

Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should

James Allon Garland*

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INTRODUCTION

... Then Doyler said, "Can I kiss you now?"

"You know better than to ask."

"Why wouldn't I ask?"

"You know you can kiss me."

"I'll kiss you all over."

But it was Jim who kissed first. He lay atop Doyler, pinning his shoulders, and kissed his forehead and his cheeks, his chin, his throat, kissing the apple in his throat. He kissed the bruise on his shoulder and the seven hairs, counting them, on his chest where the half a medal lay. He watched Doyler's face through the strands of his hair while he snuck down, still watching, and kissed the very tip of his horn which bounced up against Jim's nose and his chin making him blink, till he kissed it again on the hop. He felt his face like a red velvet. He was charged with the wonder of desire. . . .

Jamie O'Neill, *At Swim, Two Boys*¹

British inventor Alan Mathison Turing was a master of nonverbal language.² His "Turing Machines," complete with coded instructions, became the blueprints for the modern computer.³ One such machine he

1. JAMIE O'NEILL, *AT SWIM, TWO BOYS* 474-475 (2002).

2. Paul Gray, *Computer Scientist*, *TIME*, Mar. 29, 1999 at 147-50. For further reading, see ANDREW HODGES, *ALAN TURING: THE ENIGMA* (2000).

3. Gray, *supra* note 2, at 148.

designed was used during World War II by Allied Command to decipher Nazi “Enigma” codes for U-boats and protect Allied warships from uncertain attacks.⁴ But Turing was also a man who had sex with men—a fact he did not keep secret.⁵ When he reported to the London police that one of his lovers stole from him, he was prosecuted for “gross indecency” and was able to escape prison only on the condition that he submit to hormone therapy to quell his sexual urges—a therapy that literally disfigured him.⁶ Severely depressed by the criminal process that publicly isolated and physically altered him, Turing committed suicide in 1954.⁷ It is not an exaggeration to say that Turing—someone who may have saved and revolutionized much of the Western world with the invention of language—died prematurely as a result of public opposition to his sexuality.

In the United States, collisions between law and sexual minorities are not as uniformly tragic as Turing’s brush with the law, but the reasoning behind American law’s interference with sex is often as enigmatic as the codes Turing helped to crack. Though sex has been described by the United States Supreme Court as a “great and mysterious motive force in human life” and a “sensitive, key relationship to human existence”⁸ that is “central” to the “development to human personality,”⁹ all fifty states, at one point or another, have imposed harsh punishments on private, consensual sex between adults, often without being able to “specify[] what harm is occasioned” by it.¹⁰ In fact, fifteen states still do so, with some laws used to punish lesbians and gay men alone.¹¹ Despite

4. *Id.* at 149.

5. *Id.* at 148-50.

6. *Id.* at 150.

7. *Id.* at 150.

8. *Roth v. United States*, 354 U.S. 476, 487 (1957).

9. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

10. *See* MODEL PENAL CODE AND COMMENTARIES § 213.2 (Official Draft 1962 and Revised Comments 1980) at 366 (describing heightened hostility for gay and lesbian sexuality “as much aesthetic as moral,” even though the “force [of such objections] is not diminished by the difficulty of specifying exactly what harm is occasioned” by gay and lesbian intimacy).

11. Four states formally prohibit nonmarital sex only when performed between persons of the same sex: KAN. STAT. ANN. § 21-3505 (prohibiting oral and anal sex as sodomy between persons of the same sex); MO. REV. STAT. § 566.090 (2000) (prohibiting deviate sexual intercourse with persons of the same sex); OKLA. STAT. 21 § 886 (2001) (prohibiting “crimes against nature,” currently applied only to same-sex partners); TEX. PENAL CODE § 21.06 (2000) (prohibiting “deviate” sex between persons of the same sex). *But see* *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999) (must prove lack of consent to obtain a conviction under Missouri law). Eleven states formally prohibit “deviate” sex, including oral and anal sex allegedly between all couples: ALA. CODE § 13A-6-65(a)(3) (1975) (deviate sex), FLA. STAT. § 800.02 (2001) (unnatural and lascivious acts), IDAHO CODE § 18-6605 (2000) (“crime against nature”); LA. REV. STAT. § 14:89 (2000) (“crime against nature”); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 2000) (“crime

its professions of respect for sex, even the Supreme Court has abandoned sex to unusual punishment for reasons that have been condemned as “incoherent,”¹² “manipulative, ignorant, inefficient, violent, historically inaccurate, misogynistic,”¹³ and insensitive to that which is “immoral”¹⁴ and “cruel[].”¹⁵

The failure of American legal authorities to redeem their regard for the value of sex is even more perplexing given that those same authorities seem to realize that their reasoning about sex is strained by emotion. American judges have confessed that they have difficulty speaking and writing about sex.¹⁶ Legislators have catalogued countless

against nature” interpreted as only anal sex); MICH. COMP. LAWS, § 750.158 (2001) (“crime against nature or sodomy” distinct from oral sex as gross indecency § 750.338); MISS. CODE ANN. § 97-29-59 (2001) (crime against nature); N.C. GEN. STAT. § 14-177 (2001) (crime against nature); S.C. CODE ANN. § 16-15-120 (Law Co-op. 2000) (buggery); UTAH CODE ANN. § 76-5-403 (2001) (sodomy); VA. CODE ANN. § 18.2-361 (Michie 2001) (sodomy). *But see* Gay & Lesbian Advocates & Defenders v. Attorney General, 763 N.E. 2d 38 (Mass. 2002) (interpreting Massachusetts law as not applying to private consensual conduct). As I note below, *infra* notes 382-385, most of these statutes are riddled with exemptions for heterosexuals.

12. Janet Halley, *Reasoning about Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1741 (1993) (describing the framework of *Bowers v. Hardwick* as “systematically incoherent”); Frank Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J. L. & PUB. POL’Y 91, 93 (1987) (describing the Court’s privacy jurisprudence as “hard to take seriously”); George Will, *What “Right” to Be Let Alone*, WASH. POST, Jul. 3, 1986, at A23 (describing *Hardwick* as unprincipled, “revealing the inner impulses of the justices” and “not the inner logic of the Constitution”).

13. WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) at 150 (citations omitted) [hereinafter *GAYLAW*].

14. *See, e.g.*, Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1745 (1998) (citing CHARLES FRIED, *LAW AND ORDER* 82-83 (1991)) (arguing that laws sanctioned by *Hardwick* violate “fundamental principles of morality and, therefore, constitutional protections of fundamental rights”).

15. *See, e.g.*, RICHARD POSNER, *SEX AND REASON* 346 (1996) (describing sodomy law as “cruelty” and the Court as insensitive to uphold such a law); *see also* Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 645-46 n.95 (surveying scholarship overwhelmingly denouncing *Hardwick* as error).

16. *See, e.g.*, *Lawrence v. State*, 41 S.W. 3d 349, 356 (Tx. Ct. of App. 2001) (describing reasons for punishing homosexual sex differently from heterosexual sex as difficult to discern because of inability of lawmakers to speak about it without euphemism and revulsion); *Boyington v. State*, 227 So. 2d 807, 808 (Ala. Crim. App. 1969) (describing acts of homosexual intimacy as so “abominable, detestable, unmentionable,” and “disgusting” as to preclude clear description and discussion thereof); *New Jersey v. Morrison*, 96 A.2d 723, 724 (Essex County Ct. 1953) (stating “this calculated avoidance of indelicacy has resulted in quite some obscurity and uncertainty in dealing with a most heinous crime, the seriousness of which is attested by the fact that our Legislature has prescribed such a high penalty for its commission”); *Wise v. Commonwealth*, 115 S.E.2d 508, 509 (Va. 1923) (describing oral sex as so “unusual and unthinkable” to explain how law once overlooked punishing it as sodomy); *Commonwealth v. Poindexter*, 118 S.W. 943, 944 (Ky. 1909) (describing oral sex as “so disgusting that we refrain from copying the indictment in the opinion” but urging its punishment despite being able to determine why the legislature omitted its inclusion in sodomy laws). As some have argued, describing homosexual sex as having “unmentionable” qualities may have been necessary to imposing harsh penalties on

hours miring battles for sexual equality and liberty in euphemism,¹⁷ some even objecting with “violent emotional hostility” to the decriminalization of consensual sex.¹⁸ Even the United States Supreme Court has described its own jurisprudence on sexual expression as suffering from discord “unmatched in any other course of constitutional adjudication,”¹⁹ and one of its sitting Justices has admitted difficulty distinguishing sex from obscenity.²⁰ Given how riddled with emotion and confusion lawmaking on matters of sex seems to be, it is difficult to understand why government officials have not been more suspicious of sex regulation.

Though the Supreme Court may protect lesbian and gay sex for the first time this Term,²¹ its recent decision in *Boy Scouts of America v. Dale*²² should hold great promise in breaking the cryptic stance that American law often has toward sex, at least as a means of expressing feelings and ideas in private. In *Dale*, the Court accepted the Boy Scout of America’s (BSA’s) claim that its troops taught young scouts about sex primarily through the use of role models, who transmitted values by their own sexual conduct.²³ As a result, the Court held that an openly gay scout leader risked interference with the BSA’s anti-gay messages by the sheer expressiveness of his own sexuality.²⁴ With all due respect to well-considered objections to the Court’s decision,²⁵ including those from

conduct with unprovable alleged harms. See Karl M. Bowman and Bernice Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 Temple L.Q. 273, 314 (1956).

17. See, e.g., Carey Goldberg, *State House Journal: A Kaleidoscopic Look at Attitudes on Gay Marriage*, N.Y. Times, Feb. 6, 2000 at A18 (explaining hours of town meetings devoted to debate over the meaning of the word “marriage”); John Gallagher, *Are We Really Asking for Special Rights?*, THE ADVOCATE, Apr. 14, 1998, at 24-27 (explaining how debates and litigation have been devoted to claims that civil rights are “special rights” for sexual minorities).

18. See MODEL PENAL CODE AND COMMENTARIES § 213.2 (Official Draft 1962 and Revised Comments 1980) at 366.

19. *Miller v. California*, 413 U.S. 15, 22 (1973) (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. at 704-05 (Harlan, J., concurring and dissenting)).

20. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (Scalia, J., concurring) (claiming that distinguishing the two is a “problem”).

21. *Lawrence v. Texas*, 123 S. Ct. 661 (2002) (granting *certiorari* in case involving the criminalization of same sex intimacy).

22. 530 U.S. 640, 648 (2000).

23. *Id.* at 655-56. (“The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes” even if the Scouts prohibit verbal instruction on sex) (emphasis added).

24. *Id.* at 655 (holding that the BSA’s objection to the expressive dangers of gay scout leaders is sincere even if the BSA only required scout leaders to “teach only by example”).

25. See, e.g., Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81 (2001); Erwin Chemerinsky & Catherine Fisk, *Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale: the Expressive Interest of Associations*, 9

many advocates for civil rights for sexual minorities,²⁶ I contend that the majority in *Dale* set the stage for acknowledging, once and for all, that sex is often quite expressive, and, as a result, positively locates sex and sexuality as possible modes of expression protected under the First Amendment.

In this Article, I take the reasoning in *Dale* to its logical conclusion, arguing that same-sex intimacy is expressive even when it does not conflict with private anti-gay instruction like the BSA's. Specifically, I contend that same-sex intimacy is equally expressive when it conveys "pro-gay" values, such as love, trust, and other feelings and ideas. The argument—advanced first in detail by Professors David Cole and William Eskridge²⁷—may have received less attention to date than it deserves, in part because it has relied on oversimplified First Amendment analysis²⁸ and overstatements and understatements about the

WM. & MARY BILL OF RTS. J. 595 (2001); Jed Rubenfeld, *The First Amendment's Purpose*, 54 STAN. L. REV. 753, 807-08 (2001).

26. See, e.g., Arthur S. Leonard, *Boy Scouts of America v. Dale: The "Gay Rights Activist" as Constitutional Pariah*, 12 STAN. L. & POL'Y REV. 27 (2001) (arguing that Dale's case was a distortion about his public speech and identity as a homosexual); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) (arguing that *Dale* did not address the expressiveness of homosexuality other than any expressiveness derived from his openness about it); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001) (highlighting the dangers of *Dale* for civil rights laws) [hereinafter, Hunter, *Accommodating the Public Sphere*].

27. David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1993). For works that have followed it, see Dale Carpenter, *The Limits of Gaylaw*, 17 CONST. COMMENT. 603, 633-38 (2000) (analyzing the Cole-Eskridge thesis); Toni Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 66-69 (1996) [hereinafter Massaro, *Thick and Thin*] (same); Toni Massaro, *History Unbecoming, Becoming History*, 98 MICH. L. REV. 1564, 1569-1570 (2000) [hereinafter Massaro, *History Unbecoming*] (same); Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 235-36 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) (suggesting that government should protect both the right of homosexuals to act in accordance with their orientation and the right of other private persons to act in accordance with their moral convictions on the matter); see also J.F. Walsh, Jr., Note, *First Amendment Protection of Homosexual Conduct*, 48 CASE W. RES. L. REV. 381 (1998).

28. The errors in the Cole and Eskridge thesis are many, and I can highlight only a few here. As Cole and Eskridge concede, the current test for determining whether expressive conduct qualifies for First Amendment protection requires analysis of (1) whether a person engaging in conduct *intended* to express a message *and* (2) whether those viewing it were likely to understand the message. See Cole & Eskridge, *supra* note 27, at 323-25. Actual data from gay people confirms that many engage in sex solely for pleasure and intend *not* to convey any message that would be cognizable under the First Amendment. But somehow, without any data whatsoever, Professors Cole and Eskridge conclude that sex is "intrinsically communicative" and "normally" engaged in for expression. Cole & Eskridge, *supra* note 27, at 326-327. But even if that were so, by their own concession, that is only *half* the test for determining whether conduct is expressive. Despite the varied meanings (or lack thereof) attached to sex, Cole and Eskridge make no effort to explain the likelihood that a *particularized* message would be understood from sex. *Id.*

expressiveness of sex.²⁹ But the inherent soundness of the Cole-Eskridge thesis is matched by a wealth of untapped data and precedent, much of

Professor Eskridge's latest methodology for defining the expressiveness of sex is even more perplexing. Regarding prostitution, for example, he claims "[t]o the extent it is expressive, sex-for-pay is, presumably, commercial speech" *See* GAYLAW, *supra* note 13, at 199. But the United States Supreme Court has made clear that "speech is not rendered commercial by the mere fact" that it is sold for profit. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Health Relations, 413 U.S. 376, 384 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales"). Indeed, under Eskridge's analysis, every newspaper and film for which "pay" is charged would be commercial speech. In reality, *solicitation* for prostitution may contain unprotected commercial speech if it gives information about the "service" and its pricing. But once the transaction is negotiated, the sex (if it is "expression") may convey nothing more about the transaction or the service provided and could have an artistic character as much as a commercial one.

Cole and Eskridge also remarkably maintain that "all state sodomy statutes . . . regulate expressive conduct based on what the conduct communicates to others" without analyzing *any* state sodomy statutes at all, but note only that they "threaten" and "implicate" expression. Cole & Eskridge, *supra* note 27, at 322, 326. As I explain in Part IV.B, many states have used non-expressive interests, like AIDS control, to justify criminalizing gay sex, and if they do so, assertion of those interests may preclude a charge that the law is based on expression, at least unless one can show that states *also* have a clear interest in the message the regulated conduct conveys. Threatening or implicating sex may be the *consequence* of the law, but not the state's interest. Cole and Eskridge repeat this error regarding military policy, claiming its interest is "solely" expressive, *id.* at 324, even though military officials have repeatedly maintained that the policy's longstanding concern is still with homosexual sex but only for its nonexpressive elements. *See e.g.*, MAJ. MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE 89-131 (1993) (claiming that sexually transmitted diseases (STDs), "unclean" sex practices, and blackmail are the driving concerns for the policy). To the extent that the government is successful in claiming that revealing sexual identity is punished as evidence of propensity of sexual conduct—which is all the policy facially claims, *see* 10 U.S.C. § 645(h)—the government may well be able to maintain in court that its interest is solely in conduct, not expression. Cole and Eskridge try to circumvent this argument by claiming that the government's alleged evidentiary interest is not credible because military policy does not target heterosexual identity as evidence of heterosexual conduct. Cole & Eskridge, *supra* note 27, at 338. But the question should have been whether the discriminatory interest in *sex* suggests that the military's interest in gay sex alone is for its expressive qualities. The fact that the military has a discriminatory conduct enforcement policy *explains* the discriminatory use of expression of homosexuality as evidence of conduct. *See, e.g.*, Phillips v. Perry, 106 F.3d 1420, 1430 (9th Cir. 1997); *see also* Able v. United States, 155 F.3d 628, 632 (2d. Cir. 1998); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir.) *cert. denied* 117 S. Ct. 358 (1996); Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996) *cert. denied* 118 S. Ct. 45 (1997). In these terms, effect of the military policy on expression would be assessed under intermediate scrutiny, not strict scrutiny. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (requiring intermediate scrutiny for laws that target conduct but not expression). Professors Cole and Eskridge do not even consider the implications of intermediate scrutiny for regulating sex as expression.

29. Professors Cole and Eskridge summarily assert that sex is "almost always" expressive without any substantiation or elaboration. *See* Cole & Eskridge, *supra* note 27, at 325. As I explain in Part I of this Article, the variety of messages men convey with sexual conduct is much more substantial, though many men who have sex with men claim they frequently engage in sex solely for pleasure and not to express a message. For a similar critique, *see* Massaro, *History Unbecoming*, *supra* note 27, at 1581 (criticizing Eskridge's romanticism of sex because it

which I strive to present here. In fact, I contend that substantial empirical data and legal history confirm that human beings have long understood that sex and other conduct related to it can communicate ideas. I also contend that American constitutional law has long been open to a claim for protection of sex as expression, even before *Dale*.

To begin this argument, in Part I, I discuss the significance that many sexual minorities attach to nonverbal conduct for communicating intimate ideas. Because heterosexuals have especially ridiculed and stereotyped sex between men to justify anti-gay discrimination, I have placed particular emphasis on the value attached to sex by gay and bisexual men, drawing upon a survey conducted for this Article of 1400 men who have sex with men, to whom I posed graphic, personal questions about their views on sexual acts and practices. The results of the survey, coupled with independent, scientific surveys of thousands of lesbians, bisexuals, and gay men, counter allegations that same-sex intimacy is purely pleasure-driven and detached from love and affection.³⁰

“replace[s] sexual “hysteria” with approval of gay sexual expression and relationships, on the assumption (or condition) that these relationships are (or must be) founded on mutuality, respect, and love” and “reject[s] implicitly the liberal neutrality that Eskridge urges in his free speech argument”).

30. Where I draw conclusions about lesbians and gay men as a class, I use the National Health and Social Life Survey, a demographically representative probability sample survey. See EDWARD O. LAUMANN ET. AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 3-73 (1994) (hereinafter NHSL) (describing the study’s theoretical background and design). The NHSL is widely respected for its methodology and objectivity. See William N. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 SO. CAL. L. REV. 65 (2001); see also John Delamater, *Sex in America: A Definitive Survey*, SCIENCE Oct. 20, 1995, at 501. As I explain throughout this Article, though, because individual intent is relevant to First Amendment analysis of whether conduct and associations engaged in by individuals are expressive, individual sexual minorities’ opinions are relevant, and the fact that thousands of such individuals can be shown to share similar views only magnifies their importance. Thus, in addition to the 1400 men who have sex with men I surveyed through a pure convenience sample, I compare my results to three of the largest surveys of lesbians, gay men, and bisexuals; two scientifically sampled and conducted by *The Advocate* in 1994 and 1995, see Janet Lever, *The 1994 Advocate Survey of Sexuality and Relationships: The Men*, THE ADVOCATE, Aug. 23, 1994 at 20 (hereinafter Lever: MSM) (sampling from 3,500 of more than 13,000 responses) and Janet Lever, *Lesbian Sex Survey*, THE ADVOCATE, Aug. 22, 1995, at 23-24 (hereinafter Lever: WSW) (sampling 2,525 of more than 8000 responses), and one by the Gay Men’s Health Crisis assessing responses of more than 7,000 men who have sex with men in New York City. See TRACY MAYNE ET. AL, RESULTS OF THE 1998 BEYOND 2000: SEXUAL HEALTH SURVEY 10-11 (1999) (hereinafter GMHC Survey) (describing methodology). On questions of contemporary lesbian and gay opinions about discrimination and expression of identity, I also draw my arguments from two recent opinion polls from renowned surveyors of such opinion. KAISER REPORT, EXECUTIVE SUMMARY: INSIDE OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS, AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION at 3 (2001) (hereinafter KAISER REPORT); Harris Interactive/Witeck-Combs Communications, *Gays and Lesbians Face Persistent Workplace*

Indeed, comprehensive data shows that arguments which demean homosexuality as hedonistic obscure the depth of expression that many sexual minorities achieve through sex and conduct related to it.

With this as context, I turn in Part II to an overview of American law, both as it reflects the expressiveness of sexual behavior, and as it protects what is loosely defined as “expressive conduct.” Though these “fields” of law have not merged, when juxtaposed they show that human understanding of the nonverbal nature of the sexual world has great historic reach, particularly where human beings may have had difficulty speaking about sex or distrusted words referring to sex. As I conclude in Part II, nothing in the law prior to *Dale* should have been viewed as a rejection of the idea that sex is entitled to constitutional protection when individuals engage in it for expressive purposes. Rather, prior to *Dale*, the United States Supreme Court’s unqualified tests for determining the expressiveness of conduct should have been considered supportive of such a claim.

In Part III, I turn to the *Dale* decision in depth and explore its contributions to First Amendment law, starting with a revealing interview with James Dale himself, conducted exclusively for this Article. Mr. Dale’s honest and detailed account of his case reveals that the lack of verbal teaching by the BSA on homosexuality at the time of his expulsion was the very reason the BSA raised a conflict over the expressiveness of his sexuality, rather than anything he or they might actually teach.³¹ Indeed, as Mr. Dale now contends, had the BSA been the verbally anti-gay organization it has now become, he would not have sought to be a part of it.³² Thus, the centrality of the BSA’s sexual conduct policy to its First Amendment claim lays firm ground for future litigants to claim that their sexual conduct is just as expressive as James Dale’s was to the BSA. The BSA, in fact, made this point to the United States Supreme Court, drawing upon the Cole-Eskridge thesis to advance its First Amendment arguments.³³

Discrimination and Hostility Despite Improved Policies and Attitudes in Corporate America, Sept. 12, 2002 (hereinafter HWC Survey).

31. See discussion *infra* Part III.B.

32. See *infra* notes 271-272 and accompanying text.

33. See Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (internal citation omitted). Michael McConnell, then a professor at the University of Utah, served as principal brief writer for the BSA. *Id.* He has since been confirmed and sworn in as a judge for the United States Court of Appeals for the Tenth Circuit. See Michael Vigh, *U’s McConnell Joins Appeals Court; U’s McConnell Sworn into Bench*, SALT LAKE TRIBUNE, Jan. 4, 2003, at A5.

Consequently, in Part IV, I set forth the First Amendment claim for sex and sexual relationships as affirmed and strengthened by *Dale*, arguing that sexual relationships can qualify as expressive associations, and that sex itself often deserves to be recognized as expressive conduct when individuals engage in it for particularized expressive purposes. This is true even though the varied motivations for sex may make claims for First Amendment protection more complex than some have suggested in the past. I specifically argue that the lengths to which the *Dale* majority went to protect the BSA's expression and association rights should also effectively sweep aside objections to claims of First Amendment protection for sex and sexual relationships. This is particularly so given the *Dale* majority's insistence that the Court had to defer to the BSA regarding its claims that "values" were expressed through the conduct of its leaders.

The Supreme Court's decision in *Dale*, I conclude, rests on the notion that the First Amendment protects discourse about homosexuality regardless of its point of view. Nothing in the Court's opinion indicates that its tolerance of multiple viewpoints on homosexuality is limited to private social groups, like a gay version of the BSA, who might teach through role models that homosexual intimacy is moral. As counsel for the BSA has argued, "If it means anything at all, a 'first amendment' for sexual orientation must include the right to practice one's sexuality, at least insofar as contrary laws are based solely on disapproval of homosexuality."³⁴ Whatever justification the Supreme Court has had for limiting rights to nonprocreative sex to one class of people under other constitutional provisions, *Dale* should make clear that there is no basis under the First Amendment for sanctioning discrimination among the points of view people express about their sexuality, even through sex itself.

I. THE IMPORTANCE OF SEX AS A FORM OF EXPRESSION

It's not just talk about gay marriage that makes me nervous; I think we should be trying to talk straight people out of marrying too. I suspect some of my gay friends have gotten married for the large cash prizes. "Honey, we've been together for 12 years. There's not a matching Tupperware top in this house. Let's get registered—I mean married." . . . [M]any people have taken me to task about my marriage aversion. I've heard horrific stories of people who were deported because they couldn't marry their partners, of families swooping in to scavenge for loot after the death of a partner. One woman in Indianapolis even brought me a computer printout of 500 ways gay people could profit from the right to

34. McConnell, *supra* note 27, at 240.

marry. My favorite was number 235. My partner and I could save money on our fishing license.

Kate Clinton³⁵

Why would anyone come out in the first place? . . . [S]ociety does not have the right to judge what you do behind closed doors. They simply don't. It's wrong, but they will do it. They will do it. If you want that judgment raining down on your head, then go out dressed like Dolly Parton. If you want to live the life where you have the most options you can have—which is really the benefit of America, options—shut up. Shut up.

Bill O'Reilly³⁶

A. *The Impact of Discrimination Against Lesbians, Gays, and Bisexuals on Verbal Expressions of Intimacy*

It is understandable that some observers of public discourse on minority sexuality might conclude that verbal communication plays a special role in the lives of lesbian, gay, and bisexual Americans, particularly in terms of communicating about sex, love, and relationships. Some of America's most renowned musical and literary works on love have come from sexual minorities, from songs like *Isn't It Romantic?*,³⁷ to poetry collections like *Leaves of Grass*.³⁸ Many of the earliest legal battles for civil rights for sexual minorities fought censorship of traditional forms of speech.³⁹ And, in more recent years,

35. Kate Clinton, *Marry, Marry Quite Contrary*, THE ADVOCATE, Apr. 30, 2000, at 62.

36. Michael Glitz, *Bill O'Reilly Really Likes You*, THE ADVOCATE, Sept. 17, 2002, at 42.

37. Lorenz Hart, composer of such songs as *My Funny Valentine*, *Isn't It Romantic*, and *Bewitched, Bothered, and Bewildered*, was one of many composers whose primary sexual relationships were with men. For a discussion of the lyricist, known by many as the "Laureate" of American musical theater, see FREDERICK NOLAN, LORENZ HART: A POET ON BROADWAY (1995). Hart is not alone as a gay author of classic American romantic songs. Cole Porter, who married a woman for economic and legal reasons, formed sexual and romantic relationships exclusively with other men, which give deep meaning to works like, *Anything Goes*, *Every Time We Say Goodbye*, *Too Darn Hot*, and *I've Got You Under My Skin*. See WILLIAM MCBRIEN, COLE PORTER: A BIOGRAPHY (1998). For another example, gay composer Stephen Sondheim is notable for more contemporary classics such as *Send in the Clowns*, *Being Alive* and the Broadway musical *West Side Story*, a collaboration with gay composer Leonard Bernstein. See MERYLE SECREST, STEPHEN SONDHEIM: A LIFE (1998).

38. Apart from Walt Whitman, the list of writers whose same-sex affections informed their work is long, including James Baldwin, Emily Dickinson, Allan Ginsberg, Nathaniel Hawthorne, Herman Melville, Edna St. Vincent Millay, Gertrude Stein, and Tennessee Williams. For collections exploring the sex lives of these individuals, see PAUL RUSSELL, THE GAY 100: A RANKING OF THE MOST INFLUENTIAL GAY MEN AND LESBIANS, PAST AND PRESENT (2002) and RICTOR NORTON, MY DEAR BOY: GAY LOVE LETTERS THROUGH THE CENTURIES (1998).

39. Nan D. Hunter, *Commentary, Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993) ("[T]he First Amendment has provided the most reliable path to success of any of the

verbalizing sexual identity has become a focal point for many advocates for lesbian, gay, and bisexual people, both as a step toward self-acceptance and as an identity around which social and political communities can form and unite.⁴⁰ Even many “moderate” opponents of homosexuality have anchored their objections to civil rights laws on verbalized sexual identity, claiming that lesbians, bisexuals, and gay men can protect themselves by remaining closeted.⁴¹

There is no basis, though, to argue that sexual minorities attach primacy to verbal communication as a form of expression, particularly on matters of intimacy. Though heterosexuals may rarely see it or acknowledge it, lesbians, bisexuals, and gay men can and do express affection through kisses, touches, and embraces, just as heterosexuals do.⁴² In fact, the beatings and murders of lesbians and gay men who have

doctrinal claims utilized by lesbian and gay rights lawyers.”); William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Only Route to Equality?: Some Reflections on the Construction of the “Hate-Speech” Debate from a Lesbian/Gay Perspective*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 290-91 (Henry Louis Gates, Jr. ed., 1994) (describing the First Amendment as a “consistent friend” to lesbian and gay rights).

40. See Gregory M. Herek, *Why Tell If You’re Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals’ Attitudes Toward Lesbians and Gay Men* in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 206, 217-219 (Gregory M. Herek, Jared B. Jobe, and Ralph M. Carney eds., 1996). Some scholars and advocates claim that queer identity should be developed without emphasis on sexual activity. Ruthann Robson, *Lesbian Jurisprudence*, 8 *LAW & INEQ. J.* 443, 446-447 (1990) (arguing that lesbianism is “not merely about [sexual orientation]” but “lesbian practices, sexual and otherwise . . . culture, politics, ‘just about everything.’”); Marilyn Frye, *To Be and to Be Seen*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 152, 171-72 (1983) (arguing that neither heterosexuality nor lesbianism is “simply a matter of sexual preference” but instead “an orientation of attention” that affects a way of looking at the world); Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro American Law and Society*, 83 *CAL. L. REV.* 1, 22-23 (1995) (arguing that gays and lesbians should resist the conflation of homosexual identity and conduct); Marc Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511, 537-70 (1992).

41. See ALAN WOLFE, *ONE NATION: AFTER ALL* 72-81 (1998) (explaining how moderate middle-class Americans generally oppose discrimination but also want lesbians and gay men not to express their sexuality in public).

42. In fact, a survey in *The Advocate* that randomly sampled from more than 10,000 men who have sex with men confirmed that such men generally prefer embracing (85%) and kissing (74%) over all other forms of sexual expression. See Lever: MSM, *supra* note 30, at 20. In a similar survey of women who have sex with women, more women preferred embracing and kissing to oral sex. See Lever: WSW, *supra* note 30, at 26 (91% enjoy hugging, caressing, and cuddling and 82% love kissing, while 70% and 75% enjoy giving and receiving oral sex, respectively). After receiving several complaints among the first 1200 responses to my survey for its lack of questions about nonsexual forms of intimate expression, I asked more than 200 men who have sex with men how they express love for their partners. More than 95% said that they do so by kissing their partners on the lips (97%), embracing them (98%), or engaging in some other form of nonverbal conduct (95%). See *infra* app. A.

expressed affection nonverbally not only prove that sexual minorities engage in such expression, but that they, unlike heterosexuals, do so at great risk of incurring violence.⁴³ While one renowned study has shown that as many as one-quarter of the people who primarily desire sex with people of the same gender may refrain from such sex, this same data suggests that just as many people reject a verbal sexual identity; thus any cultural hostility causing the loss of expression spreads that loss equally between verbal and nonverbal expression.⁴⁴ Indeed, most people who privately, verbally identify as lesbians or gay men engage in sex, despite criminal prohibitions.⁴⁵ Apparently only the rarest individuals verbally come forward to claim a lesbian or gay identity while refraining from lesbian or gay sex because the law has made it criminal.⁴⁶

43. See, e.g., John L. Mitchell, *Beating of Actor Is Investigated as a Hate Crime*, L.A. TIMES, Sept. 5, 2002, § 2, at 3 (explaining how a gay man, Treve Broudy, was beaten into a coma as he embraced his male companion to say goodnight); Michael Janofsky, *A Defense to Avoid Execution*, N.Y. TIMES, Oct. 26, 1999, at A18 (explaining how one of Matthew Shepard's killers claimed Shepard expressed affection for him by kissing and touching him, allegedly prompting Shepard's murder); CLAUDIA BRENNER, EIGHT BULLETS: ONE WOMAN'S STORY OF SURVIVING ANTI-GAY VIOLENCE (1995) (explaining how Brenner was shot and her partner, Rebecca Wight, was killed by a man who claims their lovemaking drove him to violence). Of course, heterosexuals may suffer that violence when presumed to be gay. See, e.g., Associated Press, *Family, Friends Stunned Over Senseless Killing*, CHATTANOOGA TIMES, Aug. 1, 2001, at B10 (describing how Willie Houston was harassed then shot after being seen holding the arm of a blind friend and carrying his girlfriend's purse).

44. According to the NHLS survey, 2.7% of all men had sex with men in the last year and 2.8% identify as gay or bisexual, but 3.7% of all men have significant desire for sex with men. See NHLS, *supra* note 30, at 305 & 311. For women the numbers are less, with 1.3% having sex with women in the last year and 1.4% identifying as lesbian or bisexual, but 1.7% having significant desire for sex with women. *Id.* at 311. Still, among the group that is willing to identify as lesbian or gay, those who accept a homosexual or bisexual orientation without having had same-sex partners is extremely rare. *Id.* at 300.

