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Tempest in a Teacup or the Mystique of Sexual Legal Discourse

Dana Neașu*

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I. INTRODUCTION

This article is about sex; but not about sex meaning gender, an adjective, or “that thing we are.”¹ It is about sexual behavior. It is, in Professor Franke’s words, about sex as verb—“that thing we do”²—or, to quote Judge Posner, it

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1. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 203 (2001)(distinguishing between sex as adjective—that thing we are—and sex as verb—that thing we do).

2. *Id.*

is about that “quintessential private activity [of] our culture.”³ However, it does not focus on sex as “the ultimate animal necessity.”⁴ That would be the realm of today’s talk shows headed by Jerry Springer⁵ and his ilk. Instead, it focuses on the pervasiveness of sexual discourse in the legal realm and tries to explain the reason behind it.

3. RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 1 (1996).

4. This article will not cover any non-legal public aspects of sex, but it acknowledges the common heritage of the North American legal and non-legal, public sexual discourse.

It is deeply threatening to our ideology, at the corporate and theological levels, to admit we’re constrained by the laws of biology. Sex is the ultimate animal necessity. ... And so here we are, modern Americans with our heads soaked in frank sexual imagery and our feet planted in our Puritanical heritage....

Barbara Kingsolver, *Writers on Writing: A Forbidden Territory Familiar to All*, N.Y. TIMES, Mar. 27, 2000, at E1.

5. The topics discussed on the Jerry Springer show demonstrate how sex is frequently showcased as the ultimate animal necessity. For example, the following topics were listed for the week of May 12-16, 2003:

Date	Title	Summary
Monday 5/12/03	I’m Pregnant by My Brother!	Not only is [Quintina] sleeping with her brother, but she’s also pregnant and the baby might be his!
Tuesday 5/13/03	Dirty Deeds!	Mable, a transsexual, is having an affair with her friend, Cookie’s man, Levy. Although Levy has been cheating on Cookie, he still loves her and even proposes marriage!
Wednesday 5/14/03	Along Came a Mistress!	Peggy’s been married 4 times and says she suspects her husband, Chris, is cheating! Not only is Chris cheating, but he’s sleeping with two women, both of them half Peggy’s age!
Thursday 5/15/03	Heart-wrenching Secrets!	Konata confesses to his girlfriend, Elaine, that not only has he been cheating with a dominatrix, but he plans to make this dominatrix his wife!
Friday 5/16/03	Steve to the Rescue: Operation Prom Night!	Kelvin is here to confess to his girlfriend that he’s been cheating and is leaving her for their neighbor, Keneisha!

The Jerry Springer Show-This Week, at <http://www.uni-television.com/jerry/thisweek.html> (last visited May 11, 2003).

This article suggests that sex has become a human behavior that is often legally sanctioned because it offers itself to endless and various permissive and restrictive regulations. Furthermore, policing sex requires little infrastructure,⁶ unlike, say, a war in Iraq or improving the public school system. Allowing permissive sex legislation is also less expensive. Moreover, like thirst and hunger and irrespective of any regulation, sex will continue its old ways, whether heterosexual or homosexual, reproductive or amative.⁷

Self-labeled progressives have initiated sexually-oriented legislation in order to further a more tolerant and, thus, democratic society through the creation of new individual rights with a sexual content. Individual rights, such as the right for nonprocreative, contraceptive, marital intercourse that was recognized by the Supreme Court in *Griswold v. Connecticut*,⁸ do seem to create a more democratic society by increasing an individual's sphere of non-governmental interference.⁹ Further, in a society in which the quest for socio-economic equality has come to a halt,¹⁰ sexual equality seems to represent the most progressive goal that one can reach.

6. E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415, 429, n.20 (2000) (discussing the Marxist terms of base, or infrastructure, and superstructure).

7. E. Dana Neacsu, *Imposing Sexual Restraint Abroad*, 2002 L. REV. MICH. ST. U. DET. C.L. 885, n.73 ("Dividing the sexual relation into two branches, the amative and propagative, the amative or love-relation is first in importance, as it is in the order of nature.") (citing John Humphrey Noyes, *The Perfectionists: Bible Communism 1848*, in *SOCIALISM IN AMERICA: FROM THE SHAKERS TO THE THIRD INTERNATIONAL* 54, 58-59 (Albert Fried ed., 1970)).

8. 381 U.S. 479, 485-86 (1965).

9. Commentators have established that the following array of sexual activities have already been protected:

- (1) Procreative marital intercourse (implicit in *Skinner*; nineteenth-century cases);
- (2) Nonprocreative contraceptive marital intercourse (*Griswold*);
- (3) Nonprocreative contraceptive nonmarital intercourse (*Eisenstadt*);
- (4) Masturbation in one's bedroom (implicit in *Stanley*);
- (5) Abortion (*Roe*);
- (6) Nonnuclear family living arrangements (*Moore*);
- (7) Intercourse in a secluded automobile (*Onofre*)

See William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV., 631, 640.

10. JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX*, at xxi (2002).

As the economy globalizes, its newly created wealth provides only a provisional and selective security. Census Bureau data released in early 2000 revealed that the U.S. poverty rate has stuck stubbornly around 12 percent for a quarter of a century, and the income and assets of the lowest fifth of wage earners have actually fallen.

Id.

Conservatives, on the other hand, have used sexually-oriented legislation to create a chimera of social order and predictability.¹¹ They prescribe abstinence through both criminal and civil law.¹² For example, by criminalizing obscenity and policing sexual expression deemed inappropriate, they purport to promote public peace for the benefit of the entire community.¹³

Sometimes the line between the progressives' and the conservatives' social agenda is blurred. At times, both favor policing sexuality and then both claim victory when such laws are enacted. This is the case with Megan's Laws¹⁴ that require sexual offenders to notify the communities in which they live of their presence.¹⁵ Similarly, Title VII, which prohibits sexual harassment, answers conservative goals—barring any sexuality at work.¹⁶

Because sex offers a never-ending source of liberal and conservative rules, sexual legal discourse is pervasive today. Regulating sex offers both illusory freedom and illusory order. There are many aspects of sex that can be barred, policed, or encouraged. The more aspects of sex that can be regulated, the more results that will be obtained. The more results obtained, the more victories for which credit can be taken.

Furthermore, as political eye candy, sex and its regulations are not geared to generate any irreversible change in the basic social or political structure. For example, regarding the rules about bankruptcy filings, the 2001 bankruptcy bill's main economic impact was to help preserve the status quo for American have-nots.¹⁷ The purpose of the bill was to amend the Bankruptcy Code by making illegal anti-abortion acts nondischargeable. Despite the fact

11. See Joanne Mariner, *Just Say "Not Until We're Married": Legislating Morality and Undermining HIV/AIDS Prevention*, FINDLAW'S WRIT, Oct. 14, 2002, available at <http://writ.corporate.findlaw.com/mariner/20021014.html> (last visited May 11, 2003).

12. See *id.*; WASH. REV. CODE § 9.68.060 (regulating the dissemination of erotic materials, as determined by the court).

13. When the late comedian Lenny Bruce used the word "f-u-c-k-i-n-g" in one of his stand-up routines, he was arrested for obscenity, although, as Lenny pointed out, the Supreme Court would have a hard time explaining that "fucking is dirty and no good." See LENNY BRUCE, *HOW TO TALK DIRTY AND INFLUENCE PEOPLE* 193 (1966).

14. "Megan's laws—named after a child who was raped and murdered by a pedophile after his release from prison—require convicted sex offenders to keep the police apprised of their whereabouts by registering where they live." Sherry F. Colb, *The Supreme Court Evaluates Megan's Laws: Probably Valid but Still Wrong*, FINDLAW'S WRIT, Nov. 20, 2002, available at <http://writ.corporate.findlaw.com/colb/20021120.html> (last visited May 11, 2003).

15. See, e.g., ARK. CODE ANN. § 12-12-906 (Supp. 2001); KAN. CRIM. CODE ANN. § 22-4904 (Supp. 2002); WASH. REV. CODE § 9A.44.130 (Supp. 2003).

16. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691-93 (1997).

17. Philip Shenon, *Bankruptcy Bill, Caught in Abortion Dispute, Dies in Congress*, N.Y. TIMES, Nov. 16, 2002, at A15.

that this proposed change was the result of a compromise with Rep. Henry Hyde, "a leading opponent of abortion,"¹⁸ the republican rank and file opposed the measure and killed the bill in the House.¹⁹ Otherwise, the amended Bankruptcy Code, "sought for years by credit-card companies, banks and retailers," would have become legislation with bipartisan support from republicans as well as liberal democrats, such as Senator Hillary Clinton.²⁰

This article is divided into three parts. The first part will attempt to demonstrate the pervasiveness of heterosexual and homosexual legal discourse²¹ by showing how legislative²² or judicial discourse satisfies the need for minor social changes, while inadvertently pacifying the need for dramatic socio-economic changes. In light of the famous "footnote 4,"²³ liberal scholars may consider legal discourse a more appropriate mechanism for promoting liberal change on behalf of "discrete and insular minorities."²⁴ While that may have been true for the judiciary then because the legislature seemed to take good care of the economic interests of the have-nots, today, in the heyday of neo-laissez-faire liberalism, neglecting such issues at either level could lead to the death of politics within a well-differentiated, dual party system.²⁵ For example, ignoring economic issues in the 2002 mid-term elections, but promoting the reproductive rights difference, probably cost the democrats a hemorrhagic loss of seats in the House and Senate.²⁶ I will thus attempt to

18. *Id.*

19. *Id.*

20. *Id.* Senator Clinton was among the 236 senators who voted in favor of the Bankruptcy Reform Act of 2001, which passed, as amended, on July 17, 2001. See U.S. Senate Roll Call Votes 107th Congress - 1st Session, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00236 (last visited May 11, 2003).

