,

To modern ears the word "boy" suggests someone between the ages of say, four and twelve. But the *eromenos* [young partner or beloved] of Greek custom was typically, and ideally, a young man between the time of full attainment of adult height and the full growth of the beard. If we go by modern growth patterns, he was perhaps sixteen to nineteen; but more likely, because the ancient Greek age of puberty seems to have [been] slightly later than ours, the age of a modern college undergraduate.

Nussbaum, *supra* note 117, at 1551.

just sexually,¹²¹ but also socially and morally.¹²² The older man was required to provide guidance, education, and support for the younger man. There needed to be, however, moderation and self-control on *both* sides. The older man "was expected to show his ardor, and to restrain it,"¹²³ the younger man "had to be careful not to yield too easily; he also had to keep from accepting too many tokens of love, and from granting his love heedlessly and out of self-interest, without testing the worth of his partner."¹²⁴ Through this ethic of moderation, each partner sought to make himself into "a subject of ethical behavior."¹²⁵ The idea, once again, was to engage in an active form of reflection with the goal of incorporating prudence and moderation into one's sex life.

The ancient Greeks disapproved of immoderation and passivity; the latter entailed allowing sexual acts to take place without engaging in an active process of reflection, an omission that was associated with femininity.¹²⁶ To be active vis-a-vis sexual pleasures meant to use them for the creation of a better self; to be active meant to be strong, to control, and to moderate one's use of sexual pleasures. The problematization, then, did not apply when the object of the sexual pleasure was of the same gender as the subject. It applied, instead, when there was a lack of attention to the care of the self.¹²⁷

121. It was the older man who was expected to penetrate physically the younger man. See DOVER, *supra* note 117, at 103; Nussbaum, *supra* note 117, at 1546-47.

122. See FOUCAULT, *supra* note 6, at 195.

123. *Id.* at 196.

124. *Id.* Foucault adds:

It was not good (especially in the eyes of public opinion) for a boy to behave "passively," to let himself be manipulated and dominated, to yield without resistance, to become an obliging partner in the sensual pleasures of the other, to indulge his whims, and to offer his body to whomever it pleased and however it pleased them, out of weakness, lust, or self-interest. This was what dishonored boys who accepted the first comer, who showed off unscrupulously, who passed from hand to hand, who granted everything to the highest bidder.

Id. at 211.

125. *Id.* at 203.

126. As the Greeks saw it,

[I]mmoderation derives from a passivity that relates it to femininity. To be immoderate was to be in a state of nonresistance with regard to the force of pleasures, and in a position of weakness and submission; it meant being incapable of that virile stance with respect to oneself that enabled one to be stronger than oneself. In this sense, the man of pleasures and desires, the man of nonmastery (*akrasia*) or self indulgence (*akolasia*) was a man who could be called feminine, but more essentially with respect to himself than with respect to others.

Id. at 84-85.

127. As Foucault notes, "[i]n the eyes of the Greeks, what constituted ethical negativity par excellence was clearly not the loving of both sexes, nor was it the preferring of one's

Foucault discusses other components of the ethical use of pleasure by the Greeks (such as "the relation to the body and to health, [and] the relation to wives and to the institution of marriage"),¹²⁸ but it was through sexual intimacy between men and boys "that the question of the relations between the use of the pleasures and access to truth was developed, in the form of an inquiry into the nature of true love."¹²⁹ The initial dissymmetry in the power and age of the partners could, through reflection and self-control, lead to true reciprocity and the "convergence of love."¹³⁰ The reciprocity existed because the older man became as much the object of attention as the boy; the older man's wisdom and experience became the boy's object of love. The older man, "through the complete mastery that he exercises over himself, will turn the game upside down, reverse the roles, establish the principle of a renunciation of the *aphrodesia*, and become, for all young men who are eager for truth, an object of love."¹³¹ Thus, Foucault notes that in the last pages of Plato's *Symposium* there is a complete role reversal with the handsome young boys enamored of the old and wise Socrates and anxious for him to return their attention.¹³²

According to Foucault, the importance of the care of the self continued in the Greco-Roman era of the first two centuries A.D. In the early part of the Roman empire, there was, if anything, a perceived need for an "intensification of the relation to oneself by which one constituted oneself as the subject of one's acts."¹³³ The Romans, like the ancient Greeks, paid little attention to universal

sex over the other; it consisted in being passive with regard to the pleasures." *Id.* at 85–86. Mark Poster adds:

An elaborate etiquette and numerous discourses were developed by the masters of this period because they feared that the practice of the love of boys might inure the boys to patterns of passivity, hence undermining their freedom and the freedom of the polis. In this way sex became a moral problem in a culture where desire itself was not a moral issue. The love of boys was the leading preoccupation in the elaboration of techniques of the self by which the masters constituted themselves in their freedom.

Mark Poster, *Foucault and the Tyranny of Greece*, in FOUCAULT: A CRITICAL READER, *supra* note 25, at 205, 211.

128. FOUCAULT, *supra* note 6, at 229.

129. *Id.*

130. *Id.* at 239 (emphasis removed); see also Nussbaum, *supra* note 117, at 1547 (noting that the relationship between older men and younger men in ancient Greece "involve[d] a real reciprocity of benefits and mutual affection based on it").

131. FOUCAULT, *supra* note 6, at 241.

132. See *id.*

133. FOUCAULT, *supra* note 7, at 41.

codes of behavior. They also did not problematize sexual intimacy on the basis of the gender of the parties.¹³⁴

There were, however, changes in the forms of problematizations that distinguished Rome in the first two centuries after the death of Christ from Greek antiquity and which, to some extent, presage some of the types of sexual problematizations found in later Christianity and even in the modern era. The first of these changes was the greater involvement of medicine in matters of sexuality as sex became viewed as potentially debilitating and as exposing individuals to illnesses.¹³⁵ A second important change was a reduced interest in the relationship between male adults and boys and a corresponding greater problematization of the relationship between husband and wife.¹³⁶ This change of focus did not mean that individuals ceased to engage in same-gender sexual conduct or even that they were discouraged from doing so. Instead, there was "a decline in the interest one took in [such conduct]; a fading of the importance it was granted in philosophical and moral debate."¹³⁷ Foucault identifies several reasons for this decline, including: greater control by parents in the elite classes over their children;¹³⁸ the availability of young slaves—who did not raise the same concerns about status and passivity as did the children of the elites—as objects of sexual pleasures;¹³⁹ the greater institutionalization of education, which

134. See *id.* at 40. See generally CRAIG A. WILLIAMS, *ROMAN HOMOSEXUALITY: IDEOLOGIES OF MASCULINITY IN CLASSICAL ANTIQUITY* (1999) (arguing that for Romans the important distinction in matters of sexuality was not that between homosexuality and heterosexuality, but was instead between citizen and slave, dominant and subordinate, and masculine and effeminate).

135. See FOUCAULT, *supra* note 7, at 112–18, 141–43. Even though medicine was now more involved in issues of sexuality, the nature of that involvement was different from what took place much later. In the modern era, the involvement of medicine "was to be organized as a domain that would have its normal forms and its morbid forms, its specific pathology, its nosography and etiology—to say nothing of its therapeutics." *Id.* at 141. In Greco-Roman culture, medicine viewed sexual acts as problematic because they could lead to physical illnesses caused by the expenditure of energy. *Id.* at 142.

136. See *id.* at 190. In the Greco-Roman era, "[m]arriage, as an individual tie capable of integrating relations of pleasure and of giving them a positive value, . . . constitute[d] the most active focus for defining stylistics of moral life." *Id.* at 192; see also Poster, *supra* note 127, at 215 ("In place of the elaborate sub-culture surrounding the love of boys, the wife became the centre of the man's sexuality and accordingly the locus in which he constituted his subjectivity.").

137. FOUCAULT, *supra* note 7, at 189.

138. See *id.* at 190.

139. See *id.*

reduced the mentoring role of adult males;¹⁴⁰ and the greater “valorization of marriage.”¹⁴¹

The increased focus on marriage meant a privileging of sexual relations within marriage coupled with a concern for the dangers of nonmarital sexuality. As the Roman Empire era progressed, there was an increasing codification of natural law and a greater acceptance of universal rules of conduct as applied to sexuality.¹⁴² With the move towards a universalization of rules, there was a corresponding emphasis on “forms of prohibition” such as the discouragement of adultery.¹⁴³ These changes presaged the Christian era, with its comprehensive religious codification of sexual morality, which in turn gave way to the modern era with its secular codes of conduct and its systems of knowledge for the production and schematization of human sexuality that Foucault captured so eloquently in *The History of Sexuality*, Volume I.¹⁴⁴

II. CODES OF CONDUCT AND A GAY AND LESBIAN SEXUAL ETHIC

It would be too simplistic to interpret ancient Greek culture as encouraging freedom and tolerance in matters of sexuality. Foucault repeatedly counsels against such an idealized interpretation of Greek sexual norms.¹⁴⁵ Those norms were not about freedom and toleration per se; they were instead about using male homosexual acts (in particular those between adults and adolescents) as the best way of constituting oneself through reflection, moderation, and self-transformation. Foucault also makes it clear that he is not calling for a return to Greek sexual ethics. Opportunities for the ethical use of pleasures and a care of the self were available only to men from the ruling classes. It was not deemed possible (or beneficial) for women, foreigners, or slaves to engage in the process of caring for the self in an ethical way.¹⁴⁶ Clearly, the ancient Greek society, with its

140. *See id.*

141. *Id.*

142. “In the new situation an effort was made for the first time to develop a universal ideal of the subject. Nature and reason became standards by which to judge and evaluate the individual’s realization of the culture of self.” Poster, *supra* note 127, at 215–16; *see also* Brown, *supra* note 101, at 484 (noting “the shift to a universal paradigm” of sexuality beginning in the second century AD).

143. *See* Poster, *supra* note 127, at 216.

144. *See supra* Part I.A, notes 29–62 and accompanying text.

145. *See, e.g.,* FOUCAULT, *supra* note 6, at 187, 192–93, 197.

146. *See supra* note 104 (discussing male centrality in the sexual ethics of ancient Greece).

oppressive class and gender hierarchies, is not one that we should aim to replicate.¹⁴⁷

But it is possible to emphasize an altogether different point: a sexual ethic which allows for a meaningful care of the self places little importance on a code of conduct that makes normative distinctions based on the nature of different sexual acts. It is not a matter, then, of emulating the Greeks. It is a matter of recognizing that a sexual ethic does not have to be grounded in codes of conduct that tell us which sexual acts (and thus which sexual desires) are "good" and which are "bad." To the extent that we think that the value, truth, and meaning of sex is to be found in codes of conduct that seek to make normative distinctions among sexual acts, there is considerably less room for the kind of self-defining and self-transformative ethical practices that existed in ancient Greece and Rome. My thesis in this part of the Article is that the partial legal, medical, and moral *decodification* of homosexuality that has taken place over the last forty years in the United States has allowed for the emergence of a gay and lesbian sexual ethic, one that offers a powerful and appealing alternative to traditional Christian sexual ethics.

In Part II.A *infra*, I briefly summarize the legal codification of homosexuality that began in the United States in the late nineteenth century. This codification paralleled the intensification of medical and psychiatric discourses of (homo)sexuality identified by Foucault in *The History of Sexuality*, Volume I. Part II.A also traces the partial *decodification* of homosexuality that has taken place in American law in the last forty years.

In Part II.B, I discuss the role that moral codes of conduct (as opposed to *legal* codes of conduct) currently play in assessments of the morality of same-gender sexual acts. In the United States today, a consensus no longer exists that moral codes of sexual conduct that privilege particular sexual acts and prohibit others can serve as normative foundations for assessments of the goodness and value (or lack thereof) of sex and sexuality. This process of moral

147. When asked whether the Greeks offered an attractive alternative to contemporary sexual mores, Foucault was emphatic in his answer: "The Greek ethics were linked to a purely virile society with slaves, in which the women were underdogs whose pleasure had no importance, whose sexual life had only to be oriented toward, determined by, their status as wives, and so on." FOUCAULT, *On the Genealogy of Ethics*, *supra* note 5, at 256-57. He added that "[t]he Greek ethics of pleasure is linked to a virile society, to dissymmetry, exclusion of the other, an obsession with penetration All of that is quite disgusting!" *Id.* at 258. In any event, Foucault pointed out that "you can't find the solution of a problem in the solution of another problem raised at another moment by other people." *Id.* at 256.

decodification, when coupled with a partial legal decodification of homosexuality, has allowed for the emergence of a gay and lesbian sexual ethic. I explore the processes, values, and some of the implications of that ethic in Part II.C.

A. *Legal Codification and Partial Decodification of Same-Gender Sexual Conduct*

The law has historically served as an important source for rules of conduct that relate not only to coerced sexual acts but also to consensual ones. Thus sodomy, for example, which is often in criminal statutes referred to as a crime against nature or as a form of deviate sexual intercourse, has been subject to criminal penalties in the United States regardless of whether consent is involved.¹⁴⁸ As I discuss below, Foucault pays insufficient attention to the role of the law in the formation of sexual identities. The law, at least in the United States, has assisted in the simultaneous creation and marginalization of a homosexual identity.¹⁴⁹

1. Foucault and the Law

Foucault has very little interest in or use for the law. He sees the law as the kind of traditional source of power that has been over-emphasized by historians and philosophers alike. For Foucault, an emphasis on the law is misplaced because it offers a view of power relations that places the sovereign (however defined) at the center of power.¹⁵⁰ According to Foucault, political theory should cease to "privilege . . . law and sovereignty," and instead analyze power through its diffusion.¹⁵¹ Foucault does not believe that real power expresses itself through institutions such as legislatures and courts. Instead, Foucault sees power as being highly diffuse, spread throughout society in a myriad of different kinds of disciplines and systems of knowledge.¹⁵² For Foucault, these "mechanisms of

148. See, e.g., MICH. COMP. LAWS ANN. § 750.158 (West 1991); OKL. STAT. ANN. tit. 21 § 886 (West Supp. 2001); TEX. PENAL CODE ANN. §§ 21.01, 21.06 (Vernon 1994).

149. See *infra* Part II.A.2, notes 158–219 and accompanying text.

150. See MICHEL FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977*, at 78, 102–04 (Colin Gordon ed., Colin Gordon et al. trans., 1980) [hereinafter FOUCAULT, *Two Lectures*].

151. FOUCAULT, *supra* note 9, at 90.

152. See *supra* notes 42–46 and accompanying text; see also FOUCAULT, *Two Lectures*, *supra* note 150, at 96 (noting that we "should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions").

power . . . are irreducible to the representation of law.”¹⁵³ “[T]he juridical system,” Foucault notes, “is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus.”¹⁵⁴

Some commentators have noted that Foucault underestimates the role that the law plays in affecting the societal structures and relations that frame the more diffuse kinds of power relations that he explores in his writings.¹⁵⁵ Given that Foucault has little faith in the ability of the law to affect meaningfully the power relations and disciplines that are the main foci of his historical and philosophical analyses, it is perhaps not surprising that he also underestimates the role that the law plays in the formation of sexual identities and moralities. There is very little in *The History of Sexuality*, Volume I, about legal discourse or rules; instead, as we have seen, Foucault’s focus in that book is on the discourses of medicine, psychiatry, and population studies.¹⁵⁶ As I argue below, however, the law, at least in the United States beginning at the end of the nineteenth century, played an important role—alongside the discourses identified by

153. FOUCAULT, *supra* note 9, at 89. For Foucault, “[t]he classical juridical focus on state power tends to obscure the ways in which the individual is dominated by other forces (e.g., schools, hospitals, the military, [and] psychiatry).” LITOWITZ, *supra* note 22, at 67.

154. FOUCAULT, *supra* note 9, at 89; see also FOUCAULT, *Two Lectures*, *supra* note 150, at 97 (“One should try to locate power at the extreme points of its exercise, where it is always less legal in character.”).

Hunt and Wickham note that Foucault’s rather circumscribed view of the law is similar to that held by the nineteenth century legal philosopher John Austin who conceived of the law as only those commands issued by the sovereign and enforced through sanctions. See ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 60 (1994) (citing JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed., Weidenfeld & Nicolson 1955) (1832)).

155. Hunt and Wickham argue that Foucault “unnecessarily marginalised” the role of the law and the state “with respect to the coordination and condensation of the forms of power.” HUNT & WICKHAM, *supra* note 154, at 71. They add “that, contrary to Foucault, disciplinary power is not opposed to law, but rather . . . law has been a primary agent of the advance of new modalities of power, law constitutes distinctive features of their mode of operation.” *Id.* at 65. Similarly, Duncan Kennedy has criticized Foucault’s conception of the law because it fails to recognize that power relations “between parties . . . [are themselves] conditioned through and through by a preexisting legal context.” DUNCAN KENNEDY, *SEXY DRESSING ETC.* 120 (1993).

156. See *supra* Part I.A., notes 29–62 and accompanying text.

Foucault—in the creation of a homosexual identity and in reifying a conception of homosexuality as dangerous and depraved.¹⁵⁷

2. Legal Codes and Homosexuality

The story of the codification of consensual same-gender sexuality in American law began with the application of English sodomy (or buggery) statutes in the colonies.¹⁵⁸ After independence, all of the new American states enacted sodomy statutes.¹⁵⁹ Prior to the late nineteenth century, however, the criminal act of sodomy was not connected to a particular sexual identity. Society, in other words, did not assign a distinctive sexual identity to those who engaged in sodomy. This changed at the end of the nineteenth century as science and medicine helped to create sexual categories known as inverts, perverts, transsexuals, and homosexuals.¹⁶⁰ While these identities had different meanings, they had one common denominator: a seeming refusal by some individuals to abide by what medical and psychiatric experts (in reflecting broader cultural norms) considered to be appropriate gender roles and behaviors.¹⁶¹ The gender nonconformists flouted the strict societal norms regarding appropriate male and female personalities, male and female dress, and male and female subjects of sexual desire.

Sodomy statutes, as a means of regulating same-gender sexual conduct, were insufficient in an era when American doctors began to view the turning to one's own gender for sexual intimacy as "a dangerous sickness."¹⁶² They proved inadequate because prior to the

157. I will also argue briefly in Part III.B *infra* that Foucault's failure to appreciate the effects of legal discourse and rules on societal power relations led him to underestimate the possible contribution of the law in helping marginalized groups resist and partially modify those relations. See *infra* notes 397–401 and accompanying text.

158. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 157 (1999); JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 16–23 (1976). The English sodomy statutes applied during the colonial period can be traced back to the Reformation Parliament of 1533. That body, in turn, secularized criminal offenses previously regulated by the Catholic Church. See ESKRIDGE, *supra*, at 157.

159. See ESKRIDGE, *supra* note 158, at 157.

160. See *id.* at 22–24, 39.

161. See George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58–59 *SALMAGUNDI* 114, 146 (1982–83).

162. See ESKRIDGE, *supra* note 158, at 22 (citation omitted). Jonathan Katz provides a fascinating cross-section of excerpts from the medical literature on homosexuality from the end of the nineteenth century to the 1970s. See KATZ, *supra* note 158, at 129–207. Katz observes:

1880s they only prohibited anal sex; they did not prohibit oral sex or mutual masturbation between men, or sex of any kind between women.¹⁶³ In addition, convicting a defendant of consensual sodomy proved difficult since the testimony of an adult accomplice was required.¹⁶⁴ Beginning in the 1880s, therefore, state legislatures enacted a slew of new laws to deal with the problem—identified by science and medicine—of sexual inversion and gender noncompliance.¹⁶⁵ The scope of sodomy statutes was expanded to include oral sex.¹⁶⁶ And just as importantly, new laws were enacted that criminalized public indecency,¹⁶⁷ sexual solicitation,¹⁶⁸ cross-dressing,¹⁶⁹ seduction of minors,¹⁷⁰ and obscenity.¹⁷¹ These laws,

The historical change in the conception of homosexuality from sin to crime to sickness is intimately associated with the rise to power of a class of petit bourgeois medical professionals, a group of individual medical entrepreneurs, whose stock in trade is their alleged "expert" understanding of homosexuality, a special-interest group whose facade of scientific objectivity covers their own emotional, economic, and career investments in their status as such authorities.