45. National surveys place celibacy rates for all people at approximately 5.9% for men and 7.1% for women over a five-year period, with the number of people who had sex only with a member of the same sex in the past year virtually identical to the percentage who identify as gay or lesbian. NHLS, *supra* note 30, at 311. The largest national survey of men who have sex with men found comparable celibacy rates among gay and bisexual men. See Lever: MSM, *supra* note 30, at 22.

46. In Alabama, for example, my client, J.B., is currently challenging the constitutionality of Alabama's proscription on oral and anal sex for its impact on her custodial rights as a lesbian, even though, in state court, she testified under oath that she refrained from oral and anal sex "because such acts are against the law in Alabama." *J.B.F. v. J.M.F.*, 730 So. 2d 1186, 1188 (Ala. Civ. App. 1997) *rev'd sub nom Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998). The other three lesbians and gay men who have joined J.B. in her suit have admitted that they engage in sex despite the existence of Alabama's criminal law. See *Doe v. Pryor*, Civil Action No. CV-02-D-546-N (M.D. Ala. 2002). The reason for this may have to do with the lack of enforceability of the statute. At least in the context of heterosexual sex, fornication, and adultery, the Alabama legislature has admitted that the "number of liaisons which are illegal under Alabama law is, undoubtedly, very high" and that "[c]riminal sanctions are practically inadequate and, therefore,

In contrast, positive verbal expression about homosexuality has long been suppressed in American culture. Only in relatively recent times have lesbian and gay people widely embraced verbal labels for sexuality, which may be increasingly possible only because of waning cultural homophobia, anti-discrimination measures, and increasing individual outspokenness and activism.⁴⁷ Indeed, under social and religious opprobrium, “homosexuality” seems to have persisted unnamed for centuries, with the first wave of verbalization of same-sex desire promoted by anti-gay leaders and pseudo-scientists as a negative label to classify, diagnose, and eliminate “deviance.”⁴⁸ Otherwise, reticence about homosexuality seems to have been common even in private circles, such as families who understood that certain members were “different” but seemed not to discuss it.⁴⁹ The popularity of the phrase “the love that dares not speak its name” as a reference for homosexuality is just one measure of how even sexual minorities have been profoundly taught not to be comfortable verbally articulating manifestations of same-sex desire.⁵⁰

Punishment of minority sexuality by law has exploited the vulnerability of verbal expression on intimate matters, especially where private expression has served as a hook for law enforcement snares. At

inappropriate to regulate nondeviant sexual behavior between consenting unmarried adults.” ALA. CODE § 13A-13-2 commentary (1994).

47. As Catherine MacKinnon notes, gay identity has played an important role in building communities around labels that were once thought demeaning; in other words “to eliminate the denigration of definition, the identity had to be embraced.” See CATHERINE A. MACKINNON, *SEX EQUALITY* 1076 (2000) (summarizing JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS, AND MODERN SEXUALITIES* 198-99 (1985)); see also Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696-1706 (tracing the history of how gay and lesbian litigants transformed identity from a means of targeting people for discrimination to a means of seeking legal protection as speech).

48. There is anecdotal evidence that gay people may have labeled and referred to their sexuality by name, though not necessarily routinely, before the nineteenth century. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 43, 295 (1980) (marking periods of use of term “gay” and other distinctions for gay people as different from norm). The term “homosexuality” first seems to have come into being in psychiatric circles, then as a term of art in a largely homophobic culture. Gay people seem to have begun reclaiming labels shortly thereafter. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 14-21 (1995).

49. See JOHN HOWARD, *MEN LIKE THAT* (1999); John Howard, *Place and Movement in Gay American History: A Case from the Post-World War II South*, in BRETT BEEMYN, ED., *CREATING A PLACE FOR OURSELVES: LESBIAN, GAY, AND BISEXUAL COMMUNITY HISTORIES* 211-225 (1997).

50. See, e.g., JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 19 (1998); Robert Oaks, “*Things Fearful to Name*”: *Sodomy and Buggery in Seventeenth-Century New England*, 12 J. SOC. HIS. 268, 268 (1978).

the height of federal campaigns against homosexuality, the U.S. Postal Service tampered with private mail and forwarded evidence of homosexuality to individuals such as employers, exposing lesbians and gay men so that actions could be taken against them.⁵¹ Romantic talk thought to be safe between potential lovers often became grounds for criminal punishment when made to an undercover police officer or an offended “heterosexual,” causing some sexual minorities during such eras of rigorous law enforcement even to resort to nonverbal codes to identify each other.⁵² Under circumstances like these, it is no wonder that many sexual minorities came to believe that verbalizing same-sex intimacy, even in private, was simply awkward and inappropriate in a culture dominated by reticence about sex.

Today, fears of negative consequences for verbalizing same-sex intimacy still linger as one of the primary costs of homophobia. Though the federal government’s notorious campaign of rooting out lesbians and gay men from government employment may have finally ended under the Clinton Administration,⁵³ thirty-seven states and the federal government still permit discrimination on the basis of sexual identity.⁵⁴ It is not surprising then that the latest national opinion polls and scientific studies on the subject of discrimination show that large percentages of lesbians and gay men report suffering discrimination, particularly in the workplace, and even heterosexuals widely seem to concede that lesbians and gay men are among the most frequent victims of discrimination.⁵⁵

51. See JOHN D’EMILIO, *supra* note 50, at 47, 214-15.

52. For extensive analysis of the emergence of such a culture, see GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* (1995).

53. During the 1950s, government officials discharged thousands of lesbian and gay workers who were labeled moral threats and security risks. See D’EMILIO, *supra* note 50, at 40-50. It was not until 1998 when President Clinton officially put a halt to the Executive Order that authorized such expulsions. See, e.g., Elizabeth Becker, *Wariness & Optimism Vie as Gays View New President*, N.Y. TIMES, Jan. 26, 2001, at A1 (describing how President Bush took office without making a commitment to preserving Clinton’s Executive Order); Elizabeth Becker, *Gay Republican Will Run White House AIDS Office*, N.Y. TIMES, Apr. 9, 2001, at A13 (describing how President Bush appointed his first openly gay leader to his Administration while merely “quietly” allowing the Clinton Executive Orders to stand).

54. Currently, only thirteen states and the District of Columbia prohibit discrimination in education, housing, and employment on the basis of sexual orientation. The states are: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Nevada, Rhode Island, Vermont, Wisconsin. See NATIONAL GAY AND LESBIAN TASK FORCE, CIVIL RIGHTS LAWS (Map) (December 2002), available at <http://www.NGLTF.org/Library/Index.cfm#1> (last visited Jan. 14, 2003).

55. See KAISER REPORT, *supra* note 30, at 3; see also HWC Survey, *supra* note 30, at 1 (showing that 40% of gay and lesbian adults report having faced some form of hostility or harassment on the job, and 73% of all Americans perceive that gays and lesbians experience substantial discrimination in the workplace, more than virtually any other group).

Undoubtedly, concerns about discrimination and violence may motivate some lesbians, gay men, and bisexuals to suppress both verbal and nonverbal expression in public,⁵⁶ but the degree to which verbal sexual conformity outstrips nonverbal sexual conformity is often telling. While there is substantial evidence that gay men and lesbians engage in some heterosexual sexual behavior in response to legal and cultural hostility to homosexuality, the same evidence indicates that nearly all known lesbians and gay men seem to confine that conformity to the past.⁵⁷ In contrast, higher numbers of lesbians and gay men continue to engage in verbal censorship in a variety of settings, not only concealing their identity to others,⁵⁸ but many seemingly refusing to identify verbally as gay, lesbian, or bisexual to *themselves*.⁵⁹ This evidence suggests that

56. See, e.g., HWC Survey, *supra* note 30, at 5-6 (showing as many lesbians and gay men are uncomfortable displaying symbols of LGBT sexuality or photographs of partners as those that are uncomfortable talking about their sexuality). In my survey of 206 men who have sex with men, most respondents said that they expressed their affection for their partners by holding hands in private (88%), but less claimed to do so in public (69%). See *infra* app. A.

57. During periods of intense homophobia, many lesbians and gay men may have gone through extreme measures to change their sexual behavior as well as having suppressed their identity. For a range of such measures, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). And, as I note above, *supra* note 44, those who refrain from sex also often refrain from verbalizing their sexual identity. But the picture for known lesbians and gay men is different. Of the 1261 men who responded to the survey for this Article and identified as gay, 48.49% have never had sex with women, while 48.18% have had sex with women in the past. See *infra* app. A. Only 3.25% have had sex with women in the past and still do, only one (1) of whom indicated that he did not have sex with men. Other surveys confirm these results. For example, while the *Advocate* survey similarly showed that more than half of men who identify as gay have had sex with women—even though for most of those men the female sex partners were few, and most of that sex occurred substantially in the past. According to the survey, nearly one in seven gay men have been married to a woman, and another 6% have been engaged to a woman in the past, but only 2% of the men who identified as gay still claimed to be dating, engaged to, or married to women, most of whom purportedly know their lovers are gay. See Lever: MSM, *supra* note 30, at 19. For lesbian and bisexual women, the results were similar. See Lever: WSW, *supra* note 30, at 26. For descriptions of this phenomenon with special emphasis on heterosexually married gay and bisexual men, see RICHARD ISAY, *BECOMING GAY* 28-29, 87-118 (1996).

58. See KAISER REPORT, *supra* note 30, at 1 (16% not out to family members, 28% closeted to coworkers, 45% closeted to bosses, 56% closeted to landlords); Lever: MSM, *supra* note 30, at 20 (56% closeted to bosses, approximately half closeted to coworkers and closeted most of the time); Lever: WSW, *supra* note 30, at 24 (approximately half out to coworkers).

59. In the twelve largest American cities for example, approximately 9.2% of men identify as gay or bisexual, though 10.2% had male sex partners in the prior year, 14.3% had such partners in the prior five years, and 16.4% had such partners since age eighteen. NHLSL, *supra* note 30, at 304-05. For women in those same cities, 2.6% identify as lesbian or bisexual, 2.1% having female sex partners in the last year, 3.3% having such partners in the last five years, and 6.2% having such partners since age eighteen. *Id.* Nationally, the percentages of individuals who identify as gay, bisexual, or lesbian are much smaller, 2.8% for men (gay or bisexual) and 1.4% for women (lesbian or bisexual), consistently with the rates of same-sex intercourse (2.7% of men having had same-sex sexual experience and 1.3% of women), but still disparate with historic

many lesbians and gay men have reacted to America's scheme for opposing homosexuality as if it were multilaterally designed to put them at risk primarily for verbally disclosing their sexuality.

Indeed, the ways in which discrimination has forced many sexual minorities to adjust culturally to hostility to their sexuality seems to have had a particularly profound effect on private and public verbal expression connected to intimate behavior. The heterosexual monopoly on marriage, for example, has not just excluded lesbians and gay men from the highly verbal ritual of publicly declaring themselves as "spouses" and the status of "marriage."⁶⁰ Rather, the attack on "equivalent" marriages for lesbian or gay couples seems to have discouraged many lesbians and gay men from disclosing their relationships to the public,⁶¹ constructing their own verbal commitment ceremonies in private,⁶² and expecting to

sexual experience (4.9% of men and 4.1% of women having same-sex partners since age eighteen). *Id.* at 311.

60. There is, perhaps, no better illustration of the verbal chaos surrounding homosexuality than the history of government positions to create a census of same-sex couplings. Throughout most of U.S. history, the Census has verbally obscured awareness of same-sex couples by refusing to count and report such couplings. Janny Scott, *Truths, Half-Truths, and the Census; In Describing Us, The Count Has Its Limits*, N.Y. TIMES, July 1, 2001, § 1 at 21. In recent years, when same-sex couples attempted to verbally identify themselves as married, government officials who did not ignore the declaration changed it—or the verbal declaration of the sex of one of the partners—to make the declaration appear to verbalize a heterosexual coupling. *Id.*

61. See, e.g., Lee Condon, *By the Numbers*, THE ADVOCATE, Sept. 25, 2001, at 37 (describing the Census 2000's failure to count single gay and lesbian people and 62% undercounts of gay couples and explaining lesbian and gay ambivalence about coming forward); DAVID M. SMITH AND GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS, Aug. 21, 2001, at 2 (noting that the projected undercount in the Census of same-sex households appears to result from fear of discrimination or lack of need to come forward).

62. See Paula L. Ettlbrick, *Since When Is Marriage A Path to Liberation*, 2 OUT/LOOK, NAT'L GAY AND LESBIAN Q. 9 (1989). For more analysis over the conflict of the desire to achieve a verbal marital status, see Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511 (1990); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 TUL. J.L. & SEXUALITY 63 (1991). The reaction of gay and bisexual men to same-sex marriage is no less ambivalent than the reaction of lesbians is. According to *The Advocate* survey, while 33% of men who have sex with men live with a primary male partner, less than half have engaged in a commitment ceremony to memorialize their commitment to each other. Lever: MSM, *supra* note 30, at 24. When I asked approximately 200 of the respondents to my survey how they would form a monogamous commitment to each other, little more than half (51%) favored doing so with a predominantly verbal commitment—such as a formalized verbal pledge for monogamy. The remainder relied heavily on conduct—assuming monogamy from behavior “without much discussion” after generally expressing a preference for monogamy (28%), living together without discussion (9%), or rejecting all common verbalized commitments outright (12%). See *infra* app. B.

rely on private contractual relationship promises.⁶³ Only now, as discrimination is finally waning in some areas, are people of all sexualities able to tout lesbian and gay relationships verbally in such venerated periodicals as *The New York Times* and the *Boston Globe*—both of which now justify publication of same-sex couplings by recognition of those relationships by law.⁶⁴

Perhaps more dramatic examples of legal conflicts where the primary losses of sexual expression are verbal surface in the United States Armed Forces, where declaration of identity is now the most common ground for separation from service related to homosexuality.⁶⁵ While some lesbian, bisexual, and gay service members are discharged for engaging in sex with someone of the same gender or conduct that expresses a propensity to engage in that sex,⁶⁶ there is substantial evidence that lesbians and gay men in the military do not maintain celibate lives.⁶⁷ Instead, the focus of modern military policy—nicely captured by the moniker “Don’t Ask, Don’t Tell”—emphasizes both the importance of talking about sexuality to catch it, as well as the notion

63. See, e.g., *Jones v. Daly*, 122 Cal. App. 3d 500, 508 (1981). Only in recent years have courts looked to the economic nature of relationships of gay couples to see sex as “incidental” to other contractual promises. See *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 451-456 (1988); *Crooke v. Gilden*, 414 S.E.2d 645, 646 (Ga. 1992).

64. *To Our Readers*, BOSTON GLOBE, Sept. 29, 2002, at A2 (explaining that the paper will publicize ceremonies automatically if they are registered in jurisdictions that officially recognize civil unions or domestic partnerships for same-sex couples); *Times Will Begin Reporting Gay Couples’ Ceremonies*, N.Y. TIMES, Aug. 18, 2002, § 1 at 30 (claiming publicizing such ceremonies is increasingly newsworthy because of public nature of increasing commitments, and using officially recognized unions as automatic criteria for publication).

65. Vernon Loeb, *1250 Gays Left Forces in ’01; Harassment Cited in Largest Exodus From Military Since ’87*, WASH. POST, Mar. 14, 2002, at A4; Christopher Marquis, *Military’s Discharges of Gays Increased 17 Percent in 2000*, N.Y. TIMES, June 2, 2001, at A9 (explaining that only 106 out of 1212 discharges were for sexual activity).

66. Compare 10 U.S.C. § 654(b)(1) (2002) (authorizing discharges for sexual conduct) with 10 U.S.C. § 654(b)(2) (2002) (authorizing discharges for disclosure of sexual identity).

67. Allan Bérubé’s historic study of lesbians and gay men in the military documented repeated instances where service members formed sexual networks in the military and even had their first sexual experiences there despite efforts of military officials to root out homosexuality. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 243-54 (1990). For countless other examples of lesbians and gay men who were sexually active in the military, see RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY* (1994). In fact, a study commissioned by the Department of Defense conceded that the military has not sufficiently studied homosexuality in service to warrant any conclusion about gay sexuality that deviates from other norms, and noted, in fact, that the only study of same-sex behavior adjusting for military service found a higher rate of same-sex sexual conduct for men with military service histories than without such histories. NATIONAL DEFENSE RESEARCH INSTITUTE, *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* (hereinafter NDRI REPORT) at 49-50 (1993). As a result, the NDRI Report seemed to assume that sexual behavior in the military was no different than outside it, in concluding that most lesbians, bisexuals, and gay men are not celibate. See *id.* at 55.

that contemporary tolerance for lesbians, bisexuals, and gay men is conditioned on keeping minority sexuality clandestine.⁶⁸ Under this scheme, broken confidences⁶⁹ and intercepted communications⁷⁰ can be much more dangerous to lesbians, bisexuals, and gay men than engaging in sex, particularly because words may be more likely to be witnessed or captured as incriminating evidence as revelations of their sexuality.⁷¹

Even if one cannot conclude with certainty that efforts to suppress verbal expression by sexual minorities successfully inhibit private verbal expression, there is still evidence that discrimination pressures have had a toxic effect on the value of many words related to sexuality, regardless of whether they are publicly or privately expressed by sexual minorities. For instance, surveys show that clear majorities of gay men do not uniformly believe that the words “straight” or “heterosexual,” mean “not gay,” even when one of those terms is used by a man for self-identification.⁷² Of the 1400 men who have sex with men surveyed for this Article, only 21% claim to consistently believe the statement “I am straight” or “I am not gay.”⁷³ In sharp contrast, these men almost uniformly believe that certain conduct indicates that a person is gay or bisexual *regardless* of what he says; 95% of these men believe that being repeatedly seen in gay bars is such an indicator, as is seeing two men passionately kissing in public or engaging in gay sex.⁷⁴ Apparently, nothing says “I like giving blow jobs” better than repeatedly, voluntarily giving them.⁷⁵

The havoc wrought on the coherence of verbal expression about the term “bisexuality” is even more remarkable. While the number of men

68. For extensive analysis, see Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997).

69. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 683 (D.C. Cir. 1994) (explaining how Steffan confided that he was gay while in the Naval Academy only to have one friend reveal it to Academy officials).

70. See, e.g., *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D. D.C. 1998) (discovery of word “gay” in AOL profile led to investigation of Timothy McVeigh as a gay man).

71. See, e.g., *Still Not Wanted*, WASH. POST, Mar. 18, 2002, at A16 (explaining how most discharges now occur by verbal outing of service members or by the service members' coming out); Elizabeth Becker, *Harassment in the Military is Said to Rise*, N.Y. TIMES, Mar. 10, 2000, at A14 (reporting that military leadership blames discharges on individuals coming out, while service members claim to come out only after being perceived as lesbian or gay and threatened for it).

72. Lever: MSM, *supra* note 30, at 20.

73. See *infra* app. A.

74. *Id.*

75. See *id.* Of the men surveyed for this Article on the question which of the following more convincingly expresses the idea “I like giving blow jobs,” 69% said “doing it” is more convincing than “saying it,” with only 21% saying the reverse.

who concurrently have sex with men and women is unknown,⁷⁶ large scientific surveys to date suggest that substantial numbers of people who are bisexual in practice—perhaps even a majority of them—personally or publicly reject a “bisexual” identity.⁷⁷ Put another way, of those who are currently bisexual in practice, more identify as gay, heterosexual, or some abstract sexual identity other than “bisexual.”⁷⁸ Matters are no more clear approaching the question of bisexuality from the perspective of verbalized self-identity: of men who identify as bisexual, for example, many are not actively bisexual⁷⁹—a fact that not only seems to confuse researchers trying to sort out bisexuals from gay men,⁸⁰ but may be attributable to significant numbers of men who personally identify as gay

76. Studies targeting the lesbian, gay, bisexual, and transgendered community show low percentages of people who identify as bisexual. See Lever: MSM, *supra* note 30, at 19 (reporting numbers of men who claim bisexuality as approximately 2% of surveyed men who have sex with men); Lever: WSW, *supra* note 30, at 24 (reporting numbers of women who have sex with women who claim bisexuality as approximately 9% of surveyed women who have sex with women). A study by the GMHC of 7,000 New York City men who had sex with men showed that less than 6% of men who have sex with men were bisexual *in practice*, although that finding was severely limited by surveying men in gay venues and limiting its inquiry to men who had unprotected sex with men. See GMHC Survey, *supra* note 30, at 13; but see NHSLs, *supra* note 30, at 311 (reporting that nationally the number of men who identify as bisexual is 0.8% of the population, or 28.57% of all men who identify as gay or bisexual, but also 0.7% of the population and 25.93% of all men who have sex with men, while the number of women who identify as bisexual is 0.5% of the population, or 35.71% of all lesbian and bisexual women, and 0.3% of the population and 23.08% of all women who have sex with women).

77. According to a study by the GMHC, only 45% of those men who admitted to having sex with both a man and a woman in a period of one year actually identified as bisexual; 21% identified as heterosexual and 30% identified as gay. See GMHC Survey, *supra* note 30, at 13. The Rand Institute’s National Defense Research Institute (NDRI) surveyed various studies of sexual activity and found that those studies showed that relatively few men who slept with men and women accepted a bisexual identity. NDRI REPORT, *supra* note 67, at 52-53 (recounting a Centers for Disease Control and Prevention (CDC) study of male blood donors who admitted having sex with both men and women with only 30% identifying as bisexual, and a *Playboy* reader’s survey showing that 29% of the same group identified as bisexual). Of the respondents to the survey generated for this Article who still have sex with both men and women, only 46.53% identified as bisexual; 40.59% identified as gay, and 12.87% identified as “not gay or bisexual” or “unsure” about their sexual identity. See *infra* app. A.

78. See studies and surveys cited *supra* note 77.

79. Of the men who identified as “bisexual” to *The Advocate*, nearly two-thirds were not actively bisexual: approximately half had not had sex with women in over three years or more, 11% had sex with only one woman, and 8% had never had sex with a woman. Lever: MSM, *supra* note 30, at 19. Of the men who responded to the survey for this Article and identified as bisexual, less than half have both had sex with women in the past and at least occasionally still do (47.82%); 6.52% had never had sex with women, and 45.65% declared sex with women to be a thing of the past. See *infra* app. A.

80. See NDRI REPORT, *supra* note 67, at 44-49, 63 (indicating that studies finding low incidences of homosexuality are problematic because of “non-exclusive” homosexual behavior and concluding that actual incidence is “undoubtedly higher”); NHSLs, *supra* note 30, at 290-92 (explaining how many people conclude that “homosexuality” must include just same-gender behavior, desire and identity).

but publicly identify as bisexual because it is easier to do so.⁸¹ As a result, many gay men in particular—perhaps based on their own historical bisexual behavior—seem to have doubts that the term “bisexual” has any true meaning in most contexts.⁸²

None of this means that sexual minorities are incapable of expressing intimate feelings with other words in a coherent way. Published letters⁸³ and personal ads⁸⁴ written by lesbians and gay men to lovers or potential sex partners certainly confirm that many of us believe the verbal expression is worth undertaking. But the known losses of verbal expression on sexuality—on matters ranging from identity, to solicitations for sex, to marriage rituals, and beyond—at least indicate that verbal expression may not be a preferred form of sexual expression for sexual minorities in a discriminatory climate. And with sex as a form of expression largely persisting among lesbians and gay men, there is also good cause to believe that when many lesbians, bisexuals, and gay men have determined to sacrifice risky forms of expression, they have been taught to start with that which is verbal. The endurance of sex as a form of expression may be driven by physical urge, but there is certainly no reason to believe that verbal expression is more powerful than sex as a

81. For example, approximately 40% of the gay men surveyed by *The Advocate* admitted to having told others they were “bisexual” as they came to terms with being gay. See Lever: MSM, *supra* note 30, at 19.

82. Nearly 60% of the gay men surveyed by *The Advocate* claimed either not to believe in bisexuality or to be unsure of its existence. See Lever: MSM, *supra* note 30, at 20.

83. See, e.g., NORTON, *supra* note 38 (collecting love letters written by men to men from notables such as Marcus Aurelius, Michelangelo, Tchaikovsky, Henry James, Herman Melville, and Allen Ginsberg). Indeed, letters of famous Americans such as Eleanor Roosevelt and Abraham Lincoln are used to suggest that both had sexual relationships with people of the same gender. See JONATHAN NED KATZ, LOVE STORIES: SEX BETWEEN MEN BEFORE HOMOSEXUALITY (2001); see also JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.: A DOCUMENTARY HISTORY (1992).

84. Indeed, some of the strongest evidence that thousands of men who have sex with men make contact for relationships verbally is through personal ads posted online with intricate verbal solicitations for sex, dating, and longer-term relationships. Several websites open to people of all sexual orientations permit heavy verbiage devoted to relationships rather than sex. See, e.g., <http://www.match.com> (last visited Sept. 13, 2002) and <http://personals.salon.com/personals/> (last visited Sept. 13, 2002). Sites specific to the lesbian and gay community are often more open to proposals for both sex and relationships. See, e.g., <http://www.planetout.com> (last visited Sept. 13, 2002) and <http://www.gay.com> (last visited Sept. 13, 2002). Other on-line personal ad services are strictly devoted to sex. See, e.g., <http://www.m4m4sex.com> (last visited Sept. 22, 2002). Nevertheless, I interviewed twelve men who used personal ads, and all twelve indicated that the verbal appeal of the men they dated through the ads generally did not translate to longer relationships because of a lack of chemistry that could not be expressed further in words. One indicated that men did not appear to have read his personal ad but only focused on the picture. Another indicated that verbal exchanges, mostly through e-mail, ultimately proved to exceed in-person encounters, with the latter often not measuring up to the former.

form of intimate expression for lesbians and gay men, and there is ample reason to believe that sex is the more enduring of the two.

B. The Importance of Sex as a Mode of Expression: The Example of Gay Men

Denigrating the value of sex, particularly sex between men, is a common tool for justifying sexual orientation discrimination, including discrimination against women who have sex with women.⁸⁵ Possibly the most dramatic example of this occurred in federal court litigation in *Bowers v. Hardwick*⁸⁶ where Attorney General Michael Bowers categorically disparaged all gay sex as hedonistic, promiscuous, and prone to violence.⁸⁷ Though the Court did not explicitly endorse Mr. Bowers' expressed view, the Court implicitly demeaned sex between men as having less constitutional value than pornography, concluding that such sex is unworthy of the right to privacy.⁸⁸ To this day, the sodomy laws upheld in *Hardwick* continue to be invoked against lesbians and gay men, particularly to deny protections to lesbians and gay men from discrimination.⁸⁹ The story of *Hardwick* greatly underscores the need to explore the value men attach to sex between men, to ensure that superficial reasoning about gay sexuality is exposed for what it is.

Though there are First Amendment imperatives for deference to those who engage in conduct to determine its value, there are good factual reasons for turning to men who have sex with men for understanding the value they attach to sex. While some advocates for gay rights may believe that sex "for most of us . . . normally" expresses a

85. For typical arguments and responses to them, see MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 206-209 (1999) (noting how stereotypes about gay men dominate anti-gay rhetoric to the exclusion of observations about lesbians); POSNER, *supra* note 15, at 300 (noting how revulsion toward gay men dominates social and legal opposition to homosexuality). See also Gregory M. Herek, *Bad Science in the Service of Stigma: A Critique of the Cameron Group's Survey Studies* in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 223-255 (Gregory M. Herek ed., 1998). Even conservative scholars who are willing to consider gay marriage or their equivalents draw upon generalizations about gay male sex to justify their arguments. See, e.g., McConnell, *supra* note 27, at 250-51 (using numbers about gay male promiscuity to assess the validity of anti-gay laws though unable to "vouch" for their "accuracy").

86. 478 U.S. 186 (1986).

87. Brief for Petitioner Michael H. Bowers, Attorney General of Georgia at 36-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

88. *Hardwick*, 478 U.S. at 190.

89. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir.); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). For further details, see Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

message,⁹⁰ many men who have sex with men hold a more sophisticated and realistic view of sex, one that recognizes that the meaning of sex can change depending on the intent and behavior of the parties engaging in it.⁹¹ Substantial numbers of men who have sex with men admit to engaging in sex purely for pleasure, and also admit to engaging in anonymous sexual encounters at least once in their lives.⁹² Many men have sex with men without intending to give the impression that their partners are sexually attractive.⁹³ And some men who have sex with men admit to having had sexual encounters where they cannot even remember what sexual acts took place in those encounters.⁹⁴ Still, the very fact that these experiences are not universal illustrates the error of drawing

90. GAYLAW, *supra* note 13, at 177.

91. Of the 1400 men who responded to the survey for this Article, approximately 89% indicated that sex was at least occasionally something they engaged in purely for pleasure without intending to express love, trust, or some other affection for a partner. *See infra* app. A (28.60% said sex was frequently for pleasure, 60.27% said it was occasionally so). When rephrased to ask whether sex has ever been “meaningless” apart from the physical pleasure of the act, 78.37% said “yes” and only 21.63% said “no.” *Id.*

92. It is important to note that this is not a normal mode of finding sex partners, with much lesser percentages engaging in this form of sex frequently periodically. *See* Lever: MSM, *supra* note 30, at 24. But 51.04% of men who have sex with men who responded to the survey for this article indicated that they have had anonymous sex in public places, such as a park or restroom or bathhouse, at least once, and 31% admitted to experience anonymous sex through a glory hole or some other venue at least once. *See infra* app. A.

93. Of the men surveyed for this Article, when asked if they had had sex with someone they did not find particularly attractive, only 9% declined to indicate that they had done so. The remaining 91% did. Of those, nearly 69% claimed to have no idea if they had conveyed that they thought their sexual partners were attractive by having sex with them, while the remaining 31% assumed that they had sent that message though they did not, apparently, mean it. *See infra* app. A. When the question was rephrased to include a third response, 91% again responded, with approximately 37% saying that they assumed their sexual partners knew that the decision to have sex had nothing to do with sexual attractiveness in that encounter, and 44% indicated that they did not assume they had conveyed to their partners a message of sexual attractiveness. *Id.*

94. Of the men who responded to the survey for this Article, approximately 16% said that they had a sexual encounter at least once where they could not remember the sexual acts they engaged in. *See infra* app. A. To the extent that the failed memory corresponds to substance abuse, the number responding affirmatively to this question corresponds with numbers about substance abuse among some gay men. In the GMHC Survey of more than 7,000 men in New York City, it found that 46% of gay men found largely in bars and clubs combined alcohol and sex, and 22% used some form of drug during sex—cocaine (14%), ecstasy (13%), “Special K” (11%) or crystal (7%). GMHC Survey, *supra* note 30, at 19. While the GMHC data also does not reflect whether any respondents feel that using these substances affected their judgment, or whether riskier sex occurred specifically under the influence of drugs or alcohol, those who admitted to drug use also admitted to engaging in riskier sex almost twice as frequently as those who did not. *Id.* GMHC notes, of course, that drawing survey respondents from bars could affect its numbers. *Id.* But as the NHSLs notes, the numbers are not inconsistent with the numbers of unmarried men and women who connect alcohol and sexual encounters where sexual encounters are likely to occur where singles socialize. *See* NHSLs, *supra* note 30, at 132. The NHSLs also showed a greater likelihood of risky sexual practices when alcohol and drugs were used. *See id.* at 416.

understanding about the expressiveness of gay male sex from the experiences of small numbers of men who have sex with men,⁹⁵ no matter how much those experiences occupy public thinking about gay sexuality.⁹⁶

Before exploring the varieties of expression that take place through sex, it is critical to contextualize how important nonverbal communication is to many men who have sex with men. From the beginning to the end of a sexual encounter, men who have sex with men frequently rely on conduct over words, even if only visiting places frequented by gay and bisexual men, to assure that finding a sexual partner with same sex desire is safe,⁹⁷ perhaps as a result of governmental prohibitions⁹⁸ and citizen attacks⁹⁹ on verbal solicitations for sex. In gay bars and other enclaves where talk of sex between men may be assumed to be safe, many men who have sex with men still engage in some nonverbal, communicative conduct before speaking to a potential partner to confirm sexual interest: men surveyed for this Article virtually all agreed that they consider it uncommon to verbally contact potential sex partners without conduct such as eye contact, or some combination of touches, smiles, or other actions to see if the proposal is appropriate first.¹⁰⁰

95. See MICHELANGELO SIGNORILE, *LIFE OUTSIDE* 47-62 & 208-218 (1997) (explaining how pleasure proponents do not represent the views of most gay and bisexual men).

96. For an interesting counterpoint arguing that expressive relationships can be developed through anonymous sex, see SAMUEL R. DELANY, *TIMES SQUARE RED, TIMES SQUARE BLUE* (1999) (describing encounters in public theaters).

97. Of the 1400 men who responded to the survey for this Article, nearly 87% indicated that they engaged in a form of common conduct—going to a place frequented by men who have sex with men—before engaging in verbal proposals for sex. See *infra* app. A.