21. See Nan D. Hunter, *Sexuality and Civil Rights: Re-Imaging Anti-Discrimination Laws*, 17 N.Y. L. SCH. J. HUM. RTS. 565, 578-79 (2000) (discussing the connection between sexual orientation speech and civil rights).

22. Such quests are not limited to the United States. For information about social revolutions and legislative acts with sexual content, such as Title VII or the Israeli Sexual Harassment Prevention Law, see Tzili Mor, *Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law - 1998*, 7 MICH. J. GENDER & L. 291, 317-19 (2001).

23. *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938).

24. For example, the Society of American Law Teachers (SALT) often provides speaking forums for professors whose primary scholarly interests are the rights of the "discrete and insular minorities" described in footnote 4. Michael L. Perlin, "You Have Discussed Lepers and Crooks": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 713 (Spring, 2003).

25. For a brief, general discussion of political parties in a democracy, see CYNTHIA A. HODY, *THE POLITICS OF TRADE: AMERICAN POLITICAL DEVELOPMENT AND FOREIGN ECONOMIC POLICY* 31 (1996).

26. Michael Janofsky, *Rove Declares Nation Is Tilting to Republicans*, N.Y. TIMES,

show how specific sexually-oriented, individual rights, such as the right to choose “to bear or beget a child” promote liberal (progressive) social change, using Hegel’s theory of *ius personale*,²⁷ its Marxist critique,²⁸ and Dworkin’s theory of individual legal rights.²⁹ The second part will then show how specific sexually-oriented legislation, such as obscenity laws and Megan’s Laws, promote conservative social change. Finally, the third part will illustrate how liberals’ promotion of Title VII legislation inadvertently satisfies a socially conservative agenda banning all sexual discourse from the work place.

II. THE PERVASIVENESS OF SEXUAL LEGAL DISCOURSE

A. Overview

The realm of sexual legal discourse covers all laws with sexual content. The well-accepted principle of the Rule of Law³⁰ legitimizes legal rules and their social effect.³¹ Accordingly, all changes regarding sex—often defined as a “peculiarly personal and private activity”³² or a fundamental and basic drive³³—when obtained through a legal process (whether judicial or legislative), are deemed to fall under the same presumption of legitimacy.³⁴

Nov. 14, 2002, at A33.

Karl Rove, the Bush administration’s chief political strategist, said today that the midterm elections that gave Republicans control of the Senate and expanded their hold on the House showed that the electorate was no longer evenly split, as it was two years ago.... Things are moving in a new direction ... [it is] not just that Republicans picked up three seats in the Senate or six or seven or eight seats in the House. It’s something else more fundamental, but we’ll only know what it is in another two years or four years.

Id.

27. See HEGEL’S PHILOSOPHY OF RIGHT (S.W. Dyde, M.A., D.Sc. trans., George Bell & Sons 1896).

28. KARL MARX, CRITIQUE OF HEGEL’S ‘PHILOSOPHY OF RIGHT’ (Annette Jolin & Joseph O’Malley trans., Joseph O’Malley ed., Cambridge University Press 1970).

29. See generally, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 150-83 (1977).

30. Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 740 (2001) (“The Rule of Law is generally defined as the basis of a legal system in which rules and their application are definite and predictable (specificity), general, impartial, and nonretroactive.”).

31. Don Welch, *The State as a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540, 542-43 (1988) (“Laws result from community choices about values we wish to enhance, rights we want to protect, and goals we deem important to pursue.”).

32. MORRIS PLOSCOWE, SEX AND THE LAW 282 (1951).

33. *Id.*

34. *Id.*

Sexually-oriented federal and state laws are quite abundant today.³⁵ They seem to face less opposition when they provide new individual rights and are easily accepted when they proscribe individual sexual behavior.³⁶

Within the American democratic tradition, both progressive and conservative social change are promoted through laws.³⁷ Abstract individual rights³⁸ focused on sexuality then become individual rights with sexual content.³⁹ Liberals sponsor individual rights that sanction concrete aspects of sexuality, such as the right to abortion;⁴⁰ the right to have the cost of

35. See, e.g., Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (encouraging the filter of visual programs that are harmful to minors, meaning any program that, "taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion."); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (prohibiting the sex trade and industry); and Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999) (denying welfare benefits to sex offenders). Under laws such as these, the socially progressive agenda uses sexual legal discourse to promote its goals. See also generally Milt Freudenheim & Winnie Hu, *Spitzer Drops Opposition to Empire Blue Cross's Becoming a For-Profit Company*, N.Y. TIMES, May 25, 2000, at B5 (discussing the use of legal recourse to attempt to stop Empire Blue Cross from morphing into a for-profit company); Richard Pérez-Peña, *Summary of Major Actions of the Legislature's 223rd Session*, N.Y. TIMES, June 25, 2000, at 32 (discussing how the democrats gave up ground on sexual assault laws in the New York Legislature); Richard W. Stevenson, *Clinton Ending Term on a Busy Note*, N.Y. TIMES, Dec. 25, 2000, at A27 (discussing President Clinton's last minute attempts to develop regulations for health care legislation passed in 1996).

36. See *infra* notes 38-39.

37. See CHARLES W. ANDERSON, *A DEEPER FREEDOM: LIBERAL DEMOCRACY AS AN EVERYDAY MORALITY* 173-78 (2002); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 137-51 (1956).

38. GINO GORLA, *COMMENTO A TOCQUEVILLE: "L'IDEA DEI DIRITTI"* 68 (1948) ("[U]n diritto non è in sè e per sè, ma soltanto in quanto l'*ethos* o la coscienza di civiltà e di uomini lo senta come tale....") (the author's translation). Literally translated, it means that an individual right does not exist in itself, but only in the collective ethos or conscience and people hear about it how it is. *Id.*

39. For the purpose of this article, rights are analyzed as interests recognized by the law and are described positively to the extent that they enable a positive action, as opposed to a negative action or abstention. The distinction between the natural view—rights as intrinsic properties of the individual—and the positive view—rights as interests created by specific legal means—is beyond the scope of this article. For a brief, but concise analysis of this issue, see IAN HUNTER ET AL., *ON PORNOGRAPHY: LITERATURE, SEXUALITY, AND OBSCENITY LAW* 205 (1993).

40. In *Roe v. Wade*, the Supreme Court struck down a Texas law prohibiting abortion as unconstitutional. The Court found that a pregnant woman has a fundamental right of privacy in deciding whether or not to bear a child and that this right could only be overcome if the state had a "compelling" interest. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Some states refer to the abortion choice as the "constitutional choice [to have] an abortion." *Ex Parte Anonymous*, 531 So. 2d 901, 904 (Ala. 1988).

contraceptives covered by health insurance;⁴¹ the right to have transgender procedures (sex change operations) covered by health insurance;⁴² and the right to be in a civil union.⁴³ These rights can exist at the federal or municipal level. For example, urban entities enacted domestic partnership laws⁴⁴ that ensure certain sexual freedoms for people in domestic partnerships.⁴⁵ Through such individual rights, liberals seek to create an acceptable substitute for an overarching individual right to sexual freedom⁴⁶ and to ensure that basic freedom for all.

Conservatives usually reach their goals by sponsoring legislation that polices individual behavior and prohibits individual liberties in the name of community moral and religious interests. This article contends that people allow such “policing” because it is perceived to be in the public interest and to promote a collective interest in community moral standards. For example, the Communications Decency Act of 1996⁴⁷ and the Child Online Protection Act,⁴⁸ which invented Internet policing, purported to protect such community interests

41. *E.g.*, CONN. GEN. STAT. ANN. § 38a-503e (Supp. 2003).

Mandatory coverage for prescription contraceptives

(a) Each individual health insurance policy providing coverage of the type specified in subdivisions (1), (2), (4), (11) and (12) of section 38a-469 ... that provides coverage for outpatient prescription drugs approved by the federal Food and Drug Administration shall not exclude coverage for prescription contraceptive methods approved by the federal Food and Drug Administration.

Id.; see also N.H. REV. STAT. ANN. § 415:18-i (Supp. 2002) (“Coverage for Prescription Contraceptive Drugs and Prescription Contraceptive Devices and for Contraceptive Services.”).

42. The San Francisco Board of Supervisors voted to provide city employees with health benefits that include sex change operations. Evelyn Nieves, *California: City to Pay for Sex Changes*, N.Y. TIMES, May 1, 2001, at A21.

43. Any adult who is not incapacitated can enter into a civil union under Vermont law. VT. STAT. ANN. tit. 18 § 5163 (2000); see also *Baker v. Vermont*, 744 A.2d 864, 887 (Vt. 1999) (“[T]he State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”).

44. See, e.g., *Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (N.Y. App. Div. 1999) (upholding the New York Domestic Partnership Law).

45. Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991, 991, n. 3 (2000) (“The number of unmarried couples living together has increased from 1.6 million in 1980 to 4.1 million in 1997.”) (citation omitted).

46. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1542 (1994) (explaining the implied protection of the individual’s right to sexual freedom, as stated in *Griswold*); see also *Jacobson v. U.S.*, 503 U.S. 540, 550-53 (1992) (discussing sexual freedom in the context of child pornography and entrapment).