Id. at 130. The view of homosexuality as a sickness began to retreat only in the 1970s after the decodification of homosexuality by the psychiatric community. See *infra* notes 217–19 and accompanying text.

163. See ESKRIDGE, *supra* note 158, at 24, 158.

164. See *id.* at 24.

165. See *id.*

166. See *id.* at 24–25, 158–59. Justice White got his history wrong, therefore, when he argued in *Bowers v. Hardwick* that the conduct for which Mr. Hardwick was arrested (oral sex) had been criminalized for centuries. See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). Oral sex was not a crime in either England before 1885, see ESKRIDGE, *supra* note 158, at 158, or more importantly, in the United States at the time of enactment of the Fourteenth Amendment, see *id.*; Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1084–85 (1988).

167. See ESKRIDGE, *supra* note 158, at 29–31. In 1903, for example, California criminalized "outraging public decency," which allowed the police "to harass cross-dressing women, female impersonators, male invert[s] looking for partners, and male as well as female prostitutes." *Id.* at 31 (citing Act of Mar. 19, 1903, 1903 Cal. Stat. 201) (other citations omitted).

168. See ESKRIDGE, *supra* note 158, at 29–31. In 1900, for example, the New York legislature "expand[ed] the definition of illegal 'vagrant' to include '[e]very male person who lives wholly or in part on the earnings of prostitution, or who in any public place solicits for immoral purposes.'" *Id.* at 29 (quoting Act of Apr. 5, 1900, 1900 N.Y. Laws 281 (amended by Act of June 6, 1910, 1910 N.Y. Laws 382)).

169. See ESKRIDGE, *supra* note 158, at 27–29. By the second half of the nineteenth century, many American cities had ordinances prohibiting cross-dressing. See *id.* at 27.

170. See *id.* at 31–32. Prior to this time, the main purpose of the law in this area was to protect girls from men who wanted to have intercourse. The focus, however, greatly expanded during the post-Civil War period. "Th[e] regulatory regime [now] not only protected boys as well as girls, but defined the arena of sexual violation more broadly than seduction and sodomy laws had done, to include sexual touching, fondling, and even just observing sexual activities." *Id.* at 32. In Appendix A-3, Eskridge lists the statutes from

violations of which were easier to prove than violations of sodomy statutes, became a powerful weapon in the regulation and oppression of homosexuals and other gender nonconformists.¹⁷²

Starting in the 1880s, then, the state significantly increased its legal regulation of same-gender sexual behavior. It would be a mistake, however, to view the law as the primary source of meaning in the construction of a homosexual identity; to believe so would be to ignore Foucault's insights about the multiplicity of sexuality discourses, most of which do not emanate directly from state regulation.¹⁷³ But as Bill Eskridge notes, the law played a "supporting role" in the creation and marginalization of a homosexual identity given that the law "reinforced social pressure by *normalizing* sex around marital procreation."¹⁷⁴ Sex outside of such procreation became subject to increasing legal regulation. At the same time that medical and psychiatric discourses led to "a unique construction of identity crystallized around same-sex desire,"¹⁷⁵ the law became much more active and aggressive in its regulation of that desire.

World War I brought further changes in the legal regulation of same-gender sexuality. The war itself was a period of relative toleration of sexual and gender nonconformity as the nation focused its attention elsewhere and as male friendships and camaraderie were encouraged.¹⁷⁶ After the war, however, there was a regulatory shift from pre-war practices. The culture began to view homosexuals not only as medical and psychiatric aberrations, but also as immoral and predatory. There was a growing sense, for example, that children needed to be protected from homosexuals. As Eskridge puts it, "[t]he state's goals [became] to control and punish the psychopathic homosexual, to harass and drive underground homosexual communities and their expression, and to exclude homosexuals from citizenship—all in the name of protecting children from a dangerous force threatening their development into heterosexuals."¹⁷⁷

Eskridge documents how sodomy and other criminal prosecutions specifically targeted at homosexuals (for disorderly

all fifty states (including their years of enactment) intended to protect minors in sexual matters. *Id.* app. A-3 at 342-51.

171. *See id.* at 32-34.

172. *See id.* at 24-34.

173. *See supra* Part I.A, notes 29-62 and accompanying text.

174. ESKRIDGE, *supra* note 158, at 52.

175. STEVEN SEIDMAN, *EMBATTLED EROS: SEXUAL POLITICS AND ETHICS IN CONTEMPORARY AMERICA* 146 (1992).

176. *See* ESKRIDGE, *supra* note 158, at 39.

177. *Id.* at 40.

conduct, lewd conduct, and solicitation) increased substantially during the postwar period.¹⁷⁸ Furthermore, the state harassed homosexuals in public places (such as bars, parks, streets, and cafes) where they sought to meet and associate.¹⁷⁹ The state also, in the period between the wars, intensified its censorship of gay books, magazines, and theatre.¹⁸⁰ "The homosexual was not only a sexual outlaw but one who by World War II had clearly caught the eye of the government."¹⁸¹

World War II, like World War I, saw a period of relative toleration toward gender and sexual nonconformity.¹⁸² But as the nation refocused on domestic issues after the war, the repression of homosexuals increased, even beyond the levels that were seen in the period after World War I. In the late 1940s and 1950s, government agencies hunted down lesbians and gay men through the use of the criminal law at a level of ferocity not seen before or since. As Eskridge explains, "[t]he state between 1946 and 1961 imposed criminal punishments on as many as a million lesbians and gay men engaged in consensual adult intercourse, dancing, kissing, or holding hands."¹⁸³ Police departments created special vice or morals squads that specialized in the targeting of homosexuals.¹⁸⁴ Police stakeouts,

178. See *id.* at 41-42.

179. See *id.* at 44-45. George Chauncey describes how the regulation of homosexuality in New York City in the 1920s and 1930s became progressively more intense and pernicious as governmental agencies (such as the police and the alcohol regulation authorities) aggressively enforced laws against homosexuals. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 331-54 (1994).

180. See ESKRIDGE, *supra* note 158, at 46-49.

181. *Id.* at 43.

182. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 24-31 (1983); ESKRIDGE, *supra* note 158, at 59. Eskridge argues that "[b]y offering unprecedented opportunities to women and by throwing men and women into homosocial settings, World War II . . . relaxed gender and sex roles and fueled the postwar expansion of homosexual urban subcultures." *Id.*

183. ESKRIDGE, *supra* note 158, at 60. In addition to prosecutions for sodomy, which according to Eskridge ranged from two thousand to five thousand nationally between 1946 and 1961, see *id.* at 66, "[p]olice also arrested people who cross-dressed, danced or flirted with someone of the same sex, loitered in public restrooms, and solicited sodomy; these mutually consenting activities could be the basis of arrests for solicitation, vagrancy, public indecency, loitering, and disorderly conduct, depending on the jurisdiction," *id.*

184. See *id.* at 63.

raids, and undercover operations became "much more aggressive and invasive than they had been before the war."¹⁸⁵

In addition to the aggressive enforcement of the criminal law, the 1940s and 1950s saw the implementation of policies that identified and expelled homosexuals from government jobs while excluding gay applicants from those jobs altogether.¹⁸⁶ Lesbians and gay men were subject to governmental harassment, surveillance, and witch hunts with an intensity that matched the treatment of communists and other leftists during the McCarthy era.¹⁸⁷ In the end, however, while the persecution of lesbians and gay men led to the destruction of thousands of lives, it did not accomplish the government's "stated goal of discouraging and erasing homosexual subcultures."¹⁸⁸ In fact, the persecution of lesbians and gay men created a shared sense of identity as they began to organize and fight back in the 1960s and 1970s.¹⁸⁹ "Ironically, the American antihomosexual terror helped create a homosexual rights movement."¹⁹⁰

The law played a complicated role in this new development; while it remained (as it remains today) a source of oppression and discrimination, the law in the 1960s began to retreat somewhat from the oppressive regulation of same-gender sexual conduct. The first sign of this partial retreat was the American Law Institute's vote in 1955 to decriminalize consensual sodomy in its Model Penal Code.¹⁹¹ In 1961, Illinois became the first state to decriminalize consensual sodomy.¹⁹² Since 1961, thirty-one additional states and the District of Columbia have decriminalized sodomy, either legislatively or through

185. *Id.* at 64; see also Robert L. Jacobson, Note, "Megan's Law": Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431, 2433-40 (1999) (describing police tactics used to harass gay men from the 1930s until the 1960s).

186. See ESKRIDGE, *supra* note 158, at 67-74.

187. See *id.*; John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in PASSION AND POWER: SEXUALITY IN HISTORY 226-40 (Kathy Peiss & Christina Simmons eds., 1989).

188. ESKRIDGE, *supra* note 158, at 82.

189. For an historical overview of this process see D'Emilio, *supra* note 187, at 129-96; ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN RIGHTS 1945-1990, at 93-338 (1992).

190. ESKRIDGE, *supra* note 158, at 83. It is interesting to consider the connection between a regime of legal regulation of homosexuality and the existence of a gay rights movement. "In Italy," for example, "a country that never had anti-homosexual legislation, even under Mussolini, gay rights has not had the political or social resonance found in the United States or Germany." Alessandra Stanley, *Dueling Festivals: Gay Pride and Vatican Collide*, N.Y. TIMES, June 3, 2000, at A4.

191. See ESKRIDGE, *supra* note 158, at 84.

192. See *id.*

judicial rulings based on state constitutional grounds.¹⁹³ Six of those states (and the District of Columbia)¹⁹⁴ have done so after the Supreme Court upheld the federal constitutionality of Georgia's sodomy statute in *Bowers v. Hardwick*.¹⁹⁵

Beginning in the 1960s, prosecutions for sodomy began to decrease, as did prosecutions for "cross-dressing, consensual oral sex and solicitation, and same-sex . . . dancing."¹⁹⁶ Vague and broad solicitation, lewdness, disorderly conduct, and vagrancy laws that states used for decades to harass and oppress lesbians and gay men began to receive greater attention by legislatures and scrutiny by courts.¹⁹⁷ Beginning in the 1960s, legislatures began "repealing broadly phrased vagrancy and disorderly conduct laws and replacing them with statutes criminalizing specified acts of public disorder."¹⁹⁸ Furthermore, as the Supreme Court strengthened individual rights of speech and association during the civil rights era, there were unintended positive consequences for lesbians and gay men.¹⁹⁹ Judicial rulings gave lesbians and gay men greater legal protection allowing them to speak, associate, socialize, and organize.²⁰⁰ Gay publications, organizations, bars, and cafes began to proliferate as lesbians and gay men for the first time were afforded partial protection by the law.²⁰¹

193. See *id.* app. A-1 at 328-37 (containing a state-by-state history of sodomy statutes).

194. See *id.* The six states are Georgia, Kentucky, Montana, Nevada, Pennsylvania, and Tennessee. See *id.* Since the publication of Eskridge's book, an intermediate appellate court in Louisiana struck down that state's sodomy statute, only to be reversed by the state supreme court. See *State v. Smith*, 729 So. 2d 648, 651-54 (La. Ct. App. 1999), *rev'd* 766 So.2d 501, 517 (La. 2000). In Texas, a panel of the Court of Criminal Appeals struck down that state's sodomy statute, only to be later reversed by the full court sitting *en banc*. See *Lawrence v. State*, 2000 WL 729417 (Tex. Crim. App. 2000), *withdrawn, superseded on reh'g by*, 41 S.W.3d 349 (Tex. Crim. App. 2001).

195. 478 U.S. 186, 196 (1986).

196. ESKRIDGE, *supra* note 158, at 101.

197. See *id.* at 108-10.

198. *Id.* at 110.

199. Freedom of association cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), helped lesbians and gay men challenge local ordinances that prohibited them from congregating. See ESKRIDGE, *supra* note 158, at 112-13.

200. The most important early case that specifically recognized the rights of association of gay individuals was *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 19 (N.J. 1967). In that case, the New Jersey Supreme Court set aside penalties imposed by the state against bar owners because they allowed lesbians and gay men to congregate. *Id.* The New Jersey court relied *inter alia* on Supreme Court cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *One Eleven Wines & Liquors*, 235 A.2d at 18.

201. See ESKRIDGE, *supra* note 158, at 111-25.

Ironically, then, after decades of legal persecution and oppression, lesbians and gay men began to turn to the law for protection. Vermont's enactment of comprehensive domestic partnership legislation that provides gay and lesbian couples who enter into civil unions the same rights and benefits enjoyed by married heterosexual couples is only the most recent and dramatic example of this phenomenon.²⁰² But there have been many others along the way, including the enactment of state and local laws that protect lesbians and gay men from discrimination,²⁰³ the issuing of executive orders banning discrimination in federal civilian agencies,²⁰⁴ as well as the recognition by many (though by no means all) judges that the sexual orientation of gay and lesbian parents is not inconsistent with the best interests of children.²⁰⁵ The result of all of this is that the law today is as often the protector of lesbians and gay men as it is their oppressor.

Of course, many law-based oppressions remain and we should not minimize their impact. Examples are many and include the following: (1) nineteen states still criminalize sodomy,²⁰⁶ (2) harassment of gay men through solicitation and public lewdness laws, while less prevalent than in the period after World War II, has by no means disappeared,²⁰⁷ (3) the military continues to discriminate openly against lesbians and gay men, and such discrimination has been found by courts to pass constitutional muster,²⁰⁸ (4) three states

202. See VT. STAT. ANN. tit. 15 § 1202 (Supp. 2000). In 1997, Hawaii enacted a statute conferring limited rights and benefits to couples (including same-gender couples) who cannot legally marry. See HAW. REV. STAT. § 572 (Supp. 2000).

203. See ESKRIDGE, *supra* note 158, app. B-2 at 356-61 (listing states and municipalities that have laws against sexual orientation discrimination).

204. See Exec. Order No. 13,087, 3 C.F.R. § 191 (1999) (amending Exec. Order No. 11,478, 3 C.F.R. § 803 (1966-70) to include sexual orientation in the list of categories for which discrimination is prohibited).

205. See, e.g., *In re M.M.D. v. B.H.M.*, 662 A.2d 837, 854 (D.C. 1995); *In re Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993); *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1273 (Vt. 1993). But see *Constant A. v. Paul C.A.*, 496 A.2d 1, 3 (Pa. Super. Ct. 1985) (noting the trial court's finding that the "natural mother's lesbian relationship shows her moral deficiency"); *Hertzler v. Hertzler*, 908 P.2d 946, 953 (Wyo. 1995) (Golden, C.J., dissenting) (noting that the trial judge stated that the "mother's open homosexuality . . . 'is likely to negatively affect the development of the children's moral values'").

206. See ESKRIDGE, *supra* note 158, app. A-1 at 328-37. Two recent state constitutional challenges to sodomy statutes have failed. See *State v. Smith*, 766 So. 2d 501, 517 (La. 2000); *Lawrence v. State*, 41 S.W.3d 349, 350 (Tex. Crim. App. 2001).

207. See Jacobson, *supra* note 185, at 2454-55.

208. See, e.g., *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136-37 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915, 934 (4th Cir. 1996).

(Florida, Mississippi, and Utah)²⁰⁹ currently prohibit lesbians and gay men from adopting children, and the view that gay and lesbian parents do not deserve the same legal protections as heterosexual parents still persists.²¹⁰

Despite these remaining law-based oppressions, the law as a codifier of sexual morality today plays a much less important role in the subordination of lesbians and gay men than it did forty short years ago. The law by and large no longer provides a hierarchy of consensual sexual conduct that seeks to distinguish between permissible and impermissible sexual acts. Even states that still have sodomy statutes on the books rarely enforce them.²¹¹ In the same way that adultery and fornication statutes have become largely irrelevant (both legally and morally),²¹² laws that still oppress lesbians and gay men have lost their ability to impact significantly the debate regarding the morality or appropriateness of same-gender sexual acts. While there remains a considerable societal hostility and animosity towards lesbians and gay men, those who share those feelings can no longer rely, as they once did, on having their views consistently reflected in the law. In fact, the Supreme Court has held that to the extent that a law is nothing more than the codification of animosity towards lesbians and gay men, it violates the Equal Protection Clause.²¹³ Our contemporary legal institutions and rules, which simultaneously protect and oppress lesbians and gay men, send mixed signals about the status of homosexuality in our society—signals that largely cancel themselves out.

This retrenchment in the ability of the law to serve as a code of conduct that distinguishes between permissible and impermissible

209. See FLA. STAT. ANN. § 63.042(3) (West 1995); MISS. CODE ANN. § 93-17-3(2) (1999); UTAH CODE ANN. § 78-30-1(3)(b) (Supp. 2000). The Utah statute bars all unmarried cohabiting couples from adopting, but it was clearly aimed at lesbians and gay men. See Nora Stephens, *Don't Adopt These Bills*, SALT LAKE TRIB., Feb. 20, 2000 at A1.

210. See generally Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (arguing for the application of a rebuttable presumption that parenting by lesbians and gay men is not in the best interests of children because of the alleged potential harm that such parenting might inflict on children).

211. Even when not enforced, however, sodomy statutes still have negative implications for gay and lesbian litigants in areas of the law such family, employment, and immigration. See Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 831-43 (2001).

212. "The American Law Institute does not define either adultery or fornication as a crime in its Model Penal Code, observing that such laws are widely disobeyed and rarely enforced." Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 526 n.8 (2000) (citing MODEL PENAL CODE § 213 note on adultery and fornication (1980)).

213. See *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

consensual sexual acts allows for the development of an alternative sexual ethic as individuals have a greater opportunity to affect the meaning of their sexual acts and sexuality. Foucault in his later work recognized that the absence of codes of conduct allows for the development of a sexual ethic that is not based on universal rules. The absence of codes of conduct permitted the flourishing of an ethic as a care of the self in Greek and Roman antiquity.²¹⁴ Similarly, in the United States over the last forty years, the law's contribution to the elaboration of universal standards that affect the perceived morality of consensual sexual activity has waned. This partial decodification has allowed for the emergence of a gay and lesbian sexual ethic that, while different in substance from a Greek sexual ethic, is procedurally similar in that it encourages the individual to engage in an ethical process of reflection and self-transformation.²¹⁵

I want to make it clear that what I mean by a partial legal decodification of sexuality entails the lessening of the ability of or interest by the law to make distinctions between permissible and impermissible consensual sexual acts. In this sense, decodification means not the absence of law, but the absence of law as a form of normative hierarchy that seeks to distinguish among different kinds of sexual acts. Thus, by using the term "decodification," I do not want to suggest that our society has as a descriptive matter embraced, or that it should as a normative matter aspire to construct, a libertarian framework that considers the absence of codes or regulations sufficient to guarantee freedom and personal autonomy. As I will argue in Part III.B, the libertarian view that requires only that the state not interfere with consensual relationships proves to be insufficient for lesbian and gay men who depend on the state (and the law) to protect them from discrimination and oppression as well as to provide them with membership into certain institutions such as parenting and (potentially) marriage.²¹⁶

It is also important to note that what I refer to as a partial decodification of consensual sexual acts has not been limited to the law. The same applies to other disciplines such as psychiatry. In 1973, the American Psychiatric Association removed homosexuality from the list of mental illnesses contained in its *Diagnostic and*

214. See *supra* Part I.C, notes 104–44 and accompanying text.

215. See *infra* Part II.C, notes 249–322 and accompanying text.

216. See *infra* Part III.B, notes 388–416 and accompanying text; see also Eskridge, *supra* note 61, at 384 (arguing that in the struggle for gay rights, the "arguments are not libertarian, because the laws we seek will enlist the state as an ally in our struggle against social oppression and because such laws will intrude upon private decision-making").