98. See, e.g., *Commonwealth v. Schnarrs*, 293 A.2d 101 (Pa. Super. Ct. 1972) (holding a request for oral sex a crime as a solicitation to commit sodomy); *State v. Phipps*, 389 N.E.2d 1128, 1133 (Ohio 1979) (indicating that “homosexual solicitations” made without certainty that the person receiving them would not be offended is punishable as “murky thinking” of a “barbarous age”); *People v. Mesa*, 71 Cal. Rptr. 594 (Cal. App. 1968) (upholding conviction under solicitation in public place for sex back at defendant’s home). But see *State v. Thompson*, 767 N.E.2d 251 (Ohio 2002) (finally striking down the state’s same-sex importuning law as discrimination on the content of solicitation). Of course, expressive conduct can be limited in these same ways. See, e.g., *People v. Rylaarsdam*, 181 Cal. Rptr. 723, 727 (Cal. App. 1982) (holding that defendant committed a sex crime by placing his penis through a glory hole in porn shop where heterosexuals viewed “sordid” material displaying homosexual sex acts because it was offensive to heterosexuals).

99. For extensive discussion of citizen violence against gay men for alleged sexual propositions, see James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 *TUL. L.J. & SEXUALITY* 51-57 (2001).

100. See *infra* app. A (showing 88% rely on eye contact before verbally contacting a potential sex partner, 82% relying on some other form of conduct).

Once a sexual encounter begins, for many men who have sex with men, actions, not words, are often a primary form of communication. Substantial numbers of gay men seem to initiate all or some of their sexual acts through a series of kisses, touches, and other conduct, not through verbal discussion.¹⁰¹ This may be particularly true the more intimate partners become. While a minority of gay men surveyed for this Article claim to always propose sexual activity through verbal communication, nearly as many only do so with a new sexual partner.¹⁰² By no means does this suggest that verbal communication during sex has no value. Safe-sex advocates certainly advise men who have sex with men to tell their partners what hurts, or to talk about sex risks to determine what is unsafe with a particular lover.¹⁰³ But while talk may not be cheap during sex, for many men who have sex with men, it also appears to be unlikely, especially for those who find it inherently awkward to stop to talk during a sexual encounter.¹⁰⁴

Given the range of nonverbal communication that attends many sexual encounters between men, it is entirely credible to believe that sex itself might be imbued with a particularized message, especially when connected to a larger belief about reasons for seeking sexual intimacy. In the largest national survey of men who have sex with men, respondents overwhelmingly ranked “love” as a priority of their lives and indicated that if they had to live without sex or love, they would sacrifice sex.¹⁰⁵ This does not, however, mean that sex and love are mutually exclusive for these men. Contrary to the myth that men who have sex with men primarily have short-term sexual partners, 44% of those responding to that survey reported that they had a primary male partner, and 87% of those men had made a long-term commitment to their partners.¹⁰⁶ And of

101. Of the men surveyed for this Article, 66% initiate sexual acts substantially through conduct—25% for almost all sexual acts, 41% do for at least some. *See infra* app. A.

102. Of the men surveyed for this Article, only 20% claimed to initiate almost all sexual acts verbally, while 13% did so only with a new partner. *See infra* app. A.

103. Two of the most popular sexual health manuals for men who have sex with men urge such men to talk about sexual risks with their partners but acknowledge that it is not the norm. *See, e.g.*, STEPHEN GOLDSTONE, *THE INS AND OUTS OF GAY SEX* 213 (1999); CHARLES SILVERSTEIN & FELICE PICANO, *THE NEW JOY OF GAY SEX* 163-64 (1992).

104. GOLDSTONE, *supra* note 103, at 213 (indicating that many men who have sex with men dispense with verbal discussions about sexual risks); *see also* SILVERSTEIN & PICANO, *supra* note 103, at 163-64 (same).

105. Lever: MSM, *supra* note 30, at 27.

106. *Id.* at 23-24 (33% having a live-in partner and an additional 11% not sharing a residence). The NHLS data is consistent with these numbers. *See* NHLS, *supra* note 30, at 316 (estimating over one-third of all men who have sex with men were living with a partner). *The Advocate* survey reported slightly higher numbers of partnered women. *See* Lever: WSW, *supra*

all the men not in a long-term relationship, 87% reported that they wished they were.¹⁰⁷ The surveys conducted for this Article corroborate those claims: only 5% of men surveyed said that they rarely engaged in sex to express love for a partner, while the rest claimed always or at least sometimes to use sex to express love.¹⁰⁸

The numbers of gay and bisexual men who claim a connection between sex and intimacy indicate that there is little reason to believe that these claims are self-serving. More than two-thirds of the men surveyed for this Article said they believe that some conduct is needed to corroborate the statement “I love you.”¹⁰⁹ Of that group, two-thirds reported that they would have doubts about the professions of love from someone who said “I love you” but repeatedly refused to have sex when he was capable of doing so.¹¹⁰ And half of the men surveyed for this Article indicated that they would feel incapable of effectively expressing love for an intimate partner without sex.¹¹¹ From this perspective, it seems that many men who have sex with men find that sex corroborates love and affection in a way that little else can.

While alternately engaging in sex for pleasure and expression might seem to diminish the ability of gay and bisexual men to extract a particularized message from sex in the abstract, the specificity of sexual acts for many men may indicate when sex is for love and when it is for pleasure, no matter how “unhealthy” or “disgusting” those acts might seem to other people. For example, to a man who loves or trusts his partner, the idea of knowing his partner’s body completely, demonstrating that none of it is offensive to taste, might make him more likely to “rim” him or swallow his semen. Of the men surveyed for this Article, many claim not to do those things casually.¹¹² But clear majorities of those same groups of men are apparently willing to do them in an exclusive relationship, and substantial majorities see the acts in question as

note 30, at 24 (54% living with a primary partner with an additional 14% not sharing a residence).

107. Lever: MSM, *supra* note 30, at 23.

108. *See infra* app. A. Of the remaining men, 11-12% said they always engaged in sex only to express love and never engaged in sex without attaching similar meaning to it. *See id.* An overwhelming number, 83.18%, said they engaged in sex at least sometimes to express love for a partner. *See id.*

109. *See id.*

110. *See infra* app. B.

111. *See infra* app. A.

112. Of 1200 men surveyed for this Article, clear majorities reported that they would not engage in anilingus (rimming) or swallow semen in casual sex. *See id.* (73.64% would not rim, 80.48% would not swallow semen in casual sex).

expressions of love or trust.¹¹³ Similarly, for some gay men, the decision to be penetrated is not casual either: of the men surveyed for this Article, nearly 41% claimed not to allow themselves to be penetrated casually, either *with or without a condom*.¹¹⁴ Of those men, more than 81%—a third of all respondents—claimed they would allow themselves to be penetrated only in an exclusive sexual relationship.¹¹⁵

Even for men who refuse condomless sex casually but engage in such sex in exclusive relationships, the decision to do so cannot be said to stem solely from safe-sex concerns: clear majorities of men surveyed for this Article said they considered the act of sex without a condom an expression of love.¹¹⁶ Indeed, suspicion that this occurs has greatly concerned some public health advocates, who worry that many men who have sex with men may be engaging in unsafe sex because of the closeness it gives them to a *particular* partner, and because of the fear that wearing a condom will communicate the impression that the relationship is casual, rather than one of trust.¹¹⁷

113. For rimming, 60.70% of the men who responded that they would not do so casually also reported that they would do it in a relationship, and 55.60% of those men consider the act an expression of love and 60.26% consider it an expression of trust. *See infra* app. B. For swallowing semen, 67.77% of the men who responded that they would not do so casually also reported that they would do it in a relationship, and 61.62% of those men consider the act an expression of love and 70.33% consider it an expression of trust. *Id.*

114. *See id.*

115. *See id.* The GMHC Survey reported higher numbers of men who had unprotected anal intercourse only with one partner even without risk of HIV infection, though it did not distinguish opportunity from motive. According to the GMHC, 70% of all men, including men who were already positive, and 77% of all HIV-negative men who had unprotected anal intercourse with other men did so with only one partner per year. GMHC Survey, *supra* note 30, at 7.

116. *See infra* app. A (62.30% reporting that receptive unprotected anal intercourse is an expression of love, 56.49% reporting that insertive unprotected anal intercourse is an expression of love). As one author explains the rationale:

[For gay men], being in love can lead to life-threatening mistakes, especially for men who have come out during the AIDS epidemic. Newcomers to the gay world bring with them a reservoir of love. For the first time in their lives they can express their romantic feelings as they search for lovers. Some gay men act as though they're more terrified of being abandoned by a potential lover than they are of the transmission of HIV virus [sic]. They have unsafe sex with someone they love, rationalizing, "I'm afraid he'll think I don't love him," or, "He'll leave me if I tell him I don't want to take his come," jeopardizing both their and their lovers' lives.

See SILVERSTEIN & PICANO, *supra* note 103, at 162.

117. Indeed, latest infection rate data suggests that men in their thirties and forties who are being educated in the ways of safe sex are being infected with HIV, and in some instances by their partners, who presumed the sex to be safe. *See* Matthew Schuerman, *A Midlife HIV Crisis*, THE ADVOCATE, Dec. 4, 2001, at 28-30. Moreover, recent estimates suggest that many men who are in presumably exclusive relationships with men do not know the HIV status of their partners. GOLDSTONE, *supra* note 103, at 210.

In fact, for gay and bisexual men in particular, the onset of deaths related to Acquired Immune Deficiency Syndrome (AIDS) has both sharpened the importance of conduct to communication and underscored the emptiness of words. The slogan “silence = death” may be an axiom of AIDS activism,¹¹⁸ but its power derives from the stigma and painfulness of deaths associated with the Human Immunodeficiency Virus (HIV), all of which have made the virus and disease difficult to discuss.¹¹⁹ That difficulty reverberates back into the sex lives of gay and bisexual men when small minorities of potential sex partners lie about their HIV status in order to have sex,¹²⁰ or when still more say they are “not HIV-positive” because they have never been tested to get a positive indication of infection.¹²¹ It is no wonder, then, that men who have sex

118. See MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE* 78 (1998).

119. For an intense discussion of the impact of HIV on men’s sexual practices, see David Charny, *Economics of Death*, 107 HARV. L. REV. 2056 (1994) (reviewing TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1994)).

120. See Lever: MSM, *supra* note 30, at 23 (11% have lied about their HIV status in order to have sex).

121. The numbers of men who may not know their status varies from population to population but is not insignificant. See GMHC Survey, *supra* note 30, at 6 (13% of NYC men did not know status); Lever: MSM, *supra* note 30, at 23 (21% of gay and bisexual men had not been tested for HIV); Lawrence K. Altman, *Study in 6 Cities Finds H.I.V. in 30% of Young Black Gays*, N.Y. TIMES, Feb. 6, 2001, at A17 (reporting CDC findings, from a study of men in Baltimore, Dallas, Los Angeles, Miami, New York, and Seattle who have sex with men, that 71% of men found to be HIV-positive did not know it). Of course, the number of men who are HIV-positive may be small. The CDC study estimated an overall infection rate of 12.3% of gay and bisexual men. See Altman, *supra*. That rate is consistent with studies estimating infection rates based solely on inquiries of men who have sex with men. See, e.g., GMHC Survey, *supra* note 30, at 6 (reporting 13% HIV-infection rate and noting consistency with other studies); Lever: MSM, *supra* note 30, at 23 (reporting a 13% response rate of seropositivity).

It is important to note that having sex while avoiding HIV testing is not necessarily irrational. Professor Charny explains a variation on one framework for “rational” decision-making in HIV-testing as follows:

One can easily construct scenarios under which, not only would safe sex be irrational, but one would increase the risks that one took as the rate of infection in the population increased. Suppose, for example, that a gay man in New York decides that, given his sexual history, he is more likely infected than not. Despondency at the death of his friends and the contempt of society for his suffering and his “lifestyle” have diminished his “utility from living”. . . . Further facing a substantial probability of a shortened life, the expected returns to human and financial capital investments are sharply diminished; the cost of leisure (including time spent on sexual pleasure) is thereby diminished; sex is a preferred leisure activity; and so he has more sex. Precautions are unlikely to be effective, because he is probably already infected; so the sex will be unsafe. Indeed, as infection rates go up, he is more likely to infer that he is HIV-positive, and so more likely to have unsafe sex.

Charny, *supra* note 119, at 2059 (quoting PHILIPSON & POSNER, *PRIVATE CHOICES*, *supra* note 119). As Charny notes, however, there are variations of thought that are just as rational:

with men consistently rate a verbal statement such as “I’m HIV-negative” as much less convincing of seronegativity than conduct which might prove it, such as developing a relationship with a partner or getting an HIV test.¹²²

Taken together, each of these examples illustrates how gay men employ a complex array of nonverbal conduct as a mode of expression to navigate their sex lives. To be sure, the varied meanings (or lack thereof) that may attach to some sexual acts in the abstract may make well-intended messages indecipherable without extended, accompanying nonverbal behavior to clarify sexual meaning, or perhaps even some verbal clarification between sex partners to achieve the same effect. But once meaning between partners is established, conduct can send messages about intimacy that can be understood physically, in a penetrating way that might not be possible even with the most moving of words. Though social and legal disapproval may shield most of the above examples from the public by deterring men who have sex with men from talking about sex, that very fact is precisely why First Amendment protection is required—to protect that expression for its minority point of view, especially when those who engage in that expression strive to keep it out of the public eye to deflect interest in its regulation.

II. LAW AND SEXUAL EXPRESSION

*“Don’t talk of stars burning above.
If you’re in love, Show me!
Tell me no dreams filled with desire.
If you’re on fire, Show me!
Here we are together in the middle of the night!
Don’t talk of spring! Just hold me tight!
Anyone who’s ever been in love will tell you that.
This is no time for a chat!
Haven’t your lips, longed for my touch?”*

[O]ne is more likely to take precautions if one is sure that they are not futile. Further, taking the test might relieve an intense anxiety that otherwise would push an individual to seek calm or solace in drugs or alcohol—which, in turn, often trigger willingness to engage in unsafe sex. Finally, individuals who test negative can match themselves with partners who test negative, and so avoid exposing themselves to risk of disease, while positive individuals can match themselves with other positive individuals.

Id. at 2070.

122. Regarding the statement “I am HIV-negative,” only 6.14% of the men surveyed for this Article ranked “saying it” as the most convincing expression of the underlying idea. *See infra* app. A.

*Don't say how much, Show me! Show me!
 Don't talk of love lasting through time.
 Make me no undying vow. Show me now!
 Read me no rhyme! Don't waste my time, show me!
 Don't talk of June, Don't talk of fall!
 Don't talk at all! Show me!
 Never do I ever want to hear another word.
 There isn't one I haven't heard.
 Here we are together in what ought to be a dream;
 Say one more word and I'll scream!"*

Eliza Doolittle, *My Fair Lady*¹²³

A. *The Law's (Dis)Respect for the Expressiveness of Sex Prior to Incorporation of the First Amendment*

At first blush, the simplistic sweep of America's historic sex regulation scheme would seem to cast doubt on the claim that American law has traditionally recognized the expressiveness of sex. Since contemporary legal authorities have tried to claim that American law has generally shielded "the sacred precincts of marital bedrooms" from governmental scrutiny,¹²⁴ one might presume that our government historically refrained from observing sex in marriage, at least to determine if it expressed anything at all. And because law criminalized most other forms of sex outside marriage,¹²⁵ one might also expect that the law presumed most nonmarital sex not to occur at all, much less express any ideas or feelings. But neither of these conclusions is valid: American legal authorities have historically invested a great deal of thinking into the expressiveness of sex, particularly in marking the bounds between lawful and unlawful sex.¹²⁶

123. MY FAIR LADY (Warner Bros. 1964).

124. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (claiming that "a right of privacy older than the Bill of Rights" deemed it "repulsive" for law enforcement to examine "the sacred precincts of marital bedrooms").

125. Much has been made of the claim that some forms of sex, such as oral sex, particularly sex between women, escaped prosecution as sodomy. See, e.g., Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1085-86 (1988); POSNER, *supra* note 15, at 343. That does not mean, however, that the sex was legal, particularly when it was subject to prosecution as "lewd" conduct. See MODEL PENAL CODE AND COMMENTARIES § 213.2 (Official Draft 1962 and Revised Comments 1980) at 359.

126. See Ann M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998) (explaining how rape without all elements proven would be criminal consensual sex); Helene S. Shapo, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1503 (1975) (explaining how rape "is the only form of violent criminal assault in which the physical act accomplished by the offender . . . is an act which may, under other circumstances, be desirable to the victim").

In determining what is rape, for example, American jurisdictions mostly took the view that the sexual world is one in which words are a secondary form of communication. By most accounts, the crime of rape took shape from the law's distrust of women's words both during and after sex.¹²⁷ Indeed, the traditional elements of the crime of rape—forceful sexual penetration by a man of a woman against her will—arose both from concerns that a woman could easily fabricate a rape charge, and from the grotesque assumption that a woman's "no" in a sexual encounter almost always meant "yes," or could become "yes" with the proper amount of pressure.¹²⁸

This misogynist distrust of women and the assumption that women do not mean what they say in sex drove the law to focus on a woman's conduct to determine whether she truly gave some indication that sex was against her will. During unwanted sexual encounters, the law traditionally required women to express any lack of consent to sex by *physical* resistance, not verbal resistance, to the extent that consent mattered at all.¹²⁹ At its worst, the law effectively recognized resistance only when there was some physical evidence of it, such as injury to the victim to corroborate that resistance,¹³⁰ even after a woman repeatedly said "no" in the sexual encounter.¹³¹ The lurid fantasy that some sex should typically involve violent "horseplay," or some form of physical resistance by women against men, seems to have been a byproduct of the assumption that women did not truly object to sex unless they physically resisted to the "utmost" to their attackers' advances.¹³² Indeed, the only benign thing that could be said about these resistance requirements was

127. 1 M. HALE, PLEAS OF THE CROWN 635 (1680) (Rape is "an accusation easily to be made and hard to be proved"); *see also*, United States v. Wiley, 492 F.2d 547, 574 (D.C. Cir. 1973) (describing Hale's claim as "one of the most oft-quoted passages" in American jurisprudence).

128. The Model Penal Code reformers maintained this position as late as 1980. *See* MODEL PENAL CODE AND COMMENTARIES § 213.0 (Official Draft 1962 and Revised Comments 1980) at 302-03 ("Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, may desire it but feel compelled to say 'no.' Her confusion at the time of the act may later resolve into non-consent.") For a general discussion of the problems with this position, *see* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1100-07 (1986).

129. *See generally*, WAYNE R. LAFAVE, CRIMINAL LAW § 7.19 (3d ed. 2000), at 762-64.

130. *See* MODEL PENAL CODE & COMMENTARIES § 213.1 (Official Draft 1962 and Revised Comments 1980) at 288 (bemoaning the modern shift in rape laws away from a lack of physical injury requirement in many states).

131. *See, e.g.*, People v. Murphy, 108 N.W. 1009 (Mich. 1906) (struggling and screaming in protest of sex was not enough to demonstrate nonconsent). For a survey of the law's respect for nonverbal resistance that produces injury, *see* Estrich, *supra* note 128, at 1098-1100.

132. *See, e.g.*, Mills v. United States, 164 U.S. 644 (1897); Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994); State v. Jacques, 536 A.2d 535 (R.I. 1988). *See also* Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1794-95 (1992).

that a woman who did manage to resist sex to the utmost at least was able to convey her lack of consent through conduct, even though nothing she may have said might have carried as much weight.

Traditionally, a woman's conduct could also be used against her in two principal ways to contravene her verbal expressions about sex after it occurred. A woman who previously had sex with her rapist, or with other men, could find that past conduct used to show that she consented to a rape later in time, regardless of her words to the contrary.¹³³ Apparently, this was so even though that prior sex—such as bad sexual encounters with her rapist or good sex with someone else—might have made her more apt to know when she did not desire sex with an unpleasant sex partner again. Even when such prior sexual history was not used to imply consent, that same conduct could be used in almost all American jurisdictions to challenge the credibility of the woman's verbal accusations of rape.¹³⁴ In this context especially, it is clear that the law traditionally considered sexual conduct a more "trustworthy" communicator of sexual ideas than words.

These perceptions of expressiveness surrounding intercourse outside marriage clarify some of what the law recognized about the expressiveness of sexual conduct in marriage as well. The initial act of sex between spouses played an important expressive function signaling assent to marriage and provided evidence of when marriage was fully formed ("consummation").¹³⁵ But after that, all sex within marriage was essentially lawful, whether a woman *verbally* consented to it or not, solely because the law assumed that by her act of marriage she consented to sex throughout marriage.¹³⁶ Mercifully, contemporary defenders of the marital rape exemption have conceded that mere verbal consent to marriage—especially without any mention of consent to sex—could hardly override more specific and equally verbal refusals for sex during marriage.¹³⁷ But many American legal authorities have still recently maintained that the *act* of companionship allegedly creates an expectation of intimacy that would not exist between strangers,

133. See LAFAVE, *supra* note 129, at 784-86.

134. *Id.* at 786.

135. See *Lutwak v. United States*, 344 U.S. 604, 613 (1953); *Gaines v. City of New Orleans*, 73 U.S. 642 (1867); *Magniac v. Thompson*, 32 U.S. 348, 392 (1833); *but see* *Lessee of Jewell v. Jewell*, 42 U.S. 219, 233-34 (1843) (fixing time of marriage based on formal promises before "sexual connexion" between the parties or on promises of future marriage conditioned on sex).

136. See MODEL PENAL CODE AND COMMENTARIES § 213.0 (Official Draft 1962 and Revised Comments 1980) at 344-45.

137. *Id.* at 342.

apparently sufficiently to counteract words expressing nonconsent to sex at least in some instances.¹³⁸

Though marriage in American law has progressively shifted to contract principles that have heightened respect for verbal agreements made regarding marriage,¹³⁹ by the time of the adoption of the Fourteenth Amendment, the majority of states also recognized that sexual relationships that looked like marriage could be legitimized as such. Common law authorities recognized that men and women lived as husbands and wives when “conduct towards each other in the eye of the public” was “[the] equivalent, in law, to a declaration by each that [what] they did” was to “occupy the relation of husband and wife.”¹⁴⁰ Indeed, according to the United States Supreme Court, by 1877 this seemed to be “the settled doctrine of American courts.”¹⁴¹

In the case of these “common law” marriages, there is little doubt that the expressive conduct of openly living together was used to assume a couple was “living professedly in that [marital] relation,”¹⁴² especially because a minority of states opposed recognizing such relationships as marriage because of their presumed illicit sexual nature.¹⁴³ Here, too, the

138. See *id.* (claiming that the marital relationship exemption is still relevant to the law of rape by comparison to other relationships because sex is expected in the “existence of a prior and continuing relation of intimacy, whether formalized by ceremony or achieved by long practice,” such as, allegedly, sex with an unconscious wife). See, e.g., *Kizer v. Virginia*, 321 S.E.2d 291 (Va. 1984) *superseded by statute* VA. CODE ANN. 16.8-2 (West 1996 & Supp. 2002); see also LA. REV. STAT. ANN. § 14.443(B) (West 1986 & Supp. 1997) (judgment of separation needed to void exemption); MD. ANN. CODE art. 27, § 464D (1996) (raped women must have lived separate and apart from spouse in addition to agreements documenting separation to charge rape).

139. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

140. *Travers v. Reinhardt*, 205 U.S. 423, 440-42 (1907) (emphasis added) (surveying English and Scottish common law and noting that “the acknowledgement of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage” and a “holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit”) (citations omitted).

141. *Meister v. Moore*, 96 U.S. 76, 82 (1877) (recognizing that experience and trends in the states had established that marriage existed above and beyond express verbal agreements meeting technical legal requirements because conduct expresses agreement and establishes the marital contract over and above any state obligation).

142. 96 U.S. at 82; see also *Beck v. Beck*, 246 So. 2d 420, 428 (Ala. 1971) (holding that otherwise illegal “sexual activities are strongly indicative. . . of the marital relationship”). The Court’s statement that “[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,” *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877), proved not to mean that the state’s power to confer a civil status on individuals would also permit criminalization of personal relationships superceding any technical requirements a state may impose for the purposes of receiving marital status.

143. See MODEL PENAL CODE AND COMMENTARIES § 213.6 (Official Draft 1962 and Revised Comments 1980) at 431. Indeed, as the Commentaries to the MPC explain, the common law seems to have developed the further distinction that if couples “managed their affairs” as if

line between what was criminal and what was not speaks volumes about sex shielded in marriage: to the extent the sexual nature of common law marriages expressed a bond between “man and wife,” logic requires that by the late nineteenth century Americans must have assumed, even if they chose not to talk about it, that sex within marriage served a similar function. Indeed, without it, the United States Supreme Court’s assertions about the need for “privacy” of the “marital bedroom”¹⁴⁴ seem extraordinarily bankrupt.

Beyond these parameters, there is strong evidence that many other forms of consensual sex were prohibited by states despite their expressive qualities, not because of some regulatory conclusion that some forms of sex lacked such qualities. Most states criminalized adultery primarily when it was “open and notorious”—that is, when the sex openly flouted community values.¹⁴⁵ Noncoital sex, particularly between people of the same gender, was often condemned as “unmentionable” or “unspeakable” to explain why it was regulated, implicitly confirming its discursive power.¹⁴⁶ To the extent that regulators intended such obfuscation to suffice as a reason for regulation of noncoital sex, at best that refusal to detail reasoning about sex precludes historians from now claiming that American legal authorities definitively concluded that sex was not expressive. Suggesting the contrary, many regulators openly proscribed noncoital sex to preference other forms of sexual expression (principally sex that expressed a procreative marital bond) and Biblical teachings.¹⁴⁷

they were married without openly flouting marital norms, their adultery might not be considered notorious. *Id.* Thus, conduct related to sex had a refined role in determining whether sex was verbally denominated “illegal” sex.

144. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

145. See MODEL PENAL CODE AND COMMENTARIES § 213.6 (Official Draft 1962 and Revised Comments 1980) at 431.

146. See *supra* note 16 and the cases referenced therein.

147. For a discussion that these were the motives behind sex regulation, see D’EMILIO, *supra* note 50, at 14, 19; JOHN D’EMILIO & ESTELLE FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 27-30, 122 (1988) (explaining how laws originated in concern about sin and protecting marital sexual expression and procreation, before flawed legalistic and pseudoscientific theories were invented to justify the regulation in the Nineteenth Century); MODEL PENAL CODE AND COMMENTARIES § 213.6 (Official Draft 1962 and Revised Comments 1980) at 430 (noting that law related to adultery and fornication was explicitly based on the Judeo-Christian Bible). See also *Doe v. Commonwealth’s Attorney for Richmond*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975), *aff’d* 425 U.S. 901 (1975) (connecting sodomy laws to religious tradition); *Warner v. State*, 175 N.E. 661, 662 (Ind. 1931) (distinctions in sexual code are based on “Levitical law”); *Williams v. State*, 316 So. 2d 362, 363 (Ala. Crim. App. 1975) (citing defunct English common law only to reinforce “the record of constant quadrimillennial revulsion of moralistic civilizations from the vice that evoked the total and everlasting destruction of Sodom and Gomorrah”). Of course, while the Supreme Court once held that laws based on religion can

Despite the regressive attitudes embedded in these regulations of sex, one conclusion clearly emerges from them: a fair reading of history forecloses the argument that the law presumed sex to be merely behavior lacking the *power* to express an idea. In the absence of some proof that the law presumed some individuals incapable of sexual expression or concluded that certain acts were noncommunicative—either entirely or in certain contexts—one must concede that the law understood that sex generally conveyed many meanings, even if the meanings taken in the past reflected ideologies that no longer seem well-reasoned. It certainly may be safe to assume that many authorities only crudely grasped sex’s expressiveness as leading pseudoscientific thinkers in the nineteenth and twentieth centuries believed that women had no sex drive, abundant sex for men led to disease, and lesbians and gay men were mentally ill.¹⁴⁸ But understanding such thinking explains sexual favoritism in America’s past; it does little to rebut the view that American culture has long understood the expressiveness of sexual behavior.

In reading this history, it is important to echo the Supreme Court’s warning that “few eternal verities” thrive in law of sexualized expression.¹⁴⁹ It should certainly be difficult to presume that states historically worked to avoid trampling on freedom of expression prior to incorporation of the First Amendment, especially as incorporation did not occur until the early twentieth century,¹⁵⁰ and states were caught suppressing expression in incorporation’s wake.¹⁵¹ Certainly, those same states prior to incorporation were engaged in unconstitutional practices

be saved from the Establishment Clause when they have a secular purpose, see *McGowan v. Maryland*, 366 U.S. 420, 442-445 (holding that Sunday work bans survive First Amendment scrutiny because they have a purpose of establishing a day of rest), the Court has since held that proper Establishment Clause inquiry asks whether a law *endorses* a religion, as seen in the eye of the reasonable observer who is informed about the “history and context” about the challenged law. See *Good News Club v. Milford Cent. School*, 533 U.S. 98, 119 (2001). Even without an Establishment Clause challenge, as I argue below, governmental attempts to regulate private expressive conduct solely on moral grounds still may be deemed to serve an expressive purpose. See discussion *infra* Part IV.A.2.

148. See WILLIAM ESKRIDGE AND NAN HUNTER, *GENDER, SEXUALITY, AND THE LAW* at 133-152 (1997) (summarizing bad science on sexual matters).

149. *Miller v. California*, 413 U.S. at 23.

150. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that it can be assumed the First Amendment is among the fundamental liberties protected by due process clause of the Fourteenth Amendment despite prior dicta suggesting the contrary).

151. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931).

of using law to restrict procreative choice¹⁵² and establish men as heads of households with the power to rape their wives.¹⁵³ But because the states were also not bound by the First Amendment through much of American history, it is virtually impossible to determine whether state lawmakers calculated to suppress expression with any sensitivity to its value. And it is not at all clear that legal traditions regarding the expressiveness of sexuality should be presumed to be entirely well-informed, much less worth maintaining with exactitude.

But whatever ideology early American law may have tried to preference with its control of sexuality, the key lesson to be learned from its history is that, in the sexual world, the law frequently reflected a popular understanding that communication through and about sex can be nonverbal, if nothing else because Americans have historically found sex difficult to express in words.¹⁵⁴ In fact, the timelessness of this view still surfaces today in the strange agreement among legal and political scholars on the question of rape and the role words should play in ascertaining consent to sex. While arch-conservatives have derided reliance on words in sex as threatening to reduce “hormonal heat” to “sex

152. See *Eisenstadt v. Baird*, 405 U.S. 438, 452-54 (1972). Regarding the “evil” of states asserting control over procreative choices of individuals outside of marriage, the Court emphasized:

‘The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.’

Id. at 454 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112-13 (1949)).

153. The Court has repeatedly conceded that states have been engaged in a “long and unfortunate history of sex discrimination” as part of a broader scheme to put women in a “cage” under the control of men in traditional households. See *United States v. Virginia*, 518 U.S. 515, 531-32 (1998); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973). See also, *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979). The granting of men power to express themselves sexually at women’s expense certainly reflected that inequality. See *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984). The law’s abandonment of women to rape by their husbands cannot be taken to mean that law disregarded the expressiveness of sex, as the exemption of raping husbands from criminal prosecution simply gave the power to men to control the meaning of messages sex conveyed in the same way it gave power to husbands to control their wives’ economic and legal lives. In these terms, if women refused to consent to sex and were raped—or even felt forced to submit to sex knowing they had no legal protection from rape—it would be a gross insult to suggest that they did not understand that their husbands expressed power over them each time they raped them.

154. See D’EMILIO & FREEDMAN, *supra* note 147, at 3-85 (discussing sexual anxieties).

with semicolons,¹⁵⁵ other contemporary reformers maintain that negotiating sex is so filled with “psychological complexity” and “ambiguous communication,”¹⁵⁶ that reliance on words is dangerous both to sexual norms and to rape victims who are unable to express themselves verbally because of fear of their rapists.¹⁵⁷ As one frequently cited commentator maintains, despite evolutions in the law, “[i]n practice couples do not discuss in advance each specific sex act . . . and there is no strong reason why the law should attempt to compel them to do so.”¹⁵⁸

The most benign view of history, therefore, suggests that states regulated sex not necessarily with the view that sex lacked expressive qualities, but with the view that they were acting within their presumed authority to use law to construct households, protect procreation, and favor religious mores before their authority to serve all those purposes was called into question prior to being bound by the First and Fourteenth Amendments. With peculiar theories about the sex drives of men and women dominating early America, the best that can be said is not that early American law and culture disbelieved in the expressiveness of sex, but rather that legal authorities thought that sex expressed a particular message between husband and wife that should be protected as such. To the extent the law misunderstood sex factually—not fully appreciating how deeply people expressed diverse ideas through sex outside marriage—its factual assumptions should no longer matter at all.¹⁵⁹

B. The Openness of the First Amendment to Claims for Sex as Expression After Incorporation

If one accepts that sex has the potential to symbolize and express a feeling or an idea, it is difficult to see how sex does not deserve

155. See, e.g., George F. Will, *Sex Amidst Semicolons*, NEWSWEEK, Oct. 4, 1993, at 93-94. For implicit agreement, see Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54, 61 (1991) (claiming that worrying about words and “rational calculation” in sex would undermine passion and spontaneity).

156. MODEL PENAL CODE AND COMMENTARIES § 213.0 (Official Draft 1962 and Revised Comments 1980), at 303.

157. See, e.g., Lynn Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELY WOMEN'S L.J. 193, 216-17 (1988) (explaining how a “victim frightened [into] passive silence” may not be able to express herself through words other than nonconsenting behavior); Stephen Schulhofer, *Taking Sexual Autonomy Seriously*, 11 LAW & PHIL. 35, 74 (1992) (explaining problems of being able to articulate objections); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 626 (1981) (explaining how rapists need to be aware that when victims are silent they are not consenting).