47. Pub. L. No. 104-104, 110 Stat. 56 (1996).

48. Pub. L. No. 105-277, 112 Stat. 2681 (1998); 47 U.S.C. § 231 (2000).

at the federal level.⁴⁹ At the state level, under a similar guise, obscenity law—“a set of juridical procedures and categories that have been developing in tandem with the governmental ‘policing’ of modern populations since the early eighteenth century”⁵⁰—punishes sexual obscenity⁵¹ as a crime against public decency and morals.⁵²

Another sexual regulation that is currently popular and promotes a socially conservative agenda at both the federal and local level is “abstinence unless married” education.⁵³ Such programs⁵⁴ have been enacted at both levels in a triumph of abstinence-unless-married pedagogy and as “the culmination of two decades’ work by the religious right.”⁵⁵ In a new attempt to buttress this untenable position, the current republican administration is sponsoring and heavily promoting a federal (early) marriage program.⁵⁶

Another way the conservative right uses state and federal legislation to control sexual legal discourse is through zoning ordinances. Local zoning ordinances that bar adult motion picture theaters from residential zones and areas near churches, parks, or schools appear to be thriving.⁵⁷ They purport to protect school children, churchgoers, and the owners of the surrounding

49. The United States Supreme Court invalidated both statutes. See *Ashcroft v. ACLU*, 535 U.S. 564, 564 (2002) (refusing to decide the constitutionality of the Child Online Protection Act (COPA) until remanded for further proceedings, but an injunction barring enforcement of the act was *not* vacated); *Reno v. ACLU*, 521 U.S. 844, 844 (1997) (holding the Telecommunications Decency Act of 1996 violative of the First Amendment).

50. HUNTER, *supra* note 39, at 230 (discussing obscenity laws).

51. “Obscene” means “that to the average person, applying contemporary ... standards,” the predominant appeal of the matter, “taken as a whole,” is to “prurient interest,” i.e., a shameful or morbid interest in nudity, sex, or excretion, that goes substantially beyond customary limits of candor in description or representation of such matters and is utterly without redeeming social importance. See CAL. PENAL CODE § 311 (West 1999).

52. For example, California has codified crimes against public decency and good morals in title 9 of the California Penal Code. CAL. PENAL CODE § 311.1 (West 2003).

53. 42 U.S.C. § 710 (2000) (providing a separate program for abstinence education).

54. *Id.*

55. Marjorie Heins, *Sex, Lies and Politics*, THE NATION, May 7, 2001, at 20 (discussing the re-authorization of abstinence programs by the current Congress).

56. Alex Kotlowitz, *It Takes a Wedding*, N.Y. TIMES, Nov. 13, 2002, at A29.

57. See, e.g., *Franklin Jefferson, Ltd. v. City of Columbus*, 244 F. Supp. 2d 835, 835-36 (S.D. Ohio 2003) (challenging local zoning laws that restrict the location of adult theaters to specified areas); *Erie Boulevard Triangle Corp. v. City of Schenectady*, No. 00-CV-1716, 2003 WL 1238431, at *1 (N.D.N.Y. Mar. 11, 2003) (challenging the same); *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County*, No. CIV.A.DKC2001-3386, 2003 WL 1868678, at *1 (D. Md. Mar. 28, 2003) (challenging the same).

property⁵⁸ while promoting the conservative agenda⁵⁹ of prohibiting individual sexual rights.

For example, in *City of Renton v. Playtime Theatres, Inc.*,⁶⁰ the Supreme Court acknowledged that such local ordinances violate an individual's First Amendment right to view films "describing or relating to 'specified sexual activities' or 'specified anatomical areas.'"⁶¹ However, because the ordinance purportedly protected collective interests, such as "the quality of urban life" by preventing crime and property depreciation, the Supreme Court upheld it and endorsed the conservative social agenda it promoted.⁶²

The Court balanced the sexual individual rights at issue—mostly First Amendment rights—with the prohibitive collective interests and found the individual rights incompatible with a certain standard of "quality of life in the community at large."⁶³ It is worth noting the clear ideological split between the conservative and the liberal justices. Only the liberal Justices Brennan and Marshall dissented from the "policing" majority opinion while the other justices joined in or concurred with Justice Rehnquist's⁶⁴ conservative majority opinion.⁶⁵

Also abundant are laws that criminalize rape and sodomy. Purportedly, they promote order as they punish those violent acts. Indeed, to the extent that both rape⁶⁶ and sodomy⁶⁷ are violent felonies that imply criminal assault, their

58. The Court emphasized that such ordinances only attempt to protect the community's investments in the area—the so-called "secondary effects"—and not to prevent the dissemination of "offensive" speech. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986).

59. Under the Giuliani administration, New York City also enacted such zoning laws. See e.g., *DJL Rest. Corp. v. City of New York*, 725 N.Y.S.2d 622, 623 (N.Y. 2001) (challenging New York City zoning laws created in 1995 to regulate the location of adult establishments).

60. 475 U.S. at 41.

61. *Id.* at 44.

62. *Id.* at 48.

63. *Id.* at 54.

64. President Nixon appointed Justice Rehnquist, a republican activist and Nixon's former Assistant U.S. Attorney General. 23 *ENCYCLOPEDIA AMERICANA* 346 (1996) (profiling United States Chief Justice William Hubbs Rehnquist).

65. For an ideological analysis of judicial decision making, see, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

66. At common law, rape was defined as "the carnal knowledge of a woman forcibly and against her will." WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 210 (reprint of 1st ed. 1966). For modern state law definitions, see, e.g., ALA. CODE § 13A-6-61 (Supp. 2002) (defining rape in the first degree as a Class A felony that consists of "sexual intercourse with a member of the opposite sex by forcible compulsion").

67. See, e.g., ALA. CODE § 13A-6-63 (1994) (defining sodomy in the first degree as a Class A felony that consists of "deviate sexual intercourse with another person by forcible

punishment is legitimized by the asexual, collective interest to a peaceful environment. However, when sexual intercourse between two consenting persons⁶⁸ becomes rape just because the "victim" is not quite seventeen years old,⁶⁹ the only protected interest is society's interest in policing sexuality.⁷⁰ Similarly, laws requiring sexual offenders to submit themselves to the public humiliation of community notification on release from prison⁷¹ have been very popular as of late and seem to answer a political agenda as well as a collective interest in sexual policing.

In "Sex Crimes and the New Punitiveness," John Pratt discussed the dynamism of sexual legal discourse and its connection with social conservative needs.⁷² He viewed the punitiveness of sexual behavior within the last two decades as a response to a socially conservative agenda.⁷³ Pratt noted that "Welfarism [and] its commitment to inclusivity and equality of opportunity,"⁷⁴

compulsion"); KY. REV. STAT. ANN. § 510.070 (Michie 1999).

68. WAYNE R. LAFAVE, CRIMINAL LAW §§ 7.18(c), 7.20 (3d ed. 2000). For a discussion of rape and consent, see Joan L. McGregor, *Feminism, Women, and the Criminal Law*, in RADICAL CRITIQUES OF THE LAW 233, 238-41 (Stephen M. Griffin & Robert C. L. Moffat eds., 1997). See also, CAL. PENAL CODE § 261(1998 & Supp. 2003) (defining rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator," who "is at the time unconscious of the nature of the act, and this is known to the accused.").

69. MO. REV. STAT. § 566.034 (1994):

1. A person commits the crime of statutory rape in the second degree if being twenty-one years of age or older, he has sexual intercourse with another person who is less than seventeen years of age.

2. Statutory rape in the second degree is a class C felony.

Id.; see also LAFAVE, *supra* note 68, § 7.20 (c).

70. Of course, enforcing statutory rape statutes also satisfies more sophisticated interests mostly related to the social and medical services that girls give up rather than risk the hurdles of becoming a "victim" of statutory rape. For an excellent account of the harms that statutory rape enforcement has on its "victims," see Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access for Adolescents*, 50 DEPAUL L. REV. 827, 840-43 (2001).

71. Carey Goldberg, *Sex Offenders in Some States Serve More than Their Time*, N. Y. TIMES, Apr. 22, 2001, at 1 (stating that, under new laws in sixteen states, sex offenders serve more than their time).

72. John Pratt, *Sex Crimes and the New Punitiveness*, 18 BEHAV. SCI. & L. 135 (2000). Pratt studied Criminology at Keele and Sheffield Universities in England and undertook post-doctoral research at Cambridge University. He has taught and lectured at universities in Australia, Canada, and Great Britain and has carried out research on juvenile justice, indigenous justice, and the history of punishment. His current research interests are in the area of criminological theory and the history and sociology of punishment theory. See Institute of Criminology Staff, Victoria University of Wellington New Zealand, at <http://www2.vuw.ac.nz/sacs/staff/pratt.html> (last visited May 8, 2003).

73. See *id.*

74. *Id.* at 141.

as well as its interests in eradicating “poverty, ill health, and unemployment,”⁷⁵ have been replaced with neo-liberalism and its “political economy of victimization”⁷⁶ based on individuals’ increased feelings of “vulnerability and anxiety.”⁷⁷ In Pratt’s words, neoliberalism is based on the belief that while everything is possible for the individual, the results are ephemeral and continuously open to attack by random “Monsters who lurk in the shadows of everyday life.”⁷⁸ The death of tolerance and inclusiveness within the welfare state gave way to individual anxiety brought about by neoliberalist individualism.⁷⁹

Pratt tied the profound economic and social changes of the last two decades to a shift in North American cultural sensitivities.⁸⁰ He then connected the latter to the dramatic shift toward criminal punishment of sexual behavior and explained that mass-mediatised, neo-liberal anxiety demanded the new penal punishment of sexually-related crimes.⁸¹ The new type of punishment answered and promoted conservative social demands.⁸² Responding to and furthering the social demands, the new punishment took the form of non-Western and pre-modern ways of social punishment that supplanted limited jail sentences with unlimited shaming punishment.⁸³ Such examples are surgical or chemical castration,⁸⁴ public ostracism required by Megan’s Law,⁸⁵

75. *Id.*

76. *Id.* at 148.