Statistical Manual of Mental Disorders (DSM).²¹⁷ The DSM, like the laws that regulate consensual sexuality, is a code of conduct that distinguishes between acceptable (or normal) and unacceptable (or abnormal) sex.²¹⁸ As long as homosexuality was officially listed as a mental illness, the medical and psychiatric professions could continue to subject lesbians and gay men to their commands and standards. Over the last thirty years, however, the importance of codes in the medical regulation of homosexuality has receded considerably as substantial numbers of American medical doctors, psychiatrists, and psychologists no longer view homosexuality as a disease.²¹⁹ While I do not attempt to explore in greater detail the medical decodification of homosexuality, that phenomenon, like the legal decodification of homosexuality, has allowed for the emergence of a gay and lesbian sexual ethic. As these codes play less of a role in defining the meaning of homosexuality in our society, lesbians and gay men have been able, through a process of self-definition and self-transformation, to give ethical meaning to their sexuality and their sexual acts. Before I turn to a detailed discussion of the content of a gay and lesbian sexual ethic, I want to explore another kind of decodification of sexuality that has taken place in the United States in the last few decades—namely, a *moral* one.

217. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 101–54 (1981).

218. The DSM “is a fairly reliable map of the current moral hierarchy of sexual activities.” Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 280 (Carole S. Vance ed., 1984). The most recent edition of the DSM lists exhibitionism, fetishism, pedophilia, sexual masochism, sexual sadism, transvestic fetishism, voyeurism, and gender identity disorder as psychiatric illnesses. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (DSM IV) 522–38 (1994).

219. See BAYER, *supra* note 217, at 155–78. In 1975, the American Psychological Association approved the action taken by the American Psychiatric Association and adopted the following resolution: “Homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.” American Psychological Association, *Policy Statements on Lesbian, Gay, and Bisexual Concerns*, at <http://www.apa.org/pi/lgbpolicy/against.html> (last visited Sept. 6, 2001). Recently, considerable attention has been paid to the appropriateness of medical and psychiatric regimes that seek to “cure” lesbians and gay men. See generally David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999) (discussing different “treatments” and “therapies” aimed at modifying same-gender sexual orientation).

B. Moral Codification and Decodification of Sexuality

The idea of a sexual morality based on a code of conduct that is tied to particular sexual acts has its roots in a Christian sexual ethic. That ethic has two principal components, both of which are traceable to the biblical writings of St. Paul and to the fourth and fifth centuries writings of St. Augustine.²²⁰ The first component is that sex must take place within marriage in order to be moral.²²¹ The second component is that even within marriage, sexual acts must be limited to those that are reproductive in nature.²²² According to the Christian tradition, only procreative, marital intercourse can turn sexual pleasure into a moral good because only such sex is about more than physical pleasure; it is also about the creation of new life and, what Aquinas called, the *fides* of the marital union.²²³ By *fides*, Aquinas meant the union of the mind and body of the two spouses into a unique form of community characteristic of the marital relationship.²²⁴

Rather than track the historical development of a Christian sexual ethic,²²⁵ I want to discuss a contemporary (and ostensibly secular) version of it as represented by the new natural law philosophy of John Finnis. Finnis is the most prominent contemporary Anglo-American legal philosopher who promotes a conception of sexual morality that is based, in part, on a code of conduct linked to the (im)morality of particular sexual acts.²²⁶ Finnis's moral code of sexual conduct is the philosophical equivalent of a legal codification of prohibited sexual acts. In the same way, however, that the relevance of legal codes on issues of sexual morality has waned, so has the relevance of a moral code of conduct that relies in a significant way on the nature of particular sexual acts to distinguish between morally acceptable and unacceptable sex.

220. For a helpful synopsis of the development of Christian sexual morality that traces it through the medieval canon law of the Catholic Church to contemporary America law, see Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. ILL. L. REV. 1.

221. See *id.* at 19–27.

222. See *id.*

223. See Finnis, *supra* note 2, at 105.

224. See *id.* at 107–08.

225. For helpful sources on such a development, see, for example, JAMES BRUNDAGE, *LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987); PHILIP L. REYNOLDS, *MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS* (1994); BOSWELL, *supra* note 119.

226. See Finnis, *supra* note 1, at 1063–76; Finnis, *supra* note 2, at 97–98. For other representative writings explicating new natural law's assessment of human sexuality, see George & Bradley, *supra* note 1; Lee & George, *supra* note 2.

At its most basic level, the normative foundation of new natural law philosophy on issues of sexuality is the connection between sex and reproduction. Reproduction gives sexual intimacy a higher purpose; it removes sex from the arena of pleasure and places it in the seemingly loftier position of supporting the survival of the species. New natural law theorists, however, do not ground their normative view of reproductive sexual intimacy on instrumentalist grounds; to do so would be to demean human sexuality by placing it at the service of species survival. Thus, new natural law theorists such as Finnis view sexual intimacy as an indispensable component of the intrinsic good of marriage.²²⁷ According to Finnis, "[g]enital intercourse between spouses enables them to actualize and experience (and in that sense express) their marriage itself, as a single reality with two blessings (children and mutual affection)."²²⁸ As Finnis sees it, lesbians and gay men cannot attain the intrinsic good of marriage because their intimate relationships have "nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit."²²⁹ Gay sex, according to Finnis, can "do no more than provide each partner with an individual gratification"²³⁰ and thus is no different, from a moral perspective, than sex between two strangers, or with a prostitute, or with oneself.²³¹

Finnis explicitly states that what interests him is "the question [of] whether certain types of *acts* are morally right or wrong."²³² Feelings of love, mutuality, and friendship in sexual intimacy matter but only if they are expressed from within the institution of marriage *and* if they accompany sexual acts that have "procreative significance."²³³ As Finnis notes, "wrongful sex acts are more seriously immoral the 'more distant' they are from *marital* sexual

227. See Finnis, *supra* note 1, at 1063–64; see also George & Bradley, *supra* note 1, at 306 ("[W]e hold that marriage and marital intercourse are intrinsically good; and . . . we deny that sexual intercourse may legitimately be instrumentalized to any extrinsic end.").

228. Finnis, *supra* note 1, at 1064.

229. *Id.* at 1066.

230. *Id.*

231. See *id.* at 1067.

232. See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 30 n.8 (1995) (emphasis added). This is the same essay as Finnis, *supra* note 1, with some additional comments by Finnis added to the footnotes.

233. See Finnis, *supra* note 1, at 1067. For Finnis, sexual acts have "procreative significance" if they in general could lead to reproduction, regardless of whether they actually do so. See *id.* In this way, Finnis can prioritize penile-vaginal intercourse even when engaged in by a sterile or elderly couple.

intercourse.”²³⁴ It is possible, therefore, to construct a hierarchy of sexual acts based on Finnis’s conception of sexual morality:

1. Uncontracepted penile-vaginal sex by a married couple
2. Contracepted penile-vaginal sex by a married couple
3. Oral or anal sex by a married couple
4. Any kind of sex by an unmarried heterosexual couple
5. Masturbation
6. Any kind of sex with someone of the same gender

For Finnis, only the first kind of sexual intimacy on this list is moral. All others, including contracepted penile-vaginal sex by a married couple, are not.²³⁵ There is a hierarchy for Finnis because the farther one moves away from marital reproductive sex, the more immoral the sex becomes. While Finnis undoubtedly believes that same-gender intimacy (item six on the hierarchy) is worse than contracepted penile-vaginal sex by a married couple (item two), the common denominator of acts two through six is that they are motivated largely by a desire to experience physical pleasure.²³⁶ Masturbation and same-gender intimacy are at the bottom of the hierarchy for Finnis because he cannot conceive of any reason for engaging in those acts other than the seeking of pleasure. No meaningful human connection, and no actual mutuality, can arise from sexual conduct that has no resemblance to marital reproductive sex. While lesbians and gay men may think that a meaningful mutuality is a component of their sexual intimacy, such mutuality is for them an emotion rather than a reality:

Reality is known in judgment, not in emotion, and in *reality*, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client

234. Finnis, *supra* note 2, at 98.

235. See *id.* at 1068 n.50; see also John M. Finnis, *Natural Law and Unnatural Acts*, 11 HEYTHROP J. 365, 384 (1970) (arguing that “the choice to exclude the possibility of procreation while engaging in intercourse is always, and in an obvious and unambiguous way . . . a choice directly and immediately against [the] basic value” of procreation).

236. See Finnis, *supra* note 1, at 1067. Lee and George argue that when individuals engage in masturbation or sodomy (whether homosexual or heterosexual), they experience pleasures as individuals rather than as a unit, and therefore use sex instrumentally. See Lee & George, *supra* note 2, at 146–47. According to them, only married couples who engage in coitus experience sex noninstrumentally, that is, as part of the basic good of marital union. See *id.* at 144.

to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a grueling day on the assembly line.²³⁷

Even when mutuality exists "in reality," it is the nature of sexual acts that for Finnis often plays a determinative role in the moral assessment of sexuality. Thus, the same married heterosexual couple can have the same level of love and respect for each other, and yet if one day they engage in uncontracepted penile-vaginal sex, they use their sexuality morally, but if on the next day they use a condom or engage in oral sex, they use it immorally. Again, while Finnis is not dismissive or unmindful of the importance of mutuality, the determinative role in his conception of sexual morality is often played not by mutuality but by the nature of the sexual act itself. No degree of love, respect, or concern for the other will make sexual acts two through six in the hierarchy free of moral suspicion.²³⁸

I have argued elsewhere that when Finnis questions the ability of lesbians and gay men to participate in sexually intimate relationships characterized by a true and meaningful mutuality, he questions their basic humanity.²³⁹ I do not here want to take issue with Finnis's hierarchy; I simply want to note that his conception of sexual morality requires a hierarchy of some sort. Finnis may argue that his conception of sexual morality does not focus on particular sexual acts, but that it instead distinguishes between *marital* sex and *non-marital* sex.²⁴⁰ That argument is not persuasive because the distinction that Finnis tries to make is itself based on the premise that only *one* kind of sexual act can be "marital" in nature. Again, Finnis relies on a hierarchy when he argues that "wrongful sex acts are more seriously immoral the 'more distant' they are from *marital* sexual intercourse."²⁴¹ In the end, not much has changed between the Christian penitentials of the sixth century, which codified proscriptions against all sexual acts other than penile-vaginal intercourse within marriage,²⁴² and Finnis's conception of sexual morality.

237. Finnis, *supra* note 1, at 1067.

238. See Finnis, *supra* note 235, at 385 (arguing "that some sexual acts are . . . always wrong because [of] an inadequate response" to the basic good of procreation).

239. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1911-19 (1997).

240. See Finnis, *supra* note 1, at 1067 (arguing that "sexual acts are not unitive in their significance unless they are marital").

241. See Finnis, *supra* note 2, at 98.

242. See *supra* notes 97-102 and accompanying text.

There are many Americans today whose conception of sexual morality remains wedded to a hierarchical list of particular kinds of sexual acts (even if some would draw the line between moral and immoral sexual acts at different places than Finnis does), or who, at the very least, view all sexual acts outside of marriage as immoral.²⁴³ On the other hand, there are many Americans (gay and straight) who have delinked their conception of sexual morality from a Finnisian hierarchy of sexual acts. This delinking began at the start of the twentieth century and reached its apogee in the decades after World War II. As the twentieth century progressed, more Americans began to view sex as having functions that went beyond reproduction and included the deepening of emotional bonds and the enjoyment of physical pleasure.²⁴⁴

The tension between a traditional conception of sexual morality founded on a code of conduct that seeks to distinguish between permissible and impermissible consensual sexual acts and one that de-emphasizes the importance of privileged sexual acts (such as penile-vaginal sex within marriage) remains quite strong in our society. Many of our most divisive political issues, from abortion to homosexuality to teenage sexuality, reflect this tension.²⁴⁵ It is, in a sense, easier for those who subscribe to a traditional conception of sexual morality to articulate a concise sexual ethic because they can point to a hierarchy of sexual acts that uses marriage and reproduction to distinguish between moral and immoral sexual conduct. Conversely, it is more challenging for those of us who reject the linkage between sexual ethics and a hierarchical code of particular sexual acts. But it is certainly not impossible. In fact, a group called the Sexuality Information and Education Council of the United States (SEICUS) recently took out a full page ad in the *New York Times* to explain how its conception of sexual ethics differs from what

243. A comprehensive survey of 2483 Americans conducted in the early 1990s, known as the National Health and Social Life Survey, found that approximately one-third of the respondents believed that all extramarital sex is wrong. See ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 232-34 (1994). Nearly half believed that "sex should be part of a loving relationship, but that it need not always be reserved for marriage." *Id.* at 233. A little more than one-quarter of the respondents believed that "sex need not have anything to do with love." *Id.*

244. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 181-82 (2000); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 239-74 (1988); SEIDMAN, *supra* note 175, at 17-48; STEPHEN SEIDMAN, *ROMANTIC LONGINGS: LOVE IN AMERICA 1830-1980*, at 65-156 (1991).

245. See SEIDMAN, *supra* note 175, at 5-8.

I have here described as the traditional Christian sexual ethic.²⁴⁶ The ad was titled a "Religious Declaration on Sexual Morality, Justice, and Healing" and listed several principles including "Sexuality is God's life-giving and life-fulfilling gift" and "Our faith traditions celebrate the goodness of creation, including our bodies and our sexuality."²⁴⁷ One of the principles set forth in the advertisement is particularly relevant for our discussion and is worth quoting in its entirety:

Our culture needs a sexual ethic focused on personal relationships and social justice *rather than particular sexual acts*.

All persons have the right and the responsibility to lead sexual lives that express love, justice, mutuality, commitment, consent, and pleasure. Grounded in respect for the body and for the vulnerability that intimacy brings, this ethic fosters physical, emotional, and spiritual health. It accepts no double standards and applies to all persons, without regard to sex, gender, color, age, bodily condition, marital status, or sexual orientation.²⁴⁸

Alternatives to a conception of sexual ethics that is founded on a hierarchical code of conduct look to normative values that are delinked from particular sexual acts. In the next section, I discuss what I take to be the values of one such alternative, namely, that offered by a contemporary gay and lesbian sexual ethic.

C. *A Gay and Lesbian Sexual Ethic*

Many opponents of gay rights view a gay and lesbian sexuality as lacking moral or ethical value.²⁴⁹ Critics of gay rights usually frame the debate as a struggle between morality on one (their) side and immorality on the other. The later Foucault, by writing so provocatively about nontraditional sexuality within a framework of sexual ethics, however, helps us understand how lesbians and gay men approach their sexuality ethically.

The shift away from the legal, medical, and moral codification of same-gender sexuality has had important implications for the

246. See *Religious Declaration on Sexual Morality, Justice, and Healing*, N.Y. TIMES, Jan. 25, 2000, at A19.

247. *Id.*

248. *Id.* (emphasis added). More information on the declaration can be found at <http://www.religionproject.org> (last visited Sept. 7, 2001).

249. See Finnis, *supra* note 1, at 1063-76; George & Bradley, *supra* note 1, at 313-18; Podhoretz, *supra* note 1, at 1063-76.

emergence of a gay and lesbian sexual ethic. The de-emphasis of codes as sources of sexual morality has allowed lesbians and gay men to construct and abide by a new form of sexual ethic, an ethic that has both procedural and substantive components. I discuss the former in Part II.C.1 and the latter in Part II.C.2. I finish this section of the Article with a discussion, in Part II.C.3, of some of the implications of a gay and lesbian sexual ethic.

Before I begin this discussion, I want to acknowledge a possible criticism of my treating lesbians and gay men in a unitary fashion without emphasizing the differences between them. I believe that there is sufficient common ground between lesbians and gay men in terms of how they construct ethical lives through their sexuality that permits us to speak in broad terms of a gay *and* lesbian sexual ethic. I do not believe, for example, that lesbians and gay men experience or celebrate values of openness, mutuality, and pleasure, which I identify below as constitutive values of a gay and lesbian sexual ethic, in significantly different ways. When one emphasizes commonalities, however, there is always the danger of minimizing important differences. Lesbians, for example, have to deal with their own distinct oppression as women in a society that retains strong patriarchal norms and values. It also appears that some lesbians have a more fluid sense of their sexual identity than do most gay men.²⁵⁰ Explorations of these differences and others are important and merit their own separate projects. I believe, however, that there are enough commonalities that make it fruitful to speak of a gay and lesbian sexual ethic that is broad enough to encompass the intimate lives and aspirations of both groups.

1. The Process of a Gay and Lesbian Sexual Ethic

The procedural component of a gay and lesbian sexual ethic consists of a process of self-definition that is similar to what Foucault describes as a care of the self. A gay and lesbian sexual ethic emerges as lesbians and gay men give ethical meaning to their sexual practices through reflection. The ethical meaning of gay and lesbian sexuality will not be found in societal sexual norms, most of which aim to stigmatize and marginalize lesbians and gay men based on their sexual conduct. Instead, the gay or lesbian individual must turn inward to reflect and elaborate on the ethical meaning of his or her

250. See Laura S. Brown, *Lesbian Identities: Concepts and Issues*, in *LESBIAN, GAY, BISEXUAL IDENTITIES OVER THE LIFESPAN* 3, 4-18 (Antony R. D'Augelli & Charlotte J. Patterson eds., 1995).

sexual practices. The legal, medical, and moral decodification of sexuality as represented by the waning of rigid normative hierarchies of sexual acts has given lesbians and gay men greater freedom to craft their own ethical sexual lives.

Opponents of gay rights often refer derisively to a gay and lesbian "lifestyle."²⁵¹ Lesbians and gay men often respond that just because one engages in sex with someone of the same gender does not mean that one leads a different lifestyle.²⁵² But opponents of gay rights may be on to something when they speak of a gay lifestyle, even if the implications of their observations (or, perhaps more accurately, of their accusations) are the opposite of what they contend. For Foucault, a gay style of life is a positive, not a negative, because a gay life can be styled and crafted through the relationship that the gay person has towards his or her sexuality. The style emanates from the creative and transformative possibilities of same-gender sex. Thus Foucault asked:

Is it possible to create a homosexual mode of life? . . . It seems to me that a way of life can yield a culture and an ethics. To be 'gay,' I think, is not to identify with the psychological traits and the visible masks of the homosexual, but to try to define and develop a way of life.²⁵³

As David Halperin puts it, "Foucault in effect seizes on that most abjected and devalued feature of gay male self-fashioning, namely, *style* . . . and finds in it a rigorous, austere, and transformative technology of the self which produces concrete possibilities for the development of personal autonomy."²⁵⁴ The practices of the self engaged in by lesbians and gay men lead to "new forms of relationship, new modes of knowledge, new means of creativity, and new possibilities of love."²⁵⁵

In a gay and lesbian sexual ethic, then, what distinguishes ethical sexual conduct from unethical sexual conduct is not the nature of the sexual act itself but instead how the individual uses it to craft an

251. See, e.g., Bryan Fischer, *Gay Lifestyle Should Not Be Endorsed Anywhere*, IDAHO STATESMAN (Boise, Idaho), Sept. 28, 1999, at 7B.

252. See, e.g., Liam Miller, Letter to the Editor, *Lifestyle Not the Word for Gay Pride Reporting*, NEWS & RECORD (Greensboro, N.C.), June 19, 1999, at A10 (arguing that "[t]here is no one 'gay lifestyle,' just as there is no one heterosexual lifestyle.").