158. Dripps, *supra* note 132, at 1792 n.41.

159. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 862-864 (1994) (explaining how a change in understanding of facts warrants rejecting law to the extent it is based on factual errors).

recognition as potential expression under current First Amendment doctrine. In the years since the United States Supreme Court held that the Fourteenth Amendment incorporated First Amendment guidelines and applied them to the states, the Court has repeatedly recognized that “symbolism is a primitive but effective way of communicating ideas” requiring the Constitution to “look[] beyond written or spoken words as mediums of expression.”¹⁶⁰ As a result, the First Amendment today protects a variety of conduct as expression—even erotic conduct, such as nude body movement.¹⁶¹ Indeed, the Court has made clear that “a narrow, succinctly articulable message is not a condition of constitutional protection,” otherwise the Constitution would not protect “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”¹⁶²

Despite the unqualified openness of these propositions to recognizing expressions of feelings or abstract ideas as worthy of First Amendment protection, the fact that no court has ever recognized sex as a form of expressive conduct might seem to undercut a claim for it. But the lack of such recognition is better explained by strategic reasons plaintiffs may have declined to press for it in the past, especially since most states have obviated the need for it in recent years either by repealing laws criminalizing consensual sex or striking down such laws on other grounds.¹⁶³ Besides, when the Court first recognized expressive conduct as a category of expression, it also warned that the Constitution cannot protect a “limitless variety of conduct” as speech.¹⁶⁴ Since then, the Court has never specified what the limits of First Amendment protection are, despite having opened up expressive conduct claims to a

160. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

161. *See, e.g., City of Erie v. PAP's A.M.*, 529 U.S. 277, 289 (2000) (erotic dancing in the nude); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (cross burning); *Texas v. Johnson*, 491 U.S. 397, 405-408 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (protesters wearing arm bands).

162. *Hurley*, 515 U.S. at 569.

163. In the early years of the Court's expressive conduct doctrine before *Hardwick*, more than half of the states had struck down or repealed their laws categorically criminalizing gay and lesbian sex. *See Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986). Since then, nine more states have done so. NATIONAL GAY AND LESBIAN TASK FORCE, THE RIGHT TO PRIVACY IN THE U.S. (2002) (Issue Map for Sodomy Laws, July 2002) (hereinafter NGLTF Sodomy Law Map 2002). After the Court in *Hardwick* refused to extend the right of privacy in matters of nonprocreative sex to gay people alone, gay rights litigants successfully turned to state courts and, winning there, have continued to pursue those claims as their primary means of attacking laws criminalizing gay sex. For further details, see Adam Hickey, *Note: Between Two Spheres: Comparing State and Federal Approaches to the Right of Privacy and Prohibitions Against Sodomy*, 111 YALE L. J. 993 (2002).

164. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

wide variety of behavior.¹⁶⁵ Yet, while plaintiffs may have been encouraged by these ambiguities to pursue other claims for protecting sex, nothing in the Court's actual expressive conduct doctrine, particularly as it has developed in the last decade, has definitively closed it to recognizing sex as a form of expression.

Admittedly, the known limits to expressive conduct recognition seem foreboding to a First Amendment claim for the protection of sex. By the early twentieth century, the Court had already set a standard for dismissing claims that certain "crimes" deserved protection, regardless of the expression involved when that expression is an "integral part of a conduct in violation of a valid criminal statute."¹⁶⁶ More recently, the Court has suggested that a vague expression of pleasure about engaging in an act is not a message worthy of constitutional protection.¹⁶⁷ Thus, in the context of recreational dancing, the Court has warned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."¹⁶⁸ Taking these two limitations together, if one assumes that a person in the throes of sexual passion is primarily engaging in sex for pleasure, there are reasons to worry that sex, like recreational dancing, might not secure First Amendment protection either, especially because it has also been criminalized in many forms.

But contrary to any troublesome language the Court has used to broadly doubt expressive conduct claims, its actual doctrine has not excluded either historically criminalized conduct or expressions of pleasure from First Amendment protection. In the years since the Court undertook analysis of a First Amendment claim for recreational dancing, the Court has twice held that dancing can take on expressive qualities given the proper context and expressive intent, even when the conduct, in

165. See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

166. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). That reasoning often persists today, see *Rice v. Paladin Enterprises*, 128 F.3d 233, 243-44 (4th Cir. 1997) *cert. denied* 523 U.S. 1074 (1998) (holding that First Amendment claims for expression "brigaded with action" would subject too many criminal laws to scrutiny); *United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982) (deriding as "specious syllogism" the claim that the First Amendment provides a defense to aiding and abetting drug distribution because written words were used to carry out a crime); *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding that disseminating information to facilitate unlawful wagering received no First Amendment protection because it was "instrumental in and intertwined with the performance of criminal activity").

167. See *Stanglin*, 490 U.S. at 25.

168. *Id.*

general, is criminal, such as dancing in the nude, no matter how much pleasure it may generate.¹⁶⁹ While the Court has held that crimes of “[v]iolence or other potentially expressive activities” are “entitled to no constitutional protection,” that seems to be so because those activities “produce special harms distinct from their communicative impact.”¹⁷⁰ The only two Justices on the current Court who maintain that certain conduct “traditionally criminalized” should never receive First Amendment protection have implicitly conceded that the Court has not adopted that view.¹⁷¹ In recent years, the Court has even held that conduct otherwise proscribable by generally applicable criminal laws can still secure First Amendment protection if government proscribes it primarily for its communicative impact.¹⁷²

To be sure, this last, rather formalistic reasoning has an edge to it that could theoretically threaten to cut deeply into claims for protecting sex as expression. In the field of sexualized speech, the Supreme Court has struggled to determine when regulation is truly enacted without regard to the conduct’s communicative functions. Justice O’Connor and Chief Justice Rehnquist have claimed that states can simply assume to focus on sexualized conduct’s harmful “secondary effects” as long as legislative “experience” assumes such harms to exist, even without any factual proof.¹⁷³ Justice Scalia, who once doubted such analysis could survive intermediate scrutiny, seems to have converted to the contrary view,¹⁷⁴ but Justices Souter, Breyer, and Kennedy now seem to doubt it, if

169. See *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 283, 289 (2000) (plurality opinion) (holding that nude dancing is entitled to First Amendment protection even where an ordinance banned public nudity as a “summary offense”); *Barnes v. Glen Theatre*, 501 U.S. 560, 563-66 (1991) (noting that even where public nudity is a misdemeanor, publicly nude dancing can curry First Amendment protection).

170. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984)).

171. See *Barnes*, 501 U.S. at 575 (Scalia, J., concurring) (taking issue with the plurality for not recognizing that certain laws criminalizing sex could not be presumed by tradition to deserve First Amendment protection); see also *PAP’s A.M.*, 529 U.S. at 310 (Scalia, J., with Thomas, J., concurring) (“The traditional power of government to foster good morals (*bonos mores*) . . . have [sic] not been repealed by the First Amendment.”).

172. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (holding that, despite general laws against burning objects in public, cross burnings still deserve First Amendment protection, reasoning that “nonverbal expressive activity can be banned because of the action it entails, but not because of the idea it expresses”).

173. Justice O’Connor and Chief Justice Rehnquist were in the plurality in both *PAP’s A.M.*, 529 U.S. at 282-302, and in *Barnes*, 501 U.S. at 562-72.

174. Compare *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) (Scalia, J., dissenting) (agreeing that it is now precedent that secondary effects assumed primarily from experience can survive intermediate scrutiny) with *Barnes*, 501 U.S. at 580 (Scalia, J., concurring) (“*Paris Adult Theatre I v. Slaton* . . . and *Bowers v. Hardwick* . . . did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held

only in subtle ways, despite once embracing it without qualification.¹⁷⁵ Still, in closely analogous contexts, the Court as a whole seems to be in agreement that if those seeking protection for sexualized expression can show “actual and convincing” evidence countering “common experience” alleging harms from such expression, legislative assumptions about those harms will not validate regulations so easily.¹⁷⁶

This is particularly important for those arguing for First Amendment protection for sex, precisely because the Court has given wide latitude to state and local governments in regulating sexualized expression because of the alleged effects it has on the public quality of life.¹⁷⁷ Though the Court has claimed that “sex and obscenity are not synonymous,” it has also held that expression that “excites” desire, longing, and other lustful thoughts is obscene¹⁷⁸—such that if sex were recognized as a form of expression, only the dullest and most passionless forms of sex might be entitled to protection. To be sure, the Court has since limited the definition of obscenity to that which is “patently offensive” and lacks other “value.”¹⁷⁹ But it has also left the definition of what is offensive to community standards,¹⁸⁰ and has suggested—again without explanation—that some “displays of sexual activity” may be deemed so “lascivious” that even discriminatory suppression of it may be constitutional.¹⁸¹ If these doctrinal positions were ever deemed relevant to the regulation of sex, political communities could, without proof, claim that certain forms of sex are *presumptively* harmful to the public quality of life. The very existence of laws criminalizing oral and anal sex only

that those concerns were particularly ‘important’ or ‘substantial,’ or amounted to anything more than a rational basis for regulation”) (citations omitted).

175. Justice Souter advocated the “secondary effects” test in *Barnes*, 501 U.S. at 583-84 (Souter, J., concurring), but defected from that view in *PAP’s A.M.*, 529 U.S. at 310-317. Justices Kennedy and Breyer concurred with the view as late as *PAP’s A.M.*, 529 U.S. at 301, but in analogous contexts Justice Kennedy has since claimed to hold that experience also probably requires some form of study or factual analysis to support the suppression of speech. See *Alameda Books, Inc.*, 535 U.S. at 451 (claiming “very little evidence is required” to sustain regulation, such as a single study and experience), while Justice Breyer has seemed to doubt the usefulness of “common experience,” though only in application. See *id.* (dissenting from the majority only on the application of experience about secondary effects to certain types of adult businesses).

176. *Alameda Books, Inc.*, 535 U.S. at 438-39; see also *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 394-395 (2000) (“invocation of academic studies” is not enough to counter state and local experience where “studies are in conflict”).

177. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973).

178. *Roth v. United States*, 354 U.S. 476, 487 (1957).

179. *Miller v. California*, 413 U.S. 15, 24 (1973).

180. *Id.* at 25.

181. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

when it is between men or between women surely demonstrates the will of those communities to do just that.¹⁸²

But the Court's decision in *Stanley v. Georgia*¹⁸³ should have put those concerns to rest as it discredited the notion that purely private expression could affect the public sufficiently to warrant its regulation, reasoning that private expression bears little risk of "intrud[ing] upon the sensibilities or privacy of the general public."¹⁸⁴ Before *Stanley*, the Court had primarily approved of protection of "public morals" as a valid governmental interest only when sex had entered the public sphere, through "commerce" or "exploitation" by film or pictures for public consumption.¹⁸⁵ But because the *Stanley* Court could not find a scenario by which private expression could reach the public, it had to conclude that regulation of expression on "moral grounds" was a bare attempt to regulate private thoughts, seemingly embracing the view that governmental attempts to extend "public morals" into private spheres is inherently an expressive, inculcative act.¹⁸⁶

From this perspective, the Court's evolving understanding of conduct as a form of expression suggests that if the Court were to consider a claim for First Amendment protection of sex, it could find that the claim is grounded on well-established principles. The Court's test for determining whether conduct is expressive, set forth in *Spence v. Washington*,¹⁸⁷ is unqualified by any "objective" criteria. Instead, it turns solely on whether the person engaging in the conduct has "[a]n intent to convey a particularized message" and whether "the likelihood was great that the message would be understood by those who viewed it."¹⁸⁸ While the *Spence* test might require individuals engaged in sex for pleasure to allege more than a "kernel" of expression in their activity to earn First

182. See, e.g., *Lawrence v. State*, 41 S.W.3d 349, 356 (Tx. Ct. App. 2001) (upholding Texas' criminalization of oral and anal sex between men or between women on the grounds that Texas could reason that "when performed by members of the same sex, [such sex] is an act different from or more offensive than any such conduct by members of the opposite sex").

183. 394 U.S. 557 (1969).

184. *Id.* at 567.

185. *Miller*, 413 U.S. at 26.

186. *Stanley*, 394 U.S. at 565 ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch"). This view directly challenges Justice Scalia's attempt to distinguish morals regulation from a concern about the communicative impact of speech. See *Barnes v. Glen Theatre*, 501 U.S. 560, 575-77 (1991) (Scalia, J., concurring) (claiming that "[t]here is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality,'" but also holding that it is impermissible for states to target conduct for its "expressive impact").

187. 418 U.S. 405 (1974).

188. *Spence*, 418 U.S. at 410-411.

Amendment protection, that same test facially requires courts to defer only to those who claim they engage in sex when it is private to determine its expressive value—not the public, not a state or local legislature, and certainly not judges themselves—none of whom are likely to have been “those who viewed” sex when it has been shielded from the public.¹⁸⁹

Unfortunately, when Michael Hardwick loosely tried to analogize his sexual activity to a form of expression in staking out his claim to a right to privacy,¹⁹⁰ the United States Supreme Court dismissed his analogy with little analysis.¹⁹¹ Comparing oral sex between Hardwick and his lover only to crimes “such as the possession and use of illegal drugs,”¹⁹² the Court concluded that *Stanley* and its respect for private sexual expression did not apply to Hardwick’s sexual activity, because *Stanley* was “firmly grounded in the First Amendment,” where Hardwick’s claim allegedly was not.¹⁹³ To make matters troubling for future claimants, the Court suggested that it failed to see a comparison between sex and expression not only in Michael Hardwick’s activity, but in a wide variety of sex, reasoning broadly that if *Stanley*’s principles were extended to protect other “voluntary sexual conduct between consenting adults,” it would be difficult to prosecute “adultery, incest, and other sexual crimes.”¹⁹⁴ Apparently, this was so regardless of whether conduct implicated by those “crimes” was expressive, or whether any harms related to such “voluntary sexual conduct” could justify their regulation under established First Amendment tests.

Nevertheless, as Professors Cole and Eskridge have argued, the *Hardwick* majority opinion cannot constitute a decision on a true First Amendment claim for sex.¹⁹⁵ Had Hardwick made a First Amendment claim for sex as expressive conduct, the Court could not have evaluated his liberty interest under rational basis review.¹⁹⁶ It certainly could not

189. While the Court in *Spence* reasoned that it was likely that a “great majority of citizens” would have understood that a peace symbol displayed on a flag was meant to communicate a message of protest and peace, the public’s view was relevant because the protester in *Spence* displayed the flag to the general public, as the Court explained, “those who viewed it.” *Id.*

190. See Brief for Respondent at 15-16, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (drawing on *Stanley* to emphasize the right to privacy was the “added dimension” that protected sexual speech differently from protection of obscenity in public).

191. *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986).

192. *Id.* at 195.

193. *Id.*

194. *Id.* at 195-96.

195. See Cole & Eskridge, *supra* note 27, at 322.

196. Compare *Hardwick*, 478 U.S. at 196, with *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 289 (2000) (noting that as long as some minimal form of expression can be found in conduct

have done so without dismissing the conduct as expression first under the *Spence* test, had Hardwick actually claimed that he intended to express an idea or feeling with sex. Even if Hardwick had made a First Amendment claim, the Court would have been hard pressed to dismiss it without two-dimensional reasoning—that sex is protected under the First Amendment only if flattened into a photograph or a filmed image, but not if it remains live and in the flesh.¹⁹⁷ That reasoning is not only at odds with the Court’s nude dancing cases and its expressive conduct jurisprudence, it is flatly at odds with the Court’s command in *Spence* to look to the parties engaged in expression to determine whether First Amendment protection extends to it, rather than some categorical definition of what is “not expression” for all time.¹⁹⁸

As I explain below, any doubt about this argument should be cast aside by the Court’s decision in *BSA v. Dale*, where the Court deferred to the BSA’s assertion of expression which derived specifically from a homosexual conduct policy and a scout leader’s sexual activity.¹⁹⁹ But it is also rebutted by the abundance of data suggesting that men who have sex with men intend to express feelings and ideas that their partners understand through sex.²⁰⁰ Indeed, that data makes the Court’s simplistic rejection of Hardwick’s First Amendment analogy particularly vicious in its dismissiveness of the expressiveness of sex. In these terms, the Court’s reasoning about sex in *Hardwick*, if it can be called that, can have

under established tests, the minimum level of scrutiny is intermediate scrutiny). *See also* *Barnes v. Glen Theatre*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (“*Paris Adult Theatre I v. Slaton* . . . and *Bowers v. Hardwick* . . . did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly ‘important’ or ‘substantial,’ or amounted to anything more than a rational basis for regulation”) (citations omitted).

197. SUSAN GRIFFIN, *PORNOGRAPHY AND SILENCE: CULTURE’S REVENGE AGAINST NATURE* 34 (1981) (“The man who stares at a photograph of a nude woman is a voyeur. He can look freely and turn away when he wishes. He can run his hands over the two-dimensional surface, but he will not be touched. He can know the body of a woman, and yet encounter a knowledge that will not change him. . . .”); CATHERINE MACKINNON, *ONLY WORDS* 17 (1993) (“With pornography, men masturbate . . . [t]he women are in two dimensions, but the men have sex with them in their own three-dimensional bodies, not in their minds alone”).

198. Indeed, the Court in *Spence* made clear that the peace symbol displayed on a flag at issue might not be well understood by an audience at a time distant from the controversy, but would be very likely to be understood by the intended audience when that expression occurred: during the “Cambodian incursion and the Kent State tragedy[,] . . . issues of great public moment.” *Spence v. Washington*, 418 U.S. 405, 410 (1974). The *Spence* Court emphasized this by noting that the wearing of black armbands during the Vietnam war was likely to be understood to convey a particular message during that controversial time period, even if it would have been widely viewed as mere clothing in another context. *Id.* at 410 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-514 (1969)).

199. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

200. See the discussion *supra* Part I.B.

no more value than that which the Court claimed to see in sex between men, and must be understood to leave open a true claim for First Amendment protection for sex.

III. SHIELDING EXPRESSIVE CONDUCT IN AN EXPRESSIVE ASSOCIATION:
THE SUPREME COURT'S DECISION IN *BOY SCOUTS OF AMERICA V. DALE*

QUESTION: Let's assume you're still in the Scouts and one of the Scouts asks you for dating advice, about dating girls . . . If a boy came to you and said, "I'm having trouble with girls. How do you deal with girls? What kind of girls do you date?"

DALE: It depends. It's hard to think any other way because I am who I am now and I don't know any other way.

QUESTION: Well, you had dated girls, you said. So it could be that . . . you could have given a half answer. . . .

DALE: No I probably would be honest. I would say, you know, I don't date girls. I date guys.

QUESTION: . . . The Scouts asked that question. I'll read it to you from the brief. They say about you, "What if during a discussion of sexual morality James Dale interjects his own views? What if he brings a significant other to a boy scout banquet?"

DALE: So what?

QUESTION: Would you? I mean, after you had come out, if you had not been expelled, would you have?

DALE: Then no, now yes.

Excerpts from an interview with James Dale²⁰¹

A. *The Facts: The Nonverbal Conflicts Between the Boy Scouts of America and James Dale*

The story of the legal conflict between the Boy Scouts and James Dale centers on ideas about sex, even though the legal academy's commentary on the case peculiarly lacks focus on that subject.²⁰² Rather, much of the commentary fractures around questions of whether the BSA had a highly verbal history of opposing gayness, and whether an abstract

201. Interview with James Dale (August 21, 2001) (transcript and recording on file with author) [hereinafter Dale Interview].

202. See sources cited *supra* notes 25-26 and accompanying text for illustrative commentary.

“ordinary man” who happens to be openly gay outside the Scouts could jeopardize an allegedly anti-gay group’s teachings by trying to serve as a group leader. But James Dale is neither an abstract or an ordinary man. The high profile of his litigation has proven what his troop must have known for years: James Dale is a striking man, not just in his eloquence on matters related to sexuality, but in his compassion, his ability to project open-mindedness, and—as popular commentary often understandably stops to note—his physical attractiveness.²⁰³ Particularly since the Supreme Court held that James Dale threatened scouting by his “presence,”²⁰⁴ it is not difficult to wonder just how much of James Dale’s sexual presence actually haunted the Supreme Court Justices and the BSA, who may have worried about young gay scouts becoming erotically aware of their own potential homosexuality in that presence, looking to Dale, perhaps justifiably, for guidance on how to live.

In its details, the true story of the dispute between the BSA and Dale is not a simple one. It is a complex story of evolution—with both parties sharpening their views about sexuality and making them more public over time. As Dale showed by his extremely honest and complex answers to an interview conducted for this Article, his feelings of how he would fit in with the BSA differ today than at the time he was expelled.²⁰⁵ Dale was never given the chance to see if he would have felt it necessary to be open about his sexuality in scouting, which he once believed to be a place where sexuality questions seldom came up and where gay-bashing, to his knowledge, was nonexistent. Today, Dale’s speculation on how he would respond to homophobia in the BSA and inquiries about sexuality is shaped by his own maturity, as well as the aggressively anti-gay posture assumed by the BSA in defending his expulsion—neither of which were available to Dale at the time of that expulsion.

Dale joined the Boy Scouts in 1979 when he was eight years old.²⁰⁶ Though he began to suspect he was gay some years thereafter and through most of his scouting, today he does not recall either the BSA or his troop officially teaching students about homosexuality through any oral or written instructions.²⁰⁷ BSA documents confirm Dale’s recollection: the only verbal instruction related to sexual matters given to

203. For commentary remarking on this point, see JOYCE MURDOCH AND DEB PRICE, *COURTING JUSTICE* (2001) at 3 (describing Dale’s “Kennedyesque” good-looks); Erik Meers, *The Model Boy Scout*, *THE ADVOCATE*, Apr. 14, 1998, at 46-47 (describing Dale as overtly “handsome” and “charismatic”).

204. *Dale*, 530 U.S. at 653.

205. *See infra* notes 267-283 and accompanying text.

206. *Dale*, 530 U.S. at 644.

207. Dale Interview, *supra* note 201.

scouts during this time period appears to have come from a 1972 edition of the *Boy Scout Handbook*, which described “manliness” as including a man’s responsibility to his children through marriage, at most only discouraging premarital sex by telling boys that they can develop a fuller understanding of sexuality through fatherhood and marriage, presumably to women.²⁰⁸

The BSA, in fact, maintains that it has always primarily taught “family-oriented values” through the use of heterosexual role models in individual troops, and that it has rejected scout leaders it presumed to be engaged in homosexual conduct while presenting themselves as role models.²⁰⁹ For the most part, the BSA appears to have used the tactic of verbally invoking homosexuality primarily to challenge certain scout leaders in litigation.²¹⁰ The BSA also claims that its policy of barring “homosexuals” from scout leadership was once consistent with New Jersey law criminalizing gay sex the year Dale joined the Scouts, though the BSA obviously did not change its conduct policy when the New Jersey legislature repealed that law.²¹¹

Prior to 1979, the BSA promulgated only one policy statement supporting denials of leadership positions to gay men, though it did not disseminate that policy statement to troops and leaders,²¹² and cautioned at the time that if anti-discrimination laws were in place prohibiting sexual orientation discrimination, the BSA would consider complying with those laws.²¹³ Counsel for BSA now claims, somewhat contrary to statements made personally to James Dale,²¹⁴ that the BSA has never had

208. Brief for Petitioner at 4-5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

209. *Id.* at 4-7.

210. Brief for Petitioner at 7, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). *See also*, *Boy Scouts of Am. v. Teal*, 374 F. Supp. 1276, 1278 (E.D. Pa. 1974) (describing efforts of local scout troop, and BSA in litigation, to use defendant’s alleged homosexuality as a reason to question his leadership.).

211. Brief for Petitioner at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

212. Brief for Respondent at 4, n.4, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (noting that none of the documents dating back to 1978 were circulated).

213. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 671-73 (2000) (Stevens, J., dissenting) (quoting the 1978 policy statement as “Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy,” but “*in the event that* such a law was applicable, it would be necessary for the Boy Scouts of America to obey it.”)

214. *See infra* notes 244-246 and accompanying text. The Scouts omitted discussion of letters indicating to the contrary to the U.S. Supreme Court. *See* Brief for Petitioner at 8, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

a policy barring celibate, closeted homosexuals from scouting.²¹⁵ The BSA bolsters that claim by further claiming not to inquire into anyone's sexual orientation.²¹⁶

Just after Dale joined the BSA, Tim Curran, a gay man and former Eagle Scout, sued the organization under California's public accommodations law, challenging the denial of his application for leadership and revocation of his Scout membership.²¹⁷ Curran came out to his family at age seventeen,²¹⁸ and made his sexuality publicly known by taking another boy to his high school prom,²¹⁹ an act that Curran considered a "political statement."²²⁰ Curran continued in scouting events until 1980, when the *Oakland Tribune*, among other newspapers, ran a story on his prom appearance.²²¹ The BSA denied Curran's application to stay with the organization as a leader, later maintaining that Curran sought to teach young scouts that there is "nothing wrong with 'the homosexual lifestyle,'" something Curran refused to disavow.²²² Curran sued in 1981, and BSA representatives defended their regulations in the

215. Statement of George A. Davidson, Oral Argument, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000):

MR. DAVIDSON: . . . if [a person had a homosexual orientation] and that person also were to take the view that the reason they didn't engage in that conduct, it would be morally wrong . . . and that's the view that would be communicated to youth . . . that person would not be excluded.

QUESTION: But somebody who was homosexual and celibate, but who said, in my view it isn't morally wrong, would such a person be excluded?

MR. DAVIDSON: Justice Ginsburg, I'm not sure I got the nots right in that question, but if somebody said it was morally wrong, and that they didn't engage in it but did have homosexual inclinations, I believe that that person would be eligible for leadership, as I understand the policy.

216. Brief for Petitioner at 6, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

217. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 48 Cal. App. 4th 670, 682 (1994).

218. Maria Wilhelm, *He's Gay, but a California Eagle Scout Says His Adult Leader Application Should Be Judged on His Merits*, PEOPLE, Nov. 7, 1983, at 139.

219. See *The Case of the Illegal Eagle*, WASH. TIMES, Dec. 26, 1990, at D2 [hereinafter *Illegal Eagle*].

220. *Gay Eagle Scout Strikes Back*, WASH. POST, May 1, 1981, at A12.

221. See *Homosexual Loses Bid to Become Scout Leader*, L.A. TIMES, Jul. 8, 1981, at A10 (summarizing the news coverage).

222. *Curran*, 48 Cal. App. 4th at 683.

press.²²³ According to Curran, the BSA's fight to discharge him branded him publicly "immoral" because of his sexuality.²²⁴

Despite the Curran litigation, Dale recalls no discussions of homosexuality in his scout troop, from the time he joined the BSA through 1990.²²⁵ While Dale specifically recalled anti-gay comments of the "locker-room" variety outside the Scouts, especially in his junior high years,²²⁶ he recalls scouting as being less homophobic,²²⁷ particularly because he felt that it valued him according to his accomplishments, and allowed him to spend more time with a mix of adults and youth who did not routinely place emphasis on sex as a route to masculinity.²²⁸ Throughout his time with the BSA, no scout leader ever even asked him about his sexuality.²²⁹ By the time he completed scouting at the age of eighteen, Dale had become a highly decorated Eagle Scout, and members of his local troop encouraged him to apply to become a scout leader.²³⁰ Dale was accepted as a scout leader and occasionally attended scouting events, again without any inquiry into his sexuality.²³¹

By his own account, Dale "came out" as a gay man at the age of nineteen, just after he had become a scout leader.²³² Dale does not claim that "coming out" was the starting point at which he "became" a gay man.²³³ In fact, he denies that he conformed to the BSA's ideal of a "good gay Scout"—one who was celibate and closeted—during his final days as a scout leader.²³⁴ Before he turned eighteen, Dale suspected he was gay but did not publicly declare it.²³⁵ Though important to Dale personally, he maintains that his "coming out" was not merely the point at which he was able to accept his sexuality, but was also his way to identify as gay to others and to become more involved in the gay community.²³⁶ He became the co-president of the Gay/Lesbian Alliance

223. See Wilhelm, *supra* note 218, at 140 (Scout representative referring to sexual activity and the "lifestyle" as incompatible with leadership); UPI, *Domestic News*, Apr. 30, 1981 (wire report) (quoting General Counsel of the BSA as claiming that "homosexuality" and "scouting" are incompatible).

224. UPI, *supra* note 223.

225. Dale Interview, *supra* note 201.

226. *Id.*

227. See Meers, *supra* note 203, at 46-47.

228. Dale Interview, *supra* note 201.

229. *Id.*

230. *Id.*

231. *Id.*

232. See Meers, *supra* note 203, at 48.

233. Dale Interview, *supra* note 201.

234. *Id.*

235. *Id.*

236. *Id.*

at Rutgers University during his sophomore year, again without any inquiry by the BSA about his sexuality or fitness as a scout leader.²³⁷ During this time period, however, Dale refrained from disclosing his sexuality directly to his troop.²³⁸ Through the summer of 1990, he also did not exhibit any behavior that would have identified him as gay at any scouting event.²³⁹

On July 8, 1990, the Newark *Star-Ledger* published a photograph of Dale and an interview with him, covering an event at which Dale appeared for gay youth.²⁴⁰ In the interview, Dale admitted that he had pretended to be straight in high school and described what life was like as a closeted gay youth earlier in his life, hearing anti-gay epithets from his peers.²⁴¹ Dale briefly explained to the *Star-Ledger* that he came out in college and emphasized the need for gay role models for other gay youth.²⁴² Several other scout leaders of the Monmouth Council governing Dale's troop saw the article and forwarded it to Council headquarters.²⁴³ Days later, the Council revoked Dale's membership by letter.²⁴⁴ Dale immediately wrote back to the BSA asking for clarification of his termination and was informed, again by letter, that the BSA "specifically forbids membership to homosexuals"²⁴⁵ and that "homosexuals," without qualification, did not meet BSA's standards for leadership.²⁴⁶

In early autumn, Dale took his case to the Lambda Legal Defense and Education Fund ("Lambda").²⁴⁷ By letter in November, Dale was informed by the head of the BSA Review Committee that it supported his troop council's decision, and in December, was told by BSA's in-house counsel that there was "no useful purpose" in having Dale appear at the review hearing because the BSA had already determined that "avowed homosexuals" were "ineligible for membership."²⁴⁸ At no time did anyone from the BSA engage in any other inquiry or hearing to ask Dale if he was a sexually active gay man, or if he had ever engaged in

237. *Id.*

238. *Id.*

239. *Id.*

240. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 690 (2000) (Stevens, J., dissenting).

241. *Id.* (Stevens, J., dissenting).

242. *Id.* (Stevens, J., dissenting).

243. Brief for Petitioner at 8, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

244. Brief for Respondent at 6-7, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

245. *Id.* at 7.

246. *Dale v. Boy Scouts of Am.*, 734 A.2d. 1196, 1205 (N.J. 1999).

247. *See* Meers, *supra* note 203, at 48.

248. Brief for Respondent at 7, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699); *Dale*, 734 A.2d. at 1205.

gay sex.²⁴⁹ Based on the letter, Dale and his attorneys concluded that his expulsion was final and that only litigation against the BSA could reverse that decision.²⁵⁰

In the months immediately following Dale's discharge, the BSA's discriminatory conduct toward gay scout leaders garnered national attention, particularly after a California trial court ordered the BSA to reinstate Tim Curran as a member of the BSA, pending resolution of the BSA's claim that application of California's civil rights laws to the BSA violated its First Amendment rights.²⁵¹ In February 1991—after James Dale was expelled—the BSA produced its first official policy statement since 1978 declaring opposition to “known or avowed homosexuals” as scout leaders, and produced three more such statements over the next two years.²⁵² Shortly after New Jersey amended its law to prohibit discrimination in public accommodations on the basis of sexual orientation, Dale sued the BSA and his troop council, charging them with discriminating against him solely on the basis of his sexual orientation and seeking reinstatement to the Scouts.²⁵³

Perhaps not remarkably, given the BSA's relative internal silence on homosexuality, little verbal attention was paid in the litigation to James Dale's actual sex life. Over the course of the litigation, Dale was declared a “sodomist” by a trial judge,²⁵⁴ though no one deposed Dale about his sexual activity.²⁵⁵ And even though the litigation immediately thrust Dale's sexual identity into the national spotlight through profiles in national publications such as *The New York Times*, none of the publicity mentioned his sexual activity.²⁵⁶ Even the mainstream gay press refrained from publishing information about Dale's sex life.²⁵⁷ Drawing on support from his record in scouting, the national media only portrayed Dale as an

249. Dale Interview, *supra* note 201.

250. *Dale*, 734 A.2d. at 1205.

251. *See, e.g., Illegal Eagle*, *supra* note 219.

252. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 673-74 (Stevens, J., dissenting).

253. *Dale*, 734 A.2d. at 1200-1205.

254. *Dale v. Boy Scouts of America*, 706 A.2d 270, 285 (N.J. App. 1998).