In a world in which everything now seems possible, nowhere now seems safe. Monsters seem to lurk behind the gloss and glitter that neoliberal systems of governance have pasted onto everyday life. New crimes and new measures of penal control address this increased vulnerability and insecurity—particularly as this relates to women and children and also the political economy of victimization.

Id.

77. Pratt, *supra* note 72, at 147.

78. *Id.* at 148. In addition, Judith Levine also tied the current public obsession with sex and sexual policing to a sense of panic caused by economic and social precariousness. LEVINE, *supra* note 10, at xxiii.

79. Pratt, *supra* note 72, at 146.

80. *Id.* at 140 (“[T]he evolution of the penal framework, the values it embraced, and the characteristics it assumed had a certain political utility in addition to it being in line with cultural sensitivities.”).

81. *Id.* at 146-48.

82. *See generally id.* at 143.

83. *Id.* at 145-46.

84. Pratt, *supra* note 72, at 146 (explaining that in some states a sex offender may be granted parole “only after he agrees to undergo surgical or chemical castration”).

85. *Id.* at 143 (discussing the rationale behind Megan’s Law and its state and federal derivatives).

or the stringent release conditions current sex offenders face after long prison sentences.⁸⁶

However, Pratt stopped here. He did not observe the public pervasiveness of sexual discourse and did not question its rationale. He did not inquire whether sexual legal discourse can promote demands for both conservative and progressive social change and he did not inquire how such a role would be possible. In brief, he did not attempt to explain how and why sexual legal discourse satisfies both ends of the political spectrum.

This article complements Pratt's analysis and suggests that sexual legal discourse satisfies both a liberal agenda through permissive individual rights with a sexual content and a conservative agenda through repressive sexual legislation. As shown below, both agendas thrive on incrementalism.⁸⁷ Since there are so many aspects of sexuality that can be regulated, everybody can claim satisfaction with each new right or piece of prohibitive legislation for a long time to come. Moreover, legal rules that repress sexual behavior and accordingly establish individual duties of abstinence, such as the law of sexual harassment, satisfy both progressive and conservative social demands.

B. *Permissive Individual Sexual Rights v. Repressive Sexual Legislation*

It has become popular to use sexual laws to further social change whether through permissive individual rights or repressive legislation. However, historically, English common law⁸⁸ deferred many aspects of human sexuality to ecclesiastical courts.⁸⁹ Those courts faced the daunting task of repressing sexual behavior outside of marriage.⁹⁰ Only the Puritans of the Massachusetts Bay Colony⁹¹ used laws to punish extra-marital sex and they chose to do so by defining adultery as a capital crime.⁹² It should be noted that people remained undeterred despite such a threat.⁹³

86. Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. L. 375, 376-91 (2000) (discussing the current criminal sentencing of sex offenders who face long prison sentences followed by stringent release conditions that, arguably, make former offenders' reintegration within the community impossible).

87. James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 61 (2001).

88. PLOSCOWE, *supra* note 32, at 138.

89. *Id.* at 136-42, 145.

90. *Id.* at 145 ("Voluntary sexual intercourse between a man and a woman, both being unmarried, is not a statutory offense but is merely a meretricious transaction.").

91. It is interesting to note that, in 1694, the death penalty for adultery was abandoned and replaced with, inter alia, whipping and fines. *Id.* at 144.

92. *Id.* at 143.

93. PLOSCOWE, *supra* note 32, at 143.

Liberals promote social change through the adoption of new, specific individual rights.⁹⁴ An individual right is a state protected or enforceable behavior or interest that enables its owner to claim the court's protection when it is violated.⁹⁵ This definition stresses both the content of a right (the specific human behavior often emphasized within the European individual rights tradition)⁹⁶ and the more American, court enforcement aspect.

As underscored by Justinian's definition of rights,⁹⁷ rights seem to empower people vis-à-vis other people, things, or actions.⁹⁸ However, as Hegel rightfully showed, individual rights only exist as relations between the individual and the State because the State approves them.⁹⁹ Moreover, to the extent that they exist only within a system and not outside it, as Marx noted, rights are closer to an illusion than to real empowerment.¹⁰⁰

However, Marx did not appear to understand the power of abstract constructs, which seem to be the very attraction of any theory of rights. When people receive something that they did not have before, because it is abstract, they cannot gauge its limits. Ultimately, they feel more empowered. Court protection for a specific sexual behavior, especially when it does not require any infrastructure, such as the right to engage in consensual sexual acts between same sex partners, is far from being a mere abstract concept. However, it should be noted that when the right received requires payment for the service involved, such as paying for abortion services, court protection achieves little if the beneficiary cannot afford that service.¹⁰¹

Individual fundamental rights are important in the American democratic tradition because *they*, and not people barricading themselves in the streets (as described by Victor Hugo¹⁰²), are perceived to promote change.¹⁰³ As "things

94. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* 192-97 (Oxford University Press 2001) (explaining the role of individual rights for the socially progressive agendas, in general, and the role of *Roe v. Wade*, in particular).

95. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

96. HUNTER ET AL., *supra* note 39, at 205 (describing rights as "devices for regulating conducts").

97. See W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN* 99 (Peter Stein rev., 3d ed. 1966).

98. See *id.*

99. HEGEL, *supra* note 27, at 48 ("A person must give to his freedom an external sphere, in order that he may reach the completeness implied in the idea.").

100. MARX, *supra* note 28, at 82-111.

101. For a detailed account of this failure in the pro-choice strategy, see, e.g., WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR* (2003).

102. See, e.g., VICTOR HUGO, *LES MISÉRABLES* (Hauteville House 1862).

103. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 365 (George Lawrence trans., Encyclopedia Britannica, Inc. 1990):

that permit individuals to act in certain ways”¹⁰⁴ against the Government,¹⁰⁵ or as “constraints on the kinds of reasons that government may legitimately act upon,”¹⁰⁶ their democratic role is clear. Having more concrete sexual individual rights certainly ensures the success of a progressive social agenda. The Fourteenth Amendment and 42 U.S.C. § 1983, for example, ensure citizens a mechanism for protecting and enforcing their fundamental individual rights and liberties.¹⁰⁷

Sexually-related individual rights are hard-fought, court-created privacy rights¹⁰⁸ that fall within the legal framework offered by the Fourteenth Amendment and the Bill of Rights. For example, in *Skinner v. Oklahoma*,¹⁰⁹ Justice Douglas stated that procreation is “one of the basic civil rights of man,”¹¹⁰ as it is “fundamental to the very existence and survival of the race.”¹¹¹ Sometimes courts have enlarged the realm of individual rights by only extending the Equal Protection Clause of the Fourteenth Amendment¹¹² or by applying the guaranties offered by the Bill of Rights.¹¹³ For example, in *Griswold v. State of Connecticut*,¹¹⁴ the Court recognized the right of marital privacy, which includes the right to use contraceptives. The *Griswold* Court

The English who emigrated three centuries ago to found a democratic society in the wilds of the New World were already accustomed in their motherland to take part in public affairs; they knew trial by jury; they had liberty of speech and freedom of the press, personal freedom, and the conception of rights and the practice of asserting them. They carried these free institutions and virile mores with them to America, and these characteristics sustained them against the encroachments of the state.

Id.

104. MICHAEL ROSEN, KARL MARX: ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (E. Craig ed., 1998), <http://www.rep.routledge.com/>.

105. DWORKIN, *supra* note 29, at 199.

106. Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301 (2000) (discussing the two ways of defining individual rights).

107. Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863, 865 (2000).

108. *Id.*

109. 316 U.S. 535 (1942).

110. *Id.* at 541.

111. *Id.*

112. *Id.* at 536. The Court found the Habitual Criminal Sterilization Act in violation of the Equal Protection Clause, as it provided that “Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.” *Id.* at 541. The Act required compulsory sterilization of “habitual criminals,” defined as two or more times convicted felons of “crimes ‘amounting to felonies involving moral turpitude.’” *Id.* (citing OKLA. STAT. tit. 57 § 1935).

113. See generally, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

114. See *id.* at 486.

stated: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."¹¹⁵

The fight for individual rights extends to state legislatures and courts. The Supreme Court of Vermont, in *Baker v. Vermont*,¹¹⁶ endorsed same-sex civil unions by holding that state laws excluding same-sex couples from benefits and protection incident to marriage violated the Common Benefits Clause of the Vermont Constitution.¹¹⁷

However, the strategy of obtaining new rights in order to promote a specific social agenda is not only a tedious process, but often a fruitless one. For example, on the issue of reproductive rights, while the Supreme Court established one's right to obtain contraceptives in *Griswold*,¹¹⁸ that right was limited by inconsistent state provisions regarding economic coverage for contraceptives.¹¹⁹ The Supreme Court also acknowledged one's right to choose an abortion, but economic deterrence, lack of money to pay for the medical procedure, and the existence of a doctor's right not to perform abortions¹²⁰ could be as much of an impediment to abortions as the previous lack of a right to choose.

Ironically, as sexually-related individual rights promote a liberal agenda and "sexual freedom,"¹²¹ the "right to liberty" debate¹²² has spawned laws

115. *Id.* at 485-86.

116. 744 A.2d 864 (Vt. 1999).

117. *Id.* at 867.

118. 381 U.S. at 485.