253. MICHEL FOUCAULT, *Friendship as a Way of Life*, in ETHICS: SUBJECTIVITY AND TRUTH, *supra* note 5, at 135, 137-38; see also *id.* at 137 (noting that homosexuality "make[s] us work on ourselves and invent—I do not say discover—a manner of being that is still improbable").

254. HALPERIN, *supra* note 20, at 73-74.

255. *Id.* at 79.

ethical life. Thus, Edmund White has it exactly wrong when he argues that sex is about aesthetics and not about ethics.²⁵⁶ It is precisely the fact that sex can be an integral part of an aesthetics of existence that imbues it with ethical meaning. A gay and lesbian sexual ethic is about crafting a certain relationship with the self. I use the word "crafting" purposefully because it suggests active participation by the individual in the molding and creating of an ethical life, akin to the work that a craftsman or an artist does in creating an object of beauty. "Sex is not a fatality," Foucault noted, "it's a possibility for creative life."²⁵⁷

It is true, of course, that not every lesbian and gay man views her or his sexual life through the rather rarefied prism of aesthetics. But all sexually active lesbians and gay men must at some point and at some level cope with the dissonance between their self-worth and self-regard as sexual beings and the societal norms that deem their sexuality to be abnormal, perverse, and immoral. Coping with this dissonance requires the constructing and crafting of ethical sexual lives that are built around an alternative sexual ethic. This process does not require endless self-redefinition and self-transformation; lesbian and gay men do not constantly re-evaluate their ethical assessments of their sexual lives. It is reasonable to assume that they, like everyone else, find routine and stability in ethical judgments appealing. But before they can settle into a routine, there is ethical work to be done as they reflect on what their sexuality means to them quite apart from what society tells them it should mean. They must construct ethical lives where love, relationships, families, and communities are built around a form of sexuality that most of the rest of society considers at best odd and at worst perverse and immoral. Lesbians and gay men have to *themselves* give ethical meaning to their sexual lives; society will not do it for them. Lesbians and gay men must transform themselves from the perverse, abnormal, and immoral persons that society deems them to be into individuals who *use* their sexuality as a way of crafting ethical lives. They must, as Sarah Hoagland puts it, "create meaning through [their] living."²⁵⁸

256. "Sexual habit . . . to my mind is . . . an aesthetic rather than an ethical issue, a matter (so long as no one is hurt) of what gives pleasure rather than what is good or right." EDMUND WHITE, *STATES OF DESIRE: TRAVELS IN GAY AMERICA* 38 (1980).

257. MICHEL FOUCAULT, *Sex, Power, and the Politics of Identity*, in *ETHICS: SUBJECTIVITY AND TRUTH*, *supra* note 5, at 163, 163.

258. SARAH L. HOAGLAND, *LESBIAN ETHICS: TOWARD NEW VALUE* 13 (1988).

2. The Substance of a Gay and Lesbian Sexual Ethic

I should acknowledge at the start of this section that Foucault never explicitly gave his conception of ethics a substantive content; he never intended, in other words, to tell people what to do or how to go about doing it. Given the constant barrage of accusations made by opponents of gay rights about the supposed immorality of gay and lesbian sexuality, however, it is normatively acceptable and politically necessary to explore the substantive elements of a gay and lesbian sexual ethic.

The process of ethical self-transformation in which many lesbians and gay men engage in today has led to the emergence of substantive values that are constitutive of a gay and lesbian sexual ethic. In my estimation, that ethic includes the values of openness, mutuality, and pleasure. I discuss each of these values below. Before I do, however, I want to make it clear that I am not suggesting that these are the only values that are part of a gay and lesbian sexual ethic or that the way in which I interpret them is the only way of doing so. Others may want to offer additional values or describe the values that I identify in different ways. My goal is less to offer a definitive and final interpretation of a contemporary gay and lesbian sexual ethic than it is to argue for the existence of such an ethic that, regardless of its precise contours, constitutes a powerful and appealing alternative to the traditional Christian sexual ethic.

a. Openness

An important value in a gay and lesbian sexual ethic is openness, a straightforward value that need not detain us long. Foucault in *The History of Sexuality*, Volume I, noted that society's power relations and systems of knowledge simultaneously create, marginalize, and silence sexual identities that are considered abnormal or perverse.²⁵⁹ The principle of openness addresses the silencing element in the triad noted by Foucault. By remaining silent, we as lesbians and gay men contribute to our own marginalization. For lesbians and gay men, to be silent about issues of sexuality is to implicitly contribute to society's disapproval of homosexuality.

It is common for lesbians and gay men to be told, "you do whatever you want to do, just don't assume that others want to hear about it." That is an ethically untenable principle for a gay or lesbian person to abide by because the silencing only deepens the stigma and

259. See *supra* Part I.A, notes 29–62 and accompanying text.

marginalization of the conduct that then, in turn, reinforces the silence. Through openness, lesbians and gay men can attempt to break this never-ending loop. The starting point of a gay and lesbian sexual ethic, then, entails a refusal to contribute to our own silencing.

In many ways, the AIDS crisis has made it impossible for homosexuals—and gay men in particular—to keep our sexuality hidden. Remaining in the closet in the face of such death and suffering threatens one's integrity and self-respect. While sex can be kept private and hidden, death and dying cannot. A gay and lesbian sexual ethic encourages lesbians and gay men to find strength and dignity through the very same sexual acts that societal norms rely on to marginalize and oppress them. With AIDS, gay men have the additional need to seek strength and dignity in the face of a deadly epidemic and under the onslaught of vituperative attacks by some conservatives (mostly Christian evangelicals) who equate AIDS with a just punishment for immoral behavior.²⁶⁰ Under such conditions, the first step toward using one's sexuality ethically is an open acknowledgment of it.

b. Mutuality

Mutuality is a second substantive value in a gay and lesbian sexual ethic, one that serves as common ground for bringing together different ways of thinking about the role of sex in the lives of lesbians and gay men. The sociologist Steven Seidman has identified two primary strains in gay sexual culture. The first is libertarian and holds that the only restraint on sexual activity should be consent.²⁶¹ The second is romanticist and views sex instrumentally as creating and

260. See MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM* 75 (1998); see also *Dr. Koop Warns of Spread of AIDS*, N.Y. TIMES, Jan. 20, 1987, at C11 (noting that the Reverend Jerry Falwell in the past stated that "AIDS could be God's judgment against a nation that chooses to live immorally"); *God Hates Fags*, at <http://www.godhatesfags.com/main/aboutwbc.html> (last visited Sept. 7, 2001) (explaining that the activities of the Westboro Baptist Church of Topeka, Kansas, include engaging in sidewalk demonstrations displaying signs stating that "AIDS CURES FAGS" and "THANK GOD FOR AIDS").

261. According to the libertarian gay ethic, [t]he only moral rule governing sexual desire and behavior should be a norm of mutual consent. This ethic fits, of course, with gays' struggle for rights and social inclusion. A libertarian ethic maximizes tolerance for diverse intimate lifestyle choices. For many homosexuals, it also resonate[s] with the elaboration of a gay male urban community that [is], in fact, organized around sexually oriented institutions, e.g., bathhouses, bars, pornography theaters, and sex shops. SEIDMAN, *supra* note 175, at 172.

strengthening emotional bonds between individuals.²⁶² The tension between these two viewpoints manifests itself periodically in criticisms by gay commentators about promiscuity and an excessive focus on sex among some in the gay male community.²⁶³ Following such complaints, there is often a response by other gay commentators who view any criticism of a free and unrestrained sexuality as a threat to gay liberation and as a dangerous incorporation of traditional and conservative heterosexual values (such as monogamy and marriage) into the gay sexual culture.²⁶⁴ An inclusive gay sexual ethic, therefore, must somehow reconcile the different perspectives of the libertarian and romanticist camps. In my estimation, the value of mutuality (by which I mean respect and concern for the needs and vulnerabilities of the sexual partner) provides the framework for an inclusive sexual ethic that brings together both libertarians and romanticists within the gay and lesbian community.

Mutuality entails more than mere consent because mutuality presupposes a respect and concern for the other person, neither of which is required by consent. In fact, some libertarians within the gay community have argued that since the only relevant issue on matters of sex is consent, consensual sex is outside "of the realm of morality."²⁶⁵ If we demand mutuality, however, we make it clear that

262. Under the romanticist view,

[s]ex is understood as involving a dense web of individual feelings and longings. The proper sphere of sex is in intimate committed relationships where the integrity of each individual's feelings is respected. As a medium of intimate bonding, sex should exhibit caring, tender qualities, and individuals should always be treated as complex whole beings. From the standpoint of sexual romanticism, sex that is devoid of the thick emotional and social content of intimate bonds is morally suspect if not outright dehumanizing.

Id. at 173.

263. See GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 1-122 (1997) (arguing that the high number of sexual partners among some gay men in the 1970s and 1980s significantly contributed to the spread of the AIDS epidemic in the United States); MICHELANGELO SIGNORILE, *LIFE OUTSIDE*, at xxv (1997) (arguing that "a highly commercialized gay sexual culture sells a particular physical aesthetic to us and demands that we conform to it"); Larry Kramer, *Gay Culture, Redefined*, N.Y. TIMES, Dec. 12, 1997, at A35 (arguing that "[a]llowing sex-centrism to remain the sole definition of homosexuality is now coming to be seen as the greatest act of self-destruction").

264. See Michael Bronski, *Behind the Sex Panic! Debate*, HARV. GAY & LESBIAN REV., Spring 1998, at 29; Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, LINGUA FRANCA, Oct. 1997, at 27, 27-31, 36-37; Sheryl Gay Stolberg, *Gay Culture Weighs Sense and Sexuality*, N.Y. TIMES, Nov. 23, 1997, § 4, at 1. The citations in this and the previous footnote relate to the intra-community debate that took place in the 1990s. Seidman recounts in great detail the debate that took place in the 1980s. See SEIDMAN, *supra* note 175, at 154-70.

265. SEIDMAN, *supra* note 175, at 171.

the sexual actor must accept a minimum level of moral responsibility for the well-being of the other person; if the actor does not meet the needs and concerns of the other person, the sexual act will lack the requisite degree of mutuality.²⁶⁶ A concern for mutuality also requires a recognition of the sexual other as a vulnerable human being. Sexual intimacy by its very nature requires a letting go, a trusting of the other, a lowering of self-protective mechanisms, all of which can make the parties feel vulnerable and insecure. By being respectful and considerate of the other, however, sex that takes place in a context of mutuality helps the other turn initial feelings of vulnerability and insecurity into ones of self-assurance and self-respect.

Mutuality is, of course, often present in sexual intimacy that is part of loving and committed relationships (though as I argue below mutuality can also be present in sexual encounters where there is no affectional connection between the parties).²⁶⁷ It is a shame that Foucault, in his extensive discussions of sexuality, did not speak more of the affectional implications of sexual acts. As Mark Poster has noted, "the great lacuna of Foucault's history of sexuality [is] a relative and remarkable absence of discussion about the affective nuances of sexual relations."²⁶⁸ In at least one interview given towards the end of his life, however, Foucault did address the ethical implications of the affection and love that can accompany same-gender sexual acts.²⁶⁹ What Foucault said was fascinating (which makes one wish he had said more!). He started by noting that society is less troubled by gay sex than it is by gay love. A same-gender sexual act does not by itself raise "troubling [questions about]

266. Feminist theory has been critical of liberalism's almost exclusive emphasis on consent in matters of sex. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 796-97 (1988). The problem with consent is that it does not account for unequal bargaining power (along, for example, gender lines) between the sexual partners. See RAYMOND A. BELLIOTTI, *GOOD SEX: PERSPECTIVES ON SEXUAL ETHICS* 86-96 (1993). The norm of mutuality, which demands respect and concern for the sexual partner, can better take into account inequalities between the parties. See Chamallas, *supra*, at 835-43; see also ESKRIDGE, *supra* note 158, at 170 (noting that "[t]he norm for sexual intimacy that has been advanced by feminist and gay legal theory is mutuality: sex is good and normal when the participants welcome it, when the sex is truly a joint enterprise meeting the needs of the partners").

267. See *infra* notes 286-92 and accompanying text.

268. Poster, *supra* note 127, at 214. Poster suggests that "[p]erhaps the reason for the omission lies in Foucault's aversion to Freudian discourse, laden as it is with the question of conscious and unconscious feelings." *Id.*; see also TERRY EAGLETON, *THE IDEOLOGY OF THE AESTHETIC* 395 (1990) (arguing that under Foucault's analysis, "[w]e are . . . not permitted to enter the tabooed realms of affection, emotional intimacy and compassion").

269. See FOUCAULT, *supra* note 253, at 135.

affection, tenderness, friendship, fidelity, camaraderie, and companionship, things that our rather sanitized society can't allow a place for without fearing the formation of new alliances and the tying together of unforeseen lines of force."²⁷⁰ It is precisely because same-gender intimacy can lead to new emotional possibilities and new loves that society fears it. "To imagine a sexual act that doesn't conform to law or nature is not what disturbs people. But that individuals are beginning to love one another—there's the problem."²⁷¹ Foucault's astute observations are reflected in our current debates over same-sex marriage. Our society today, as David Halperin points out, has an "easier [time] . . . legaliz[ing] gay sex than gay marriage."²⁷² While in most states gay sex is no longer a criminal act, no jurisdiction recognizes same-sex marriage.²⁷³

With the exception of the recent enactment of the Vermont civil union statute, lesbians and gay men have failed in their attempts to gain meaningful state recognition and protection of their relationships. Despite the absence of pre-determined relational frameworks (legal and otherwise) upon which to rely, it is nonetheless remarkable how lesbians and gay men, have, over the last few decades, created new types of relationships and loves with their own distinctive characteristics and forms.²⁷⁴ Gay families, for example, do not have a pre-determined biological structure. They can include close friends, current and former lovers, adopted children, and children from previous heterosexual relationships, among others.²⁷⁵ Instead of organizing families around principles of biology, gay families are "[o]rganized through ideologies of love, choice, and creation."²⁷⁶ Thus, by their very nature, gay families are more fluid and accommodating than traditional heterosexual families, which are

270. *Id.* at 136.

271. *Id.* at 136-37. Foucault noted the bind in which some institutions find themselves when they simultaneously foment and discourage same-gender camaraderie and companionship. An example is the military, "where love between men is ceaselessly provoked [*appelé*] and shamed. Institutional codes can't validate these relations with multiple intensities, variable colors, imperceptible movements and changing forms. These relations short-circuit it and introduce love where there's supposed to be only law, rule, or habit." *Id.* at 137.

272. HALPERIN, *supra* note 20, at 98.

273. *See supra* note 193 and accompanying text.

274. As Mark Blasius has noted, lesbians and gay men "must invent ways of relating to each other because there are not ready-made cultural or historical models or formulas for erotic same-sex relationships, as there are for different-sex erotic relationships." MARK BLASIUS, *GAY AND LESBIAN POLITICS: SEXUALITY AND THE EMERGENCE OF A NEW ETHIC* 191 (1994).

275. *See* KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 3 (1991).

276. *Id.* at 27.

primarily defined through biological ties.²⁷⁷ Similarly, committed and sexually intimate gay and lesbian relationships cannot rely on pre-determined gender roles that have traditionally been incorporated into heterosexual intimate relationships (such as the role of the male money earner and that of the female homemaker). When gay or lesbian partners decide that their sexual intimacy leads to emotional bonds that are strong enough to make their lives into one, they must work out the arrangements and dynamics of their relationship with little societal or legal guidance. The structure and form of gay and lesbian relationships and families do not depend on pre-determined concepts of law and biology or on presumptions about gender roles. Instead, the structure and form are provided by the mutuality (as reflected in reciprocity and support) that exists between the partners.

It has been argued that "[t]he aesthetics of self-creation and self-fashioning only puts emphasis on 'the constructive, creative nature of our expressive languages, and ignores the 'dialogical setting, which binds us to others.'"²⁷⁸ In fact, the later Foucault has been criticized for emphasizing an ethics of individualism that ignores relationships, communal ties, and collective action.²⁷⁹ In Foucault's defense, he made it clear that the care of the self, as practiced in antiquity, "constituted, not an exercise in solitude, but a true *social practice*."²⁸⁰ He also noted that while the "care for the self is ethical in itself . . . it

277. "In [gay] families we choose, the agency conveyed by 'we' emphasizes each person's part in constructing gay families, just as the absence of agency in the term 'biological family' reinforces the sense of blood as an immutable fact over which individuals exert little control." *Id.* at 38.

278. Lothar Bredella, *Aesthetics and Ethics: Incommensurable, Identical or Conflicting?*, in *ETHICS & AESTHETICS: THE MORAL TURN OF POSTMODERNISM* 29, 40 (Gerhard Hoffmann & Alfred Hornung eds., 1996) (quoting CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 67 (1992)).

279. See, e.g., EAGLETON, *supra* note 268, at 393 ("Foucault's vigorously self-mastering individual remains wholly monadic. Society is just an assemblage of autonomous self-disciplining agents, with no sense that their self-realization might flourish within bonds of mutuality."); Herbert Grabes, *Ethics, Aesthetics, and Alterity*, in *ETHICS & AESTHETICS*, *supra* note 278, at 13, 20–21 (noting that the "individualist ethics" of thinkers such as Foucault "is gravely deficient concerning the problematic side of intersubjective alterity"); Jean Grimshaw, *Practices of Freedom*, in *UP AGAINST FOUCAULT*, *supra* note 104, at 51, 68 (arguing that in Foucault's writings "there is no sense . . . of collective goals or aspirations"); LOUIS MCNAY, *FOUCAULT AND FEMINISM: POWER, GENDER AND THE SELF* 163–64 (1992) (arguing that Foucault's "ethics privileges a notion of the self establishing a relation with the self, rather than understanding the self as embedded in and formed through types of social interaction").

280. FOUCAULT, *supra* note 7, at 51 (emphasis added). In classical antiquity, there was an insistence "on the need to fulfill one's obligations to mankind, to one's fellow-citizens, and to one's family [L]axity and self-satisfaction in practices of social withdrawal" were denounced. *Id.* at 42.

[also] implies complex relationships with others insofar as this *ethos* of freedom is also a way of caring for others.”²⁸¹ These statements notwithstanding, Foucault was not as explicit as he should have been about the relational and associational components of his conception of ethics.²⁸²

Despite the fact that Foucault did not explicitly emphasize the connection between relationships and communal ties on the one hand and ethics on the other, the very idea of a gay and lesbian sexual *ethic* suggests shared values by collective entities (gay and lesbian friendships, relationships, families, and communities).²⁸³ It is not an *individualistic* ethic in the libertarian sense where the primary norm is freedom constrained only by issues of consent—rather, it is a collective ethic (or an *ethos*) developed by a group of individuals whom society has marginalized and stigmatized because of their sexuality and whose ethical values and practices of freedom are direct responses to that oppression. As Mark Blasius notes, “contemporary gay men and lesbians live in a situation where, because of their sexual and affectional attractions, they must create relationships and networks of relation with each other against the void in which they have historically and culturally found themselves.”²⁸⁴

281. FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 287. For Foucault, “technologies of the self . . . permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection or immortality.” FOUCAULT, *Technologies of the Self*, *supra* note 67, at 225 (emphasis added).

282. Foucault, for example, could have elaborated further in *The Use of Pleasure* on the role that same-gender sexual intimacy played in the formation of strong bonds between men in ancient Greece. Martha Nussbaum, after a comprehensive discussion of homosexuality in classical Greek thought, concludes that the “Greek texts show, and show repeatedly, that the passionate love of two people of the same sex may serve many valuable social goals apart from procreation. The couple may communicate love, friendship, and joy; they may advance *shared* political, intellectual, and artistic ends.” Nussbaum, *supra* note 117, at 1600 (emphasis added).