255. Dale Interview, *supra* note 201.

256. *See, e.g.,* Victoria A. Brownworth, *From an Eagle Scout to a Persona Non Grata*, N.Y. TIMES, Aug. 15, 1992, at B4; Associated Press, *Ex-Eagle Scout Sues Over Ban on Homosexuals*, N.Y. TIMES, Jul. 30, 1992, at B4; David Tuller, *Group Challenges Scouting's Gay Barrier*, S.F. CHRON., Jul. 18, 1992, at A13; Carol M. Ostrom, *Expelled Scout Is Taking Lessons to Heart*, SEATTLE TIMES, July 10, 1992, at A2.

257. Dale Interview, *supra* note 201.

exemplary Boy Scout²⁵⁸—a characterization later accepted by the United States Supreme Court.²⁵⁹

Since the time of Dale's discharge, the BSA has maintained that it has always had a clear policy on sex, but otherwise did not teach that homosexuality is wrong through any verbal lessons or written materials.²⁶⁰ According to the BSA, "[o]fficial Scouting materials addressed to the boys do *not* refer to homosexuality or inveigh against homosexual conduct."²⁶¹ The BSA, in fact, has conceded that none of its handbooks or materials distributed to scouts were intended to "catalog immoral behavior for Boy Scouts."²⁶² Moreover, the BSA did not distribute its policy statements objecting to "known or avowed homosexuals" to troops throughout the country, nor did it require scouts or scout leaders to pledge restraint from homosexual sex prior to accession to membership or while assuming a leadership position.²⁶³ In fact, the BSA has continued to require investigation of a scout's homosexuality to be "discreet" only if it became known, and confined most of its public statements about its policy to litigation.²⁶⁴

To the public, of course, the BSA's recent retrenchment on its policy of discharging gay men has now positioned it politically as an anti-gay organization. Though active scouting officials refrained from appearing in the national press, the BSA's repeated announcements of resistance to anti-discrimination laws and to movements within the organization to end its policy towards members like Dale and Curran have heightened its perceived anti-gay status.²⁶⁵ Litigation has particularly kept the BSA in the press, pushing its anti-gay stance into national news headlines and turning the BSA into a symbol of exclusion and intolerance.²⁶⁶

258. See sources cited *supra* note 256 and the publicity referenced therein.

259. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) ("By all accounts, Dale was an exemplary Scout").

260. Brief for Petitioner at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

261. *Id.* (emphasis added).

262. *Id.*

263. *Dale*, 530 U.S. at 674 & n.5; Brief for Respondent at 4, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

264. Dale Interview, *supra* note 201.

265. See, e.g., *New Knots of the Scouts*, THE ADVOCATE, Oct. 10, 2000 at 13 (describing how Hollywood and national figures increasingly denounced the Scouts in the wake of *Dale*); Kate Zernicke, *Scouts' Successful Ban on Gays Is Followed By A Loss of Support*, N.Y. TIMES, Aug. 29, 2000, at A1.

266. See, e.g., Dateline NBC: Scout's Honor (NBC Television Broadcast, Aug. 24, 1999); Elaine Rivera, *All for a Scout's Honor: New Jersey Rules Against Boy Scouts in Latest Skirmish over Gay Rights*, TIME, Aug. 16, 1999, at 33; *Outlook/People in the News*, U.S. NEWS & WORLD REP., Aug. 16, 1999/Aug. 23, 1999, at 18; Anne E. Kornblut, *Boy Scouts' Ban on Gays Is Illegal*, BOSTON GLOBE, Aug. 5, 1999 at A1; CBS Morning News: Issue of Homosexuality in the Boy

To this day, Dale maintains that until the BSA took on such an anti-gay stance as a national matter, he always viewed the BSA primarily as a place where sexuality was not an issue, and considers it a place where sexuality still probably does not often come up, at least verbally.²⁶⁷ With that view of scouting in mind, Dale insists that at the time of his discharge he never had any plan or general intention to make sexuality an issue in his troop, and that he certainly had no intention to bring it up or introduce his sexuality into Scouting events.²⁶⁸ He further insists that he would not have made an effort to make a point about his sexuality through public displays of affection, such as taking a male date to a Scout banquet, primarily because he never considered himself the type of person to exploit his personal life to make a political statement.²⁶⁹

But the transformation of the BSA—from an organization that randomly engaged in fights against gay scouts to a national organization opposing anti-discrimination efforts—has clearly impacted Dale’s view of the Scouts.²⁷⁰ Dale maintains that if the BSA had been the anti-gay organization it is now, he probably would not have sought to be reinstated.²⁷¹ And Dale believes that the reaction of schools and local communities that are now challenging BSA policy on homosexuality confirms his view that the BSA of today is not the BSA of the past.²⁷²

Dale also acknowledges that speculation about how he would serve as a scout leader permits few categorical answers, especially as his expulsion prevented him from knowing if he would have felt comfortable keeping his sexuality from scouts if sexual issues arose in his troop.²⁷³ Moreover, Dale emphasizes that he is not the same man that he was when he was expelled more than ten years ago.²⁷⁴ Dale has strongly and consistently affirmed that he has always wanted to live his life as anyone would, not having to hide his relationships and sexuality, or even needing to declare it.²⁷⁵ But Dale also feels that he would have faced judgment

Scouts of America to be Taken to the United States Supreme Court (CBS Television Broadcast Aug. 5, 1999).

267. Dale Interview, *supra* note 201.

268. *Id.*

269. *Id.*

270. See, e.g., Jane Gross, *Scouting Debate Leaves Children Caught in the Middle; Uproar Over Excluding Gays Disrupts Young Lives*, N.Y. TIMES, Oct. 1, 2000, § 1, at 33; Debra Galant, *Breaking Camp*, N.Y. TIMES, Apr. 1, 2001, § NJ, at 14 (describing Scouts “reel[ing] from the fallout” of the litigation and experiencing “bad publicity”).

271. Dale Interview, *supra* note 201.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

calls in scouting regarding candor about sexuality just as many gay people face those same judgment calls in life—those based on perceptions of how others will handle the disclosure, and how much energy one would want to invest, on any particular day in time, in bearing the burden of helping others understand what it means to be gay.²⁷⁶ Dale feels this is sometimes even more true for him today, as his notoriety surrounding his expulsion from the BSA has sometimes threatened to exhaust his interest in defending his sexuality.²⁷⁷

On these terms, Dale can only cautiously speculate how he might respond to the BSA's policy had he never been expelled.²⁷⁸ He is certain that he would not pledge to the BSA that he would refrain from having sex with men, and that he would not pledge to teach that homosexuality is immoral.²⁷⁹ But today, at least, he also feels, had he been allowed to stay in the BSA, he would not expect to behave differently from any other adult scout leaders whose dates or loved ones might become known, if, for example, a boyfriend or partner were to drop him off at a scouting event, kiss him goodbye, or accompany him to a scouting event, just as a matter of being together.²⁸⁰

Now, more than a decade after “coming out” as a gay teenager, Dale concedes that his openness about his sexual identity might allow others to assume he has “intimate relationships” with men, and he would not equivocate to the contrary about his sexuality if asked.²⁸¹ Specifically, Dale speculates that if he were serving as a scout leader and discussion at a troop gathering turned to the morality of homosexuality, he would not let the discussion turn homophobic, nor would he refrain, if pressed, from disagreeing with the view that homosexuality is immoral.²⁸² And if asked for advice about dating girls by young scouts, particularly if asked about his own dating life, Dale posits that he would probably correct any false impression about his identity and indicate that he does not date women but instead dates men.²⁸³

These facts all indicate that by the time the case reached the Supreme Court, the conflict between James Dale and the BSA was a very different one from when Dale served in the Scouts, or even when he was discharged. As the litigation rolled along, the positions of both

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

James Dale and the BSA changed. James Dale not only became nationally known as a gay man, he matured in ways that could have impacted his tolerance for being closeted while on Scouting duty. And the BSA had become known nationally as an organization opposed to homosexuality, even if it gave all of its verbal instruction on that topic through the press and courts and said nothing about homosexuality directly to young scouts.

And yet, while, in many ways, the BSA's case seems to have been influenced by that conflict, what the Court did in *Dale*, and the cryptic things it said, suggests that it was aware that it had to base its holding on a very different case—one firmly based on the time of Dale's discharge, where the conflict was between a man who was likely to have intimate relationships with other men and an organization that made no claim that it took any verbal position on homosexuality beyond its private "homosexual conduct" policy. It was this case that stood at the heart of the decision in *Dale*, even if so many of the words in the majority's opinion suggested that the Court might be concerned about something different altogether—something only *potentially* nonverbal.

B. The Supreme Court's Decision: The Holding

There are several grounds upon which the Court's decision in *Dale* could have rested that would have made sense in associational terms, especially given the BSA's claim that it taught opposition to homosexual sex, and implicitly made that point by expelling "gay activist" scouts. The Court could have held that if James Dale was publicly known as both a scout and an activist, the BSA could have asked for a right to withdraw its brand from his activism, which it did not appear to endorse by association. To the extent that the BSA required its leaders to answer "honestly" any question put to them by young scouts, and did not want its leaders to endorse gay sex,²⁸⁴ the Court also could have held that inclusion of a "gay activist" would at least *risk* that that activist would reveal a belief that sex with someone of the same gender was not wrong, thus triggering a message the BSA did not want to carry. But nothing in the *Dale* majority's opinion even implicitly supports such reasoning.

The problems deciphering *Dale* begin with the majority's incoherent use of the term "homosexual."²⁸⁵ On this point, the opinion is a virtual model of verbal ineffectiveness. With several prior Court decisions at its

284. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 668-69 (2000) (Stevens, J., dissenting) (comparing the BSA's policy and claims).

285. See *id.* at 648-657.

disposal, the *Dale* majority should have been well aware that the term “homosexual” could mean both a person who merely *desires* sex with a person of the same gender and a person who *has* sex with such a person.²⁸⁶ But the Court’s use of the term never made clear what its intended meaning was, either in the context of the phrase “avowed homosexual” (one who avows he has homosexual sex or mere desire for it?)²⁸⁷ or even worse, “homosexual conduct” (*any* “conduct” by a “homosexual,” including seeking reparative therapy or conduct *conforming* to BSA policy?).²⁸⁸

Regardless of whether the majority believed there is a meaningful difference between a person who desires same-sex intimacy and one who acts on that desire, the BSA certainly claimed not to favor exclusion of persons who merely desire homosexual sex, and the Court should have spoken more clearly to the distinction as a result of the very distinction the BSA made. Dale’s “avowal” as a “homosexual” could very well have meant that he was the type of “homosexual” the BSA claimed to embrace—one who desires same-sex intimacy but has pledged not to act on it.²⁸⁹ And yet the Court made no attempt whatsoever to determine what type of “homosexual” Dale was, and seemed to have simply assumed that his “avowed” sexuality conflicted with BSA policy.²⁹⁰

286. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (protecting people of homosexual orientation and behavior from discrimination); *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986) (accepting the description of Hardwick as a “practicing homosexual,” presumably, to avoid redundancy, meaning one who has a desire for sex with people of the same sex *and* “practices” it); *Boutelier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (using homosexual as an adjective to describe a pattern of behavior). For further discussion of the varied meanings of the term “homosexual,” *see* DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988).

287. *Compare Dale*, 530 U.S. at 646 (“avowed homosexuality”) *with id.* at 655 (“an avowed homosexual”).

288. The Court has used the absurd euphemism “homosexual conduct” to refer to homosexual sex. *See Hardwick*, 478 U.S. at 195 (clearly referring to a claim for a right to engage in homosexual oral sex as “homosexual conduct”). In this sense, the phrase “homosexual conduct” is especially nonsensical: if “conduct” is used to distinguish “homosexual” from something that is not based in conduct, then it is inherently too broad, as it could include breathing or eating. To the extent “homosexual” implies “sex,” the addition of “conduct” to it is superfluous.

289. If the Court disbelieved the distinction, it would have no basis for doing so. *See* NHSLS, *supra* note 30, at 290-91. For example, Gay Catholics who are faithful to Catholic doctrine are supposed to remain chaste but are to be accepted as gay. *See* CATECHISM FOR THE CATHOLIC CHURCH (1994) at 566 (defining “homosexual persons” as persons with “exclusive or predominant desire” to have sex with someone of the same gender requiring them to refrain from such sex but urging that “every sign of unjust discrimination in their regard should be avoided.”)

290. *Dale*, 530 U.S. at 652 (claiming that the policy barred “avowed homosexuals” without qualification). Of course, the majority made the nature of the “burden” on the BSA no more clear by indulging the claim that what the BSA taught to individual Scouts was to be “morally straight.” Though the Court conceded that the term “morally straight” was “not self-defining”

The majority's analogies to other First Amendment cases for possibly defending the BSA did not make its opinion any clearer. Throughout the opinion, the majority invoked its earlier decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, in which the Court held that forcing the organizers of the Boston St. Patrick's Day Parade to include a group under a gay banner forced the organizers to carry a message they did not want.²⁹¹ As a result of the comparison to *Hurley*, both critics and supporters of the *Dale* Court's decision claim that the Court premised that decision on the assumption that Dale's openness about his sexuality outside the Scouts would be carried like a banner into the Scouts.²⁹² But the Court never explained how Dale's "activism" would likely be imputed to the BSA, or carried on there, or that either the public or the BSA would be sufficiently aware of his activism for anyone to make the assumption that his activism was implicitly endorsed by the BSA.²⁹³

The key to understanding the majority's opinion, then, begins with its most notable claim—that the BSA could exclude Dale even if it admitted that it retained *heterosexual* supporters of those who are openly gay²⁹⁴—something that should have immediately undercut the claim that it was Dale's verbal power that troubled the BSA. Even if one accepts the absurd proposition that a twenty-year-old gay scout in the abstract is more menacingly persuasive than some other potentially revered scout leader—such as a popular heterosexual scout leader or a beloved heterosexual parent—one would still have to assume that the BSA did not object to messages supporting the morality of gay sex if the BSA tolerated a heterosexual scout leader who espoused that gay sex is moral. But the Court concluded that Dale's status as an "avowed homosexual" somehow made him a *greater* threat on the topic of homosexuality than any heterosexual could be. To translate, the Court believed that something about Dale made the message he sent by his very *being* unique vis-à-vis heterosexuals and, thus, particularly "burdensome" to the BSA.²⁹⁵

and could have multiple meanings, *id.* at 650, the Court used the phrase, found in the Scout Oath, to illustrate that the BSA taught values "expressly and by example," and noted that the BSA considered "engaging in homosexual conduct" contrary to those values. *Id.*

291. *Id.* at 640.

292. *Id.* at 653; *see also supra* notes 25-26 and the accompanying commentary.

293. *Dale*, 530 U.S. at 654 (holding, without discussing the effect of Dale's avowal or non-avowal of his conduct, that "the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.").

294. *See id.* at 655-56.

295. *Id.* at 656.

From this vantage point, it is clear that the *Dale* majority's concern could not have rested on a potential verbal conflict between James Dale's activism and the BSA's teachings. Nothing about New Jersey law forbade troops from teaching that gay sex is wrong, or even from changing its policy to require James Dale to teach such a thing, or to force all scout leaders to remain silent on sexuality if they wanted to retain membership.²⁹⁶ Nor did the Court offer any basis for the assumption that James Dale as a gay man would inherently be unable to maintain a pledge to teach that homosexuality was wrong, if the BSA were to require such a pledge and if Dale were willing to take it. Rather, the Court held that the BSA would be forced to send a message of tolerance of homosexual sex to its members only through Dale's *presence*, without any reference to what James Dale might *say*.²⁹⁷

As a factual matter, the Court could not have found a conflict between Dale's speech and the BSA's speech, because neither claimed to speak on the subject of homosexual sex. Through the litigation, at least, James Dale's counsel certainly maintained that Dale had no intention of advocating for gay rights or talking about sex in his troop.²⁹⁸ At the same time, the Court accepted the BSA's view that Scout troops are taught to be "morally straight" through "'a list of do's' rather than 'dont's.'"²⁹⁹ In other words, the Court implicitly recognized that the BSA did not verbally teach young scouts to refrain from gay sex. In fact, as noted above, the BSA insisted in its briefs that it did not seek to "refer to homosexuality or inveigh against homosexual conduct" and admitted that none of its teachings intended to "catalog immoral behavior for Boy Scouts."³⁰⁰ Thus, for all its elaboration on the BSA's verbal teachings on "moral straightness," the majority's discussion of the Scout Oath only indicates that the BSA made *some* attempt at verbal instruction on arguably sexual subjects, not that the instruction verbally included statements on homosexuality.³⁰¹ Indeed, the Court explained that it considered these verbal statements relevant "only on the question of the

296. *Id.* at 688 (Stevens, J., dissenting) (explaining that the BSA could alter its teaching or require silence on matters of sexuality, and Dale could not claim a right to advocate on homosexual subject matter and the BSA could exclude him for that).

297. *Id.* at 653 ("Dale's *presence* in the Boy Scouts would, at the very least, . . . send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.") (emphasis added).

298. Statement of Evan Wolfson, Oral Argument, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000).

299. *Dale*, 530 U.S. at 650.

300. Brief for Petitioner at 5, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

301. *Dale*, 530 U.S. at 655.

sincerity of the professed beliefs” that it tried to instill values as part of scouting.³⁰²

Given the Court’s concern with James Dale’s presence in the Scouts and its lack of a finding of a verbal conflict, the Court’s acceptance of the BSA’s expressive association claim had to rest on a nonverbal conflict. In its briefs, the BSA explained that its “expressive purpose” was implicated *only* when “a prospective leader presents himself as a role model inconsistent [with BSA policy].”³⁰³ At oral argument, the BSA’s counsel maintained that the BSA was not just concerned with Dale’s teaching but with any conduct expected of gay men that would indicate that even *dating* members of the same sex was acceptable.³⁰⁴ On this point, the *Dale* Court’s finding on whether the BSA’s teachings on homosexuality were verbal or conduct-based is abundantly clear: “the Boy Scouts takes an official position with respect to *homosexual conduct*, and *that* is sufficient for First Amendment purposes.”³⁰⁵ Indeed, the Court centered its holding on the grounds that the First Amendment protects the “method of expression” even if that method is “teach[ing] *only* by example.”³⁰⁶

On these terms, if it could be reasonably inferred from Dale’s activism and acceptance of his sexuality that he was sexually active with other men, Dale became ineligible as a role model not by stating he was gay, but by “coming out,” providing *evidence* of what he *did*, such that the Scouts’ leadership would know his behavior was not “suitable” for his status as a role model. On this point the BSA’s argument was also clear:

QUESTION: Is it fair to say, then, that anyone who is openly homosexual and whose admission, or profession of that fact would be likely to come to the attention of the Boy Scouts themselves, be excluded?

MR. DAVIDSON: That’s correct, Your Honor. The boys are—

QUESTION: Openly homosexual in the sense of practicing homosexuality?

302. *Id.* at 651.

303. Brief for Petitioner at 6, *Boy Scouts of Am. v. Dale* (No. 99-699).

304. Statement of George Davidson, Oral Argument, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000).

305. *Dale*, 530 U.S. at 655-56 (emphasis added). Here, if the phrase “homosexual conduct” was meant to be broader than the phrase “homosexual sex” to include “conduct” such as activism, opening the phrase that much would, by necessity, open it to all “conduct” including conduct that *conformed* to BSA policy, even though the BSA said it would not exclude a scout who engaged in such conduct.

306. *Id.* at 655 (emphasis added).

MR. DAVIDSON: Well, being openly homosexual in, communicates the concept that this is okay. This is an alright lifestyle to pursue. Whether the—

QUESTION: That the sexual expression of it is okay?

MR. DAVIDSON: Absent some further statement that it would be immoral to act on the impulses, in the culture in which these statements are made we talk about coming out. We don't talk about coming out as Canadian or heterosexual or anything else. This is a statement fraught with moral meaning.³⁰⁷

In short, the BSA's very position was that James Dale's statement "I am gay" was not troubling because it actually reached, or could have reached, the troop members. Rather, the BSA's position was that, unless he indicates to the contrary, a man who says "I am gay" is likely to act in other ways, such as openly dating men, indicating that he is most likely sexually active, or that he does not care if others think that he is sexually active.³⁰⁸ Perhaps most important, it is a statement that James Dale's counsel never rebutted. Rather, attorneys for James Dale insisted only that "a human being is not speech" and that "Mr. Dale is not here to advocate that he be allowed to advocate that gays are okay within Scouting."³⁰⁹

The Court implicitly rejected the view of Dale's counsel, apparently holding that an openly gay person in a particular state of being can be like "speech" when asked to teach by example.³¹⁰ Consistent with *Spence v. Washington*, which relied on audience understanding to test a message sent by conduct,³¹¹ it was arguably quite reasonable for the majority and the BSA in this day and age to assume that coming out as "gay" implies that the person who does so expresses a willingness to engage in sex with people of the same gender.³¹² Thus, a gay man like Dale who does not

307. Statement of George A. Davidson, Oral Argument, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000).

308. This is the only logical explanation of the BSA's claim not to inquire into anyone's sexual orientation, Brief for Petitioner at 6, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Feb. 28, 2000), while claiming to be concerned that "Boy Scouts do not simply see one aspect of an adult leader's character: they see it all." *Id.* at 4. Arguably, if the BSA presumes scout leaders will not be gay by having a "homosexual conduct policy" it might presume unless learning to the contrary that it has no concerns about a role model's sexual behavior.

309. Statement of Evan Wolfson, Oral Argument, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000).

310. *See Dale*, 530 U.S. at 665-67 (Stevens, J., dissenting).

311. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

312. *See supra* note 45; *see also Steffan v. Perry*, 41 F.3d 677, 690-91 (D.C. Cir. 1994) (explaining how, without forced judicial scrutiny, it is not irrational to assume from a declaration of homosexuality in a context that is adverse to homosexuality that the declarant is aware that many might infer that the declarant engages in sex).

disavow engaging in sex with men permits the assumption, by his generic statement of his sexuality, that he probably engages in sex with other men, even if other scouts never heard Dale state a sexual identity, because it is also likely that he engages in other conduct that young scouts might look to, quite possibly as cues on how to live their own lives.

To be sure, this interpretation of *Dale* requires an understanding of “coming out” as gay that may seem unfair to the “celibate” gay man or the gay man who has sex only with women. It may also seem factually and personally unfair to James Dale, who probably should have been asked in litigation what he believed his “coming out” meant at the time he was discharged. But it is equally true, as the BSA claimed, that most men who are publicly willing to identify as gay do have sex with other men,³¹³ and it is not at all clear that most people who come out as gay want people to assume that they refrain from sex, regardless of what a celibate gay man or a gay man who has sex only with women might insist being gay means. Most important, Dale agrees that stating that one who is “openly gay” can convey a multitude of meanings, and that the one assigned to him by the BSA is not one he would declare inaccurate for him, either now or at the time of his expulsion, given that he believes it means he has “intimate relations” with men, and given that he would not pledge celibacy.³¹⁴

For an additional reason, the significance of James Dale’s potential sexual activity to his case cannot be understated. Under traditional First Amendment analysis, legislatures can generally prohibit discrimination without worrying about burdening expression because they can be said to be targeting conduct rather than expression.³¹⁵ Indeed, the Court has made clear that states can prohibit discrimination because such illegal conduct is not “shielded from regulation merely because [it expresses] a discriminatory idea or philosophy.”³¹⁶ Thus, if the BSA truly did retain heterosexual scout leaders who supported same-sex intimacy, the expulsion of Dale would not only have been blatantly discriminatory, but the application of New Jersey law to the BSA would have been directed at that discrimination, not at the message the BSA taught. In this sense, claiming a First Amendment interest in the act of discrimination was critical to the BSA’s claim. To the extent the BSA wanted to teach primarily by example, only the avowed “homosexual” as scout leader

313. *See supra* note 45.

314. *See supra* note 279 and accompanying text.

315. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-90 (1992).

316. *Id.*

would be able to teach by his example that being gay is an acceptable model for a young scout's life in ways the avowed "heterosexual" or closeted and celibate gay man never could.

In short, despite the frequent rhetoric in the *Dale* majority opinion about the BSA's verbal teachings and allusions to gay banners carried into private associations, the Court proved by its judgment that a court, too, often "holds what it does, not what it says."³¹⁷ The Court's core holding permitting the exclusion of Dale for his mere presence simply cannot be explained without entertaining the notion that Dale was a role model who permitted the assumption that he was sexually active in ways that his organization forbade. The Court's clear emphasis that all else would be "irrelevant" if the BSA taught only by example is crucial to this point.³¹⁸ Even if the BSA and the Court may have inferred from James Dale more about his conduct than he intended to convey by "coming out," Dale's role as a scout leader inherently put him in the position of teaching by his conduct that he was an appropriate role model for scouts. In these terms, the Court accepted the BSA's concerns—that young scouts would look to James Dale in his entirety, sexual activity and all, to learn appropriate behavior. Without these assumptions, the opinion in *Dale* would have to be read, as critics have suggested, as speculative about facts not before it, and the opinion would make even less sense than it otherwise does on its face.

C. *The Supreme Court's Decision: The Consequences*

The Court's decision in *Dale*, of course, is not without analytical problems. Chief among these is the short shrift the majority opinion gave to New Jersey's interest in prohibiting discrimination, which the majority purported to analyze according to the Court's prior decision in *Roberts v. United States Jaycees*.³¹⁹ In *Roberts*, the Court carefully scrutinized the Jaycees' claim that its exclusion of women was essential to its expressive interests, sufficient to avoid complying with the anti-discrimination provisions of Minnesota's public accommodations law.³²⁰ Though the Court found a minor infringement on the Jaycees' associational rights, it nevertheless challenged the assumptions behind the Jaycees' asserted expressive needs for discrimination, then found Minnesota's interest in securing equal economic opportunities for women

317. LINDA HOLDEMAN EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 41 (1996).

318. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000).

319. *Id.* at 657-60.

320. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622-25 (1984).

sufficiently compelling to *override* the Jaycees' claim.³²¹ In contrast, without questioning *Roberts'* methodology, the *Dale* Court gave little consideration to New Jersey's interest in ending discrimination, and suggested that New Jersey's interest would fail to override the BSA's interest in private expression,³²² perhaps because, in the majority's view, protecting gay people from harm was not "compelling."³²³

321. See *id.* at 623 (holding that it is unquestionable that the application of anti-discrimination law to force an association to accept a member it does not want "works an infringement" on associational rights). The *Roberts* Court made abundantly clear that Minnesota's interests in prohibiting discrimination that threatened equal economic access for women was a compelling concern and that the comparative burden on the Jaycees' expressive interests was minimal. See *id.* at 624 ("the Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.") (internal citations omitted); *id.* at 625-26 ("Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests" because it "protects victims of gender discrimination from a number of serious social and personal harms"); and *id.* ("the Jaycees has failed to demonstrate . . . any serious burden on the male members' freedom of expressive association").

322. See *Dale*, 530 U.S. at 657-58. For commentary on this point, see Rubinfeld, *supra* note 25, at 807-08 ("There is virtually not a word in *Boy Scouts* about what New Jersey's interests were, nor about the calculation of reasoning that yielded the conclusion that these interests did not outweigh the associational "burdens" suffered by the Scouts. . . .").

323. The *Dale* Court's discussion of New Jersey's interest in ending discrimination noted only that the interest had "expanded from clearly commercial entities" and had reached private "membership organizations" "without even attempting to tie the term [public accommodations] to a place." *Dale*, 530 U.S. at 657. Noting the lack of a burden on expressive association in *Roberts*, the *Dale* Court concluded in contrast that the burden on the BSA's expressive interests was significant. *Id.* at 657-59 ("the state's interests . . . do not justify such a severe intrusion on the Boys Scouts' rights to freedom of expressive association.") In the sense that the Jaycees might have been able to trump Minnesota's anti-discrimination prohibitions with a stronger expressive association claim, it cannot be said for certain that the Court viewed New Jersey's interest in ending anti-gay discrimination as less worthy than a state's interest in ending discrimination against women or racial minorities.

Still, at oral argument, Chief Justice Rehnquist suggested that the interest in prohibiting discrimination against gay people was not necessarily compelling because the Court, in its alleged wisdom, had yet to heighten scrutiny of anti-gay discrimination under the Equal Protection Clause. Statement of Chief Justice Rehnquist, Oral Argument, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (Apr. 26, 2000). The majority opinion was not so explicit in the suggestion, instead commenting that public accommodation laws had expanded to protect groups that have not "been given heightened scrutiny" while citing *Romer v. Evans*, the case in which the Court had used rational basis review to declare anti-gay discrimination unconstitutional. *Id.* at 580 (citing *Romer v. Evans*, 517 U.S. 620, 629 (1996)). Apart from the majority's peculiar suggestion that equal protection doctrine "scrutinizes" the victims of discrimination rather than the discrimination itself, it is disturbing that the Court would even risk suggesting that its own institutional failure to determine when discrimination is suspect means that discrimination the Court has yet to address is unimportant. Even in the equal protection context, the Court has admitted it is only reluctant to heighten scrutiny for classes for whom lawmakers have a history of "addressing their difficulties in a manner that belies a continuing antipathy or prejudice." *City of Cleburne v. Cleburne Living Centers*, 73 U.S. 432, 442 (1985).

The Court's feeble examination of the weight of New Jersey's interest is particularly curious as the BSA did not, like the Jaycees, make a claim that complying with the state's anti-discrimination law would burden its ability to produce speech or an identity. The BSA's claim, in fact, was distinct in asserting that the selection of members inherently dictated the content of its role models' instruction. In that way, it sought to protect a form of expressive conduct—enlisting scout leaders who purportedly engage exclusively in heterosexual sex—so that, in turn, it could ensure that scout leaders teach by example that a traditional heterosexual lifestyle is preferred by the BSA. But if that conduct were not shielded by an expressive association claim, the Court should have analyzed a claim for protection of it under the standard set forth in *United States v. O'Brien*—where the Court deemed intermediate scrutiny appropriate for conduct regulations that only incidentally affect expression³²⁴—as New Jersey did not object to the BSAs' teaching that homosexuality is immoral.

The Court summarily dismissed the relevance of *O'Brien* with an argument that was verbally obscure, to say the least. According to the Court, the *O'Brien* standard did not apply because New Jersey law “directly and immediately affect[ed] associational rights.”³²⁵ Nothing in *O'Brien* qualifies its applicability in this way. Indeed, the Court's most recent application of *O'Brien* confirms that *O'Brien*'s tolerance for “incidental” effects focuses on the regulation's intended consequences (those that are “incidental” by choice), not its impacts (those that are “incidental” because they are minor).³²⁶ Though the rule requiring preservation of draft cards examined in *O'Brien* directly “affected” a form of expression by banning destruction of draft cards outright, the “effect” was still incidental because the government did not directly *object* to the expressive elements of burning draft cards.³²⁷ Indeed, under *O'Brien*, assessment of the degree of the burden on expression is not a precondition of the applicability of the test, but a factor that weighs in the balance of a regulation's constitutionality.³²⁸

324. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

325. *Dale*, 530 U.S. at 659.

326. *City of Erie v. PAP's A.M.*, 529 U.S. 277, 292-95 (2000) (repeatedly characterizing a ban on expressive conduct as incidental where the message is not intentionally targeted). Here again, the Court's sloppy use of a term like “incidental” with dual meanings contributes to the opinion's verbal ambiguity. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th Ed. 2001) at 586 [hereinafter WEBSTER'S].

327. *O'Brien*, 391 U.S. at 377-78.

328. *PAP's A.M.*, 529 U.S. at 301.

Despite the Court's redundant use of the term "immediate" to describe the equally "direct" harm Dale's sexuality allegedly caused the BSA,³²⁹ the Court's view that New Jersey's regulations directly touched or concerned the BSA's associational rights has some merit, especially if the Court actually concluded that New Jersey extended anti-discrimination law into private spaces not to prevent injuries from discrimination but primarily for the purpose of teaching lessons on the acceptance of homosexuality. Unlike Massachusetts in *Hurley*, which had effectively required parade organizers to admit a group with a particular banner,³³⁰ New Jersey did not apply its anti-discrimination law in a "peculiar" way "directed immediately" at expression, such as requiring the BSA to admit Dale wearing a pink triangle on his scouting uniform, or to retain him regardless of his advocacy. But if New Jersey did not have economic, health, or safety reasons for extending anti-discrimination law to private groups, the law was also arguably directed at associational and expressive interests, something very different than what occurred in *O'Brien*. This, in fact, is the *only* explanation for the Court suggesting that New Jersey had "no better reason" to extend its anti-discrimination law into private spaces other than "promoting an approved message or discouraging a disfavored one."³³¹

As I suggested in Part III.B, the same reasoning works in assessing the burden on the BSA. Had Dale's conflict with the BSA been a verbal one, forced inclusion of Dale would not have had an "immediate" effect on the BSA's verbal teachings until someone discovered Dale's external verbal activism, or unless Dale "immediately" began teaching about the positive aspects of gay sexuality the moment he returned to a troop, or disclosed his personal life to hold it up as an example for scouts. But the application of New Jersey law could be characterized as "immediate" if one considers that the BSA associated with leaders to teach by example, such that Dale's *direct* return would immediately constitute "gay role

329. The term "immediate" in the context of effects inherently means to "directly touch or concern." See WEBSTER'S, *supra* note 326, at 578. In this sense, "directly and immediately" is inherently redundant.