119. Sam Howe Verhovek, *Idaho: Anti-Abortion Bill Enacted*, N.Y. TIMES, Apr. 3, 2001, at A12.

Gov. Dirk Kempthorne has signed a bill eliminating state financing of health-related abortions for poor women, saying it will protect "the lives of unborn children." Critics say it will just spark a legal battle, pointing to a 1994 court ruling that prompted the state to pay for health-related abortions under Medicaid. Abortions, meanwhile, are declining in Idaho: there were 867 in 1999, a record low since reporting began in 1977, the state said. The peak was 1981, with 2,706.

Id.

120. *E.g.*, IDAHO CODE § 18-612 (Michie 1997).

Refusal to Perform Abortions - Physicians and hospitals not liable.

Nothing in this act shall be deemed to require any hospital to furnish facilities or admit any patient for any abortion if, upon determination by its governing board, it elects not to do so.

Id.

121. DWORKIN, *supra* note 29, at 266.

122. It is interesting to note that so-called socialist countries, such as Romania, and more liberal capitalist countries like the United Kingdom and capitalist countries with a powerful Christian lobby, the United States for example, have used and encouraged the use of law as a tool to change behavior. Jane Lewis, *Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature*, 15 INT'L J. L. POL'Y & FAM. 159, 174-75

suppressing sex and promoting a conservative agenda.¹²³ As shown in this article, there seems to be a conservative answer to the inevitable gap that exists between theoretical moral discourse and how it translates into the lives of people¹²⁴ since conservatives also promote social change through legal means.¹²⁵ Lately, this gap has been successfully filled with sexually prohibitive legislation in the name of the silent majority,¹²⁶ directed at changing individuals' behavior.¹²⁷

III. PROMOTING CONSERVATIVE SOCIAL CHANGE THROUGH SPECIFIC SEXUALLY-ORIENTED LEGISLATION

A. *The Individual Right to Freely Choose Whether "to bear or beget a child"*

Abortion law is a classic example of how sexual legal discourse has been used to promote both a socially conservative agenda by criminalizing abortions and a liberal agenda by recognizing abortion rights—the right to freely choose whether “to bear or beget a child.”¹²⁸

The abortion discourse has a long history as a tool to simultaneously promote both agendas. Until the mid-nineteenth century,¹²⁹ criminal

(2001) (discussing the relationship between law and behavior, generally, and the role of U.K. and U.S. law in facilitating and legitimizing certain kinds of behavior).

123. *See id.*

124. Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1019 (1991).

125. For a discussion on the role of law, see Davis & Neacsu, *supra* note 30, at 735-36 (“It is almost tautological to say that law is mere superstructure. On the other hand, it is highly contestable, because within the claim that law is superstructure is the implication that law changes nothing and that to change the law changes nothing else.”) (citations omitted).

126. *See* DWORKIN, *supra* note 29, at 266.

127. Sex-related legislation is obviously the product of “legislated morality.” Regarding the intertwined relationship between law and morality, see Welch, *supra* note 31, at 543.

We have learned that we *can* “legislate morality.” If morality is viewed simplistically as the way people behave, then law obviously shapes morality. When we act on decisions about what we ought to do, the legal “ought” plays a major role in the choices we make. . . . The weight of societal judgment, expressed through the law, is inevitably felt as we develop our individual perspectives.

Id.

128. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

129. *Roe v. Wade*, 410 U.S. 113, 140-41 (1973).

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early

punishment for abortion co-existed¹³⁰ with a limited right to abortion¹³¹ under which abortions could be easily induced by a physician, midwife, or anyone without penalty,¹³² so long as before “quickening.”¹³³

By the end of the nineteenth century, however, the abortion discourse was limited to the promotion of socially conservative goals.¹³⁴ The individual right to choose an abortion disappeared in favor of the collective interest to police sexuality and ensure public health.¹³⁵ Abortion became exclusively subject to criminal law.¹³⁶

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence. It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct.... [In addition,] it has been argued that a State’s real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.... The third reason is the State’s interest—some phrase it in terms of duty—in protecting prenatal life.¹³⁷

The progressive social movements of the 20th century incorporated sexual freedom as one of their goals. As a consequence, reproductive rights—the

stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id.; see also JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, 3 (1978).

130. *Roe*, 410 U.S. at 147-51.

131. WAYNE C. BARTEE & ALICE FLEETWOOD BARTEE, *LITIGATING MORALITY: AMERICAN LEGAL THOUGHT AND ITS ENGLISH ROOTS*, 6 (1992) (summarizing the history of the common law abortion right).

132. Whether abortion of a quick fetus was a felony, or even a lesser crime, at common law is still disputed. Bracton, writing early in the thirteenth century, considered abortion by blow or poison as homicide “if the foetus be already formed or animated, and especially if it be animated, he commits homicide.” *Id.* at 12. See also *Roe*, 410 U.S. at 132. “It is undisputed that at common law, abortion performed before ‘quickening’—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.” *Id.*

133. Quickening, a phenomenon associated with normal gestation, established the beginning of the fetus’s existence for criminal purposes. See MOHR, *supra* note 129, at 3.

134. See *Roe*, 410 U.S. at 148.

135. See *id.*

136. *Id.* at 147-51.

137. *Id.*

right protecting “the interest in reproductive autonomy”¹³⁸—became the paradigm of American liberalism, which limited itself to equating social change with legal change.

In 1970, Alaska, Hawaii, New York, and Washington repealed their statutes criminalizing abortion.¹³⁹ Taking note of these changes, the Supreme Court started to specifically include individual rights that promoted sexual freedom in the fundamental right to privacy.¹⁴⁰

First, the Supreme Court recognized a married woman’s right to contraceptives. In *Griswold*,¹⁴¹ the plaintiff was convicted under state law of giving contraception information to married couples.¹⁴² In Connecticut, it was a statutory crime to use or to teach the use of contraceptives.¹⁴³ The Court found that statute unconstitutional and held that the right to privacy was “older than the Bill of Rights[,] older than our political parties, older than our school system”¹⁴⁴ and covered a married woman’s right to contraceptives.¹⁴⁵

Next, in *Eisenstadt v. Baird*,¹⁴⁶ the Court held that the reproductive lives of men and women are a private area free from government regulation.¹⁴⁷ Writing for the majority, Justice Brennan held that “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁴⁸

Liberals pushed the legal battle further, arguing that the Fourteenth Amendment, because it asserts that “no state” shall interfere with the people’s liberties, should be interpreted as to include “the freedom of women to decide on abortions without interference by the state.”¹⁴⁹ At last, a sympathetic fact

138. Waldron, *supra* note 106, at 305 (2000).

139. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 184 (1991); *see also* DERSHOWITZ, *supra* note 94, at 192 (“Between 1967 and 1971, under mounting pressure from the women’s rights movement, 17 states decriminalized abortion.”).

140. *See id.*

141. 381 U.S. 479 (1965).

142. *Id.* at 480.

143. *Id.* at 485-86; DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 131 (1994) (telling the plaintiff’s full story).

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

145. *Id.*

146. 405 U.S. 438 (holding that Massachusetts’ statute permitting married persons to obtain contraceptives to prevent pregnancy, but prohibiting distribution of contraceptives to single persons for that purpose violated the Equal Protection Clause).

147. *Id.* at 453; *see also* *THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY* 119 (Eva Rubin ed., 1994) [hereinafter *THE ABORTION CONTROVERSY*].

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

149. *THE ABORTION CONTROVERSY*, *supra* note 147, at 120.

pattern arose and the Supreme Court decided in favor of a woman's individual right to choose an abortion.¹⁵⁰

In *Roe v. Wade*,¹⁵¹ the individual plaintiff claimed to be an unmarried woman who had been gang raped and was unable to obtain an abortion.¹⁵² Under century-old Texas statute, it was a felony for anyone to destroy an embryo or fetus, except for the purpose of saving the life of the mother on medical advice.¹⁵³ The plaintiff challenged the statute denying her an abortion, claiming equal protection, due process, and the right to privacy.¹⁵⁴

[The] attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy....[This right is alleged to exist] in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in the personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras...or among those rights reserved to the people by the Ninth Amendment.¹⁵⁵

The Supreme Court held the statute unconstitutional and found in favor of an individual reproductive right.¹⁵⁶ The Court construed that right in light of the common law historic precedent, the Ninth¹⁵⁷ and Fourteenth Amendments,¹⁵⁸ and "a right to privacy that is not explicitly written into the Constitution,"¹⁵⁹ but was recognized by the *Griswold* Court.¹⁶⁰

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action,

150. *Id.* at 131; see generally GARROW, *supra* note 143, at 473.

151. 410 U.S. 113 (1973).

152. THE ABORTION CONTROVERSY, *supra* note 147, at 131.

153. *Roe*, 410 U.S. at 113.

154. *Id.* at 120.

155. *Id.* at 129.

156. *See id.* at 166.

157. *See id.* at 152; U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

158. *Roe*, 410 U.S. at 153.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

159. THE ABORTION CONTROVERSY, *supra* note 147, at 119.

160. 381 U.S. 479, 484, 486 (1965).

as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁶¹

However, the Court eventually granted the plaintiff a flawed individual right—one pregnant with collective interests.¹⁶² It held that a woman's right to choose was absolute only in the first trimester, after which the state's interests prevailed.¹⁶³ Gradually, the state interest becomes more compelling, starting with protecting the mother's health in the second trimester and, in the third trimester, protecting the viable fetus.¹⁶⁴ The Court finally held that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."¹⁶⁵

With *Roe*, the Court pushed the abortion discourse to the battlefield of social change. It again became a potential promoter of both conservative and progressive agendas. It encouraged a liberal agenda by advancing the freedom of individual choice¹⁶⁶ and it encouraged a conservative agenda by advancing the state's interest in the health of the mother and the fetus after viability.¹⁶⁷ The latter position would soon become known as the "right-to-life"¹⁶⁸ position, which stands for the fetus's right to life (a collective interest until the fetus becomes an individual)¹⁶⁹ and opposes the liberals' "right to choose," which stands for a woman's right to choose to bear a child.