283. That ethic “involves . . . the creation of a way of life—understood as a primary means of creating one’s own self in and through one’s relations with others.” BLASIOUS, *supra* note 274, at 192; *see also* THOMAS DUMM, MICHEL FOUCAULT AND THE POLITICS OF FREEDOM 153 (1996) (“The cultivation of ourselves is no exercise in narcissism but involves a deep engagement with others as we cultivate them and get them to recognize our selves in response.”); MCWHORTER, *supra* note 20, at 197 (“[C]aring for one’s self would lead, often, to caring for others and for one’s community and world. . . . [N]o one engages in any sort of ethical practice—no one establishes routines, values, systems of meaning—alone.”).

284. BLASIOUS, *supra* note 274, at 192. I have elaborated elsewhere on the role that gay communities play in protecting the freedom and dignity of lesbians and gay men. *See* Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 468–79 (2000).

The creation of gay and lesbian relationships, families, and communities results from lesbians and gay men reflecting on, and working through, the meaning and purpose of their sexuality. The bonds that build and cement gay and lesbian relationships, families, and communities most often originate from a sexual attraction that is different from the societal norm. That different and stigmatized attraction leads lesbians and gay men to a myriad of connections and associations that provide the support and affirmation that is denied by the broader society. Gay and lesbian relationships, families, and communities are the collective manifestations of a process of self-definition and self-transformation in which lesbians and gay men engage as they seek to build ethical lives based, in part, on sexual intimacy. For lesbians and gay men, caring for others, defining and transforming the self, and sexuality are all bound together. As Blasius notes, "lesbians and gay men use their sexuality throughout the course of life to create diverse relationships and to integrate sexual freedom within relationships as a source of revitalization, innovation, and self-invention."²⁸⁵

While gay sex has led to the formation of new kinds of relationships based on love and commitment, the principle of mutuality in sexual relations can also be satisfied outside of an affectional context. It is possible, for example, for mutuality to be present even in an anonymous S/M sexual encounter. One of the aspects of S/M that fascinated Foucault was the fluidity of its internal power relations. The uninformed outsider may view an S/M encounter simply as the sexual domination of one party over another. But the power dynamics within an S/M sexual encounter can shift at any time. As Foucault noted, "the S&M game is very interesting because it is a strategic relation, but it is always fluid. Of course, there are roles, but everybody knows very well that those roles can be reversed. Sometimes the scene begins with the master and slave, and at the end the slave has become the master."²⁸⁶ The fluidity of power in an S/M encounter imbues it with mutuality, which is the polar opposite of a rigid domination of one party over the other.²⁸⁷ In fact, Blasius discusses the fluidity of power in gay and lesbian S/M as well

285. BLASIUS, *supra* note 274, at 109.

286. FOUCAULT, *supra* note 257, at 169.

287. Sadomasochism "is a game in which power differentials are subordinated to the overall strategic purpose of producing human pleasure; it is not a form of domination in which human beings are subordinated to the functioning of rigidly structured power differentials." HALPERIN, *supra* note 20, at 87.

as in so-called butch/femme lesbian relationships.²⁸⁸ He notes that in both situations, as well as in a more general gay and lesbian sexuality, [t]here may be a top and a bottom, but "who" is "what" is ambiguous and reversible in terms of power. It is not only that people may switch roles Rather, to the extent that people invent an erotic power game, it is understood as an invention, and neither position is reinforced by social power relations as it is in heterosexuality.²⁸⁹

Sex that lacks mutuality is inconsistent with a gay and lesbian sexual ethic because such sex cannot play a role in either the creation of gay and lesbian relationships, families, and communities, or in maintaining equality and a balance of power between sexual partners. Mutuality is a crucial component of a gay and lesbian sexual ethic; it explains the role of sex in both committed relationships and in sexual encounters where there is no affectional commitment but there is nonetheless a minimum of respect and concern for the other individual as a distinct human being with his or her own needs, expectations, and vulnerabilities.²⁹⁰ In fact, Finnis's conception of sexual morality is limited precisely because it does not sufficiently account for mutuality in sexually intimate relationships.²⁹¹ For Finnis, no amount of mutuality can mitigate the intrinsic immorality of some sexual acts. So, for example, the respect and concern that two gay

288. See BLASIUS, *supra* note 274, at 86–91. In a butch/femme relationship:

[t]he gender-rejecting butch is rewarded for her courage by the admiration of the femme. Indeed, it is often the femme who takes care of the butch who has been battered by the world's abuse of her "gender dysfunction." This taking care occurs through a sexuality that, because the femme has created it herself to give pleasure to another woman rather than to satisfy the demands of a man, is truly *her* creation . . . through her femme sexuality. This reciprocity has been emblemized by Joan Nestle in the single word "butch-femme."

Id. at 88–89 (citing THE PERSISTENT DESIRE: A FEMME-BUTCH READER 267 (Joan Nestle ed., 1992)).

289. BLASIUS, *supra* note 274, at 91.

290. If such minimum respect and concern for the other person is missing, then the sex will be inconsistent with a gay and lesbian sexual ethic. See J. Michael Clark, *Phenomenology & Prophecy, Victimization & Transformation: Further Notes on Gay Ethics*, 4 J. MEN STDS. 263, 264–67 (1996) (noting that if gay men engage in sex where "neither partner . . . is 'really interested in the historical density of the other as [a] full individual,'" such sex does not "help foster mutuality in-relation or diversity in-community.") (alteration in original) (citation omitted).

Mutuality in matters of sexuality is not, of course, an exclusive norm of the gay and lesbian community. As I explain below, however, mutuality plays a unique role in the development of a gay and lesbian sexual ethic because of the way in which homosexuality is problematized in our society. See *infra* notes 311–13 and accompanying text.

291. See *supra* notes 226–42 and accompanying text (explaining how Finnis's conception of sexual morality creates a normative hierarchy based on the nature of different kinds of sexual acts).

men may have for each other as they engage in sexual acts (whether or not in a committed relationship) is morally irrelevant to Finnis because they are engaging in the *wrong* kinds of sexual acts.²⁹² This view places Finnis in the morally indefensible position of having to argue that which bodily orifice is penetrated, and by whom, has a greater normative significance than the mutuality that may exist between the parties. A gay and lesbian sexual ethic, on the other hand, values mutuality because it assists lesbians and gay men in constructing affectional relationships, loving families, and enriching communities around a form of sexuality that a large segment of the society deems to be immoral and perverse. Without mutuality in sexual intimacy, lesbians and gay men could not create and maintain those collective entities; it is mutuality, through the trust and confidence in others that it provides, which makes up for the lack of pre-determined structures (afforded by law, biology, and gender roles) that are characteristic of heterosexual relationships and families. In addition, mutuality plays a crucial role for those lesbians and gay men who choose to engage in sex in the absence of affectional commitment. The principle of mutuality allows for the delinking of sex from commitment (for those who so choose) without compromising a respect for the other person and without incorporating into the sexual encounter society's pre-determined power relations and hierarchies such as those that are part of traditional gender roles.

c. Pleasure

The third important value that I take to be constitutive of a gay and lesbian sexual ethic is pleasure. For Foucault, an emphasis on sexual pleasure requires a corresponding deemphasis on sexual desire. As he explains it, the Christian conception of sex is centered around controlling lustful desires.²⁹³ The psychiatric conception is centered around understanding and categorizing sexual desire.²⁹⁴ On the other hand, Foucault was intrigued by the sexual ethic of the ancient Greeks because they delinked sex from desire; neither the subject nor the object of desire was of ethical interest to them.²⁹⁵ Instead, what mattered was sexual pleasure, and how the individual came to it and incorporated it into his ethical life.²⁹⁶

292. See *supra* notes 226–42 and accompanying text.

293. See *supra* notes 101–02 and accompanying text.

294. See *supra* Part I.A, notes 29–62 and accompanying text.

295. See *supra* notes 111–12 and accompanying text.

296. See *supra* notes 113–31 and accompanying text.

The idea that sex should be governed by desire is so ingrained in our consciousness that it is, at first glance, difficult to imagine sex without desire. But that is precisely what Foucault asks us to entertain: to take sex out of the sphere of desire and place it in the sphere of pleasure. Foucault explains this idea as follows:

I am advancing this term [pleasure], because it seems to me that it escapes the medical and naturalistic connotations inherent in the notion of desire. That notion has been used as a tool, as a grid of intelligibility, a calibration in terms of normality: "Tell me what your desire is and I will tell you who you are, whether you are normal or not, and then I can validate or invalidate your desire."

The term "pleasure" on the other hand is virgin territory, unused, almost devoid of meaning. There is no "pathology" of pleasure, no "abnormal" pleasure. It is an event "outside the subject," or at the limit of the subject, taking place in that something which is neither of the body nor of the soul, which is neither inside nor outside—in short, a notion neither assigned nor assignable.²⁹⁷

While desire, in other words, can be defined and manipulated by scientific, medical, and religious discourses, pleasure is a "virgin territory" that has largely escaped analysis and categorization.²⁹⁸ While various disciplines and moral perspectives have sought to distinguish between normal and abnormal sexual desires, little attention has been paid to pleasure, which is usually dismissed as a dangerous concept associated with self-satisfaction and self-indulgence.²⁹⁹ As a result, pleasure is an appropriate focus for a gay and lesbian sexual ethic that seeks to challenge traditional sexual moralities and discourses grounded on the distinction between normal and abnormal sexual *desires*. As Ladelle McWhorter notes,

297. HALPERIN, *supra* note 20, at 93–94, 215 n.165, 217 n.181. A slightly different translation of the same interview can be found in DAVID MACEY, *THE LIVES OF MICHEL FOUCAULT* 365 (1993).

298. As Foucault notes, "[p]leasure is something which passes from one individual to another; it is not secreted by identity. Pleasure has no passport, no identification papers." HALPERIN, *supra* note 20, at 95 (quoting MACEY, *supra* note 297, at 364); *see also* MCWHORTER, *supra* note 20, at 184 (noting that "attempts to quantify pleasure and measure it, to capture it in terms of statistically manipulable developmental norms, have not met with much success").

299. It is precisely because new natural law theorists view all same-gender sexual intimacy as nothing more than the pursuit of pleasure that, in their estimation, makes such intimacy morally suspect. *See* Finnis, *supra* note 1, at 1066–67; *see also* George & Bradley, *supra* note 1, at 142 ("To be morally right a sexual act must involve more than a fair and nonviolent pursuit of pleasure.").

"Foucault advocates the use of pleasure and the expansion of our capacities for pleasure as a means of resisting sexual normalization and creating different lives for ourselves."³⁰⁰

A gay and lesbian sexual ethic embraces and celebrates sexual pleasure. In order to do so, it must constantly work to counteract the idea that it is pleasure that makes sex morally suspect.³⁰¹ For a gay and lesbian sexual ethic, pleasure is a normative good; it is the pleasure of sex that leads individuals to use sex and sexuality in the construction of an ethical life. As Michael Warner notes, "[p]leasures once imaginable only with disgust, if at all, become the material out of which individuals and groups *elaborate themselves*."³⁰² When we evaluate sex from the perspective of pleasure, rather than desire, we shift the focus away from codes of conduct that seek to distinguish between moral and immoral sexual desires and towards the ways in which individuals *use* sexual pleasures to transform themselves.

For Foucault, pleasure is both creative and transformative. Sado-masochistic sex, for example, is intriguing for Foucault because he sees it as expanding the possibilities of pleasure. While an outsider might view S/M as painful and violent, such a view, according to Foucault, "is stupid."³⁰³ Instead, S/M is about "inventing new possibilities of pleasure with strange [or different] parts of the[] body—through the erotization [of nongenital parts] of the body."³⁰⁴ Sadomasochism, Foucault concludes, is "the real creation of new possibilities of pleasure, which people had no idea about previously."³⁰⁵

Gay and lesbian sex, like S/M sex, explores the boundaries of pleasure as a means of self-definition. In response to society's stigmatization of same-gender intimacy, the lesbian or gay individual

300. MCWHORTER, *supra* note 20, at 177; see also Huijer, *supra* note 13, at 73–74 (noting that for Foucault, "ethics was not a solemn matter, something we use in an effort to keep evil under control. Ethics was . . . a matter of pleasure, of taking risks, of danger and the intensity of existence.") (citations omitted).

301. As Gayle Rubin has noted, in our culture "[s]ex is presumed guilty until proven innocent. . . . [T]he exercise of erotic capacity, intelligence, curiosity, or creativity all require pretexts that are unnecessary for other pleasures, such as the enjoyment of food, fiction, or astronomy." Rubin, *supra* note 218, at 278.

302. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 12 (1999) (emphasis added). As Gayle Rubin has noted, "[m]ost people find it difficult to grasp that whatever they like to do sexually will be thoroughly repulsive to someone else, and that whatever repels them sexually will be the most treasured delight of someone, somewhere." Rubin, *supra* note 218, at 283.

303. FOUCAULT, *supra* note 257, at 165.

304. *Id.*

305. *Id.*

asks herself or himself the following: *how do I use sexual pleasure to simultaneously constitute and transform myself? It is the seeking of this sexual pleasure that makes me a "homosexual," and yet it is through this pleasure that I can work on myself as an ethical person. It is through a reflective posture vis-a-vis the pleasure of sex that I can escape the normalizing and stigmatizing efforts by society to link my sexual conduct to supposed abnormal sexual desires.*

An emphasis on pleasure, of course, makes lesbians and gay men vulnerable to accusations of hedonism and moral relativism. Such accusations are best addressed by emphasizing that pleasure is only one of the values of a gay and lesbian sexual ethic and that another value—that of mutuality—places limits on the uses of pleasure. Particular sexual pleasures in particular contexts violate what I take to be an appropriate gay and lesbian sexual ethic if, in the seeking of pleasure, the individual fails to respect the needs, expectations, and vulnerabilities of the sexual partner.³⁰⁶ Furthermore, no one denies that a life that is only concerned with pleasure is an empty and unsatisfying one.³⁰⁷ But sexual pleasures that are part of the cultivation of the self, that are aimed to better the self and create links of mutuality and respect with others, ought to be seen as ethical regardless of which bodily orifice is penetrated or the gender of the penetrator. A gay and lesbian sexual ethic is not meant to justify any and all sexual pleasures; rather, such an ethic "acknowledge[s] . . . that the imaginative and intelligent pursuit of pleasure *requires* a certain amount of work (in the sense of exertion) and that it *does* a certain amount of work (in the sense of transformation)."³⁰⁸

The key ethical precept, then, is not to be passive vis-a-vis sexual pleasure. Like the ancient Greeks, the key is to work with pleasure in order to transform oneself.³⁰⁹ The result of this transformation for contemporary lesbians and gay men will, of course, be different from the transformation of the privileged males in ancient Greece. These differences, however, are consistent with Foucault's views since, as already mentioned, he did not want us simply to embrace the sexual ethics of antiquity.³¹⁰ Instead, he wanted sexual ethics to focus on the need to transform the self rather than on universal codes of conduct

306. See *supra* Part II.C.2.b, notes 261–92 and accompanying text.

307. This is a point that Robert Nozick makes when he hypothesizes about the lack of appeal in plugging into a machine that would "give you any experience you desired." See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 42 (1974).

308. HALPERIN, *supra* note 20, at 107.

309. See *supra* notes 104–31 and accompanying text.

310. See *supra* notes 145–47 and accompanying text.

that seek to distinguish moral sexual acts from immoral ones. For the contemporary lesbian or gay man, the transformation that can be achieved through the values of openness, mutuality, and pleasure is a transformation from an individual who is marginalized and stigmatized to one who, through reflection and self-definition, leads an ethical life characterized by dignity and self-respect.

3. Some Implications of a Gay and Lesbian Sexual Ethic

Many heterosexuals, of course, also emphasize openness, mutuality, and pleasure in their sexual relations; lesbians and gay men obviously do not have a monopoly on these values. It is therefore possible to articulate and defend a progressive sexual morality that applies to everyone regardless of sexual orientation. Gayle Rubin, in her influential essay on human sexuality, explains such a morality in this way: "A [sexual] morality should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of the pleasures they provide."³¹¹ What is different for lesbians and gay men is that, unlike heterosexuals, society defines them morally as human beings, not just as *sexual* human beings, through their sexuality. As the philosopher Ladelle McWhorter notes of her unsuccessful efforts to overcome society's definition of her based on her sexual identity:

Very quickly . . . I was made to understand that society would not allow me *not* to be a sexual subject and that if I persisted in engaging in homosexual acts I would have to be a homosexual subject and be outcast and ridiculed as such. What kind of moral subject I might be was exhaustively defined by my homosexuality; nothing I might do would mitigate society's moral condemnation of me. My sexuality, not my morality, determined who I truly was.³¹²

The gay or lesbian individual uses his or her sexuality to construct and fashion an ethical life through a process that does not replicate itself for heterosexuals because their sexuality is already ethically privileged. While heterosexuals can, of course, lead sexually ethical lives, they do not construct for themselves an ethical sexual life in the face of societal norms that equate their very sexuality with abnormality, perversity, and immorality.

The relationship that heterosexuals have with their sexuality is not unlike the relationship that white Americans have with the color

311. Rubin, *supra* note 218, at 283.

312. MCWHORTER, *supra* note 20, at 101.

of their skin. Many, if not most, white Americans cannot comprehend the reactions and sensitivities that African Americans have towards issues of race because black skin is problematized in America in a very different way than is white skin. W.E.B. Du Bois wrote famously about the double-consciousness that African Americans experience as a "sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."³¹³ Black skin is marginalized and oppressed, whereas white skin stands in a relationship of supremacy vis-à-vis black skin. The same applies to heterosexuality, which is defined and receives its many privileges when juxtaposed to the supposed immorality and perversity of homosexuality. Lesbians and gay men, on the other hand, are defined and despised "through the eyes of others" as society sits in moral judgment of them primarily through their sexuality.

There are in this regard interesting parallels between a gay and lesbian sexual ethic and a feminist sexual ethic. While female heterosexual sexuality has not been as despised as gay or lesbian sexuality, it has had to cope with its own distinctive set of taboos requiring circumspection and subservience to the desires of men. There is a long-standing myth that men enjoy sex more than women, and this belief has led to all kinds of misperceptions and stereotypes about women's sexuality.³¹⁴ Believing that women have less interest in or use for sex helps reinforce cultural norms that sex is really about satisfying the needs of men, and that the role of women, here as in so many different areas of American life, is to serve men. One of the goals of the early women's liberation movement was to address the double standard that applied to women's sexuality.³¹⁵ It is not surprising, then, that there are commonalities between what I take to be a contemporary gay and lesbian sexual ethic and the sexual ethic of the early women's liberation movement. That movement pursued

313. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 3 (Bantam Books 1989) (1903). For a thoughtful analogy between racism and homophobia that discusses, among other matters, Du Bois's concept of double consciousness, see DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 6-38 (1999).

314. See, e.g., PAUL R. ABRAMSON & STEVEN D. PINKERTON, *WITH PLEASURE: THOUGHTS ON THE NATURE OF HUMAN SEXUALITY* 121-25 (1995).

315. See LYNNE SEGAL, *STRAIGHT SEX: RETHINKING THE POLITICS OF PLEASURE*, at xi-xii (1994) ("The fight against sexual hypocrisy and for sexual openness and pleasure provided much of [women's liberation] early inspiration, as women decided that pleasure was as much a social and political as a personal matter."). Segal's book encourages contemporary feminists to refocus on issues of sexual openness and pleasure.

goals that included, *inter alia*, the need: (1) to discuss *openly* female sexuality (including lesbianism); (2) to demand a minimum degree of *mutuality* and respect between men and women in intimate relationships; and (3) to promote awareness that women can also get *pleasure* from sex.³¹⁶ Given the problematization by society of women's sexuality, the attempts by women to cope with their marginalization and oppression, to lead lives of dignity and self-respect, are imbued with an ethical content, a content that is simply nonexistent (and largely incomprehensible) for heterosexual men. The same is true for lesbians and gay men who must create ethical lives, from within a society that views their sexuality as intrinsically immoral, through reflection and self-transformation, and through the promotion of values such as openness, mutuality, and pleasure.