330. *Dale*, 530 U.S. at 658. Both the Court and its critics claim that *Hurley* was a case in which parade organizers did not discriminate against the Gay Lesbian Irish of Boston on the basis of their sexual orientation, which is a bizarre claim for anyone to assume in the conflict because, if that were true, the parade organizers would not have violated the Massachusetts discrimination prohibitions in its public accommodation law *at all*. The only way the Court could have found a way to justify *Hurley* not as a regulation of conduct would have been to find that Massachusetts did not merely seek to apply its anti-discrimination law generally, but to do so in "a peculiar way" to give GLIB the right to "participate in [the parade organizers'] speech" and "join in with an expressive demonstration of their own." *Id.* (quotations and citations omitted).

331. *Id.* at 661 (quoting *Hurley*, 515 U.S. at 579).

modeling” and trigger the conflict with the BSA’s associational interests and the expressive conduct they expected to flow from it.

From this perspective, though the BSA’s claim for protection for its association and expressive “conduct policy” seemed to rest where *Roberts* and *O’Brien* converge, the Court’s refusal to follow *O’Brien* instead of *Roberts* or some hybrid of the two makes enormous sense. *O’Brien* differs from *Roberts* primarily in allowing governments broader flexibility in targeting as much conduct as possible for reasons unrelated to expression, requiring only an important justification, rather than a compelling one, to justify the resulting burdens on speech.³³² But *O’Brien*’s concern for preserving legislative power is less appropriate when states try to pierce associations and reach conduct that is expressive within those associations for broader purposes. In those cases, the potential is great that the regulatory push will trample far too much expression and association on its way to reaching conduct that is allegedly harmful. Thus, as *Dale* makes clear, a finding of such a burden justifies strictly scrutinizing a regulation that pushes into private, expressive associations as a regulatory gesture—particularly when the regulation turns on the members’ associations with each other—since the association’s overall communication of its shared views could be snared too much in regulation.

To be sure, the Court’s strict scrutiny of regulations affecting expressive, discriminatory conduct raises as many questions as it answers, particularly regarding the strength of future expressive association claims by businesses who assert a right not to associate with gay employees.³³³ Only Justice O’Connor, one of the five members of the *Dale* majority, has signaled a willingness to maintain a presumption against expressive association claims for commercial enterprises.³³⁴ Unlike the New Jersey law in *Dale*, anti-discrimination laws limited to the marketplace and other public arenas may be presumed to prevent concrete injuries, such that those laws may equally be presumed to rest on non-expressive interests. Here, too, the requirement that a challenger to anti-discrimination laws engage in some expressive conduct by

332. *O’Brien*, 391 U.S. at 376.

333. For analysis, see Chemerinsky & Fisk, *supra* note 25; and Hunter, *Accommodating the Public Sphere*, *supra* note 26; see also, Rubinfeld, *supra* note 25, at 809 (“If First Amendment rights were really to be analyzed in the balancing-test terms invoked by the *Boy Scouts*’ Court, then every time a person wanted to break the law for expressive reasons, there should be equally painstaking judicial review of the pertinent costs and benefits, and especially of the state’s ability to satisfy its interests, without paying too high a price.”)

334. *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring).

association may work to avoid exempting businesses from those laws unless they genuinely claim, as the BSA does, that their ability to teach that homosexuality is wrong is directly connected to the individuals whom they permit to associate with their organization.

Perhaps not ironically, shielding expressive conduct in an expressive association in this way may also seem to raise *Hardwick*-like concerns—namely, that broad acceptance of the claim would shield “otherwise illegal conduct” from regulation simply because it took place in private spaces.³³⁵ It seems more than ironic that two of the Justices in the *Hardwick* majority would be “unwilling to start down that road” and yet, in *Dale*, would object to application of conduct regulation to a “private entity” because New Jersey did not limit its regulation to “a physical location.”³³⁶ Particularly as Justice O’Connor and Chief Justice Rehnquist brusquely dismissed Michael Hardwick’s comparison of his sexuality to expression,³³⁷ their subsequent deference to the BSA on its expression claim for protection of its unlawful discrimination seems deeply offensive, especially when viewed as selective respect for illegal conduct in private spaces.

Nevertheless, on this point, *Dale* makes one of its greatest contributions to the Court’s recent jurisprudence on laws based on morality. By suggesting that many laws reflect moral choices, the Court in *Hardwick* was able to characterize Michael Hardwick’s claim as a broad one, attacking each and every law based on morality under an abstract claim to a liberty interest in “criminal” conduct.³³⁸ But in *Dale*, the Court recognized that a private association’s sexual conduct policy under a moral label could very well be expressive and could clash with an otherwise generally applicable state law in some instances, at least when the association professes concern with the values taught by its “illegal” conduct. Where Michael Hardwick’s argument could have led to the categorical invalidation of all laws based on traditional modes of behavior, the BSA’s request for a singular exemption from general laws allowed the Court to remain open to more limited challenges to conduct regulation in individual cases of proven conflicts between expression and regulation.

Without reconciling *Dale* and *Hardwick* in this way, the difference in the outcomes of the two cases reeks of bias harbored by members of the *Dale* majority, particularly by Justice O’Connor and Chief Justice

335. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

336. *Compare Id.* at 196 *with Dale*, 530 U.S. at 657.

337. *Hardwick*, 478 U.S. at 195-96.

338. *Id.*

Rehnquist, who favored heightened protection of an ostensibly private “homosexual conduct policy” in one case, but who opposed protection for Michael Hardwick’s very own private “homosexual conduct policy” in the other. In both cases, of course, the Court curiously went out of its way to insist it reflected no particular view on homosexuality, almost as if it knew a charge of bias might seem appropriate.³³⁹ But in *Hardwick*, the Court rallied to the defense of the states’ use of popular morality to regulate private sexual conduct,³⁴⁰ while in *Dale*, the Court somehow insisted that equally moral demands, cast as “public or judicial disapproval,” could not justify interference with a private association’s need for illegal conduct.³⁴¹ If the difference in the cases is that the BSA made a First Amendment claim where Michael Hardwick failed to, then the test of the fairness of *Dale* is to see if an expressive association and conduct claim would protect a pro-“homosexual conduct policy” and an anti-“homosexual conduct” policy on equal terms, even if one of those policies is personal and for much more private and sexual expression.

IV. FIRST AMENDMENT PROTECTION FOR SEXUAL ASSOCIATION AND EXPRESSION AFTER *DALE*

*My heart unto yours [is] knit,
So that but one heart we can make of it;
Two bosoms interchained with an oath,
So then two bosoms and a single troth.
Then by your side no bed-room me deny;
For lying so, Hermia, I do not lie.*

Lysander, *A Midsummer Night’s Dream*³⁴²

339. Compare *Dale*, 530 U.S. at 661 (“We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong”), with *Hardwick*, 478 U.S. at 190 (“This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.”); *id.* at 197 (Burger, C.J., concurring) (“This is essentially not a question of personal ‘preferences’ but rather of the legislative authority of the State.”).

340. *Hardwick*, 478 U.S. at 197.

341. *Dale*, 530 U.S. at 661.

342. WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT’S DREAM*, act 2, sc.2.

A. *The Dale Court's Impact on Strict Scrutiny for Sexual Relationships and Expression*

1. Expressive Association Claims for Lesbian and Gay Relationships

The *Dale* Court clarified expressive association claims once and for all by setting the sole criterion for recognizing such an association as determining whether it forms for the purpose of engaging in “some” abstract form of expression—whether it be cultural, political, social, or otherwise.³⁴³ Prior to *Dale*, a claim to associate for expression through an illicit form of conduct risked dooming the association to the characterization that it formed for an illicit purpose,³⁴⁴ or at least to beg a First Amendment question—whether the illicit conduct itself was constitutionally protected expression. But the *Dale* Court’s ability to conceptually sever a message from its method of communication should enable plaintiffs who seek freedom to engage in criminalized sex to claim that they associate generally to express feelings and ideas, and thereby claim that a law criminalizing sex merely *burdens* and *affects* the otherwise lawful and expressive aspect of their relationship.³⁴⁵ It is, therefore, no longer proper to argue that an association forms for an “illegal” purpose simply because it utilizes one form of expression that is illegal, as long as the illegality is merely one means to express the *ideas* for which individuals associate.³⁴⁶

The BSA, for example, did not have to prove that its members associated for the purpose of discriminating illegally, on the one hand, or that its troops would be prevented from teaching that homosexuality was wrong without illegal sexual orientation discrimination, on the other hand. Indeed, the BSA could not have made the latter argument because a troop could still have vehemently denounced homosexuality even with

343. *Dale*, 530 U.S. at 650.

344. *Id.* at 655 (explaining *Hurley* to mean that parade organizers celebrating Irish heritage could claim a need to discriminate in violation of law even if they *never* had a need for exclusion before) (citations omitted).

345. *Id.* at 659 (holding that intermediate scrutiny is not appropriate where a regulation “directly and immediately affects associational rights.”)

346. Decisions to the contrary turn on the fact that associations that exist primarily or solely for criminal activity do not have any free-floating association rights of their own. *See, e.g.*, *Scales v. United States*, 367 U.S. 203 (1961). It could not be said, then, for example, that people who are unmarried lack a “license” to engage in sex and thus, can have their expressive sex criminalized. Under the First Amendment, the Court has held that a person with an expressive right can violate a criminal law to exercise that right, such that “a person faced with such an unconstitutional licensing law may ignore it and *engage with impunity* in the exercise of the right of free expression for which the law purports to require a license.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) (citations omitted) (emphasis added).

dissenter James Dale in its presence.³⁴⁷ Rather, the BSA was able to claim that an openly gay scout leader's presence would merely burden the association's otherwise unencumbered teaching of undefined moral straightness.³⁴⁸ By not focusing on the harder question of whether the BSA organized for the purpose of associating discriminatorily in public spaces in violation of New Jersey law, the Court was able to focus on the expression the BSA formed for more abstractly—the teaching of values—even though one of its teaching methods—discrimination—was illegal.

Like the BSA, lesbians, bisexuals, and gay men should not be required to associate for the purpose of engaging in criminalized sex in order to claim that sex regulation interferes with their expressive association rights. Rather, they should be able to claim to associate with lovers abstractly for the expression of intimacy, then show only that sex regulation would place unacceptable burdens on those associations to succeed under *Dale*.³⁴⁹ Just as the BSA could teach that homosexuality is

347. Even if Dale could have vocally protested and attempted to drown out the BSA's teaching on homosexuality, nothing in *Dale* suggests that the Court relied on the assumption that Dale would do so to reach its holding. Again, the Court assumed James Dale would burden the BSA's teaching by his presence and *by example*. *Dale*, 530 U.S. at 655 (holding that the BSA's objection to the expressive dangers of gay scout leaders is sincere even if the BSA only required scout leaders to "teach only by example").

348. *Id.* at 658-59 (emphasizing that the troops teach young scouts to be "morally straight").

349. The focus in this section on expressive association claims does not mean that gays and lesbians after *Dale* do not have an equally strong intimate association claim for relationships. The United States Supreme Court has made clear that the intimate association right is not "restricted to relationships among family members" but fundamentally extends to "deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspects of one's life." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-546 (1987) (internal citations omitted). While the Court has suggested that tradition may aid in determining which associations are protected, *see e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990), the Court has by no means "mark[ed] the precise boundaries of this type of constitutional protection." *Duarte*, 481 U.S. at 545. Indeed, the Court has located the right to marry in the category of intimate associations under the First Amendment, as well as the Fourteenth Amendment, *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)), even though most states have traditionally criminalized those relationships. *See Loving*, 388 U.S. at 6 n.5 (noting criminal laws in 30 states). The Court has long since recognized that intimate associations are equally protected if they are "deep attachments and commitments," those from which individuals "draw much of their emotional enrichment from close ties with others" as well as those involving "a high degree of selectivity." *Roberts*, 468 U.S. at 619-20. Especially since the Court in *Dale* emphasized the importance of the First Amendment's purpose in safeguarding "the ability to define one's identity," *Roberts*, 468 U.S. at 619, 622, it is difficult to imagine that democratic traditions—the antithesis of individual judgment—could form the baseline at which an association would define itself by unwanted members. Critics who argue that the acceptable bounds of intimate associations must be defined by majority preferences cannot be correct. *See, e.g.*, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47-48 (1996) (claiming that

wrong without resorting to discrimination, lesbians, bisexuals and gay men can certainly associate with partners to express love, affection, or a desire for intimacy verbally without having sex. Though that fact does not control the constitutional question of whether a regulation burdens the associational freedoms of intimate partners, it also proves that those partners associate for expressive reasons beyond a desire to commit criminal acts by engaging in prohibited forms of sex. This should be so no matter how important sex ultimately proves to be to the expressive nature of the relationship—just as discrimination ultimately proved to be important to the BSA.

The *Dale* Court's analytical simplicity on this point is especially important in the context of lesbian and gay relationships, because some lower courts to date have doubted the inclusion of those relationships under the First Amendment in deference to heterosexist tradition.³⁵⁰ At no point in *Dale* did the Court inquire whether the type of association formed by the BSA was traditionally recognized as an expressive association. Instead, the Court recognized the BSA as an expressive association solely because the BSA's members claimed to "engage in *some form of expression*" and came together for that purpose.³⁵¹ As explained above in Part III, the *Dale* Court deferred to the BSA in its expressive association claims—not tradition—relying on minimal, self-serving "evidence" proffered by the BSA to show that its members conveyed values on homosexuality. Indeed, the Court required no witnesses to show that others understood that the BSA's homosexual conduct policy was part of its expressive teachings.³⁵²

The *Dale* majority's categorical refusal to look to tradition to define an expressive association is particularly critical to its recognition that expression may be subtly *private* and still worthy of First Amendment

the definition of a "marital relationship" requires an "objective test"). Intimate associational rights protect self-definition, not definition by others. That same approach is even more relevant to intimate associations that involve "distinctively personal aspects of one's life," where selectivity plays a much greater role in defining the intimacy of the relationship. Indeed, as Justice White himself once noted, the very essence of "personal integrity and autonomy" includes "privilege of choosing those with whom intimate relationships are to be established," and denial of the freedom to choose one's sexual partner is the "ultimate violation of self." *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

350. *See, e.g., Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975) (three-judge court), *aff'd* 425 U.S. 901 (1976) (invoking tradition broadly to sweep against privacy and expression claims); *Shahar v. Bowers*, 114 F.3d 1097, 1099-1100 (11th Cir. 1997) (claiming that tradition raised questions about an expressive association, suggesting it is a "new" right); *Shahar*, 114 F.3d at 1115 (Tjoflat, J., concurring).

351. *Dale*, 530 U.S. at 648.

352. *Id.* at 685-86 (Stevens, J., dissenting).

protection.³⁵³ Where an association forms for private expression, it is unreasonable to expect the public to have a tradition of recognizing the association's expressive functions precisely because the expression has been kept from public view.³⁵⁴ Thus, just as the BSA was deemed an expressive association even though it did not publicize its values, a sexual couple would not need to show that detailed, public displays of affection (or sex) are a critical part of their relationship in order to be recognized as such by tradition, or to qualify as an expressive association.

In this sense, it is grossly wrong to deride expressive association claims for lesbian and gay relationships as threatening to turn those relationships into potential "spectacles" and "attention-getting antics."³⁵⁵ If the *Dale* Court was correct in claiming that the BSA could make out an expressive association claim even if it did not "trumpet its views from the housetops,"³⁵⁶ lesbians, bisexuals, and gay men need not treat an "arm-in-arm stroll" with a partner like "a parade" or "commitment vows" like "soapbox oration"³⁵⁷ in order to make the same claim. Just as a private conversation is expressive with only those engaged in it serving as both speaker and audience, there is no need for a public audience to

353. *Id.* at 648 (noting that an expressive association need only engage in some expression that is "public or private"); *see also* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (holding that private religious speech falls within the full protection of the First Amendment).

354. Since *Hardwick*, many states have recognized that lesbians and gay men shield their sexual expression from the general public. *See, e.g., Powell v. Georgia*, 510 S.E.2d 18, 24 (Ga. 1998) ("We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity"); *Gryczan v. Montana*, 942 P.2d 112, 123 (Mont. 1997) (arguing that it "cannot seriously be" denied that all adults have a reasonable expectation that their sexual activity, regardless of whether heterosexual or homosexual, and regardless of gender or marital state, will be personal and private); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) ("to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern.") *Commonwealth v. Wasson*, 842 S.W.2d 487, 490 (Ky. 1992) (tracing history of Kentucky court decisions recognizing acts that do not harm public are personal and private).

355. *See* Massaro, *Thick and Thin*, *supra* note 27, at 62:

In any event, there is something unsatisfying and even distasteful about recasting all same-sex conduct as political speech or expressive conduct in a First Amendment sense. Such a move ironically reinforces the pernicious ways in which society tends to treat being "out" as necessarily political or as an attention-getting antic. For some advocates, the point of pursuing gay rights is to undermine this popular tendency to treat gay and lesbian couples as spectacles; the point is to defy treatment of a gay couple's arm-in-arm stroll as a parade, or their commitment vows as a soapbox oration.

Massaro repeats this error when she claims that sex cannot be expressive because it involves a "wide array of private conduct." *Id.* at 63.

356. *Dale*, 530 U.S. at 656.

357. Massaro, *Thick and Thin*, *supra* note 27, at 62.

validate sex as a form of expression either. Again, the *Dale* Court emphasized that First Amendment protection extends to any individual who “engage[s] in *some form* of expression” as a unit, not some form of “advocacy,” regardless of whether anyone in the public understood the expression to occur.³⁵⁸

Consequently, there is little doubt that many lesbians and gay men can make a claim that they associate with their sexual partners to express some intimate feeling or idea, particularly those who seek to partner long-term and consequently may have a record of other forms of expression between them. If the BSA can associate for recreational purposes with incoherent verbal instruction on values,³⁵⁹ any individuals who can prove they have associated at least as subtly and nonverbally as partners should also qualify as an expressive association for the purposes of the First Amendment. Indeed, as the Supreme Court has recognized, at common law, couples who express “emotions” or “spirituality” by sharing their daily lives together³⁶⁰ can “liv[e] professedly in that relation” whether the law endorses the union or not.³⁶¹ As long as individuals engaged in sexual conduct can show by some evidence—such as a few letters or notes³⁶²—that their association for feelings or ideas is sincere

358. *Id.* at 648 (emphasis added) (“The First Amendment’s protection of association is not reserved for advocacy groups” but merely requires that the members as a group “engages in some form of expression, whether it be public or private.”).

359. *See id.* at 650 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O’Connor, J., concurring) (“Training of outdoor survival skills or participation . . . might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”)).

360. Speaking of barred marriages, the Court in *Turner v. Safley* recognized that those marriages are still “expressions of emotional support and public commitment” and because “many religions recognize marriage as having spiritual significance . . . marriage may be an exercise of religious faith as well as an expression of personal dedication.” 482 U.S. 78, 95-96 (1987).

361. *See Meister v. Moore*, 96 U.S. 76, 82 (1877). The Court’s statement that “[t]he State . . . has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,” *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877), proved not to mean that the state’s power to confer a civil status on individuals would also permit criminalization of personal relationships superceding any technical requirements a state may impose for the purposes of receiving marital status. For First Amendment purposes, the law’s approval is clearly not required. *Roberts*, 468 U.S. at 620 (“Accordingly, the Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse that would not apply to regulations affecting the choice of one’s fellow employees”) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977) (recognizing that private marriage supercedes state controls in that states cannot use law to “foist orthodoxy on the unwilling by banning, or criminally prosecuting, nonconforming marriages”).

362. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-49 (2000) (relying on a letter to Dale, homosexual conduct policy statements, and the BSA’s litigation claims to conclude that the BSA taught only by example and not through verbal instruction).

and not invented for litigation, the first hurdle to an expressive association claim should be relatively easy to clear.

In fact, many lesbians and gay men can show that states actually object to their associations for the very feelings and ideas they express, even though laws criminalizing sex are applied to them. In one recent notorious case, *Ex Parte J.M.F.*,³⁶³ the Alabama Supreme Court specifically recognized that a lesbian woman, “J.B.,” lived with her partner “G.S.,” and that the two women expressed affection for each other by “exchang[ing] rings and hav[ing] a committed relationship as ‘life partners’ that include[d] ongoing sexual activity.”³⁶⁴ The court further recognized that J.B. told her daughter that “she and G.S. love each other the way that the child’s father and stepmother love each other.”³⁶⁵ Though J.B. testified at trial that she did not engage in the specific sex acts proscribed by Alabama law,³⁶⁶ the court denied J.B. custody and upheld an order limiting visitation with her daughter whenever she associated with her partner, allegedly because Alabama’s sex crime law made J.B.’s lifestyle “neither legal in this state, nor moral in the eyes of most of its citizens.”³⁶⁷ In cases such as this,³⁶⁸ with government officials pretending that they disfavor lesbian and gay relationships for the “inherent” sexual conduct presumed to lurk underneath, the *broader* objections to the gay or lesbian “lifestyle” must be presumed to be equally broad attacks on the associational rights of lesbians and gay men.

Apart from determining whether punishment of the lesbian and gay “lifestyle” itself is an infringement of associational rights, the more direct question that remains, then, is whether the existence of laws criminalizing sex burdens associations of same-sex partners who come together for expressive purposes. To the extent that the Court recognizes that sex is a “sensitive, key relationship of human existence,”³⁶⁹ the burden imposed by removing sex from an otherwise expressive and intimate relationship should be obvious. Even if a court assumes that sex itself is not expressive of a variety of intimate ideas, the fact that it is felt, by many, to be an irreplaceable way to *corroborate* a verbal expression of

363. *Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998).

364. *Id.* at 1192.

365. *Id.*

366. *See* *J.B.F. v. J.M.F.*, 730 So. 2d 1186, 1188 (Ala. Civ. App. 1997), *rev’d sub nom Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998).

367. *Ex Parte J.M.F.*, 730 So. 2d at 1196 (citing ALA. CODE § 13A-6-65(a)(3) (Michie 2002) and claiming some conduct inherent in lesbianism is illegal).

368. *See* *Shahar v. Bowers*, 114 F.3d 1097, 1099-1100 (11th Cir. 1997) (disparaging the expressive nature of a lesbian relationship where states have the power to criminalize gay sex); *see also* *Leslie*, *supra* note 89 (collecting cases).

369. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

those ideas can make removal of sex devastating to many intimate relationships.³⁷⁰ Moreover, if lesbian and gay lovers associate with the goal of establishing an exclusive intimate relationship, a prohibition on sex between two partners by design burdens such a relationship by forcing the lovers to associate with others to satisfy their needs for physical intimacy. Because the freedom to associate “*plainly presupposes* a freedom not to associate,”³⁷¹ the attempt to force lesbians and gay men to go outside intimate relationships for intercourse is, at its core, an objection to individuals’ actual associational choices, and threatens to destabilize those relationships in ways that the BSA was never threatened in *Dale*.

Even if the laws criminalizing sex between men or between women were never enforced—such that no person were truly deterred from engaging in same-sex intimacy—laws criminalizing gay sex to punish lesbians, bisexuals, and gay men because of their relationships still directly touch and concern associative freedoms. Because those laws are used as hooks to broadly punish lesbians and gay men for “lifestyle” concerns, those affected by the laws are forced to choose between their relationships on the one hand, and their children or their jobs, on the other—not just the decision whether to engage in sex. As cases like *Ex Parte J.M.F.* demonstrate, lesbians and gay men can still be forced to refrain from associating with each other as conditions of other rights even if they testify that they abstain from sex. To compare the damage to the BSA’s case, the BSA could not have suffered as badly unless scouting had been criminalized for the discrimination inherent in it, with New Jersey randomly imposing penalties on individual boys for associating with the organization.

Because bans on gay sexuality are inherently based on approval of heterosexual associations, which often involve the same conduct proscribed for lesbians and gay men, *Dale* requires strict scrutiny of laws that criminalize same-sex intimacy.³⁷² The fact that same-sex couples may have other, non-sexual means, to express intimacy for each other should not lessen scrutiny of the burden sex regulation imposes on affected relationships, especially since there is ample data that sex between intimate couples is a critical factor in human happiness.³⁷³ The

370. See *supra* notes 105-111 and accompanying text.

371. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added).

372. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). For evidence of states that permit oral and anal sex in heterosexual relationships of one form or another, see sources cited *infra* note 382.

373. See NHSLs, *supra* note 30, at 357-67.

Court in *Dale* did not require the BSA to prove that it would be *completely* unable to express its views on homosexual sex with the presence of an openly gay Boy Scout among its ranks. The failure of the *Dale* Court to discount the BSA's claim of burden without analyzing the range of options it had for pedagogy—from making its position verbally clear to requiring scout leaders to teach that homosexuality is wrong—should bar future courts from requiring people engaging in sex to prove that they have no other means to express affection before making an expressive association claim. In any event, the transformation of an intimate same-sex relationship to one approximating “kissing-friends” by denying sex to it should be more than enough to show that sex crime laws radically damage and change associations by harms they are designed to inflict.

2. *Dale's* Reinforcement of Expressive Conduct Claims for Sex Between Men or Between Women

a. *Dale* and Its Lessons on the Expressiveness of a “Homosexual Conduct Policy”

Even if lesbians, bisexuals, or gay men fail to establish an expressive association claim for sexual relationships, *Dale's* core reasoning should still strengthen an independent claim that sex deserves protection as expressive conduct, warranting the same strict scrutiny imposed in traditional expressive conduct cases where regulators punish conduct out of interests in expression. The *Dale* Court's reminder that the First Amendment protects private expression³⁷⁴ reinforces the notion that individual sexual behavior, like the sex lives of scouting role models, can be expressive in a particular context, even in private spaces. Moreover, the Court's deference to the BSA about the expressiveness of its associational aims³⁷⁵ is sufficiently analogous to other associational conduct to prevent courts from injecting their own disbelief into claims that sex is expressive. To the extent individuals express “some message” to each other privately through sex, even though it is criminalized, a court analyzing a First Amendment claim for protection of sex as expressive conduct should subject them to no heavier burden than it imposed on the BSA in assessing the sincerity of their beliefs.

But *Dale* should support an expressive conduct claim in factual ways as well. It is virtually inconceivable that a court could find that lesbians and gay men, like other human beings, do not express values

374. *Dale*, 530 U.S. at 658-59.

375. *See id.* at 652-53.

through sexual activity if the BSA could express values primarily through their role models' sex lives, teaching by example under a sexual conduct policy. Following the *Spence* test,³⁷⁶ a court should assess solely (1) what the person engaging in sex intended to convey by doing so and (2) whether there was a likelihood that *those who viewed it* understood the message.³⁷⁷ Thus, the only relevant view on the expressiveness of a particular sexual act should be the understanding of the parties who engaged in and viewed the specific sexual act. Here again, as in *Dale*, *Spence* does not require a public audience to validate conduct as expression, any more than the First Amendment requires public validation of a private conversation to render it expression.

Of course, the fact that many lovers may engage in a sexual act for pleasure without intending to express a particularized idea may make an expressive conduct claim complex, especially if that leaves many people uncertain in sexual encounters whether sex conveyed any particular message at all. But the *Spence* Court made clear that the time, context, and audience for a particular expression can still make worthy of constitutional protection what otherwise “might be interpreted as . . . bizarre behavior.”³⁷⁸ Given that many people in many circumstances consider sex expressive, it is at least *likely* within the meaning of *Spence* that people can make a contextual claim that sex is expressive. Just as nude dancers have an expressive conduct claim despite the fact that some people dance purely for recreational purposes,³⁷⁹ the fact that some people occasionally choose to engage in sex purely for pleasure should not foreclose a First Amendment claim for others.

For example, if a gay man seeking First Amendment protection for receptive anal intercourse was understood by his partner generally only to engage in that act with a man he claimed to love, there is no reason that his partner would not be able to testify that he genuinely believed that each time his partner allowed himself to be anally penetrated that he understood that act to be an act of love or affection. This might be so even if the man did not carefully articulate his conditions for being penetrated—for instance, if he refused penetration at the beginning of the relationship, or was known to refuse to do so in casual dating, but did so in a particular relationship as it evolved. Certainly for those individuals who say that they only engage in sex as an act of love—or couples who say that they love each other and generally have agreed to become

376. See *supra* notes 187-189 and accompanying text.

377. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

378. *Id.* at 410.

379. See *City of Erie v. PAP's A.M.*, 529 U.S. 277, 289 (2000).

sexually exclusive as an expression of that love—there is a great likelihood that the individuals in those instances reasonably believe that their decision to engage in sex conveys love.

Even without resorting to such specific proof in individual cases, the *Dale* majority's ability to find expression hidden in sexual conduct policies should justify concerns that sex prohibitions may be primarily directed at sex for expressive reasons and trigger strict scrutiny. The Court has made clear that if the government objects to *any* of the expressive qualities involved in conduct touted as expression, strict scrutiny of the regulation is required, not a lower form of scrutiny. Indeed, the Court has held that "in order to come under [a] less demanding rule," the government must articulate its interest "in regulating the nonspeech element" and its regulation must be "unrelated to the suppression of free expression" and "unconnected" to it without qualification.³⁸⁰ In these terms, if the government has ever regulated homosexuality by articulating a preference for the expressiveness of sex in marriage or deference to Biblical teachings or objections to expressions of affections between people of the same gender, such reasons for sex regulation should presumptively trigger strict scrutiny.

Especially after *Dale*, a court should not be quick to dismiss a "homosexual conduct policy" on the assumption that it is inherently directed at conduct rather than expression. Indeed, the discriminatory criminalization and enforcement that embodies most states' homosexual conduct policies should be sufficient to raise suspicion of the "realistic possibility that official suppression of ideas is afoot"³⁸¹ under them. Virtually all states permit oral and anal sex to occur heterosexually, even if only in licensed marriages, giving unique access to heterosexuals to engage in it as a form of expression.³⁸² By doing so, these regulators

380. *Texas v. Johnson*, 491 U.S. 397, 407 (1989).

381. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 410 (1992).

382. In addition to the four states that statutorily allow all heterosexual couples to engage in oral and anal sex, five other states allow heterosexuals exemptions from general laws prohibiting the conduct altogether. *See* ALA. CODE 13A-6-60(2) (2001) (defining deviate sex as inherently nonmarital, without further definition); *State v. Holden*, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (holding "Idaho's statute prohibiting the infamous crime against nature may not be constitutionally enforced to prohibit private consensual marital conduct"); *People v. Lino*, 527 N.W.2d 434 (Mich. 1994) (holding that Michigan law does not prohibit consensual oral sex between heterosexuals in private); *Mohammed v. State*, 561 So. 2d 384, 387 (Fla. Ct. App. 1990) (law prohibiting unnatural and lascivious acts cannot apply to fellatio performed between a man and a woman in private); *State v. Poe*, 252 S.E.2d 843 (N.C. Ct. App. 1980) (construing statutory prohibition of fellatio as not applying to married couples); *Lovisi v. Slayton*, 539 F.2d 349, 352 (4th Cir. 1976), *aff'g*, 363 F. Supp. 620 (E.D. Va. 1973) (noting that married couples remain protected in Virginia in the expectation of privacy in their bedroom). Of the remaining states, only Louisiana has negatively answered the question of whether heterosexuals can escape its law

effectively concede that they do not perceive the conduct itself to be inherently harmful, especially given the frequency at which heterosexuals seem to engage in it.³⁸³ Because there is no biological difference between the mouths or anuses of men and women, sex regulators cannot seriously claim there is a factual justification for permitting oral-genital and anal-genital sex between heterosexuals while prohibiting it between people of the same gender.³⁸⁴

against oral or anal sex through marriage. *See* *State v. Smith*, 766 So. 2d 501 (La. 2000) (upholding a statute that criminalizes sex without a marital exemption). The Massachusetts Supreme Judicial Court has held its state law prohibiting oral sex to be inapplicable to any consenting adults in private. *See* *Gay & Lesbian Advocates & Defenders v. Attorney General*, 763 N.E.2d 38 (Mass. 2002); *Commonwealth v. Ferguson*, 422 N.E.2d 1365, 1367 (Mass. 1981) (holding law inapplicable to consensual sex in case involving sex between men).

383. *See* NHSLs, *supra* note 30, at 101-02 (showing that oral sex is a nearly universal sex practice among heterosexuals, particularly white heterosexuals). Other studies confirm that oral sex is a popular form of sexual expression. *See, e.g.*, SAMUEL S. JANUS AND CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 89, 310-311 (1993) (showing that 88% of all men and 87% of all women believe that oral sex is either normal or “all right,” increasing from 85% of men and 80% of women with high school education agreeing on that point to 98% of all men and women with post-graduate educations agreeing on that point).

384. There is no doubt that the same level of heightened scrutiny is appropriate for sex roles fixed in the act of sex just as outside of it. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-470 (1981). Because men and women have the ability to have sex with members of their own gender, and because some prefer oral sex generally, *see* JANUS & JANUS, *supra* note 383, at 98-99 (preferred for 10% of men and 18% of women), a state regulation that forces all men to have sex with women and vice versa, through penile-vaginal sex or not at all, relies on “overbroad generalizations about the different talents, capacities, or preferences of males and females,” *United States v. Virginia*, 518 U.S. 515, 533 (1996), and reflects a “stereotypic notion” about “fixed roles” for men and women. *Mississippi Univ. of Women v. Hogan*, 458 U.S. 718, 725 (1982).

A state need not engage in some grand scheme to subordinate men or women to run afoul of the Fourteenth Amendment’s concerns about gender discrimination. Indeed, the State’s motive in gender discrimination is presumptively irrelevant. *See Michael M.*, 450 U.S. at 472 & n.7. On the contrary, what is most relevant is the impact the state’s scheme has on men and women in affecting the roles they play. *J.E.B. v. Alabama*, 511 U.S. 127, 130 (1994) (holding that view “axiomatic”). Even when a statute is arguably facially neutral regarding gender roles, that statute may *still* be unconstitutional if it is a “covert” gender classification, one that merely “reflects invidious gender-based discrimination.” *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (emphasis added) (internal citations omitted).