161. *Roe*, 410 U.S. at 153.

162. *See id.* at 162-63.

163. *Id.* at 163.

164. *See id.* at 139-40.

165. *Id.* at 154.

166. *See e.g.*, DERSHOWITZ, *supra* note 94, at 193. ("*Roe v. Wade* helped secure the presidency for Ronald Reagan by giving him a 'free' issue.").

167. *See id.* For a recent summary of legal issues related to the fetus' viability, see Bruce Ching, *Inverting the Viability Test for Abortion Law*, 22 WOMEN'S RTS. L. REP. 37, 37-45 (2000).

168. It is interesting to note that conservatives have yet to discover and fight for the right to life of those living on death row.

169. With the latest technological developments that ensure the viability of fetuses aborted in the last trimester, the issue of perceiving fetuses as individuals may even transcend the theoretical realm. *See, e.g.*, Roy Rivenburg, *Partial Truths In the PR War Over a Form of Late-Term Abortions, Both Sides Are Guilty of Manipulating the Facts: Here's What They Are (and Aren't) Saying*, L.A. TIMES, April 2, 1997, at E-1; *see also* Karen E. Walther, *Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693 (2000).

During the 1960s movement era, abortion faced “public moralization”¹⁷⁰ and, with the advent of the “right-to-life” versus “right to choose” conflict, became a major issue of public debate.¹⁷¹ In fact, the debate over abortion became so absorbing that:

Never, since the final shot of the Civil War, over a century and a quarter ago, has American society been faced with an issue so polarizing and, at the same time, so totally incapable of either rational discussion or compromise, as is the ongoing controversy . . . over the legality of attempts by the State to regulate abortion—the act of voluntarily terminating a pregnancy, prior to full term.¹⁷²

The arguable success of *Roe* meant the beginning of a new phase for the liberal movement—a defensive one¹⁷³ that left the conservatives in the spotlight. This new reality was mirrored in *Planned Parenthood v. Casey*.¹⁷⁴

The *Casey* Court addressed abortion from a conservative position.¹⁷⁵ It balanced collective interests versus individual rights, as if the first were more or equally important.¹⁷⁶ Thus, it found that Pennsylvania’s informed consent law did not unconstitutionally interfere with a woman’s right to choose.¹⁷⁷ By statute, Pennsylvania required a woman to receive extensive review of the abortion procedure at least twenty-four hours before the scheduled abortion.¹⁷⁸ This requirement clearly gave preference to the collective or state’s interest in each pregnancy.¹⁷⁹ The Court reached its decision not by using the “compelling interest” (strict scrutiny standard) of *Roe*,¹⁸⁰ but the “undue burden” standard on pre-viability abortion.¹⁸¹

“Justices Kennedy, O’Connor, and Souter, who authored the decisive joint opinion,”¹⁸² claimed to have reaffirmed “the essential core of *Roe*”¹⁸³—a woman’s right to decide whether or not to abort a non-viable fetus. (Four

170. MOHR, *supra* note 129, at 261.

171. *See id.*

172. Walther, *supra* note 169, at 693.

173. DERSHOWITZ, *supra* note 94, at 193.

174. 505 U.S. 833 (1992).

175. *Id.*

176. *Id.* at 833-34.

177. *Id.* at 878.

178. *Id.* at 833.

179. *Planned Parenthood v. Casey*, 505 U.S. 833, 883 (1992).

180. 410 U.S. 113, 150 (1973).

181. *Casey*, 505 U.S. at 876-78.

182. David M. Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to Stenberg v. Carhart*, 24 HARV. J.L. & PUB. POL’Y 815, 816 (2001).

183. *Id.*

justices argued that *Roe* should be overruled¹⁸⁴ while only two argued to reapply it).¹⁸⁵ The *Casey* Court changed the terms of a woman's right to abort by restricting it in favor of the collective interest in a woman's health¹⁸⁶ and legalized state interference with a woman's right to choose.¹⁸⁷ The Court justified this intrusion with the State's interest in protecting a woman's physical and psychological well being.¹⁸⁸ It held that the State had an interest in informing the woman about the "health risks of abortion and childbirth"¹⁸⁹ and insuring that she would not discover later, "with devastating psychological consequences, that her decision was not fully informed."¹⁹⁰

Despite recognizing *Roe*'s "core" of abortion rights,¹⁹¹ the *Casey* Court narrowed *Roe*'s holding¹⁹² by discarding as dicta the "fundamental rights" language¹⁹³ that the *Roe* Court used to describe abortion rights.¹⁹⁴ Furthermore, it rejected *Roe*'s rigid trimester framework, giving states more authority to limit abortion.¹⁹⁵ The state's interest, recognized by *Casey*, permeated the previously absolute individual right that a woman enjoyed under *Roe* during her first trimester of pregnancy.¹⁹⁶

The more recent history of the abortion discourse further shows that fighting for individual rights in order to obtain social change, even if the change does not challenge the system, is a cumbersome process.

The short-term consequences of constitutionalizing the abortion issue were powerful and positive for the pro-choice movement. The long-term consequences were disastrous. *Roe v. Wade* provided the religious right and the conservative wing of the Republican Party one of the best organizing tools and rallying cries imaginable. The right-to-life movement was

184. Rehnquist, White, Scalia, and Thomas. *Id.* at n.8.

185. Stevens and Blackmun. *Id.* at n.9.

186. 505 U.S. at 877.

187. *Id.* at 876.

188. *Id.* at 882.

189. *Id.*

190. *Id.* For a discussion of different constitutional standards, see Debra L. Moore, *Don't Rush to Judgment on "Dolly": Human Cloning and Its Individual Procreative Liberty Implications*, 66 UMKC L. REV. 425, 442-43 (1997).

191. Lynne Marie Kohm & Colleen Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?*, 6 WM. & MARY J. WOMEN & L. 381, 400-01 (2000); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 120 n.5 (1992).

192. 410 U.S. 113 (1973).

193. Kohm & Holmes, *supra* note 191, at 400.

194. *Id.*

195. *Id.*

196. *Id.*

energized by this decision and became one of the potent political forces both nationally and in a large number of states. At the same time, the pro-choice movement became lethargic, celebrating its great judicial victory and neglecting the hard work of organizing and fund-raising—at least in the beginning.¹⁹⁷

The abortion saga illustrates that obtaining social change through new individual rights is a never-ending process. First, rights established through the judiciary process are imperfect. For example, the *Roe* Court did not give the feminist movement what they asked.¹⁹⁸ In spite of amici briefs, the Court did not uphold a woman's inalienable right to control all her bodily functions, "as it affected pregnancy, gestation, and childbirth."¹⁹⁹ Second, even to the extent that they are recognized, those rights are susceptible to change in concert with the Court's ideological adjustments.²⁰⁰ The right to choose an abortion established in *Roe* was modified by *Casey*, reflecting changes in the ideological composition of the Court,²⁰¹ although, as mentioned before, the adjustments were not too dramatic.²⁰² Finally, judicially created rights may potentially be hollow. Without an economic requirement, such as payment for abortion services, abortion rights are shallow victories for those who cannot afford those services.²⁰³

Currently, whether as a result of *Roe* or not,²⁰⁴ liberals and conservatives seem deadlocked in the abortion debate. In 1998-1999, for example, their battle crossed ideological lines,²⁰⁵ as only forty-one percent of republicans and

197. DERSHOWITZ, *supra* note 94, at 193.

198. Kohm & Holmes, *supra* note 191, at 400.

199. MOHR, *supra* note 129, at 253.

200. For a discussion on the impact of the Justices' ideology on the decisions that they make and thus on Supreme Court decisional law, see EPSTEIN & KNIGHT, *supra* note 65. See also DERSHOWITZ, *supra* note 94, at 142 (making the case that the Justices decided *Bush v. Gore* based on their ideology and not on the law).

201. See *THE SUPREME COURT OF THE UNITED STATES: IT'S BEGINNINGS AND ITS JUSTICES 1790-1991* (Justices Blackmun, Rehnquist, White, Scalia, Thomas, O'Connor, Kennedy, Stevens, and Souter heard argument in *Casey* and Justices Blackmun, Rehnquist, White, Burger, Douglas, Brennan, Marshall, Powell, and Stewart heard argument in *Roe v. Wade*).

202. See *supra* discussion on *Casey*.

203. See *supra* note 101.

204. See, e.g., MOHR, *supra* note 129, at 250-63 (discussing the potential social reasons for the pro-abortion changes); see also ROSENBERG, *supra* note 139.

205. The public opinion seems to be favorable of abortion rights. The following table shows attitudes toward abortion:

fifty-one percent of democrats opposed such a right,²⁰⁶ while, in the same year, the majority of the U.S. population favored a limited individual right to an abortion.²⁰⁷ In addition, the recent legislative debate surrounding the bankruptcy bill shows the political impact that the abortion discourse continues to have, as it has stopped the republican-lead House from further damaging the socio-economic situation of American have-nots who did not support the bill's passage.²⁰⁸

*B. The Individual Right to Engage in Private, Consensual Sexual Acts
Between Same Sex Adults*

Whether called sodomy²⁰⁹ and criminalized or consensual sexual acts between same sex adults and fought for as a future individual right, this discourse has also been used to promote both a socially conservative and

	Always Legal	Legal under certain circumstances	Never legal
National	27	55	16
Sex			
Male	23	57	15
Female	31	50	17
Politics			
Republican	16	59	24
Democrat	31	49	15
Independent	31	54	12

BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1998 169 (Kathleen Maguire et al., eds., 1999).