As society moves towards greater tolerance and acceptance of gay and lesbian relationships, however, an interesting question emerges: what happens to the process of ethical self-definition and self-transformation once gay sex is no longer viewed as morally problematic? If society some day ceases to morally problematize same-gender sexual intimacy, then the opportunity to engage in self-transformative practices through that intimacy will be reduced. That does not mean, however, that gay sex will become ethically or morally valueless, in the same way that contemporary society's failure to problematize consensual heterosexual sexuality does not render it valueless. If and when gay sex is no longer morally problematic in the minds of a clear majority of Americans, that will mean that norms such as openness, mutuality, and the value of sexual pleasure will be more morally relevant to the sexual ethic of most Americans than the nature of particular sexual acts or the gender of the parties involved. A gay and lesbian sexual ethic, in other words, will be part of, or at least be consistent with, largely accepted sexual norms.

There are some in the gay community who are afraid of the day when gay sex might lose its transgressive meaning and outsider status.³¹⁷ For these individuals, lesbians and gay men must never become part of the sexual mainstream of society because to do so will be to give in to conservative, heterosexist values. I do not see it that way. As I argue in Part III.B, I do not see much value in transgression for the sake of transgression; the ultimate goal should not be transgression—a morally empty concept that does not by itself

316. See, e.g., KATE MILLETT, *SEXUAL POLITICS passim* (1970); THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES passim* (1973).

317. Michael Warner is an eloquent proponent of this view. I discuss Warner's ideas in *infra* notes 407–16 and accompanying text.

tell us what we should transgress *against*—but the reduction, and eventual elimination, of oppression. If society some day ceases to problematize gay and lesbian sexuality, then I think lesbians and gay men should happily trade in their marginalization and stigmatization for the opportunity to live open and dignified lives in a society that values them as full and equal human beings. If society someday no longer morally problematizes gay and lesbian sexuality, that will not mean that society will have simply co-opted lesbians and gay men into accepting its values. If problematization of same-gender intimacy ends some day, those values will have been *modified* in order to incorporate the relationships and sexuality of lesbians and gay men. If, for example, same-sex marriage is one day recognized in the United States, that will mean that the gender of spouses will become irrelevant for purposes of marriage. This development will mean that centuries-old ideas about gender roles and privileges within marriage will be undermined and weakened. The radical, transformative impact of such a change should not be underestimated. True acceptance of gay and lesbian relationships and sexuality will require a meaningful transformation of society's norms that should help allay the concerns of some about co-optation of lesbians and gay men into existing values.

While some on the left will be skeptical of the notion that a gay and lesbian sexual ethic should (ever) be part of a mainstream sexual ethic, some on the right will argue that the values of a gay and lesbian sexual ethic as I have explained them here do not speak of the need for *restraint* on matters of sex. A traditionalist will argue that a gay and lesbian sexual ethic will allow individuals to do whatever they want as long as they reflect on the meanings of their sexual acts and use those acts to define and transform themselves. The traditionalist will point out that a code of conduct, such as the one that is part of traditional Christian sexual morality, places certain sexual acts out of bounds. Not so a gay and lesbian sexual ethic.

There are at least two responses to this argument. First, as explained above, the value of mutuality in sexual relationships—a constitutive element of a gay and lesbian sexual ethic—acts as a restraint on sexual conduct.³¹⁸ A gay and lesbian sexual ethic demands that the needs, concerns, expectations, and vulnerabilities of sexual partners be respected because it is through that mutuality that gay relationships, families, and communities are formed and maintained. In addition, it is that mutuality which protects and

318. See *supra* Part II.B, notes 220–48 and accompanying text.

promotes equality and a balance of power in gay and lesbian sexual encounters that take place outside of an affectional context.

Second, there are other moral and ethical norms (that are not explicitly about sex) that are always applicable to sexual relationships and encounters. The duty not to cause pain or suffering, the duty not to deceive or mislead, the duty to treat others as ends rather than merely as means for the attainment of our own ends, to name just three, are moral obligations that apply whenever humans interact, including interactions that have a sexual component. The traditionalists, however, want to go beyond those kinds of generalized moral restraints by automatically placing certain sexual acts outside of acceptable moral bounds.³¹⁹ It is precisely the efforts by traditionalists to mandate sexual restraint through a code of conduct that is based on the gender of the parties involved and on the particular bodily orifices that are penetrated that have caused unacceptable suffering and oppression. What a gay and lesbian sexual ethic questions most fundamentally is the traditionalist idea that there is intrinsic moral (un)worthiness associated with particular sexual acts.

A traditionalist might also take issue with the fact that I have not included monogamy as a value in my conception of a gay and lesbian sexual ethic. I have not done so because I have tried to focus on those values that a broad spectrum of lesbians and gay men—defined at both ends of the spectrum by what I, following Seidman, refer to above as the libertarian and romantic camps in the gay community—can embrace.³²⁰ As with heterosexuals, there are many lesbians and gay men who practice monogamy, while there are others who do not prioritize exclusivity in their sexual lives. In fact, there are many homosexuals, especially gay men, who do not believe that monogamy is an essential characteristic of commitment in a sexually intimate relationship.³²¹ It seems to me that whatever harms might arise from

319. See *supra* notes 226–42 and accompanying text.

320. See *supra* notes 261–64 and accompanying text.

321. The results of studies published almost twenty years ago (and conducted several years earlier) showed that only a minority of gay men (though not of lesbians) were sexually exclusive in their relationships. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 271–72 (1983); DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 252–59 (1984). It is likely that as a result of the AIDS epidemic and the greater acceptance of homosexuality by society, the number of gay men for whom sexual exclusivity in committed relationships is important has since then increased. See SIGNORILE, *supra* note 263, at 208–65 (noting the trend in gay male relationships towards greater sexual exclusivity, especially outside of large urban centers). In fact, in a recent study of ninety gay and lesbian couples, Gretchen Steirs found that “92 percent of the lesbians and 81 percent of the gay men stated they had either

some instances of nonmonogamy, they can be avoided through two ways already noted: first, by requiring mutuality in all sexual encounters, both inside and outside of affectional contexts; and second, by applying the more universal norms that go beyond matters of sexuality and apply whenever human beings interact and which proscribe deception and the causing of pain and suffering to others. Thus, sexual non-exclusivity when there is consent and agreement by all of the potentially affected parties does not violate a gay and lesbian sexual ethic.³²²

In any event, despite the inevitable skepticism that will be expressed by traditionalists about a gay and lesbian sexual ethic, it is clear that Foucault's conception of ethics requires an active participation by the individual in the formation of an ethical sexual life. This raises the intriguing question of whether a capacity for autonomy is a constitutive element of such a life. I next turn to the role of autonomy in the formation of a gay and lesbian sexual ethic.

III. THE ROLE OF AUTONOMY IN A GAY AND LESBIAN SEXUAL ETHIC

As discussed above, many scholars who write about homosexuality abide by an antiessentialist view of sexual orientation.³²³ Foucault's highly influential *The History of Sexuality*, Volume I, provides powerful support for the idea that sexual orientation categories are the effects of societal discourses and power relations.³²⁴ Prior to writing Volumes II and III, it was also quite clear that Foucault was not only an antiessentialist on issues of sexuality, but was also a committed philosophical antifoundationalist who

agreed to be monogamous or assumed the relationship was monogamous." GRETCHEN A. STEIRS, FROM THIS DAY FORWARD: COMMITMENT, MARRIAGE, AND FAMILY IN LESBIAN AND GAY RELATIONSHIPS 53 (1999). Interestingly enough, the study found that while the clear majority of the couples interviewed thought that their relationships were meant to be monogamous, only thirty-two percent of the lesbians and ten percent of the gay men discussed "the importance of monogamy as part of their commitment to their partners." *Id.* at 52. This raises the intriguing possibility that monogamy may be honored more in practice than in theory in at least some gay and lesbian relationships (arguably the exact opposite than in some heterosexual married relationships).

322. Andrew Yip has documented the way in which some gay male couples set "ground rules" for sexual activity outside of the relationship so that such activity is done with the consent and agreement of both partners. See Andrew K.T. Yip, *Gay Male Christian Couples and Sexual Exclusivity*, 31 SOC. 289, 296-98 (1997). Yip concludes that what is important to many of the couples he studied was emotional fidelity and commitment rather than sexual exclusivity. See *id.* at 303.

323. See *supra* notes 50-55 and accompanying text.

324. See *supra* notes 29-47 and accompanying text.

rejected objective or universal conceptions of truth.³²⁵ Although Volumes II and III by no means turned Foucault into a Kantian liberal, it is nonetheless intriguing that Foucault in those two books for the first time wrote extensively about practices of *freedom*. In my estimation, Volumes II and III allow us to consider whether it is possible to delink antiessentialism on issues of sexuality from antifoundationalism on issues of moral and political philosophy.

I argue in Part III.A below that Foucault, in his later work, had a conception of the self that allows for a discussion of a capacity for autonomy as a universal good that is necessary for the development of an alternative sexual ethic. Foucault's later work, in fact, leads us to the conclusion that the difference between liberal autonomy and postmodernist agency is not as marked as some queer theorists have argued. I argue in Part III.B that there is also common ground between queer theorists and liberals on the importance of individual rights for lesbians and gay men. I will explain how the important differences among academic supporters of gay rights positions are not those between queer theorists and liberals, but are instead between those who defend a negative conception of freedom and those who defend a positive one.

A. *Agency Versus Autonomy in Foucault's Late Writings*

As with many of Foucault's philosophical ideas, his conception of the self was complicated and not always consistent throughout his career. As we saw in Part I, the earlier Foucault viewed the self as a largely passive creature who is constituted by the effects of social discourses, systems of knowledge, and power relations that are beyond its control.³²⁶ In the earlier part of Foucault's career, then, it was common for him to write sentences such as the following: "It is one . . . of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals."³²⁷ As we also saw in Part I, however, the later Foucault came to have a different conception of the self. The

325. See, e.g., MICHEL FOUCAULT, *Truth & Power*, in *POWER/KNOWLEDGE*, *supra* note 150, at 109, 131 ("Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true.").

326. See *supra* notes 38–47 and accompanying text.

327. FOUCAULT, *Two Lectures*, *supra* note 150, at 98; see also FOUCAULT, *supra* note 325, at 117 (arguing that "[o]ne has to dispense with the constituent subject, to get rid of the subject itself, that's to say, to arrive at an analysis which can account for the constitution of the subject within a historical framework"); Foucault, *supra* note 75, at 208 (noting that the objective of his work has "been to create a history of the different modes by which, in our culture, human beings are *made* subjects") (emphasis added).

later Foucault by no means denied the importance of social discourses, systems of knowledge, and power relations in the formation of individual identities, and he *never* argued that it was possible for individuals to step outside of them. But the self for the later Foucault was no longer hopelessly passive; instead, the self in the later works played an active role in its own constitution through self-defining and self-transformative practices, including sexual ones.³²⁸ The issue that I want to explore in this section of the Article is whether the later Foucault, in allowing that the subject can play an active role in constituting and defining itself, was speaking of a capacity for autonomy that is in any way similar to the way in which autonomy is viewed by some liberals. If the answer to that question is yes, then I believe that Foucault's later writings can help us find some common ground between liberal and postmodernist supporters of gay rights.

Postmodernists are, as a rule, extremely skeptical of the concept of autonomy. Ladelle McWhorter, for example, criticizes "liberal theorists [for] their delusions of autonomy."³²⁹ Judith Butler sees autonomy as an illusion held by dominant groups such as men.³³⁰ Individual autonomy for these thinkers is a liberal ruse that views the individual as being separate from and existing prior to society. For postmodernists there is no such Archimedean point from which we can apply (or celebrate) so-called neutral and universal values such as autonomy.³³¹

Postmodernists, however, cannot completely give up on the idea that the self has *some* control over its life because to do so would be to give up all hope of a progressive political agenda. If the self is indeed nothing more than a reflection of societal systems of power and knowledge, there is little room for optimism that it can, in any meaningful way, resist or undermine existing social relationships and practices. A conception of the self that requires us to view it as being nothing more than the effect of power and knowledge would lead to despondency and hopelessness about the human condition. Thus, postmodernists like to speak not of autonomy but of agency. The self

328. See *supra* notes 63–91 and accompanying text.

329. MCWHORTER, *supra* note 20, at xvi.

330. See BUTLER, *supra* note 20, at vii (noting that "[t]he radical dependency of the masculine subject on the female 'Other' . . . exposes his autonomy as illusory").

331. See Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1184–85 (1992) ("Rather than think of the individual subject as a unitary and sovereign subject whose self-directed vocation is to bring the world to heel through the exacting discipline of rational inquiry, postmodernism interrogates the whole idea of autonomous subjectivity and abstract reason.").

as an agent is not prior to society. Instead, it is defined and constructed by society; within those parameters, however, there is enough room to oppose and subvert existing power relations. As Butler puts it, "[e]ven within the theories that maintain a highly qualified or situated subject, the subject still encounters its discursively constituted environment in an oppositional epistemological frame. The culturally enmired subject negotiates its constructions, even when those constructions are the very predicates of its own identity."³³² Mark Bevir also makes it clear that in his view there is an important distinction between autonomy and agency. "Autonomous subjects," he argues, "would be able, at least in principle, to have experiences, to reason, to adopt beliefs, and to act, outside of all social contexts."³³³ He contrasts such ultimately illusory liberal subjects to

[a]gents [who] exist only in specific social contexts, but these contexts never determine how they try to construct themselves. Although agents necessarily exist within regimes of power/knowledge, these regimes do not determine the experiences they can have, the ways they can exercise their reason, the beliefs they can adopt, or the actions they can attempt to perform. Agents are creative beings; it is just that their creativity occurs in a given social context that influences it.³³⁴

Clearly, the concept of an aesthetics of existence as a form of ethical practice as envisioned by Foucault in *The History of Sexuality*, Volumes II and III, requires at the very least the kind of agency that

332. BUTLER, *supra* note 20, at 143; *see also id.* at 145 (arguing that agency is located within repetitive processes of gender regulation when those processes allow for new possibilities "that contest the rigid codes of hierarchical binarisms"). For Butler, there is no pre-discursive subject; both the subject and its agency are fully constituted by culture and discourse. *See id.* Carl Stychin provides the following explanation of a postmodernist conception of agency: agency emanates from "the necessarily incomplete delineation of the boundaries of any discourse." CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 21 (1995). This incompleteness "allows for intervention, resistance, and subversion of the terms of the system. The active role of the agent, through her creative intervention and resistance, ultimately contributes to the social construction of identity." *Id.* at 22.

333. Bevir, *supra* note 94, at 67.

334. *Id.* Sarah Hoagland, writing more as a lesbian feminist than as a postmodernist, calls autonomy a "thoroughly noxious concept" because it suggests separation, independence, and self-sufficiency. *See* HOAGLAND, *supra* note 258, at 144. Rather than autonomy, Hoagland prefers to speak of "autokoenony," which envisions individuals making choices in a community of others who also make choices. *See id.* at 145. Hoagland adds that it "is not a matter of us controlling our environment but rather of our acting within it and being a part of it." *Id.*

Bevir describes. Foucault's aesthetic of existence envisions the self as participating in its own constitution and transformation as it negotiates the construction of its identity.³³⁵ The issue is whether such a view of agency is significantly different from the conception of autonomy held by some liberals.

The definition of liberal autonomy that Bevir explicitly provides,³³⁶ and that postmodernists such as Butler use as counterpoints to their political philosophy,³³⁷ is consistent with a Kantian/Rawlsian conception of the self that views it as standing apart from its social context. A Rawlsian subject enjoys two moral powers: first, the capacity for a sense of justice, and second, the ability to apply reason in order to develop and pursue a life plan.³³⁸ Rawls, however, is not interested in the way liberal subjects define or transform themselves depending on how they are situated in particular social contexts. For Rawls, "[i]t is not our aims that primarily reveal our nature but rather the principles that we would acknowledge to govern the background conditions under which these aims are to be formed and the manner in which they are to be pursued."³³⁹ For Rawls, then, principles of justice "reveal our nature" and from those principles, "background conditions" (or social contexts) are determined, which, in turn, define our political aims.³⁴⁰

335. See *supra* Parts II.B and II.C, notes 220–322 and accompanying text.

336. See *supra* note 333 and accompanying text.

337. Butler summarizes the liberal position as:

The prevailing assumption of the ontological integrity of the subject before the law might be understood as the contemporary trace of the state of nature hypothesis, that foundationalist fable constitutive of the juridical structures of classical liberalism. The performative invocation of a nonhistorical "before" becomes the foundational premise that guarantees a presocial ontology of persons who freely consent to be governed and, thereby, constitute the legitimacy of the social contract.

BUTLER, *supra* note 20, at 3.

338. See John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 525 (1980), reprinted in JOHN RAWLS, COLLECTED PAPERS 303, 312 (Samuel R. Freeman ed., 1999).

339. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

340. As is well known, individuals in Rawls's original position, who choose the foundational principles of justice behind a "veil of ignorance," are in a position that is prior to what Rawls considers to be external contingencies to the self (such as race, gender, age, and class). See *id.* "Rawls believes that one's life should be governed by considered judgments which are 'independent of natural contingencies and accidental circumstances,' and maintains that autonomous individuals should thus govern their lives according to justice, which requires that people test their action against principles adopted behind the 'veil of ignorance.'" THOMAS MAY, AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY 45–46 (1998) (quoting Rawls, *supra* note 338, at 515).

Similarly, for Kant, "self-governance [is] a necessary feature of human beings, one not dependent on or created by society."³⁴¹

It is not necessary, however, to abide by a Kantian/Rawlsian view that the self can be separated from its social context in order to believe that the self has a capacity for autonomy. A believer in autonomy "need not deny that the self is a cultural product, rather than a divine or natural one."³⁴² There are liberal political philosophers, in fact, who *do* incorporate the social situatedness of subjects into their conceptions of liberalism and autonomy. One of those philosophers is Stephen Macedo, who addresses the issue at some length in his book *The Liberal Virtues*.³⁴³

Macedo notes that a liberal conception of autonomy starts with the proposition that "[a] crucial feature in the move from autarchy to autonomy is the development of the *capacity* critically to assess and even actively shape not simply one's actions, but one's character itself, the source of our actions."³⁴⁴ The exercise of that autonomy, however, takes place *within* particular social contexts and public meanings. As Macedo notes (in a passage with which I believe the later Foucault would have been in complete agreement):

We can control our own actions but not the public meanings of our actions, for we act in a context largely given. We are not autonomous in the sense of "radically free" or able to create the values that define the moral problems we face, or to make words mean whatever we choose. Our freedom and the autonomy we strive for are not the consequences of an ability to extricate ourselves from this network of public meanings. We are objects and not only agents of critical interpretation.³⁴⁵

Macedo also recognizes that the identity of the self is not fixed, but is instead contingent on dynamic forces that are both internal (reflection and self-evaluation) and external (commitments, attachments, social context, and language). "The desires, convictions,

341. J. B. Schneewind, *The Use of Autonomy in Ethical Theory*, in RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY, AND THE SELF IN WESTERN THOUGHT 64, 69 (Thomas C. Heller et al. eds., 1986). "Kant thought that we might be able to separate the metaphysical, transcendent self from the contingent self, such that the core self can be brought to exist separately from its immersion in a particular culture, language, or history." LITOWITZ, *supra* note 22, at 11–12.