It is difficult to imagine that dictating roles men and women should play in the uses of their genitalia contrary to their abilities and desires would not be sex discrimination. The Court has, for example, declared unconstitutional schemes that assume that a man should be the provider for his family, with a woman as his dependant, *Orr v. Orr*, 440 U.S. 268, 279-80 (1979); that a man is head and master of a household with his wife deferring to him, *Kirchberg v. Feenstra*, 450 U.S. 455, 458 (1981), that men should be doctors and women should be nurses, *Mississippi Univ. of Women*, 458 U.S. at 730l and that women can be barmaids as long as their fathers or husbands run bars to watch over them as workers, *United States v. Virginia*, 518 U.S. at 531 (repudiating *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)). Fixing men and women in sexual roles from which they cannot deviate, regardless of ability and preference, is equally dependent on stereotypes assuming that all men should want or only be able to penetrate women vaginally for sex, and that all women should want or only be able to be so penetrated.

From this perspective, strict scrutiny is particularly appropriate in states that legalize a wide array of sex acts for heterosexuals while punishing comparable acts between same-sex partners, as the states' objection is clearly not to the underlying sex acts themselves. To say that sex is acceptable as an expression of affection for someone of a different sex but not another unabashedly preferences heterosexual sexual expression, particularly if states admit to preferencing it. Even if diversion of lesbian or gay expression were not a goal of sex regulation, saying that "a person can desire someone of the same sex but cannot *express* it" transparently targets expression as well. At bottom, none of the states that currently retain laws criminalizing same-sex intimacy can claim that they are tolerant of expression of homosexual affection apart from sex, because all of them object to other expressions of affection, such as same-sex marriage³⁸⁵ and other "pro-homosexual" expression on the alleged grounds that it promotes criminal behavior.³⁸⁶ Unless government officials are prepared to defend sex regulation based on the status of the individuals involved and face equal protection challenges, the only credible explanation for the objection to sex between people of the same gender is the content of the message itself.

b. *Dale* and Its Lessons on the Intersection of Morality and Expression

As I explained in Part III.B, the *Dale* majority opinion was arguably suspect in its brusque dismissal of New Jersey's interest in opposing discrimination. But to the extent one accepts the Court's characterization of New Jersey's interest in extending anti-discrimination law into "private spaces" as serving an educational function, even in part, *Dale* provides enormous ammunition to individuals who challenge sex regulations on similar grounds. Conceivably, the Court in *Bowers v. Hardwick* failed to see the attempts of states to push morality into private spaces as causing the same conflict that exists in cases where government tries to punish the use of books and films in private homes as a means of advancing "moral" thoughts. But following *Dale*, a First Amendment claim for sex should be able to capitalize on the Court's view that the extension of

385. See NATIONAL GAY AND LESBIAN TASK FORCE, SPECIFIC ANTI-SAME-SEX MARRIAGE LAWS IN THE UNITED STATES (ISSUE MAP) (2002).

386. See, e.g., National Gay Task Force v. Board of Education of the City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985); Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984); Gay Lesbian Bisexual Alliance (GLBA) v. Pryor, 110 F.3d 1543 (11th Cir. 1997) (Alabama); Gay Lib. v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom.* Ratchford v. Gay Lib, 434 U.S. 1080 (1978); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976).

conduct regulation into private spaces with no justification other than “public or judicial disapproval” of conduct raises the potential for a purely expressive conflict over the morality of the conduct in question, especially where the conduct or an association engaging in it may be expressive.

Because states primarily defend regulation of sexuality on the basis of morality and little else that holds up under scrutiny,³⁸⁷ there is good reason to presume that those states that continue to regulate sex will continue to collapse their arguments to a morality claim, particularly after *Hardwick* declined to endorse a First Amendment analogy for private sexual expression to trump morals regulation.³⁸⁸ Yet, while a plurality of the Court once held that a morals defense for regulation is not “necessarily” an interest in expression,³⁸⁹ the majority of the Court, as explained in Part II of this Article, currently seems to require an assertion of a nonexpressive regulatory interest in sexual expression before lowering scrutiny of the regulation.³⁹⁰ This lack of deference to morals regulation is particularly sound in this day and age, with national religious leaders claiming that the “immorality” of “the gay lifestyle” has caused terrorist attacks and cataclysmic weather.³⁹¹

387. See MODEL PENAL CODE AND COMMENTARIES § 213.2 (Official Draft 1962 and Revised Comments 1980) at 362-63 (explaining that “moral decay” is the usual justification for laws criminalizing homosexual sex); see also *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002) (noting and rejecting state’s sole contention that morality is sufficient grounds for regulating homosexual sex, and that the state made no showing that sex implicates public health or welfare); *Lawrence v. State*, 41 S.W.3d 349 (Tex. Crim. App. 2002) (evaluating state’s defense of the Homosexual Practices Act solely on morals claim); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (rejecting morality as primary reasons to regulate private noncommercial consensual sex).

388. See *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

389. See *Barnes v. Glen Theatre*, 501 U.S. 560, 569-70 (1991) (plurality opinion) (agreeing only with the argument that a morals claim is “necessarily” expressive on the grounds that not all conduct is expressive and challenges to every morals regulation as expression would be unlimited). Indeed, Justice Scalia implicitly faulted the majority in *Barnes* for not holding that some regulations of mores are always non-expressive. See *Barnes*, 501 U.S. at 575-77 (Scalia, J., concurring). Currently, only he and Justice Thomas share this view. See *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring). In any event, a plurality of the Court now permits regulation under less than strict scrutiny seemingly only if secondary effects can be found to justify the suppression of expression. See *id.* 529 U.S. at 291-297.

390. See *supra* notes 169-176 and accompanying text.

391. See John F. Harris, *God Gave Us ‘What We Deserve,’ Falwell Says*, WASH. POST, Sept. 14, 2001, at C3 (explaining how Southern Baptist leader Jerry Falwell attributed the September 2001 terrorist attacks on the World Trade center to “gays and lesbians who are actively trying to make that an alternative lifestyle” saying “I point the finger in their face and say, ‘You helped this happen,’” and how televangelist and Presidential candidate Pat Robertson twice concurred); Frank Rich, *The Fire Next Time*, N.Y. TIMES, Jun. 20, 1998, at A11 (explaining how Robertson warned that “terrorist bombs, earthquakes, tornadoes and ‘possibly a meteor’” could strike Orlando, Florida in biblical vengeance for ‘Gay Days’ at Disney World). Illustrating how inappropriate such “moral reasoning” is for the world, Falwell first said his comments were

The real appeal of a morals claim, of course, is that it circumvents a need to prove that any harms emanate from that which is deemed immoral, especially if courts do not scrutinize the claim for some explanation of how conduct engaged in by one person contributes to the declining morals of others. Certainly, in the case of private, consensual same-sex intimacy, there is no evidence that criminalizing such intimacy improves any heterosexual sexual behavior. On the contrary, divorce rates are highest in states where bans on gay sex remain in place and where heterosexual promiscuity is undeterred by laws against homosexuality.³⁹² Even if that were not the case, it is difficult to see how criminalizing lesbian and gay sex would promote heterosexual morals since it is well-recognized that laws against heterosexual promiscuity have had no effect on heterosexual behavior, so much so that most states have decriminalized heterosexual fornication.³⁹³ In these terms, a morals charge seems most likely to fail strict scrutiny, which is precisely why courts should be suspicious of the defense in the First Amendment context in the first place.

Indeed, “morals regulations” generally bear two well-recognized indicia of interests in expression that typically trigger strict scrutiny. In *Texas v. Johnson*, the Supreme Court held that Texas’s failure to document any proven harm from flag burning left the state only objecting to the conduct because of its emotive impact and the public’s desire to preserve the flag as a symbol of values.³⁹⁴ Both of these interests, the Court concluded, are related only to the communication of ideas—conveying thoughts and feelings on the one hand,³⁹⁵ or expressing values contrary to those of a political majority on the other.³⁹⁶ If morality were as simple a barrier to strict scrutiny as censors wished, legislatures

misunderstood by a “secular” audience, while Robertson, after first defending Falwell, claimed he did not understand Falwell at the time, and said Falwell’s comments were inappropriate. John F. Harris, *Falwell Apologizes for Remarks*, WASH. POST, Sept. 18, 2001, at C4. After President Bush condemned Falwell’s comments as “inappropriate,” Falwell claimed his comments were “insensitive” and “badly timed” and that if God allowed terrorism as punishment for sins the sins would include his own. Gustav Niebuhr, *A Nation Challenged: Placing Blame; Falwell Apologizes for Saying An Angry God Allowed Attacks*, N.Y. TIMES, Sept. 18, 2001, at B4.

392. See Marion Manuel, *Untying the Knot: Divorce Now A Southern Ritual*, ATLANTA J. & CONST., Nov. 12, 1999, at 1A.

393. See MODEL PENAL CODE AND COMMENTARIES § 213.6 (Official Draft 1962 and Revised Comments 1980) at 435; see also, Commentary to ALA. CODE § 13A-13-2 (1994) (noting that laws criminalizing fornication should be repealed because they cannot control the conduct).

394. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

395. *Id.* at 408.

396. *Id.* at 410

could simply declare conduct like flag burning immoral and impede any scrutiny of their reasoning at all.

As in the flag burning cases, states that assert allegedly “moral” revulsion to homosexuality assert only an objection to the feelings gay and lesbian sex arouse in the public by its mere existence, collapsing to an attempt to monopolize sex as a symbol of “moral heterosexuality.” The current President of the United States has even defended Texas’s punishment of gay sex solely on the grounds that it is a “symbolic gesture of traditional values” and nothing more.³⁹⁷ Whatever other interests a state could assert in regulating sexuality, it is virtually impossible to distinguish such assertions from an interest in making that symbolic gesture in private spaces for no other reason than “promoting an approved message,” something the *Dale* Court expressly condemned.³⁹⁸

Ultimately, a court should be hard pressed to distinguish the BSA’s expressive “homosexual conduct” policy from a law prohibiting homosexual sex because both are *understood* primarily to reflect and teach traditional values, especially when they are rarely enforced as an alleged means to control “harms.” Indeed, in the BSA’s case, the Court did not turn to New Jersey to determine the actual interest of its laws.³⁹⁹ Rather, the Court simply assumed that the common understanding of “coming out” meant approval of engaging in homosexual conduct because that was how others, like the BSA, were likely to interpret it, and that anti-discrimination law imposed an expressive burden on the BSA’s ability to express themselves.⁴⁰⁰ Because the staunchest defenders of morals regulation of sexuality seem to believe that prohibitions on gay sex exist to symbolize and confirm majoritarian values about what sex should express and to whom,⁴⁰¹ it is grossly inappropriate for a court to impose a nonexpressive purpose on the law—especially when the law in

397. Chris Bull, *Who Is George W. Bush?*, THE ADVOCATE, Jul. 4, 2000, at 28.

398. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

399. *See id.* at 690-93 (Stevens, J., dissenting) (criticizing majority for adopting BSA’s position without inquiring into the message Dale’s sexuality imputes to the BSA).

400. *See id.* at 653.

401. *See* John M. Finnis, *Law, Morality, and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1063-69 (1994) (surveying historic law to claim the view that homosexual love cannot be expressed by sexual acts). Of course, as Finnis correctly and implicitly explains it, the historic “moral” view is based on the myth that husband and wife become “one”—a “biological unit”—because of the way their genitals fit together. *Id.* Certainly, as a matter of biology this is false; while heterosexual *offspring* might be a single biological unit, sex *partners* do not become one “biologically.” But as Finnis explains, this view of biology shapes anti-gay views that sex expresses only friendship, not “true love.” *Id.*; *see also* Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 1 NOTRE DAME J.L. ETHICS & PUBLIC POL’Y 41 (1995) (rebutting Finnis).

question is randomly enforced and otherwise cannot be taken seriously for any other purpose.

The “moralist” attempt to monopolize meaning for conduct, therefore, is no more “ideologically neutral” than any attempt to monopolize a mode of communication to ensure it is “used to express only one view.”⁴⁰² Unless government officials are prepared to argue that heterosexual sex is not expressive of feelings and ideas, they must concede that criminalizing sex to assure that only certain classes of people will be able to use it to express their feelings and desires is blatantly a preference for sex expressing one point of view.⁴⁰³ Anyone who has lost one lover to another knows that the messages “I love you” and “I must love someone else” are radically different in content. As a result, sex regulators cannot separate their interest in sex from expression—either for what it communicates to the public, or for the preservation of sex as a heterosexual symbol of affection—and moralistic prohibitions on sex should not be entitled to anything less than strict scrutiny.

B. Sex Regulation Under Scrutiny After Dale

1. The Weight and Role of Any Alleged Non-Expressive Regulatory Interests

If the case for strict scrutiny of sex regulation under the First Amendment has merit in individual cases, *Dale* should mean that the burden on states to justify a sweeping ban on private expression is severe, especially to the extent that states cannot show that such expression is inherently harmful to people engaging in it. The Court in *Dale* did not hold that New Jersey’s interest in ending sexual orientation discrimination failed to prove compelling. Rather, the Court held that New Jersey imposed a significant burden on private expression at least in part for inculcative purposes, and that could not justify the burden imposed on expression and expressive associations by law.⁴⁰⁴ That same analysis should apply outside the context of scouting to assess the risks that sex crime laws will burden relationships that are otherwise lawful associations for the expression of feelings and ideas.

402. *Johnson*, 491 U.S. at 417 (1989) (finding a First Amendment right to burn a flag in criticizing government rather than to show respect in disposal of it).

403. *Spence v. Washington*, 418 U.S. 405, 411 (1974); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

404. *Dale*, 530 U.S. at 661.

Whatever other interest a regulator may invent for regulating sex, it cannot criminalize sex under heightened scrutiny if the reason in part is for the purpose of “fostering values” or to make a moral statement in private spaces, especially if no clear harm results from the regulated behavior. Even before *Dale*, the Court held that “where the State’s interest is to disseminate an ideology,” such an interest categorically fails to outweigh First Amendment interests in allowing individuals to control their own expression.⁴⁰⁵ If *Dale* teaches anything, it is that freedom of expression does not merely enable an individual “to avoid becoming the courier” of the state’s message,⁴⁰⁶ but also to be free from burdens in expressing a point of view, specifically one contrary to a “popular” perspective on homosexuality.⁴⁰⁷

It is, perhaps, important to consider potential non-expressive interests that states could level against sex between people of the same gender, if only for the sake of argument to prove how lacking in substance those claims are. To the extent a court were to accept any asserted nonexpressive interests in sex, those assertions would certainly play a greater weight in assessing the constitutionality of burdens on expression, perhaps even lowering scrutiny of sex regulations. Still, as long as a First Amendment claim for sex passes the *Spence* test for finding expression in conduct, the government would still have to show that sex regulation furthers an asserted nonexpressive interest,⁴⁰⁸ and that it made an attempt to “precisely and narrowly assure” that the regulations serve those interests without more than an incidental burden on expression.⁴⁰⁹ In these terms, defenders of sex regulation daring to assert such interests run the risk of proving that their true aims lie elsewhere, especially because allegedly nonexpressive interests in sex are typically facially “outrageous.”⁴¹⁰

To be sure, the United States Supreme Court’s current conflict over the rigor of intermediate scrutiny poses a greater threat to a First Amendment claim than would exist under *Dale*, at least to the extent that the Court has tended to defer under intermediate scrutiny to “legislative experience” regarding what secondary effects are allegedly caused by

405. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

406. *Id.* at 717, *accord Dale*, 530 U.S. at 660-661.

407. *Dale*, 530 U.S. at 660.

408. *United States v. O’Brien*, 391 U.S. 367, 77 (1968).

409. *Id.* at 381.

410. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1993) (finding that the ban on consensual private sex to reach sex crimes is “simply outrageous”).

regulated conduct.⁴¹¹ This may seem especially troubling for a claim for constitutional protection for gay sex, because the last time the Court encountered views on sex drawn from “legislative experience,” the Attorney General of Georgia claimed:

It should be permissible for the [Georgia] General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestitism, to name only a few. Homosexual sodomy . . . is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence. Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases . . . and the concomitant effects of this relationship on the general public health and welfare.⁴¹²

Fortunately, the Court’s latest gloss on its secondary effects test suggests that even under intermediate scrutiny, legislative experience—particularly when drawn from other states—is only entitled to judgment in the *absence* of evidence to the contrary.⁴¹³ In the case of laws regulating private consensual sex, legislative experience actually favors striking *down* those laws, as all of the states that have recently scrutinized sex crime laws for factual bases have found none.⁴¹⁴ Even when the most common “fact-based” criticisms of same-sex intimacy are recast as arguments against the excesses of expression, those criticisms still lack credibility. For example, a claim that lesbians and gay men would seek protection for sexual associations the size of the BSA not only grossly

411. See *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 297-98 (2000) (deferring to local experience allegedly observing secondary effects of nudity from living near areas surrounding nude dancing establishments).

412. Brief for Petitioner Michael H. Bowers, Attorney General of Georgia at 36-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). For criticisms of similar distortions of facts that feign harms posed by lesbians and gay men, see Herek, *supra* note 85, at 223-255. See also SIMON LEVAY, *QUEER SCIENCE* 211-230, 273-296 (1996).

413. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

414. See, e.g., *Powell v. State*, 510 S.E.2d 18, 24-25 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112, 123-125 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 262-265 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487, 501-02 (Ky. 1992). States that have recently upheld their laws have done so on morality grounds, not factual bases. See *Lawrence v. State*, 41 S.W.3d 349 (Tex. Crim. App. 2002); *State v. Smith*, 766 So. 2d 501 (La. 2000). For further analysis of the emptiness of factual harms attributed to intercourse with someone of the same gender, see Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

stereotypes lesbian and gay sex⁴¹⁵ but is severely undermined by most states' overwhelming lack of concern for heterosexual promiscuity.⁴¹⁶ The same can be said for unsupported claims that a ban on all lesbian and gay sex is needed because such sex leads to dangerous lifestyles prone to disease and violence—a claim that is wholly unsupported by fact,⁴¹⁷ not to mention disingenuous as a concern for lesbians and gay

415. NHSLS, *supra* note 30, at 314. In *The Advocate* survey, only 1% of all men who have sex with men reported having more than 100 partners a year. See Lever: MSM, *supra* note 30, at 22.

416. See UTAH CODE ANN. § 76-7-104 (2001); IDAHO CODE § 18-6603 (2000). Reported convictions under such promiscuity laws seem to occur when the state cannot prove rape. See, e.g., *State v. Houston*, 9 P.3d 188 (Utah Ct. App. 2000) (fornication charge appropriate where state could not prove complainant did not consent to sex); *State ex rel. W.C.P. v. State*, 974 P.2d 302 (Utah Ct. App. 1999) (fornication charge inappropriate where state could prove statutory rape). The remaining twelve formally permit it or openly acknowledge that the laws are moribund. As the Supreme Court of Kentucky explained:

The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment. Is there a rational basis for declaring this one type of sexual immorality so destructive of family values as to merit criminal punishment whereas other acts of sexual immorality which were likewise forbidden by the same religious and traditional heritage of Western civilization are now decriminalized? If there is a rational basis for different treatment it has yet to be demonstrated in this case. We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Wasson, 842 S.W.2d at 501; see also *Gryczan*, 942 P.2d at 127 (“As an expression of societal mores, the statute is both overbroad and under inclusive . . . permitting heterosexuals to engage in conduct long deemed inappropriate by some segments of society, such as anal sex, sex outside of marriage, and non-procreative sex.”).

417. Despite claims that lesbians and gay men are more prone to “suicide, depression, and drug and alcohol abuse,” see, e.g., *Campbell*, 926 S.W.2d at 263, the medical community now recognizes that emotional disturbance experienced by sexual minorities that causes such harms comes from the strains of prejudice, not from alleged sexual dysfunction or activity. American Psychiatric Association, Fact Sheet: Sexual Orientation, June 2000 at 1 [hereinafter APA Fact Sheet] (focusing on the mental illnesses caused by a homophobic society); American Medical Association, Council on Scientific Affairs, *Health Care Needs of Gay Men and Lesbians in the United States*, 275 J. AM. MED. ASS'N 1354, 1356-57 (1996) (most of the emotional disturbance experienced by lesbians and gay men is not based on psychological causes but rather on alienation from an unaccepting environment); American Psychological Association, *Answers to Your Questions about Sexual Orientation and Homosexuality* (July 1998), at <http://www.apa.org/pubinfo/answers.html> (last visited Nov. 18, 2002). Indeed, when the American Psychiatric Association removed homosexuality from its list of disorders in 1973, it did so on the basis of evidence that distress, pain, and increased risk of death were *not* caused by any aspects of being gay or having sex. See Victor Cohn, *Doctors Rule Homosexuals Not Abnormal*, WASH. POST, Dec. 16, 1973 at A1, A21 (noting the APA called for an end to laws discriminating against “homosexuals” because they are “cruel” and for the repeal of laws criminalizing gay and lesbian sex, deeming those laws “irrational”).

On the question of STD control, it is quite obvious that all lesbians and gay men are not carriers of disease, such as AIDS. See *Gryczan*, 942 P.2d at 123; *Sundquist*, 926 S.W.2d at 254. On the question of violence, no data by any law enforcement agency shows that sexually active

men, considering that virtually all the states that retain laws criminalizing lesbian and gay sex have abandoned sexual minorities to discrimination and violence.⁴¹⁸

gay men or lesbians are more likely to commit other crimes, either in the throes of sexual passion or because of it. Sex offense murders are overwhelmingly likely to be perpetrated by men (95.0%) against women (82%) and rape and sexual assault was even more “heterosexual” (91% of all rapes or sexual assaults were against women, 99% of whom were raped by men). LAWRENCE GREENFELD, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT* 2, 28-29 (1997) (studying data for a sample year). Recent data confirms that this pattern holds true over time. According to the most recent FBI Uniform Crime Reports (1999), in cases where the victim was both raped and murdered, forty-five out of forty-six of the victims (97.8%) were women and only one man was reported raped and murdered by another man. In intimate partner violence, men batter their female partners at twice the rate that women do in lesbian relationships. PATRICIA TJADEN AND NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* 30 (2000). Lesbian women who had prior relationships with men were three times as likely to report violence. *Id.* While men may be victims less in heterosexual relationships than in gay relationships, the data also shows that men are still less likely to batter their partners in gay relationships, as heterosexual men batter women more. *Id.* at 31 (noting that the comparisons of the findings merely suggest that “intimate partner violence is perpetrated primarily by men, whether against male or female partners”). Of men and women killed by intimate partners, two-thirds are killed by husbands or wives. James Alan Fox, *Analysis of Trends in Intimate Murder, 1976-1996* in LAWRENCE A. GREENFELD ET. AL. EDs., *BUREAU OF JUSTICE (BJS) STATISTICS VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS AND GIRLFRIENDS* 6 (1998). The only objective data on crimes against children is that the vast majority of men who engage in abuse of children are those who have access to children through heterosexual rituals such as marriage and traditional families. ANDREA SEDLAK & DIANE D. BROADHURST, *NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT* 6-3 (1993) (hereinafter NCCAN) (finding that 77.8% of all abuse was caused by birth parents and 13.6% by other parents). LAWRENCE A. GREENFELD, *BUREAU OF JUSTICE STATISTICS, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS* 5 (1996) (studying offenders already convicted and finding that “[n]early two-thirds of those who reported having committed their crime against a child had married”). Of these victimizers, offenders are more likely to sodomize their own child and just as likely to rape a child who is a mere acquaintance. *Id.* at 10. In general, men commit all crimes against children, sexual or otherwise. *See id.* at iv (“All but 3 percent of offenders who committed violent crimes against children were male.”); NCCAN, *supra*, at 6-10 (Males perpetrate eighty-nine% of sexual abuse of all children). Even if all sex crimes against boys could be presumed to have been performed by gay men—rather than heterosexual men who use sex as a form of abuse to taunt men for being “gay”—that same presumption would require the conclusion that heterosexual men are exclusively responsible for child abuse of girls. *See* DAVID FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 184 (1984) (showing that men account for 95% of all sexual abuse of girls and perpetrate slightly less, 80%, of all sexual abuse of boys).

418. Fourteen of the fifteen states with same-sex intimacy bans continue to permit discrimination against lesbians and gay men, *Compare* NGLTF Sodomy Law Map 2002, *supra* note 163, *with* NATIONAL GAY AND LESBIAN TASK FORCE, *CIVIL RIGHTS LAWS IN THE U.S.* (2002). This is so even though discrimination is well known to cause “occupational stressors,” as well as “social disruption,” “individual suffering” and “emotional and physical trauma.” APA Fact Sheet, *supra* note 417, at 3. For further information see Ilan H. Meyer and Laura Dean, *Internalized Homophobia, Intimacy, and Sexual Behavior Among Gay and Bisexual Men*, in GREGORY M. HEREK ED., *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS,*

Under scrutiny, it is clear that categorical bans on gay and lesbian sex transparently punish lesbians, bisexuals, and gay men who are not promiscuous carriers of STDs and perpetrators of other crimes, threatening all lesbian and gay expressions of affection through sex along the way. Even if criminal law were an effective means of controlling such harms as STD transmission,⁴¹⁹ most states have found that the law can be tailored to address such specific harms,⁴²⁰ as well as sexual violence,⁴²¹ without intruding on all private consensual sexual expression.

GAY MEN, AND BISEXUALS (1998) at 165-68. Moreover, nine of the fifteen states with same-sex intimacy bans additionally exempt hate crimes based on sexual orientation from their hate crime laws, compare NATIONAL GAY AND LESBIAN TASK FORCE, HATE CRIME LAWS IN THE U.S. (2001) and NGLTF Sodomy Law Map 2002, *supra* note 163, even though lesbians, gays, and bisexuals have suffered 99% of all offenses of bias-motivated violence reported to the FBI in the last five years—including 100% of all murders and 99% of all assaults. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME-2000 (2001) at 7, 10; FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME -1999 (2000) at 7; FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME -1998 (1999) at 7, 10; FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME-1997 (1998) at 7, 10; and FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME-1996(1997) at 7, 10.

419. The best evidence suggests that this is not the case. The CDC has warned that all STDs are “hidden epidemics” because infections often are “unrecognized and untreated.” U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTERS FOR DISEASE CONTROL AND PREVENTION, TRACKING THE HIDDEN EPIDEMICS: TRENDS IN STDs IN THE UNITED STATES 1 (2000) (hereinafter, CDC: TRENDS). In fact, the CDC lists six of the states with laws against sex between men and between women as states with the unhealthiest rates of gonorrhea and syphilis. *Id.* at 29 (reporting that Alabama, Louisiana, Mississippi, North Carolina, and South Carolina are among the top ten states for unhealthy rates of gonorrhea and syphilis transmission, as well as Texas for gonorrhea and Oklahoma for syphilis).

Regarding AIDS control, there is new evidence that stigma encourages risky behavior. Richard A. Friedman, *A Clue to Why Gays Play Russian Roulette with HIV*, N.Y. TIMES, Sept. 24, 2002, at F5. The very terming of AIDS as a “gay related immunodeficiency” (GRID) in the early 1980s may not only have allowed the disease to spread more rapidly in the heterosexual population than it otherwise would have, but it may have continued public perceptions of AIDS as a “gay disease” that put everyone at risk. See Lawrence Altman, *The Cause of the Outbreak is Unknown*, N.Y. TIMES, Jul. 3, 2001, at F1. AIDS had already spread through the population of gay men in epidemic proportions in the United States most rapidly through the 1980s, See JOHN LOUGHERY, THE OTHER SIDE OF SILENCE, 419-436 (1986), during the time when “most states” had sodomy laws, as that period was marked by *Hardwick* in 1986. See *Bowers v. Hardwick*, 478 U.S. 186, 189-90 (1986). If the AIDS crisis has taught us anything, it is that targeting gay sex for STD control may worsen public health crises overall by lowering heterosexual defenses to it.

420. See, e.g., Paul Barron, Sara J. Goldstein & Karen L. Wishnev, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary*, 5 TUL. J.L. & SEXUALITY 1 (1995) (summarizing statutes separately punishing HIV transmission); see also Christopher Heredia, *Infected Former Lover Wins \$5 Million From Ex-Official*, S.F. CHRON., Mar. 19, 2002 at A17.

421. See, e.g., *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) (“The State fulfills its role in preventing sexual assaults and shielding and protecting the public” by specifically criminalizing violent sexual acts, prostitution and public lewdness); *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997) (recognizing state power to regulate nonconsensual commercial sex but preventing states from regulating private noncommercial sex); *Campbell v. Sundquist*, 926 S.W.2d 250, 265 (Tenn.

It is precisely that kind of tailoring that proves that state interest in harm is genuine in those cases, as well as an interest that would justify a burden on expression in limited circumstances. Particularly as states do not subject all heterosexuals to categorical bans on sex because some heterosexuals transmit STDs and commit sexual violence, states that purport to assert alleged harmful secondary effects from all same-gender sex cannot be taken seriously on those charges.

Ultimately, the fact that none of the asserted reasons for regulating sex survive scrutiny proves that states' regulatory interests lie in expression, and that strict scrutiny is warranted in the first instance. As the Court reasoned long ago in *Stanley v. Georgia*, the claim that private sexual expression triggers secondary effects is almost always speculative,⁴²² but even if it were not, the state has no justification for targeting expression for advancing "morals" in private spaces as long as it can also address harmful conduct when and where it actually occurs.⁴²³ The volume of evidence indicating a lack of connection between societal harms and sex suggests that states must either be misinformed about sex or, more likely, that the assertion of those harms is a mere smokescreen for other concerns about sex that regulators do not want to concede. Without punishing heterosexual sex in the same way—such as banning all sex with multiple sex partners, regardless of the gender of the parties—it is impossible to portray regulation of lesbian and gay sex as anything other than a bald objection to the associational choices of lesbians and gay men and the expression that flows from it, an interest that should carry no constitutional weight at all.

2. The Comparison of State Interests to the Burden on Expression

Given the extremely slight nature of states' alleged interests in regulating sex, the burdens that laws place on sexual minorities should favor voiding sex regulations, especially when they are enforced or applied in individual cases. For expressive associations, the burden is not only inherent when sexual minorities are punished with such tangible harms as criminal stigma, or the loss of a job or child custody, but unjustified when states endeavor to push regulation into private associations without proof of harm caused by the sex they disfavor. But regardless of actual damage done by sex regulations in individual cases, the potential for suppression of expression is significant enough to

Ct. App. 1996) (recognizing that the state has a "broad range of police power" to regulate harmful sex without burdening private consensual noncommercial sex).

422. *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969).

423. *Id.* at 567.

outweigh any alleged interests states claim in a categorical ban on sex, because “the existence of a penal statute susceptible of sweeping and improper application” may broadly threaten expression and associations that are “inherently delicate and vulnerable,” “deter[ring]” them “almost as potently as the actual application of sanctions.”⁴²⁴

The fact that states rarely prosecute people criminally under sex crime laws should not lessen any assumption of existing burdens. The United States Supreme Court has repeatedly struck down unenforced criminal statutes because the potential threat to expression that a criminal penalty inherently poses is simply too great.⁴²⁵ Indeed, it is the randomness of criminal prosecutions and the uses of sex crime laws in civil cases that make such statutes so unpredictable and dangerous to expression. As Justice Robert Brown of the Arkansas Supreme Court emphasized:

The State’s counsel at oral argument contended that the sodomy statute is a “dead letter” and that no prosecutor currently enforces it. Nor has it been enforced for decades, counsel adds. In the same breath, she urges that the statute must be kept on the books and that the plaintiffs should be prevented from challenging it, even while the statute makes them criminals. It is indisputable that the sodomy statute hangs like a sword of Damocles over the heads of the plaintiffs, ready to fall at any moment.

The idea of keeping a criminal statute on the books which no one wants to enforce is perverse in itself. This brands the plaintiffs with a scarlet letter that the State contends they should have no chance to contest in the courts of this State. The State’s position comes perilously close to complete inconsistency and smacks of a no-lose proposition for the government⁴²⁶

Admittedly, the inability to prove how many lesbians and gay men refrain from exercising their expressive and associational rights because of sex crime laws may make challenges to such laws seem forced. Indeed, in *Meese v. Keene*,⁴²⁷ the United States Supreme Court rejected a similar First Amendment challenge to a law requiring films to be labeled “propaganda” precisely because the challengers to the law failed to show that the statute actually deterred expression.⁴²⁸ But the Court reached that

424. NAACP v. Button, 371 U.S. 415, 433 (1963).

425. See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234, 242-44 (2002) (voiding the Child Pornography Prevention Act, 18 U.S.C. § 2251, solely because the coalition of plaintiffs feared the law “threatened the activities of its members.”); Reno v. American Civil Liberties Union, 521 U.S. 844, 861 (1997) (striking down the Communications Decency Act of 1996 even though the challenge was filed only one week after it was signed into law).