206. *Id.*

207. *Id.*

208. *See supra*, note 17.

209. *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1432-43, n.4 (1992) (noting the "problematic persistence" of the religious word "sodomy" in conjunction with the medical term "homosexual" and explaining the "parasitic relationship" between the two terms—"sodomy," impregnated with religious, moral meaning (see the city of Sodom), and "homosexual," which is of secular and more recent provenience as another example of the "regnant biases" that are found in *Bowers*). For an analysis of the term "sodomy," see the Supreme Court case of *Bowers v. Hardwick*. 478 U.S. 186 (1986).

liberal agenda. Historically, it promoted only a socially conservative agenda since consensual acts between same-sex partners were covered by criminal laws.²¹⁰ Such laws were legitimized by a collective interest in policing sexuality and repressing individuals in their search for sexual happiness.²¹¹ This conservative approach appeared to have answered public calls, for prohibiting hedonistic sexual acts—whether by the state, public opinion, or religion—while it utterly disregarded any potential common gain in “the good of friendship by engaging in sexual intercourse that is not open to procreation.”²¹²

In 1986, the Supreme Court chose to speak on this issue, although the lower court had ruled in favor of an individual right to allow consensual sex between same-sex adults.²¹³ In *Bowers v. Hardwick*,²¹⁴ the Court made a conservative decision which “almost obsessive[ly] focus[ed] on homosexual activity,”²¹⁵ to the exclusion of other issues.²¹⁶ Essentially, the Court found that homosexuals did not possess a constitutionally protected right to engage in private, consensual, same-sex acts.²¹⁷

Respondent Hardwick, who had been charged with committing sodomy under a Georgia state statute²¹⁸ for having engaged in consensual, same-sex acts with another adult male in the bedroom of his home, brought suit in federal district court, challenging that statute’s constitutionality.²¹⁹ He lost at the

210. Christopher S. Hargis, *Romer, Hurley, and Dale: How the Supreme Court Languishes with “Special Rights,”* 89 KY. L.J. 1189, 1193 (2000-2001).

211. *Id.*

212. Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593, 1604 (2001) (“What is morally objectionable about homosexual acts [pleasure] is also what is wrong with contracepted vaginal heterosexual intercourse, nonvaginal heterosexual intercourse, masturbation, and adultery.”).

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

214. *Id.*

215. *Id.* at 200. (Blackmun, J., dissenting); see also Thomas, *supra* note 209, at 1432, n.3.

216. As Professor Thomas stated, “This is an appropriate point ... to note the problematic persistence ... of the [religious] word ‘sodomy’ ... [in conjunction with] the medical term ‘homosexual.’” Thomas, *supra* note 209, at 1432-33, n.4.

217. *Id.*

218. GA. CODE ANN. § 16-6-2 (1984).

(a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another...

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years....

Id.

219. *Bowers*, 478 U.S. at 186.

district court level and appealed.²²⁰ The Court of Appeals reversed, finding that the Georgia statute had violated Hardwick's fundamental rights.²²¹

The Supreme Court granted the state's petition for certiorari. Justice White, a Kennedy appointee²²² writing for a 5-4 majority,²²³ delivered the Court's "vigorously written opinion."²²⁴ Applying the "rational basis" standard, the Court "rejected the argument that notions of morality held by the Georgia electorate did not provide a sufficiently rational basis"²²⁵ and found the state statute at issue constitutional.²²⁶ The Court pointed out that sodomy was traditionally considered a crime in all states and that to assert that a right to engage in consensual, anal or oral sexual acts was deeply rooted in history was, "at best, facetious."²²⁷ Thus, in *Bowers v. Hardwick*,²²⁸ the Supreme Court held that there was no right to engage in private, consensual acts of, what the court poignantly called, "homosexual sodomy."²²⁹

It is worth noting, as Professor Thomas pointed out, that there is a "problematic persistence" of the religious word "sodomy" in connection with "the medical term 'homosexual'" throughout the entire opinion.²³⁰ He suggested that the "parasitic relationship" between the two terms, especially in view of the historical, religious meaning of "sodomy," as derived from the Old Testament city of Sodom, and the meaning of "homosexual," which is of

220. *Id.*

221. ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT? MAKING SENSE OF THE CONTROVERSY, 94 (1990).

222. See, DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 310 (1998) (explaining that, despite his Democratic political orientation, Justice White's philosophy and voting record were conservative).

223. Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 902; Allan Ides, *Bowers v. Hardwick: The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93 (1992).

224. MAGNUSON, *supra* note 221, at 94; see also *Bowers*, 478 U.S. at 186. On Justice White's use of precedent for "argumentative, rhetorical, or even partisan purposes," see Eskridge, *supra* note 9, at 665.

225. Angus Campbell & Kenneth Norrie, *Homosexual Rights in Romer v. Evans: Animus Averted*, 27 ANGLO-AM. L. REV. 285, 292 (1998).

226. Blackmun attacked this position when he stated that "[T]he fact that moral judgments expressed by statutes ... may be 'natural and familiar ... ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986); see also Mark E. Papadopoulos, Note, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y 165, 172 (1997).

227. *Bowers*, 478 U.S. at 194.

228. *Id.* at 186.

229. *Id.*

230. Thomas, *supra* note 209, at 1432 n.4.

secular and more recent provenience, is another example of the “regnant biases” that are found in *Bowers*.²³¹

Two decades later, however, same-sex partners enjoy similar benefits to heterosexual married couples in some geographical areas of the United States. When the Vermont State Supreme Court, in *Baker v. Vermont*,²³² held that homosexuality is not a bar to receiving benefits similar to those offered by marriage,²³³ it clearly acknowledged that the state of Vermont recognized the right to engage in private, consensual sexual acts between same sex adults.

Going one step further, the Vermont Legislature addressed this implied right and eventually adopted a comprehensive domestic partnership scheme, “a sort of separate-but-operationally-equal legal status.”²³⁴ The Vermont House of Representatives passed “An Act Relating to Civil Unions”²³⁵ and the Governor signed it into law.²³⁶ The Act, which specifies that “Parties to a civil union shall have all the same benefits, protections and responsibilities under law...as are granted to spouses in a marriage,”²³⁷ ensures that the legal status of “domestic partnership” is virtually identical to marriage.²³⁸ Adults, at least in Vermont, have a limited right to engage in private, consensual sexual acts.²³⁹ However, since this right was achieved as part of a package, i.e., “the secular benefits and protections offered [to] married couples,” this right for homosexuals is defined by heterosexual marriage.²⁴⁰ It is undeniably limited to

231. *Id.*

232. 744 A.2d 864 (Vt. 1999).

233. The court found that the mixed-sex requirement for civil marriage violated the Common Benefits Clause of the state constitution and provided that the legislature was to accommodate same-sex couples with the rights and protections extended to married, mixed-sex couples. *Id.* at 867; see also David B. Cruz, ‘Just Don’t Call It Marriage’: The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925, 952 (2001).

234. Cruz, *supra* note 233, at 952.

235. VT. STAT. ANN. tit. 15 § 1204 (2002).

236. *Id.*

237. *Id.*

238. Cruz, *supra* note 233, at 953. Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075 (2000-2001) (noting that the Vermont Legislature has created a “quasi-marital animal: the civil union.”).

239. The Act guarantees all the rights and privileges of married couples. See Dale Carpenter, *The Limits of Gaylaw*, 17 CONST. COMMENT. 603, 604 (2000); Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT’L L. & COMP. L. 141, 141-42 (2001); see also Vicki L. Armstrong, *Welcome to the 21st Century and the Legalization of Same-Sex Unions*, 18 T.M. COOLEY L. REV. 85, 87-88 (2001) (underlining that the benefits conferred on civil marriages and unions are identical and that civil union is the equivalent of a marriage in Vermont, but for the title and sex of the partners).

240. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).

those who enter civil unions, which brings to mind the same, old no pre-marital or extra-marital sex prohibitions.

This tolerant trend started by the Vermont court was continued by the United States Supreme Court in *Lawrence v. Texas*,²⁴¹ which ensured sexual freedom for all same-sex partners.²⁴² The Vermont court stated that “The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.”²⁴³

On December 2, 2002, the U.S. Supreme Court granted *Lawrence* certiorari.²⁴⁴ Unlike in *Bowers*, *Lawrence* was granted certiorari on the defendants’ appeal and the lower court upheld the state statute that criminalizes homosexual acts.²⁴⁵ The *Bowers* Court granted the Attorney General’s petition for certiorari, questioning the holding that the sodomy statute violated the fundamental rights of homosexuals,²⁴⁶ which was construed against the individual “freedom of intimate association.”²⁴⁷ Unlike in *Bowers*, the main argument in *Lawrence* was whether the Petitioners’ convictions under the Texas “Homosexual Conduct Statute” violated the Equal Protection Clause of the Fourteenth Amendment.²⁴⁸ In *Bowers*, Powell’s decisive vote was won because the Petitioners’ argument was based solely on a sexually-oriented individual right instead of an argument based on the Eighth Amendment.²⁴⁹ Delivering the Court’s decision in *Lawrence*,²⁵⁰ Justice Kennedy chose to focus on individual freedoms by defining “the liberty of all” rather than curtailing

241. 41 S.W.3d 349 (Tex. Ct. App. 2001), *cert. granted*, 123 S. Ct. 661 (2002), *rev’d*, 123 S. Ct. 2472 (2003).