342. Schneewind, *supra* note 341, at 72.

343. See STEPHEN MACEDO, *THE LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 203–53 (1990).

344. *Id.* at 216 (emphasis added).

345. *Id.* at 225.

and even the identity of the autonomous liberal subject are never fixed or closed: they are to some degree malleable and open to revisions in response to the broad vista of human experience."³⁴⁶ "Liberal autonomy engages our understanding and responsibility at a deep level by engaging the capacity critically to reflect upon morality and personal identity, itself already constituted by projects, plans, commitments and strong evaluations."³⁴⁷

Macedo in *The Liberal Virtues* is responding to the communitarian critique of liberalism and not explicitly to postmodernism.³⁴⁸ But the communitarian critique of the atomistic individual, separated from communities and social attachments, is similar to the postmodernist critique of the liberal conception of the self. Macedo is one of several liberal political philosophers who have taken the communitarian critique of liberalism seriously and who have, in response, presented restructured understandings of liberalism.³⁴⁹

Feminists have also criticized a conception of the self that gives a descriptive emphasis and a normative priority to the separateness of individuals. Feminists, therefore, have generally been skeptical of a conception of autonomy that equates it with individualism and the right to be left alone.³⁵⁰ Many feminists instead emphasize the role that ties, relationships, and an ethic of care play in the construction of identities and the attainment of well-being of all individuals, and in particular of women.³⁵¹ A conception of the self that views it as

346. *Id.* at 223; *see also id.* at 226 ("Our very identity may be open to revision, but we are not simply adrift . . . because autonomous persons are not passive but active centers of self-direction, always constituted by a range of commitments, attachments, and allegiances.").

347. *Id.* at 220; *see also id.* at 216 ("Strong evaluation allows us . . . to situate autonomy in a social context by emphasizing the roles played by language and articulation in the process of deliberation.").

348. *See id.* at 2-3. On the communitarian critique of liberalism, *see, for example*, THE COMMUNITARIAN CHALLENGE TO LIBERALISM (Ellen Frankel Paul et al. eds., 1996); THE LIBERALISM-COMMUNITARIANISM DEBATE (C.F. Delaney ed., 1994); STEPHEN MULLHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS (2d ed. 1996).

349. Other liberals who have sought to present modified forms of liberalism that are aimed, in part, to respond to communitarians include WILLIAM GALSTON, LIBERAL PURPOSES (1991); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

350. For a helpful summary of different kinds of feminist critiques of autonomy, *see* Catriona MacKenzie and Natalie Stoljar, *Introduction: Autonomy Refigured*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5-12 (Catriona MacKenzie and Natalie Stoljar eds., 2000) [hereinafter RELATIONAL AUTONOMY].

351. The two books that are usually credited with inspiring the articulation of a feminist ethic concerned with relationships and caring for others are CAROL GILLIGAN,

largely defined through social attachments, relationships, and commitments, however, has not prevented liberal feminists from recognizing and valuing a capacity for autonomy.³⁵² As Catriona MacKenzie and Natalie Stoljar put it, "[w]e can accept that social relations influence and perhaps constitute agents' senses of themselves and their capacities, without concluding that capacities such as autonomy are nonexistent."³⁵³ That capacity plays an important role in the ability of women to give shape to their lives and to define who they are rather than accepting definitions provided by a male-dominated society.³⁵⁴

The conception of autonomy held by restructured forms of liberalism closes the gap between liberalism and the later Foucault. While Foucault obviously never spoke of an autonomous subject that can define itself independently of social power relations—and while liberal philosophers such as Macedo are more optimistic than Foucault ever was about the moral guidance that reason and principles of justice can provide to individuals³⁵⁵—the later Foucault's belief in a capacity for agency is not significantly different from Macedo's and liberal feminists' belief in a capacity for autonomy. In fact, Bevir, in discussing Foucault's distinction between morality and ethics,³⁵⁶ notes that,

[m]orality, in any sphere, represents a set of imposed rules to follow, which is not truly to exercise one's agency, not to be free, but only to regulate oneself. Agency and freedom really appear only when we question moral rules by interpreting them creatively in an ethics, although equally we can develop an ethics only because we possess a capacity

IN A DIFFERENT VOICE (1982) and NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984).

352. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7, 7–13 (1989); see also SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 214 (1992) (arguing that "[t]he situated and gendered subject is heteronomously determined but still strives toward autonomy"); Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in *RELATIONAL AUTONOMY*, *supra* note 350, at 35, 40 ("The fact that mistaken conceptions of autonomy are male-biased . . . does not show that autonomy *properly understood* is male-biased or antifemale.").

353. MacKenzie and Stoljar, *supra* note 350, at 8. As the liberal feminist Linda McClain notes, "a liberal conception of autonomy does not require a model of the self as immune from the process of social construction." Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty Toleration" to Toleration as Respect*, 59 OHIO ST. L.J. 19, 128 (1998).

354. See Nedelsky, *supra* note 352, at 8–9.

355. See MACEDO, *supra* note 343, at 226.

356. See *supra* notes 92–96 and accompanying text.

for agency and freedom. We are agents, but we exercise our agency properly only when we resist the pressures of normalization by challenging a morality through our personal, ethical conduct.³⁵⁷

If we substitute the word "agency" with "autonomy" in this passage, there is nothing with which a liberal such as Macedo would disagree. While trying to distinguish Foucauldian agency from liberal autonomy, Bevir acknowledges that for the former to exist, social structures must allow for a "space . . . where individuals [can] decide what beliefs to hold and what actions to perform."³⁵⁸ It is difficult to imagine a more traditional bedrock principle of liberalism than the need to create the necessary space for individuals to be able to choose their own beliefs and actions.

David Halperin typifies the postmodernist queer theorist who, in putting forth an eloquent defense of an antiessentialist conception of sexual orientation,³⁵⁹ bundles that defense with a rejection of a liberal conception of freedom.³⁶⁰ As such, Halperin sides with the earlier Foucault's conception of the subject when he notes that it "is not an identity or a substance" (i.e., there is nothing to the subject that stands apart from the effects of social constructions).³⁶¹ And yet, practically in the same breath, Halperin adds a crucial qualifier: "Nonetheless, insofar as the subject is an *ethical* subject, a subject of ethical practices, it is to that extent a free subject, for that is what it means, definitionally, to *be* an ethical subject."³⁶² Halperin adds that "[t]he kind of power that Foucault is interested in, . . . far from enslaving its objects, constructs them as subjective agents and preserves them in their *autonomy*, so as to invest them all the more completely."³⁶³ It seems to me, however, that one cannot have it both ways: either there is nothing to the self that is independent of the effects of power and discourse *or* the self, even from within a regime of power and discourse, has the capacity to exercise personal autonomy, at least as conceived by a restructured liberalism as articulated by Macedo. If the latter proposition is correct, then the sharp contrast that postmodernist queer theorists seek to draw

357. Bevir, *supra* note 94, at 76.

358. *Id.* at 68.

359. See HALPERIN, *supra* note 20, at 38–48.

360. See *id.* at 123.

361. *Id.* at 212 n.137.

362. *Id.*

363. *Id.* at 18; see also *id.* at 74 (noting that Foucault has hope for a gay life style that is "rigorous, austere, and transformative . . . of the self which produces concrete possibilities for the development of *personal autonomy*") (emphasis added).

between themselves and (a restructured) liberalism is not as great as they would like us to believe.³⁶⁴

The postmodernist philosopher Ladelle McWhorter, in writing about issues of sexuality, also rejects a conception of the self that is independent of power relations and discourses. For McWhorter, there is no constitutive part of the self that is not an effect of power.³⁶⁵ When we scratch at the surface and try to strip away our sexual identity, for example, there is nothing below that particular layer that is not itself constituted by societal forces. For McWhorter, the sexual self as well as the knowing self are socially constructed. Social construction, in other words, goes all the way down; there is for her "no epistemic stopping point."³⁶⁶ And yet, McWhorter grounds her philosophy and politics on the ability of individuals to engage in *transformative* practices, by which she means practices, chosen by individuals, that lead to self-expansion and self-definition as a way of attaining if not freedom, then at least some measure of meaningful agency.³⁶⁷ She argues that there is no inconsistency between her conception of the self and her faith in transformative practices because, as she puts it, "I can exercise agency despite (and even because of) the fact that my very existence as a subject is a form of subjection."³⁶⁸ It seems to me, however, that McWhorter, like Halperin, is trying to have it both ways. On the one hand, she follows postmodern theory in arguing that nothing, including human beings,

364. Seyla Benhabib nicely captures the contradiction in postmodernist theory between its conception of the self as completely determined by societal forces and its simultaneous promotion of a set of values that she calls "hyper-universalist and superliberal":

What is baffling . . . is the lightheartedness with which postmodernists simply assume or even posit . . . hyper-universalist and superliberal values of diversity, heterogeneity, eccentricity and otherness. In doing so they rely on the very norms of autonomy of subjects and the rationality of democratic procedures which they otherwise seem to so blithely dismiss. What concept of reason, which vision of autonomy allows us to retain these values and the institutions within which these values flourish and become ways of life? To this question postmodernists have no answer.

BENHABIB, *supra* note 352, at 16; see also RAHMAN, *supra* note 20, at 134 (noting a contradiction in queer theory "between an exclusive focus on discursive production of subjectivity and the reflexivity of the subject which would allow for agency").

365. See MCWHORTER, *supra* note 20, at 34–61.

366. *Id.* at 50.

367. McWhorter gives a personal account of how the practices of gardening and dancing, for example, have allowed her to expand her interests and experiences and have therefore allowed her to expand her sense of self. See MCWHORTER, *supra* note 20, at 162–75.

368. *Id.* at 79. I discuss McWhorter's ideas in more detail in Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 LAW & SOC. INQUIRY 271, 274–85 (2001) (book review).

is constituted independently of societal forces. And yet, at the same time, she recognizes that we are capable of *choosing* among different kinds of practices in order to transform ourselves. Whether we call that capability agency or autonomy is less important than the fact that it is a constitutive part of ourselves that is in some measure able to stand apart from power and discourse in order to work on a self that is ultimately a *different* one than would exist if it did not work to resist societal forces through transformative practices. Again, I believe such a view of the self is consistent with a liberal conception of a capacity for autonomy.

In thinking about the role of self-transformative practices, or what Foucault called practices of freedom,³⁶⁹ it is important to keep in mind the distinction between self-definition and self-discovery. Foucault very much rejects the latter because it suggests that there is a true self that exists somehow prior to power relations and systems of knowledge that is amenable to discovery.³⁷⁰ If we believe that self-discovery is possible, then, power relations and systems of knowledge can obstruct the discovery of the true self. For Foucault, however, the practices of freedom have to be based not on self-discovery but on self-definition, that is, on the working of the self by the self.³⁷¹ But not self-definition in a Kantian/Rawlsian sense whereby the individual defines itself largely independently of its social ties and encumbrances. Rather, the process of self-definition is a highly contextualized one that takes place within, not outside of, societal structures. The process of self-definition for Foucault was one of self-transformation. That "[t]ransformation is . . . not a distant flight away from the conditions of our being but, instead, a metamorphosis, or morphing, of the virtuality of our lives, building concretely upon the experience of the present so as to realize our freedom as a practice."³⁷²

When we apply this theoretical framework to a gay and lesbian sexuality, we see how lesbians and gay men develop a sexual ethic not independently of societal norms, but very much from within them. The ethic has to be developed from within those norms because it is those norms that define the homosexual identity to begin with. But

369. See *supra* notes 65–91 and accompanying text.

370. See Peter Dews, *The Return of the Subject in Late Foucault*, 51 *RADICAL PHIL.* 37, 38 (1989) (noting that "Foucault's task, in his late work, will be to articulate the concepts of subjectivity and freedom in such a way as to avoid any suggestion that such freedom must take the form of the recovery of an authentic 'natural' self").

371. See FOUCAULT, *On the Genealogy of Ethics*, *supra* note 5, at 262–69.

372. DUMM, *supra* note 283, at 15.

even as that identity is being determined by power relations and systems of knowledge, the opportunity for resistance presents itself.³⁷³ The socially-defined gay and lesbian subject seeks to transform itself through practices of freedom. This transformative process requires a self that has the capacity to participate in its own definition, that is, a capacity for at least partial self-authorship or autonomy. It is true that the self "is not a bare, vanishing, purely rational entity that stands outside the world and judges it."³⁷⁴ In this sense, the postmodernists are correct. Nonetheless, even if "the self is a creature in and of the world, [it is also] one capable of at least partially transforming herself through thought, criticism and self-interpretation."³⁷⁵ This possibility of partial transformation for Foucault entails the possibility of freedom, which, in turn, exists wherever there is power because power (as opposed to domination) requires freedom as a constitutive element.³⁷⁶ If power is everywhere, then, so is the possibility of freedom. While postmodernists emphasize the former when they discuss Foucault, they rarely mention the latter. If you take away the capability of the subject to exercise its autonomy, then you take away the possibility of freedom and the possibility of engaging in ethical practices.³⁷⁷ Such scenarios do, of course, exist when there is domination (i.e., the impossibility of resistance).³⁷⁸ But Foucault's discussion of sexuality was rarely about domination; it was instead about power. And it is the omnipresence of power that accounts for the omnipresence of the possibility of freedom.

The capacity for autonomy, in my view, plays a foundationalist or universal role in the development of an alternative sexual ethic. The marginalized sexual subject, who works on the crafting of an alternative sexual ethic through reflection and self-transformation, must be given the opportunity to exercise its capacity for autonomy. Without that opportunity, the development of a sexual ethic that arises from a process of self-definition and that is different from and

373. See FOUCAULT, *supra* note 9, at 101–02.

374. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 888 (1994).

375. *Id.* Seyla Benhabib similarly argues that even if we concede that subjectivity can only be structured within narratives and culture, "we must still argue that we are not merely extensions of our histories, that vis-a-vis our own stories we are in a position of author and character at once." BENHABIB, *supra* note 352, at 214.

376. See *supra* notes 68–78 and accompanying text.

377. See *supra* notes 85–86 and accompanying text (discussing the connection that Foucault makes between freedom and ethics).

378. See *supra* notes 74–77 and accompanying text.

resistant to the societal norms relating to sexuality would be impossible. The role that autonomy plays in that development is not culture-specific. Instead, it is appropriate to speak of the *capacity* of the sexual subject to exercise its autonomy as a form of universal good.

It is important to understand what is and what is not universal about this process. The need of individuals to exercise their capacity for autonomy is universal. The ways in which sexuality is problematized, which then leads some individuals (if they have the opportunity) to approach their sexuality ethically in response to that problematization, however, will vary across history and cultures. As we have seen, the way in which the Greeks problematized same-gender sexual conduct was very different from the contemporary problematization of homosexuality.³⁷⁹ Similarly, the substantive content of the sexual ethic that develops in response to the differing forms of problematization will be different across history and cultures. There is no such thing, then, as a universal sexual ethic.

It is clear that when Foucault alluded to a capacity for autonomy in his later writings, he did not have in mind autonomous subjects that are somehow separated from or independent of the society in which they live. "Foucault saw the freedom that subjects have to work on themselves not as an abstract freedom, but as dependent on the resources they had at their disposal, both in terms of their own capacities and the structures of society."³⁸⁰ Autonomy does not inhere in atomistic individuals; instead, the capacity for autonomy must be cultivated internally (through a care of the self) and promoted externally (through modes of power that encourage the capacity and discourage submission and domination).³⁸¹

The later Foucault, then, allows us to build a bridge across the seemingly irreconcilable differences between liberals and postmodernists. Foucault's writings emphasize the postmodernist

379. See *supra* notes 117–32 and accompanying text.

380. Jeremy Moss, *Introduction: The Later Foucault*, in *THE LATER FOUCAULT: POLITICS AND PHILOSOPHY* 1, 5 (Jeremy Moss ed., 1998) [hereinafter *THE LATER FOUCAULT*].

381. Paul Patton explains this point as follows:

So long as human capacities do in fact include the power of individuals to act [on] their own . . . we can see that Foucault's conception of human being[s] in terms of power enables us to distinguish between those modes of exercise of power which inhibit and those which allow the self-directed use and development of human capacities.

Paul Patton, *Foucault's Subject of Power*, in *THE LATER FOUCAULT*, *supra* note 380, at 64, 72.

(and communitarian) idea that societal forces and relationships largely determine the identity of the self. At the same time, however, Foucault's conception of ethics recognizes a capacity for autonomy as the self seeks to care for itself through self-constitutive and self-transformative practices of freedom. The conception of ethics held by the later Foucault, in other words, requires a self that is to some degree capable of self-authorship. If even someone like Foucault, who was of course no liberal, can acknowledge the importance of the capacity for autonomy as individuals participate in the constitution of their identity through practices of freedom, perhaps there is more to the capacity for autonomy than postmodernists have been willing to admit. On the other hand, Foucault's acknowledgment in his later works that the omnipresence of power is not inconsistent with freedom can allay the fears of liberals who believe that to pursue the implications of Foucault's writings is to somehow give up on the idea of human freedom.³⁸² Again, as Foucault noted several months before he died, "[t]he idea that power is a system of domination that controls everything and leaves no room for freedom cannot be attributed to me."³⁸³

If liberals can lower their philosophical guards when approaching Foucault's ideas, they may be more willing to explore the implications of his trenchant observations about the role of power in society. Liberals tend to view power only in its negative form, focusing largely on the need to contain power in order to protect the individual; Foucault emphasized power in its positive form, as a constitutive element of all interactions and relationships among individuals, not as a force that can be isolated.³⁸⁴ There is no need to fear the omnipresence of power, then, as long as we understand that the ability of power to constrain freedom is always accompanied by its ability to provide *for* freedom.³⁸⁵ A conception of power that views it

382. See DUMM, *supra* note 283, at 5 ("From the perspective of most liberals, the bulk of Foucault's work has participated in damaging the faith in liberal freedom necessary for its continued sustenance as a value and its effective operation within institutions.").

383. See FOUCAULT, *The Ethics of the Concern for Self*, *supra* note 5, at 293.

384. As Foucault notes,

We must cease once and for all to describe the effects of power in negative terms: it "excludes," it "represses," it "censors," it "abstracts," it "masks," it "conceals." In fact, power produces; it produces reality, it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.

FOUCAULT, *supra* note 40, at 194.

385. See *supra* note 68-78 and accompanying text; see also HALPERIN, *supra* note 20, at 17 (noting that power is not only about suppression and constraint, but "[p]ower is also

only as a force from which we need protection is too limited because power helps to constitute individuals. Power, in other words, plays a crucial role in constructing the very individuals whose autonomy liberals want to protect.³⁸⁶

I do not want to suggest that Foucault completely reconciles the hegemonic influences of power relations and systems of knowledge, as emphasized in his earlier work, with the recognition that individuals have a capacity for autonomy implied in his later work.³⁸⁷ My point instead is that, at least in the context of sexuality, it is possible to do some of the reconciling *for* Foucault if we separate the social construction of sexual orientation categories from the capability of individuals (once society places them in those categories) to work on and transform themselves. That transformation will never be so complete as to lead to a radically new and free self that emerges from the socially constructed one. Instead, a process can take place whereby the individual tries (sometimes successfully and sometimes not) to create a modest separation between a working on the self and societal moral codes. It is in the space created by this modest separation that freedom for marginalized sexual minorities resides. If what I am suggesting is in fact possible, then the connection between antiessentialism on matters of sexual orientation and antifoundationalism on matters of

positive and productive...[a]nd freedom... is not freedom *from* power ... but a potentiality internal to power, even an effect of power").