426. Jegley v. Picado, 80 S.W.3d 332, 354 (Ark. 2002).

427. 481 U.S. 465 (1987)

428. *Id.* at 477-485.

conclusion in *Keene* because it held that the propaganda label was not inherently pejorative, and because the government made no effort to actually prohibit the labeled expression.⁴²⁹ That is certainly not the case with criminalized, sexualized expression. Indeed, the Court has made clear that a “criminal” penalty attached to expression is much more dangerous than any other label.⁴³⁰ Even outside the criminal context, the Court has recognized that a branding of illegality “poses the threat of reputational harm that is different and additional to *any* burden posed by other penalties.”⁴³¹

Since regulators generally make no pretense that the purpose of laws prohibiting same-sex intimacy is “repressing homosexual behavior by state action,”⁴³² they should take the blame for any restraint of such behavior for expressive purposes. The most widely-respected statistical evidence on sexuality in America indicates that many men and women who have same-sex desires refrain from sex because of negative sanctions for engaging in it.⁴³³ Thus, to the extent that laws criminalizing the expression of same-sex desire aggravate “the sting of society’s disgust and derision” for lesbian and gay identity by sanctioning harassment and pushing sexual minorities “into back spaces,” “subcultures,” and “double life,”⁴³⁴ the restraint exercised by many people with desire for same-sex intimacy cannot be unbundled from the stigma that the state itself has openly sought to encourage with criminal law.

The true burden on expression achieved by sex regulation emerges from the choices lesbians and gay men would face in trying to obey a state’s criminal law. As long as the state is aware that sex generally has potential for expressing a message of desire, love, and intimacy, it must concede that the law leaves sexual minorities with only two real expressive options.⁴³⁵ On the one hand, sexual minorities who choose to

429. *Id.* at 480-81.

430. *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002) (holding it to be “textbook” that facial challenges are permitted to criminal statutes prohibiting forms of expression); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (“[A] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms”).

431. *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002) (emphasis added).

432. *See, e.g.,* *Lawrence v. Texas*, 41 S.W.3d 349, 361 (Tex. Crim. App. 2001).

433. *See* NHSLs, *supra* note 30, at 308 (“[A]n environment that provides increased opportunities for and fewer negative sanctions against same-gender sexuality may both allow and even elicit expression of same-gender interest and sexual behavior.”)

434. EDWIN M. SCHUR, *DEViant BEHAVIOR AND PUBLIC POLICY: ABORTION, HOMOSEXUALITY, AND DRUG ADDICTION* 79-86, 92-94 (1965).

435. Arguably individuals could also physically alter their “sex” to attempt to express love and other feelings for a partner with the same biological sex and avoid criminal penalties. At least in one state, changing sex has achieved full treatment as a person of a sex contrary to sex

refrain from sex in response to the law sacrifice a great deal of expression. On the other hand, those who feel compelled to channel their sexual needs into relationships with people they do not love or desire will not only associate with others against their will, but risk conveying messages of love and affection contrary to their true intent. Even to avoid such false expression, minorities exercising the option of heterosexual sex would have to verbalize their true feelings to prevent any misunderstanding that their sex partners may take from intimacy. For the first option, the law risks the loss of expression on minority points of view—something that *Dale* warns is of special constitutional concern precisely because the expression is unpopular and contrary to majoritarian values.⁴³⁶ For the second option, the law effectively imposes a message of one form or another on a person—something that *Dale* also warns is presumptively constitutionally impermissible.⁴³⁷

It is certainly true that, even without sex, same-sex partners still have words, kisses, and touches to express many of the ideas that might otherwise might be expressed sexually. It is also true that, to many people, some of the messages lost by prohibiting sex—such as “I want to know you in every way possible”—may seem laughably clumsy and hyperbolic. But none of the Court’s expressive conduct doctrine cases have legitimized conduct regulations on the grounds that speakers have verbal means of expressing their ideas. Indeed, the Court warned in *Hurley* that the First Amendment extends protection to nonverbal

designation at birth, see *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. 1976). Several states at least facially permit such changes. See ALA. CODE § 22-9A-19(d); FLA. STAT. Ch. 29, § 382.016; KAN. ADMIN. REGS. 28-17-20(b)(1)(A)(i); LA. REV. STAT. ANN. 40:62 (1995); MASS. GEN. LAWS ch. 46, § 13(e); MICH. COMP. LAW S. § 333.2831(c); MO. REV. STAT. § 193.215; OKLA. STAT. tit. 63, § 1-321; MISS. CODE ANN. § 41-57-21; N.C. GEN. STAT. § 130A-118; S.C. CODE ANN. § 44-63-150; TEX. STAT. ANN. §§ 191.028, 192.011; UTAH CODE ANN. § 26-2-11; VA. CODE ANN. § 32.1-269. Only Idaho has consistently refused such sex changes, see <http://www.lambdalegal.org/cgi-bin/Idaho/documents/record?record=1162> (Last visited November 20, 2002). But these changes are not always effective as a matter of law. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999) (holding that a person designated male on an original birth certificate could not become female for the purposes of marriage); *J’Noel v. Gardiner*, 42 P.3d 120 (Kan. 2002) (recognizing a transsexual as “not neatly” fitting into male or female categories but still not sufficiently male to legally marry a male). Moreover, not all people qualify for sex assignment surgery. For an overview of the procedure and how it has evolved, see BERNICE HAUSMAN, CHANGING SEX: TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER (1995).

436. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (holding that the First Amendment is “crucial” to prevent the majority from imposing its views on people who express unpopular ideas and to preserve “cultural diversity” from suppression by the majority) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

437. The Court has repeatedly struck down local laws compelling one form of conduct or other expression where it imposes on the person suffering under the law a risk of conveying an unwanted message. See, e.g., *Wooley v. Maynard*, 403 U.S. at 714-717; *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. at 636; see also *Miami Herald Publ’g v. Tornillo*, 418 U.S. 241 (1974).

messages precisely because they cannot be appreciated verbally.⁴³⁸ And to many people, to feel the taste and touch of another person is to experience a message of love and desire without hollow phrases or any other corroborating expression of affection.⁴³⁹ For many, reducing a message of love and affection to a verbal shell strips it of the nuance and conviction that sex inherently provides, precisely because it leaves recipients of the verbal message of desired closeness and intimacy with enormous doubt that the message truly means what it says.⁴⁴⁰

Ultimately, most states' failure to make any attempt to narrow the focus of laws criminalizing homosexual sex to actual harms proves that the burden imposed on expression is unjustified. In *O'Brien*, for example, the United States Supreme Court recognized that the burdens on expression caused by banning draft card destruction could be justified because the government had a need to preserve each and every card for administrative purposes.⁴⁴¹ Without similar proof of need for a ban on all body exposure, the Court held in *PAP's A.M.* that state restrictions on nudity imposed justifiable, minimal burdens on expression, because the state allowed dancers to express themselves wearing only g-strings and pasties.⁴⁴² States that place flat bans on consensual sex simply cannot show that each and every occurrence of the proscribed conduct is as harmful as in *O'Brien*—especially when they permit heterosexuals unique access to the very conduct in question. Nor can they show that a flat ban imposes a minimal burden on expression as in *PAP's A.M.* The burdens on expression caused by sex bans simply cannot be squared with any Supreme Court precedent sanctioning comparable burdens in the past.

The very freedom that the BSA sought by privately preferring certain forms of sex for its members as a means of role modeling is no less valued by lesbians and gay men who derive identity from emotional and sexual relationships as well. The Supreme Court has already recognized in *Dale* that the First Amendment is critical to “the ability to define one’s identity,”⁴⁴³ and has held elsewhere that sex is indeed “central” to the “development of human personality.”⁴⁴⁴ In these terms, it is clear that suppression of sex has a unique impact on human life that

438. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995).

439. *See infra* notes 109-112 and accompanying text.

440. *See infra* notes 109-112 and accompanying text.

441. *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968).

442. *City of Erie v. PAP's A.M.*, 529 U.S. 277, 301 (2000).

443. *Roberts v. United States Jaycees*, 468 U.S. 609, 619, 622 (1984).

444. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

goes far beyond the loss of a nuanced message. As David Richards has eloquently written, laws criminalizing sex inherently denigrate it, disregarding sex's expressive power and "dehumanizing human sexuality" by reducing lovemaking to an animalistic act that it is "mere conduct" fit for regulation, "usurp[ing] the moral sovereignty of the person over the transformative moral powers of love."⁴⁴⁵

When all is said and done, even if laws criminalizing sex between men or between women were rarely enforced, they still impose exactly the same unwarranted burdens imposed in *Dale* every time such statutes are used—threatening expression and associational interests in individual cases for no clear reason to do so other than to make a point about right and wrong. If rare enforcement and use of criminal law illustrates the state's genuine lack of interest in it as a means of harm control, the opportunistic assertion of power represented by the random use of statutes to attack lesbians and gay men for sex in relationships unnecessarily interferes with those relationships. If the United States Supreme Court can require New Jersey to refrain from applying anti-discrimination laws to associations who teach sexual values in private, there is no reason states should not be required to refrain from reaching into private spaces to completely occupy them with sex control, preventing lesbians and gay men in particular from controlling the meaning of our own sex lives.

CONCLUSION

The world is straight. I walk down the street and I see women and men holding hands, and kissing, and thinking actually nothing about it, but I've been with a boyfriend and we've been walking down the street and I've wanted to hold his hand, and he was like, "No, I—please, don't." Why can't I? Why—why can't I? Because he's afraid that we're going to get hit. It shouldn't be an issue. Can you imagine what it would be like to walk down the street and not think about the person—not think about the ramifications of loving the person you love?

Patrick McBride, a New Yorker
to ABC World News Sunday⁴⁴⁶

As this Article goes to press, the United States Supreme Court is once again considering whether the United States Constitution provides any protections against criminal prosecution for consensual sex, particularly when engaged in by same-sex couples. Unfortunately, the grounds upon which the Justices may find such protection are laden with

445. DAVID A. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION* 446 (1998).

446. World News Sunday (ABC television broadcast, Sept. 29, 1996).

potential for negative connotations, particularly for lesbians and gay men in the twenty-first century.⁴⁴⁷ Even though the Court has granted heterosexual sexual partners special rights to sexual practices that lesbian and gay partners physically cannot engage in,⁴⁴⁸ the Court may hold that states cannot specially criminalize specific sex acts between same-sex partners now only where the heterosexual majority has admitted to engaging in the acts and legalized those acts for themselves. And if the Court holds that a right to privacy in sexual matters exists for gay and lesbian sex, it may do little more than affirm homophobic sentiment that same-sex intimacy is worthy of protection only if it is shielded from the heterosexual public so that heterosexuals can ignore its existence.

From this perspective, First Amendment protection for sexual intimacy seems to be needed now as much as ever before, especially as lesbians and gay men remain under attack for the feelings and ideas we express, as much as the sex that we engage in. In 2002, for example, the Chief Justice of the Alabama Supreme Court, Roy Moore, invoked the state's law criminalizing lesbian and gay sex as grounds to call the entire lesbian and gay "lifestyle" "evil," "heinous," "detestable," and "abominable."⁴⁴⁹ Moore specifically urged Alabama authorities to use "the power of the sword, that is, the power to prohibit conduct with physical penalties, such as confinement and even execution . . . to prevent the subversion of children toward this lifestyle."⁴⁵⁰ With lesbians and gay men suffering under such extreme rhetoric—regardless of whether we refrain from engaging in criminalized sex⁴⁵¹—it is clear that the feelings and ideas we convey need protection, and a First Amendment claim is worth pursuing for that reason alone.

Even if it were not needed as a practical matter, a First Amendment claim for sex and sexuality is needed to redeem the law's regard for sex, lest *Bowers v. Hardwick* and its comparisons of sex to drug abuse and suicide remain law's legacy of disrespect for human intimacy.⁴⁵² It should be obvious that expression about sexuality left in the hands of government officials cannot be presumed to be coherent or stable. When

447. Brief of Petitioners at ii, *Lawrence v. Texas*, No. 02-102 (U.S. 2003) (filed Jan. 16, 2003) available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/177.pdf (last visited Feb. 24, 2003) (stating the issues as whether the right to privacy protects consensual sex, or whether states violate equal protection when criminalizing same-sex "intimate behavior" while legalizing different-sex "intimate behavior").

448. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 452-54 (1972) (granting the right to engage in penile-vaginal sex with contraception, regardless of marital status).

449. Ex Parte H.H., 830 So. 2d 21, 2002 Ala. LEXIS 44 (Ala. 2002).

450. *Id.* at 38.

451. See *supra* notes 363-364 and accompanying text.

452. *Bowers v. Hardwick*, 478 U.S. 186, 195-99 (1986).

speaking about sex, this nation's last President did not even seem to know what "the meaning of the word 'is' is."⁴⁵³ And our current President claims to believe in "equal rights" not "special rights"⁴⁵⁴ while openly supporting the criminalization of lesbian and gay sex alone, effectively giving heterosexuals special rights to engage in noncoital sex.⁴⁵⁵ Apparently, to our current President, "equality" in the United States on matters of sexuality still depends on what the word "equal" equals.

"Men feared witches and burnt women," Justice Brandeis once wrote, warning that "the function of speech" is to free people "from the bondage of irrational fears."⁴⁵⁶ It is not hard to see the value of that lesson in a nation still clashing on questions of homosexuality, where state officials invoke extraordinary claims of harm caused by homosexuality to justify heterosexist discrimination. Indeed, in the last half-century, the heterosexual majority has branded its sexual minorities

453. Maureen Dowd provides a stinging indictment of President Clinton's inability to speak clearly about sex:

The quintessential Bill Clinton moment can be found in footnote 109 of the Starr report.

The President was asked before the Starr grand jury about Robert Bennett's assertion during the deposition for the Paula Jones case that "there is absolutely no sex of any kind" between the President and Monica Lewinsky.

Mr. Bennett was right, Mr. Clinton said, because he was using the present tense. "It depends on what the meaning of the word 'is' is," the President explained helpfully.

The same footnote offers three other Clintonian gems before the grand jury: "I have not had sex with her as I defined it." "It depends on how you define alone." And, "There were a lot of times when we were alone, but I never really thought we were."

Mr. Clinton's double-talk had a contagious effect on Betty Currie. "I don't want the impression of sneaking," the secretary said, about Monica, "but it's just that I brought her in without anyone seeing her." And, "The President, for all intents and purposes, is never alone."

Mr. Clinton's greatest sin is not sex or dissembling about sex, as the heavy-breathing Kenneth Starr believes. His greatest sin is swindling and perverting the American language. He is like the cursed girl in the fairy tale: Every time he opens his mouth, a toad jumps out. . . . The President admits trying to mislead Paula Jones's lawyers, but denies lying under oath. He admits Monica had sex with him, but denies he had sex with Monica. He denies that oral sex (the second word of which is sex) is sex. The President, David Kendall says, committed "interpretations of contorted definitions," not perjury.

Maureen Dowd, *The Wizard of Is*, N.Y. TIMES, Sept. 16, 1998, at A29.

454. *The 2000 Campaign: 2nd Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000, at A22, A23 (transcribing then-Gov. Bush's remarks on a law that would protect gays and lesbians from employment discrimination as "I support equal rights but not special rights for people.").

455. See note 382, and accompanying text.

456. *Whitney v. California*, 274 U.S. 357, 376 (1925).

as “psychopaths”⁴⁵⁷ and “criminals” to prop up popular opinion about the purported superiority of homosexuality. And though much of that demonization in the public consciousness has been countered by individual lesbians, bisexuals, and gay men who have verbally come out as gay to their friends and family members,⁴⁵⁸ much of the public still believes that lesbian and gay sexuality is immoral.⁴⁵⁹ It is no wonder that sexual minorities in this country have been left subject to horrific harassment, discrimination and violence.

If maltreatment and misunderstanding of sexual minorities in the United States is ever to change, sex between men and between women must be rescued from the enigma of difference that the law has shrouded around it, not just by talking about it, but by ensuring that the law recognizes that it is worthy of the status of expression and free from suppression as a result. American law has recognized the expressiveness of sex in variety of contexts throughout its history. That recognition deserves to be fleshed out in cohesive form under the First Amendment if individuals are ever to have full control of consensual sex to give it meaning. Many Americans seem to believe that sex is a means of expressing love and affection. If the claim for First Amendment protection for sex is unprecedented, that it is all the more reason to press it.

457. See *Boutelier v. INS*, 387 U.S. 118 (1967) (illustrating how the definition of psychopath depended solely on deviating from socially accepted behavior and presumptively included “homosexuals”).

458. According to the Kaiser Report’s latest scientific survey of public opinion, 73% of the public knows someone who is gay and 62% have a gay acquaintance—up from 24% two decades ago and 55% three years ago—and as many people who know lesbians and gay men oppose sexual orientation discrimination. See KAISER REPORT, *supra* note 30, at 3. Indeed, increases in public support for sexual equality has risen in opposition to discrimination, from 56% in 1977 to 84% in 1996 and 83% in 1999. See KENNETH SHERRILL & ALAN YANG, FROM WRONGS TO RIGHTS: 1973-1999: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY (2000) (noting Gallup surveys and three PSRA surveys done between 1996-1998 show support at 83-84% as well).

459. See KAISER REPORT, *supra* note 30, at 3.

APPENDIX A

SURVEY RESULTS: PART I
(For 1405 Men Who Desire or Have Sex With Men)

PART I. SEXUAL IDENTITY

(QUESTION 1) How do you describe yourself sexually?

A gay or homosexual man (1262 of 1405) = 89.82%

A bisexual man (92 of 1405) = 6.55%

A man who is neither gay nor bisexual (20 of 1405) = 1.42%

A man who is unsure about a sexual identity (31 of 1405) = 2.21%

(QUESTION 2) Have you had or do you still have sex with women?

- Of those men who identify as “gay,” 48.53% have never had sex with women (612 of 1261 respondents), 48.22% have had sex with women in the past (608 of 1261 respondents), and an additional 3.25% have had sex with women in the past and still do (41 of 1261) and 1 did not answer the question.
- Of those men who identify as “bisexual,” 6.52% have never had sex with women (6 of 92), 45.65% have had sex with women exclusively in the past (42 of 92), and 47.82% have both had sex with women in the past and at least occasionally still do (44 of 92).
- Of those men who have sex with men but who identify as “not gay or bisexual,” or were unsure about their sexual identity, 19.05% have never had sex with women (8 of 42, 6 unsure, 2 “not gay or bisexual”), 50% have had sex with women in the past (21 of 42, 11 unsure, 10 “not gay or bisexual”), and 30.95% have had sex with women in the past and still do (13 of 42, 7 unsure, 6 “not gay nor bisexual”).

(QUESTION 3) Do you generally believe the statement “I am not gay” or “I am straight” when a person says it? (2 not responding)

Yes = 20.96% (294 of 1403)

No = 26.73% (375 of 1403)

Depends on the context = 52.32% (734 of 1403)

(QUESTION 4) Which mode of expression more convincingly expresses the idea “I like giving blow jobs”? (7 not responding)

Saying it: = 31.04% (434 of 1398)

Doing it = 68.96% (964 of 1398)

(QUESTIONS 5-8) Of these acts, which do you take is a sign a man is PROBABLY gay or bisexual (assuming none of the acts are done in jest, such as part of a role in a play or film) (percentages indicate that respondents do take the act in question as a sign of bisexuality or homosexuality)

Repeatedly going to a gay bars or clubs = 94.08% (1318 of 1401)

Passionately kissing in public = 96.21 % (1344 of 1397)

Holding hands in public = 76.89% (1078 of 1402)

Giving oral sex or a blow job = 95.23% (1337 of 1404)

PART II. NEGOTIATING SEX

(QUESTION 9) Do you commonly engage in any of the following conduct before approaching a man for sex? (Percentages indicate “yes”)

Making eye contact before introducing oneself = 85.40% (1024 of 1199)

Visiting a gay bar or other place frequented by gay men = 86.66% (1039 of 1199)

Other nonverbal contact = 82% (989 of 1199)

(QUESTION 10) Do you verbally discuss sex acts with a partner before engaging in them?⁴⁶⁰

Always = 24.18% (289 of 1195)

460. Because of comments indicating that respondents did not understand “verbal” to mean words (and thus might exclude sexual partners met through written personal ads or over the Internet), the question was clarified to make clear that verbal meant “using words, such as over the Internet,” then posed to 206 additional men who have or desire sex with men, to which 204 responded. The responses were as follows:

rarely = 19.12% (39)

sometimes = 47.06% (96)

almost always = 18.63% (38)

only with a new partner = 15.20% (31)

Sometimes (usually through kisses and touches) = 45.86% (548 of 1195)

Only with new partners = 11.05% (132 of 1195)

Rarely = 18.91%

* * * * *

PART III. SEX AS AN EXPRESSION OF LOVE, TRUST, ATTRACTION OR AFFECTION

(QUESTION 11) Is sex an expression of love? (2 not responding)

Always = 12.05% (169 of 1403)

Sometimes = 83.18% (1167 of 1403)

Rarely = 4.78% (67 of 1403)

(QUESTION 12) How often have you engaged in sex only for pleasure without intending to have the sex communicate love, trust, or affection for a partner? (4 not responding)

Frequently = 28.60% (401 of 1402)

Occasionally = 60.27% (845 of 1402)

Never = 11.13% (156 of 1402)

(QUESTION 13) If you were prohibited by law from having sex with your partner and felt obligated to obey the law, would you feel unable to express that love effectively? (1199 responding)⁴⁶¹

Yes = 51.38% (616 of 1199)

Not Necessarily = 48.62% (583 of 1199)

461. Several respondents who agreed to a follow-up question indicated that they responded “no” to this question because they would not comply, despite the question asking that to be assumed. As a result, the question was rephrased to focus only on the compliance question to ask “If every state in the U.S. criminalized sex between men and actually arrested and imprisoned men for having sex with other men, and if you could not leave the country, would you comply with the law and refrain from having sex with other men?” Only eight (3.90%) respondents out of 206 responded “yes” and one declined to respond; overwhelmingly the respondents said “no” (197 of 205, or 96.10%).

(QUESTION 14) If a man who identified as gay or bisexual said that he loved you but refused to have sex with you (even though he was healthy and not in another relationship) would you doubt his expression of love? (2 not responding)

Yes = 61.94% (869 of 1403)

No = 38.06% (534 of 1403)

(QUESTION 15) Do you consider the statement “I love you” automatically convincing for its truthfulness, without some other conduct to corroborate it? (5 not responding)

Yes = 25% (350 of 1400)

No = 75% (1050 of 1400)

(QUESTION 16) Do you express love for a partner in any of these ways?⁴⁶²

Holding hands in private = 86.41% (178 of 206)

Holding hands in public = 69.90% (144 of 206)

Embracing or hugging = 98.06% (202 of 206)

Kissing on the lips = 97.09% (200 of 206)

Deep tongue kissing = 87.86% (181 of 206)

Other forms = 95.15% (196 of 206)

(QUESTION 17) For you, are these acts expressions of trust? (Percentages indicate “yes” responses)

Rimming = 50.71% (608 of 1199)

Swallowing Cum = 60.13% (721 of 1199)

Receptive Unprotected Anal Intercourse (UAI) = 56.71% (680 of 1199)

Receptive Anal Intercourse (AI) with condom = 54.71% (656 of 1199)

Insertive UAI = 52.46 (629 of 1199)

Insertive AI with condom = 50.04% (600 of 1199)

None of the above = 19.02% (228 of 1199)

462. This question was posed to only the final 206 respondents.

(QUESTION 18) For you, are these acts expressions of love?
(Percentages indicate “yes” responses)

Rimming = 44.04% (528 of 1199)
Swallowing Cum = 51.46% (617 of 1199)
Receptive UAI = 48.79% (585 of 1199)
Receptive AI with condom = 52.71% (632 of 1199)
Insertive UAI = 44.29% (531 of 1199)
Insertive AI with condom = 49.71% (596 of 1199)
None of the above = 28.36% (340 of 1199)

(QUESTION 19) Would you engage in these acts in casual sex?

Rimming = 26.36% (316 of 1199)
Swallowing Cum = 19.52% (234 of 1199)
Receptive UAI = 6.59% (79 of 1199)
Receptive AI with condom = 57.05% (684 of 1199)
Insertive UAI = 11.34% (136 of 1199)
Insertive AI with condom = 71.31% (855 of 1199)
None of the above = 20.52% (246 of 1199)

(QUESTION 20) Would you engage in these acts only in a monogamous, exclusive relationship?

Rimming = 58.47% (701 of 1199)
Swallowing Cum = 65.14% (781 of 1199)
Receptive UAI = 66.22% (794 of 1199)
Receptive AI with condom = 54.88% (658 of 1199)
Insertive UAI = 64.89% (778 of 1199)
Insertive AI with condom = 53.96% (647 of 1199)
None of the above = 6.09% (73 of 1199)

(QUESTION 22) Has sex ever been “meaningless” to you apart from the physical pleasure of the act? (4 not responding)

Yes = 78.37% (1098 of 1401)
No = 21.63% (303 of 1401)

(QUESTION 23) If you have ever had sex with someone you were not very attracted to, what message do you think that sent to your partner about his attractiveness to you? (with 9.01%, or 108 of 1199, not

responding, presumably having sex with men they thought were attractive)⁴⁶³

I have no idea what he thought I meant = 68.93% (752 of 1091)

He probably thought that I thought he was attractive = 31.07% (339 of 1091)

PART IV. MISCELLANEOUS QUESTIONS

(QUESTION 21) Have you ever been unable to remember what sexual acts you engaged in (because of exhaustion or intoxication) (4 not responding)?

Yes = 15.99% (224 of 1401)

No = 84.01% (1177 of 1401)

(QUESTION 24) Have you ever engaged in anonymous sex under these conditions?⁴⁶⁴

Park, restroom, bath house = 51.04% (612 of 1199)

Glory hole = 31.19% (374 of 1199)

Other (including sex for money) = 26.86% (322 of 1199)

463. For the final 206 respondents, a third response was added to clarify that individuals were having sex with individuals that they thought were not attractive and understood that a possible response was that no assumption had been reached about attractiveness. Of the 188 individuals who responded, 19.15% thought that the sex partner probably assumed an attraction (36 of 188), 43.62% claim to have no idea what the sex partner thought as a result of the sexual encounter (82 of 188), and 37.23% claimed to believe that the sex partner presumed nothing about attractiveness because of the nature of the encounter (70 of 188).

464. After receiving following comments from survey respondents that the categories for anonymous sex encounters needed greater specificity, I asked the final 206 variations on the same questions and received the following responses, which suggested I had reached a slightly more promiscuous group:

Sex in a public park, restroom or bathhouse: 62.14% (128 of 206)

Glory hole sex: 30.10% (62 of 206)

Rave, circuit party, or sex party: 35.44% (73 of 206)

Exchange for money: 17.96% (37 of 206)

Other forms: 59.71% (123 of 206)

(QUESTION 25) Is saying “I am HIV negative” the most reliable or convincing evidence of the statement itself of the underlying idea, at least more so than either witnessing and receiving an HIV test result or having sex without getting infected with the person in question?

Of the 1380 who gave some ranking, only 4.06% ranked “saying it” exclusively as most convincing (56 of 1380).

APPENDIX B

SURVEY RESULTS: PART II
Additional Questions & Analysis

ADDITIONAL ANALYSIS

1. Of 1400 responses, for the men who indicated a “no” response to the question of whether they believed the statement “I love you” was convincing without corroborating conduct (1050 men) (Question 15), how many would doubt the statement “I love you” from a refusal to have sex (question 14)?

Yes = 66.67% (700 of 1050)

No = 33.14% (348 of 1050)

2. Of 1199 responses, for the men who did not indicate that they engaged in an act in casual sex (Question 19), how many indicated that they would engage in the act in an exclusive relationship and, in turn, considered the act an expression of love or trust (Questions 17 and 18)?

(a) Rimming

73.64% would not do so casually (883 of 1199), but of these men, 60.70% would engage in the act in an exclusive relationship (536 of 883), and of these 55.60% said it was an act of love (298 of 536) and 60.26% said it was an act of trust (323 of 536).

(b) Swallowing Cum

80.48% did not report engaging in the act casually (965 out of 1199), but of these, 67.77% said that they would engage in the act in an exclusive relationship (654 of 965), and, of these, 61.62% of those men consider the act an expression of love (403 of 654) and 70.34% consider it an expression of trust (460 of 654).

(c) Receptive Unprotected Anal Intercourse

93.41% did not report engaging in the act casually (1120 of 1199), but of these, 66.79% would engage in the act in an exclusive relationship (748 of 1120), and of those 62.30% believe the act is an expression of love (466 of 748), 69.79% believe it is an expression of trust (522 of 748).

(d) Insertive Unprotected Anal Intercourse

88.66% did not report engaging in the act casually (1063 of 1199) but of these, 65.95% indicated that they would do it in an exclusive relationship, (701 of 1063), and of these, 56.49% say an expression of love (396 of 701), 64.91% say the act is an expression of trust (455 of 701).

3. Of the men who did not indicate engaging casually in receptive anal intercourse, protected or unprotected, how many would engage in the act in an exclusive sexual relationship and how many of those considered the act an expression of trust or love?

41.70% did not indicate that they engaged in the act casually (500 of 1199) but of those men 81.20% indicated that they would engage in the act in an exclusive relationship (123 only with a condom, 99 only without a condom, and 184 both with and without a condom, for a total of 406).

Of these men 70.94% reported that the form of receptive anal intercourse they would engage in only in an exclusive relationship is an expression of trust (76 of 123 indicating that they would be penetrated in an exclusive relationship only with a condom, 61 of 99 indicating they would be penetrated in an exclusive relationship only without a condom, and 151 of 184 of those indicating that they would engage in both forms of receptive anal intercourse indicated that at least one form was an expression of trust, for a total of 288 of 406).

Of these men, 67.49% reported that the form of receptive anal intercourse they would engage in only in an exclusive relationship is an expression of love (71 of 123 indicating that they would be penetrated in an exclusive relationship only with a condom, 61 of 99 indicating they would be penetrated in an exclusive relationship only without a condom, and 142 of 184 of those indicating that they would engage in both forms of receptive anal intercourse indicated that at least one form was an expression of love, for a total of 274 of 406).

B. ADDITIONAL QUESTIONS

These questions, posed differently to the final 206 men, were kept separate because they focused on any lifetime behavior rather than general behavioral patterns that may differ from overall or present intentions, and also seemed to reach a group of men who have sex with men with a higher degree of unprotected casual sex and who report a

greater degree of forgetfulness of the nature of their sexual encounters after they occurred.

1. Regarding the act of swallowing semen in oral sex:

I have done so at least occasionally in a CASUAL encounter—(71)—34.47%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(67)—32.52%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(64)—31.07%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST (70)—33.98%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE (44)—21.36%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(32)—15.53%

I have at least occasionally engaged in this act solely for PLEASURE —(70)—33.98%

I generally do not engage in this act—(98)—47.57%

2. Regarding the act of rimming:

I have done so at least occasionally in a CASUAL encounter—(91)—44.17%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(74)—35.92%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(47)—22.82%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST—(48)—23.30%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE —(32)—15.53%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(44)—21.36%

I have at least occasionally engaged in this act solely for PLEASURE —(97)—47.09%

I generally do not engage in this act—(79)—38.35%

3. Regarding the act of Protected Receptive Anal Intercourse:

I have done so at least occasionally in a CASUAL encounter—(115)—55.83%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(97)—47.09%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(43)—20.87%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST—(59)—28.64%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE—(44)—21.36%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(62)—30.10%

I have at least occasionally engaged in this act solely for PLEASURE—(107)—51.94%

I generally do not engage in this act—(60)—29.12%

4. Regarding the act of Unprotected Receptive Anal Intercourse:

I have done so at least occasionally in a CASUAL encounter—(50)—24.27%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(43)—20.87%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(69)—33.50%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST—(66)—32.04%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE—(52)—25.24%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(28)—13.59%

I have at least occasionally engaged in this act solely for PLEASURE—(47)—22.82%

I generally do not engage in this act—(108)—52.43%

5. Regarding the act of Protected Insertive Anal Intercourse:

I have done so at least occasionally in a CASUAL encounter—(129)—62.62%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(96)—46.60%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(44)—21.36%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST—(42)—20.39%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE—(33)—16.02%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(69)—33.50%

I have at least occasionally engaged in this act solely for PLEASURE—(111)—53.88%

I generally do not engage in this act—(52)—25.24%

6. Regarding the act of Unprotected Insertive Anal Intercourse:

I have done so at least occasionally in a CASUAL encounter—(62)—30.10%

I have done so at least occasionally with a man with whom I am in an ongoing but NON-EXCLUSIVE sexual relationship—(50)—24.27%

I have done so and would do so ONLY with a man with whom I am in an EXCLUSIVE or MONOGAMOUS sexual relationship—(57)—27.67%

When I engage in that act, I ALMOST ALWAYS consider it an expression of TRUST—(55)—26.70%

When I engage in that act, I ALMOST ALWAYS do so as an expression of LOVE—(50)—24.27%

I only SOMETIMES consider that act to be an expression of LOVE or TRUST—(30)—14.56%

I have at least occasionally engaged in this act solely for PLEASURE—(62)—30.10%

I generally do not engage in this act—(102)—49.51%

7. Which of the following is the most LIKELY way that 2 men would establish and maintain a monogamous sexual relationship with each other?

(of the 204 individuals who responded)

Tell each other (55)—26.96%

Live together and Verbally Agree—(68)—33.33%

Live together without verbally discussing—(19)—9.31%

Civil union—(12)—5.88%

Commitment ceremony—(25)—12.25%

None of the above (25) 12.25%