386. Dumm notes that under a traditional conception of freedom (which he calls "utopian"), freedom is understood as:

[T]he removal of constraints on the activities of people, who would be able to behave otherwise in the absence of repression. . . . But this vision of freedom has never comprehended the constitutive powers that situate it. In understanding freedom to be the opposite of repression, utopian thinkers misapprehend the positive, constitutive character of power as it operates in shaping how we are free.

DUMM, *supra* note 283, at 124.

387. Christopher Norris, for one, has argued that Foucault "left himself no room for maneuver when it came to explaining how subjects could exercise a degree of ethical autonomy or choice, a margin of freedom that would not be foreclosed by the pervasive workings of power/knowledge." CHRISTOPHER NORRIS, *THE TRUTH ABOUT POSTMODERNISM* 47 (1993); *see also* Dews, *supra* note 370, at 40 ("The obvious paradox of a reflexive account of self-construction [i.e., an account about the relation of self to the self] is that the self must already exist in order to construct itself."). *But see* MCWHORTER, *supra* note 20, at 213 (arguing that "Foucault's claim that the subject is not prior to and in control of all exercises of power is not the same as the claim that no subject is ever prior to and in control of any exercise of power"); Neve Gordon, *Foucault's Subject: An Ontological Reading*, 31 *POLITY* 395, 396 (1999) (arguing that the later Foucault successfully "resituate[d] the subject, seeking a balance between agency and structure, activity and passivity").

moral and political philosophy is not as immutable as postmodernist queer theory holds.

B. Queer Theory and Individual Rights

In the previous section, I argued that the conception of agency held by queer theorists is not significantly different from that of autonomy held by some liberals. As I explain below, there is also a surprising common ground between queer theorists and liberals on more practical matters such as the role of individual rights in protecting lesbians and gay men from oppression and discrimination. In fact, as I also explain below, the important divide in gay rights academic circles on issues of individual rights is not between queer theorists and liberals. Rather, the more relevant debate is between those who defend a negative conception of freedom arguing that the only obligation of the state is not to interfere with consensual acts and relationships and those who defend a positive conception of freedom believing that the state has proactive obligations to create the necessary conditions for individuals to be able to exercise their capacity for autonomy. The debate, then, is not so much whether the promotion and protection of individual rights should be the principal political and legal strategy of lesbians and gay men (and their supporters), but is instead what kind of liberal political and legal model should be promoted. I below provide a brief argument in favor of a positive conception of freedom in the context of gay rights.

While postmodernist queer theorists are skeptical of liberal *theory*, many of them remain, at the level of *practice*, focused on a traditional liberal model of individual rights that seeks to protect the freedom, autonomy, and equality of lesbians and gay men.³⁸⁸ The queer theorist Ladelle McWhorter, for example, relies heavily on Foucault's writings to critique an essentialist conception of sexual identity as well as foundationalist conceptions of truth and reason.³⁸⁹ In the end, however, her political strategy is a liberal one, namely, to work within the legislative and judicial systems to promote the civil rights of lesbians and gay men.³⁹⁰ Similarly, Mark Blasius, while

388. An important exception is Judith Butler, who calls for performative transgressions as alternatives to the traditional liberal focus on individual rights. See *infra* notes 402–06 and accompanying text.

389. See MCWHORTER, *supra* note 20, at 34–61.

390. See *id.* at 215–23; see also Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Practice of "Sexual Orientation,"* 48 HASTINGS. L.J. 1293, 1311 (1997) (noting that "nothing to date suggests that present-day Queer activism and theorizing . . . is inclined to abandon [a] broad anti-discrimination quest").

defending a Foucauldian interpretation of politics, power, and ethics, nonetheless calls for a recognition of relational rights through a "recourse to the legal system."³⁹¹ By relational rights, Blasius means rights that would allow lesbians and gay men to aim for self-determination in their relationships with others.³⁹² Furthermore, the prominent queer theorist Michael Warner endorses a political morality that is not very different from the liberalism of John Stuart Mill.³⁹³ Even those who are skeptical of relying on an individual rights model because they view it as insufficiently radical and transformative of cultural and social norms, recognize that individual rights can play an important role in the struggle for freedom, autonomy, and equality by lesbians and gay men.³⁹⁴ As Shane Phelan notes, "[e]ven the most critical of queer theorists returns to rights when needed."³⁹⁵ Queer theory, then, has not been as skeptical of individual rights as have other leftist academic movements such as critical legal studies and (to a lesser extent) critical race theory.³⁹⁶ The continued reliance by many queer theorists on an individual rights model may be more a matter of pragmatic necessity than philosophical commitment, but such reliance supports the view that liberal values such as freedom, autonomy, and equality remain a vital part in protecting the interests and dignity of lesbians and gay men.

Of course, Foucault would not have agreed that individual rights enforced through legal institutions and rules can play a particularly helpful role in promoting the freedom and equality of lesbians and gay men. Foucault did not see rights as providing protection for individuals; instead, rights for Foucault were part of a liberal discursive regime that uses the language of rights to mask power relations and disciplines that are ultimately about submission and

391. BLASIUS, *supra* note 274, at 134.

392. *See id.* at 137.

393. *See infra* notes 407–12 and accompanying text.

394. *See* URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 178–80 (1995). *But see* VALERIE LEHR, *QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY* 12 (1999) ("A rights-based approach cannot challenge power as much as it can simply let a few privileged lesbians and gays gain further entry to power.").

395. Shane Phelan, *Queer Liberalism?*, 94 AM. POL. SCI. REV. 431, 441 (2000).

396. These critics have viewed rights with suspicion, seeing them as reflecting current power structures and norms and thus as insufficiently radical and subversive. *See, e.g.*, DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 299–338 (1997); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2018–30 (1990); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364–71 (1984). Patricia Williams has criticized critical legal scholars for underestimating the political utility of rights, a utility that can benefit members of racial minorities. *See* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146–65 (1991).

subjugation.³⁹⁷ For Foucault, a change in the law simply represents a shift in a society's power relations and has no substantive effect on possible freedom. But in the same way that Foucault underestimated the role that the law plays in the *formation* of a gay and lesbian identity,³⁹⁸ he also underestimated the role that the enforcement of basic civil rights can play in helping to resist or at least partially modify current power relations in order to make them less oppressive.³⁹⁹ We do not know, in fact, how Foucault would have fit the recent enactment of comprehensive domestic partnership legislation for lesbians and gay men (as well as for other unmarried couples) in his native France or the recognition of same-sex marriage by the Netherlands into his pessimistic assessment of the value of individual rights.⁴⁰⁰ One wonders whether a Foucault writing in the first decade of the twenty-first century would have been more optimistic about the ability of the law to ameliorate some of the worst forms of societal discrimination and oppression against lesbians and gay men. As noted above, even otherwise committed Foucauldians such as McWhorter and Blasius support a political and legal strategy based on liberal individual rights.⁴⁰¹

Not all queer theorists abide by a political model of individual rights. Judith Butler, for example, eschews the traditional civil rights model in favor of transgressive practices aimed at undermining

397. "The system of right, the domain of law, are permanent agents of . . . relations of domination, [of] polymorphous techniques of subjugation. Rights, should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates." Foucault, *supra* note 150, at 96. Although, as David Halperin points out, Foucault did at times express support for gay rights positions, see HALPERIN, *supra* note 20, at 80, it is fair to say that Foucault was skeptical of the growing attention paid to the pursuit of individual rights. As Foucault put it, "if what we want to do is create a new way of life, then the question of individual rights is not pertinent." *Id.*

398. See *supra* Part II.A, notes 148–219 and accompanying text.

399. As Douglas Litowitz notes, "a major problem with Foucault's understanding of law . . . [is that] he focuses too closely on the genealogy of modern law and therefore fails to appreciate the way in which the modern legal system (especially constitutional law) has protected individuals against coercion." See LITOWITZ, *supra* note 22, at 84–85; see also HUNT & WICKHAM, *supra* note 154, at 45 (noting that Foucault "makes an important point when he insists that rights and freedoms are practices and no constitution or bill of rights can strictly 'guarantee' them, but it does not follow that such provisions are mere rhetorical flourishes"); Baxter, *supra* note 8, at 477–78 (arguing that "[l]aw, no less than the discursive practices Foucault analyzed in detail, provides resources both for the exercise of power and for resistance to power").

400. See Suzanne Daley, *France Gives Legal Status to Unmarried Couples*, N.Y. TIMES, Oct. 14, 1999, at A3; *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES, Sept. 13, 2000, at A4.

401. See *supra* notes 389–92 and accompanying text.

socially constructed identities.⁴⁰² Although Butler's work has been highly influential inside the academy, it is not clear that her emphasis on resistance to power through performative transgressions (such as drag) translates into a coherent or viable political vision.⁴⁰³ The value of transgression is that it allows for resistance of societal forces that seek to oppress through normalizing pressures. In the context of sexuality, to transgress against prescribed gender roles and compulsory heterosexuality is to seek to undermine the claim that everyone must abide by those norms. It is one of Foucault's great many insights that he recognized that violence and domination are not necessary for the exercise of power; modern systems of knowledge and regulation (including those related to sexuality) exercise immense amounts of power over their subjects through modes of normalization.⁴⁰⁴ The problem with transgression, however, as Foucault himself recognized, is that it has no positive content.⁴⁰⁵ It does not, in other words, provide us with arguments (either moral or political) as to what we should transgress *against*. As Mark Bevir notes, "we surely cannot accept that all behaviour contrary to existing norms should be regarded as ethical. Yet once we evoke grounds for distinguishing good and bad transgressions, then transgression itself is unlikely to remain the cornerstone of our theory of freedom."⁴⁰⁶

Michael Warner, another prominent queer theorist, has also celebrated the value of transgression, though he, unlike Butler, does so within a liberal model. Warner, in his recent book *The Trouble*

402. See BUTLER, *supra* note 20, at 124. In particular, Butler encourages performative transgressions such as those contained in "the practices of drag, cross-dressing, and the sexual stylization of butch/femme identities." *Id.* at 137.

403. On the political limitations of Butler's transgressive practices, see MAX H. KIRSCH, QUEER THEORY AND SOCIAL CHANGE 8 (2000); MOMIN RAHMAN, SEXUALITY AND DEMOCRACY: IDENTITIES AND STRATEGIES IN LESBIAN AND GAY POLITICS 131-42 (2000).

404. See notes 29-47 and accompanying text.

405. See Michel Foucault, *A Preface to Transgression*, in MICHEL FOUCAULT, AESTHETICS, METHOD, AND EPISTEMOLOGY 69, 74 (Robert Hurley et al. trans., James D. Faubion ed., 1998).

406. Bevir, *supra* note 94, at 79. Martha Nussbaum notes that the emphasis that Butler places on transgression or subversion, when coupled with her refusal to rely explicitly on normative arguments, means that Butler assumes that her readers agree with her on what needs to be subverted. See Martha Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37, 42. "Subversion," Nussbaum adds, "takes many forms, not all of them congenial to Butler and her allies." *Id.* In order to distinguish good subversion from bad subversion, norms (such as "fairness, decency, and dignity") must be articulated—"and this Butler refuses to do." *Id.* at 43; see also Nancy Fraser, *False Antitheses: A Response to Seyla Benhabib & Judith Butler*, in SEYLA BENHABIB ET AL. FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 59, 68 (1995) (noting that "Butler seems to valorize change for its own sake and thereby to disempower feminist judgment").

with *Normal: Sex, Politics, and the Ethics of Queer Life*,⁴⁰⁷ seeks to promote a radical and transgressive view of gay and lesbian sexuality through what is in essence a codification of Mill's harm principle.⁴⁰⁸ As long as the conduct in question does not harm third parties, the harm principle holds, the state has no business getting involved.⁴⁰⁹ Under this view, the law can penalize those who engage in sexual acts without the consent of the other, but would have to remain silent as to all other sexual conduct, thus presumably leaving lesbians and gay men the freedom to explore their sexuality to the fullest and to transgress the boundaries of sexual and gender identities.⁴¹⁰ Warner is not troubled by the fact that the libertarian model does not by itself require the recognition of same-sex marriage because such a recognition is for him not a sufficiently transgressive or radical goal for the gay and lesbian rights movement.⁴¹¹ Warner would like lesbians and gay men to give up on the goal of marriage so that they can concentrate on the more transgressive and subversive implications of a gay and lesbian sexual ethic.⁴¹² For Warner, then, a

407. WARNER, *supra* note 302. Warner is the editor of an important book on queer theory. See FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993).

408. "[A]lthough th[e] book is the work of a leading queer activist and a defense of a radical subculture, it is also a descendent of Mill's *On Liberty*, which similarly inveighed against the tyranny of public opinion in the name of liberty and of 'experiments in living.'" Martha Nussbaum, *Experiments in Living*, NEW REPUBLIC, Jan. 3, 2000, at 31, 32. Warner does not refer to Mill directly, though as Nussbaum observes, he "[i]n effect . . . advocates making Mill's 'harm principle' into a legal standard: if an activity does no harm to non-consenting others, it should not be legitimate to regulate it by law." *Id.*

409. See JOHN STUART MILL, ON LIBERTY 68-69 (Gertrude Himmelfarb ed., Penguin Books 1982) (1859).

410. This approach appeals to someone like Warner who was one of the academic founders of SexPanic!, a group formed in the early 1990s to counteract what its members perceived to be anti-sex positions taken by New York City government officials (who wanted to regulate sex establishments in the name of HIV prevention) and by some gay commentators who were critical of what they perceived to be sexual promiscuity among some in the gay community. See Crain, *supra* note 264, at 27.

411. For Warner, marriage, whether gay or straight, "sanctifies some couples at the expense of others. It is selective legitimacy." WARNER, *supra* note 302, at 82.

412. Thus, Warner, for example, extols the virtues of sex for purposes other than promoting committed relationships:

When gay men or lesbians cruise, when they develop a love of strangers, they directly eroticize participation in the public world of their privacy. Contrary to myth, what one relishes in loving strangers is not mere anonymity, nor meaningless release. It is the pleasure of belonging to a sexual world, in which one's sexuality finds an answering resonance not just in one another, but in a world of others. Strangers have an ability to represent a world of others in a way that one sustained intimacy cannot, although of course these are not exclusive options in gay and lesbian culture.

Id. at 179.

libertarian understanding of freedom that views freedom only as a negative concept is sufficient.

The problem with Warner's view is that it ignores the needs and priorities of a significant number of lesbians and gay men who are interested in marriage (and parenting) and who consider that kind of socially-recognized validation of their commitment important.⁴¹³ For those lesbians and gay men, the law has a positive role to play in redefining institutions (such as marriage and parenting) from which they have been excluded. A failure to recognize same-sex marriage, or to provide protection to gay and lesbian parents, is not the kind of traditional state coercion that a libertarian conception of freedom proscribes. Rights under a positive conception of freedom, on the other hand, not only *protect* individuals from state-sponsored coercion, but also *provide* those individuals with a range of options that are necessary for them to exercise their capacity for autonomy.⁴¹⁴ It is insufficient, under this view, to assert that the state must not interfere in the lives of sexual minorities; principles of noninterference do not impose positive obligations on the state to create the social conditions necessary that make possible the full exercise of our capacity for autonomy. Principles of noninterference are undoubtedly useful in protecting the privacy of lesbians and gay men and can be relied upon, for example, to question the appropriateness of sodomy statutes and other criminal laws that regulate consensual sexual conduct between adults. But for those lesbians and gay men who want to exercise their capacity for autonomy through marriage and parenting, principles of noninterference, while certainly not irrelevant, are inadequate on their own. At the same time, a positive conception of freedom recognizes that the decision of whether to seek mutuality in matters

413. A 1994 poll of gay men found that almost two-thirds of them would marry another man if they were legally able to do so. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 583 (1994) (citing Janet Lever, *Sexual Relations*, ADVOCATE, Aug. 1994, at 17, 24). A 1995 poll of lesbians found that seventy percent of them would marry another woman if it were legal. See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1726 n.162 (1998) (citing Janet Lever, *The 1998 Advocate Survey of Sexuality and Relationships: The Women*, ADVOCATE, Aug. 22, 1995, at 23, 27).

414. I have elaborated on this point elsewhere, both in the context of gay rights, see Ball, *supra* note 239, at 1920-30 (using the work of the legal philosopher Joseph Raz to explain a positive conception of autonomy and its implications for gay rights), and in the context of disability rights, see Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 549, 644-47 (2000) (explaining how autonomy for individuals with disabilities requires both actions and omissions on the part of the state).

of physical intimacy through marriage or through more transgressive sexual practices is ultimately a decision for the individual to make. The challenge, as discussed above, is to articulate a gay and lesbian sexual ethic that accounts for both the libertarian and romanticist views on sexuality that are held by the broad spectrum of lesbians and gay men.⁴¹⁵

The tension between libertarians and romanticists in the gay community spills over into debates over the advisability of seeking a right to same-sex marriage because once the romanticists construct relationships and families based on long-term mutuality and commitment, it is understandable for them to seek the protection and support of the law. Libertarians such as Warner then feel threatened by efforts to privilege through law some relationships and not others. I cannot here fully address the best way of resolving this intra-community tension, except to note that the pursuit of legal rights that protect long-term relationships is not mutually exclusive of the idea that individuals are the best judges of what kind of relationships are most appropriate for their intimate lives.⁴¹⁶

A libertarian such as Warner could argue that if what I posited in Part II.C above is correct, namely, that lesbians and gay men must seek to define and transform themselves through reflection on the meaning of their sexual practices in order to lead ethical lives, then why do they need social institutions such as marriage? The need to turn inward, so to speak, is the result of societal judgments that deem same-gender sexual intimacy as immoral and perverted, judgments that oppress and marginalize lesbians and gay men and which leave them no alternative but to seek ethical meaning outside of societal codes of conduct. The finding of ethical meaning in this way is not an intrinsic characteristic of homosexuality; rather, it is a reaction to societal oppression. The ultimate goal has to be to reduce that oppression, and providing lesbians and gay men with access to social institutions such as marriage can contribute to that reduction. It is true, as I noted in Part II.C.3, that if gay and lesbian sexuality and relationships become largely accepted by society, there will be less of a role for the kind of ethical practices associated with a care of the self that I have argued characterize a contemporary gay and lesbian sexual ethic. But, again, I believe that if society someday ceases to problematize gay and lesbian sexuality, then lesbians and gay men

415. See *supra* notes 261–64 and accompanying text.

416. I elaborate on this point in chapter 3 of CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* (forthcoming 2002).

should happily trade in their marginalization and stigmatization for the opportunity to lead open and dignified lives in a society that values them as full and equal human beings.

CONCLUSION

I have argued in this Article that the later writings of Michel Foucault allow us to think about the meaning and implications of a contemporary gay and lesbian sexual ethic. That ethic, which promotes values of openness, mutuality, and pleasure, provides an important alternative to the traditional view of sexual morality that seeks to create a normative hierarchy of consensual sexual acts. The existence of a gay and lesbian sexual ethic has been made possible by the partial decodification (legal, medical, and moral) of homosexuality in contemporary America, in the same way that the absence of codes of conduct in ancient Greece and Rome allowed for the flourishing of a sexual ethic characterized by the care of the self as practices of freedom.

I have also argued that the capacity for individual autonomy plays a crucial role in the development of a gay and lesbian sexual ethic as lesbians and gay men negotiate the construction of their ethical lives. It is perhaps easy to despair about the possibility of freedom if we view our entire world as nothing more than the effects of power relations and systems of knowledge. Lesbians and gay men have shown, however, that it is possible to lead lives that are both free and ethical even in the face of powerful societal forces that simultaneously define and marginalize their sexual identity.