242. *See id.*

243. *Baker*, 744 A.2d at 867.

244. *See Lawrence v. Texas*, 123 S. Ct. 661 (2002).

245. TEX. PENAL CODE ANN. § 21.06 (Vernon 2001).

246. *Bowers*, 478 U.S. at 190.

247. *Id.* at 202 (Blackmun, J., dissenting).

248. *Lawrence*, 41 S. W.3d at 352-53.

249. Justice Powell wrote:

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i.e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga.Code Ann. § 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue.

Bowers, 478 U.S. at 197 (Powell, J., concurring).

250. 123 S. Ct. 2472 (2003).

them under the Court's "own moral code,"²⁵¹ as *Bowers* did. In *Lawrence*, the Court found that absent any legitimate state interest, there was no justification for statutory "intrusion into the personal and private life of the individual."²⁵² Thus, the Court overruled *Bowers*²⁵³ and reversed the lower court's decision in *Lawrence*.²⁵⁴

All of these issues re-emphasize the role that sexual legal discourse fulfills by promoting opposite interests as well as the never-ending nature of achieving social change through legal change. It is also worth noting that judicial or legislative acknowledgment of the right to engage in consensual sexual acts between same-sex partners would help to eradicate this specific discrimination. Progressive social change would then be palpable and the victory real, not shallow, as is the case with the abortion issue whose solution requires both decriminalization and payment for abortion services. Without addressing the economic aspect of abortion rights, the victory achieved there seems closer to the lack of victory for tolerance of homosexual acts. The issue is left open for debate and neo-liberal, individual success, which raises the issue of life enjoyment²⁵⁵ irrespective of the existence of specific sexual legal rights.²⁵⁶

C. *Obscenity Laws and the Collective Interest in Sexual Policing*

Obscenity laws have been used to promote a conservative agenda and it seems that they will continue to fulfill this role. Even if the Court "step[ped] in and play[ed] its traditional role as enlightened conservator of the social interest in ordered stability, and ... str[uc]k down,"²⁵⁷ for example, sodomy laws, the Court shows no sign that it will decriminalize obscenity.²⁵⁸ This will be true at least as long as obscenity continues to be seen to unleash, in the

251. *Id.* at 2480 (quoting *Casey*, 505 U.S. at 850).

252. *Id.* at 2484.

253. *Id.* (O'Connor, J., concurring) ("The Court today overrules *Bowers*....I joined *Bowers*, and do not join the Court in overruling it.").

254. *Id.*

255. For example, in Australia, opinion polls suggest that "most homosexual couples see no need for the status of marriage." Hon. Michael Kirby, *Law and Sexuality: the Contrasting Case of Australia*, 12 STAN. L. & POL'Y REV. 103, 110 (2001).

256. To view the right to enter into a civil union or marriage in terms of collective, as opposed to individual, rights, see Lynn D. Wardle, 'Multiply and Replenish': Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, HARV. J.L. & PUB. POL'Y 771, 778 (2001) (stating that same-sex marriages should not be legalized because they do not further the same social interests as heterosexual marriages).

257. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 97 (1980).

258. *Id.* at 91.

words of Thomas Grey, “the great and mysterious *anti-social* force of sexuality.”²⁵⁹

In the name of morality,²⁶⁰ public order, and tranquility, obscenity laws police the most benign forms of sexuality²⁶¹—art, whether in print, on celluloid, or live.²⁶² As shown below, federal and state courts, as well as legislatures, are embattled in controlling individual forms of sexual expression.

Obscenity, such as a visual representation of a sexual assault accompanied by the performer stripping to the waist and smearing chocolate on her breasts, is described as a social wrong because it purportedly violates “general standards of decency and respect for the diverse beliefs and values of the American public.”²⁶³ Fortunately, in the above case, the guilty artist, Finley, was only denied public funding²⁶⁴ and not liberty, as had often happened since the early nineteenth century.²⁶⁵

In 1821, for example, in *Commonwealth v. Holmes*,²⁶⁶ the Massachusetts Supreme Court charged the defendant, a printer and publisher, with publishing a “lewd and obscene” book.²⁶⁷ The Court defined obscenity by three criteria.²⁶⁸ Accordingly, it found the publication obscene because it: 1) debauched and “corrupt[ed] the morals of youth” as well as other good

259. *Id.*

260. See Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 394 (1963).

261. Feminists such as Catharine MacKinnon and Andrea Dworkin would disagree with the above statement since they see pornographic material as a type of discrimination that perpetuates a “practice of exploitation and subordination based on sex [gender] which differentially harms women.” *American Booksellers Ass’n, Inc. v. Hudnut*, 598 F.Supp. 1316, 1320 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986). For more information see HUNTER ET AL., *supra* note 39, at 262 n.3-6.

Thus, MacKinnon & Dworkin believe that policing obscenity protects women’s Fourteenth Amendment rights, as pornography perpetuates women’s discrimination on account of their gender. The author disavows such an interpretation of obscenity and simply views matters of decency as belonging to the moral not legal realm. Such an interpretation does not interfere with the author’s analysis of obscenity viewed only in connection to sex as a verb and not sex as one’s gender. In addition, to the extent that pornography exhausts one’s energy or imagination, it is policed for that very reason and legitimized by the community right for sexual tranquility.

262. See generally *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

263. Alison Young, *Aesthetic Vertigo and the Jurisprudence of Disgust*, 11 LAW & CRITIQUE 241, 243 (2000); see also *Finley*, 524 U.S. at 572.

264. *Finley*, 524 U.S. at 580-81.

265. *Commonwealth v. Holmes*, 17 Mass. 336 (1821).

266. *Id.*

267. *Id.*

268. *Id.*

citizens;²⁶⁹ 2) constituted a disturbance of the peace;²⁷⁰ and 3) was the product of the defendant's evil²⁷¹ intent. The court sentenced the defendant to a jail term "which [did] not extend to life."²⁷²

The passage to the twentieth century was marked by other, similar decisions that aimed at protecting the community from sexuality. Between 1821 and 1870, other publications were found obscene.²⁷³ One was deemed obscene for describing methods of birth control²⁷⁴ and another for depicting other sexual facts of life.²⁷⁵ Soon afterward, judges, such as Judge Learned Hand, became crusaders against obscenity in the name of community standards. In *United States v. Kennerley*,²⁷⁶ Judge Hand created the community standards criterion for determining obscenity.²⁷⁷ Accordingly, Justice Hand enlarged the scope of obscenity rules. From the previous standard of safety, which stated that what was safe for children was safe for adults, the current application of the rules protects the community at large,²⁷⁸ according to the standards of a hypothetical "average man."²⁷⁹ This standard and the "whole book" standard for obscenity prosecutions first appeared in *United States v. One Book Entitled "Ulysses."*²⁸⁰

In *One Book Entitled "Ulysses,"* the court held that the book at issue should "be tested by the court's opinion as to its effect [in its entirety] on a person with average sex instincts."²⁸¹ This test replaced the previous one that instructed juries to "consider whether [depictions or descriptions were] obscene, or lewd, or lascivious to any considerable portion of the community,

269. See BARTEE & BARTEE, *supra* note 131, at 62.

270. Those who have studied the history of obscenity-related cases in England and America have found that the charge of "disturbing the peace" is the oldest criterion used in obscenity proceedings. For example, in London in 1663, Sir Charles Sedley was prosecuted for "breach of the King's Peace." His obscene conduct consisted of hurling bottles containing urine on a crowd, naked from his balcony. *Id.*; Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40-43 (1938) (explaining the history and fallout of *Sedley's* case).

271. *Holmes*, 17 Mass. at 340.

272. *Id.*

273. BARTEE & BARTEE, *supra* note 131, at 62.

274. DAVID TRIBE, *QUESTIONS OF CENSORSHIP* 25 (1973) (explaining how, in 1832, Dr. Charles Knowlton was fined and imprisoned for writing a contraceptive manual entitled *The Fruits of Philosophy*).

275. BARTEE & BARTEE, *supra* note 131, at 62.

276. 209 F. 119 (S.D.N.Y. 1913).

277. *Id.* at 121.

278. *Id.* at 120-21.

279. *Id.* at 121.

280. 72 F.2d 705, 707-08 (2nd Cir. 1934).

281. *Id.*

or whether they excite[d] impure desires in the minds of the boys and girls or other persons who [were] susceptible to such impure thoughts and desires."²⁸² During the next couple of decades, the Supreme Court applied those standards and homogenized the national application of obscenity rules. In 1957, the Supreme Court redefined the obscenity test in *Roth v. United States*.²⁸³

In *Roth*,²⁸⁴ the Court defined obscenity in connection to a collective interest in policing sex.²⁸⁵ The new standard for the analysis of materials alleged to be obscene was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to prurient interests."²⁸⁶ Like the old test, *Roth* held that actual harm need not occur and that obscenity was to be judged by its tendency to arouse sexual thoughts. The Court defined sex as "a great and mysterious motive force in human life, [that] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."²⁸⁷ Perhaps weighed down by too much mystery, the Court departed from the criminal law canons of punishing acts and came closer to defining obscenity as a crime of the mind.²⁸⁸ As Justice Douglas underlined in his dissenting opinion, obscenity had become a crime of thoughts.²⁸⁹ Under obscenity standards, punishment was meted out for the thoughts provoked by [the defendant's] innocent acts²⁹⁰ of mailing and not for the overt acts or antisocial conduct caused by those acts.²⁹¹

282. *United States v. Bennett*, 24 F. Cas. 1093, 1105 (S.D.N.Y. 1879).

283. 354 U.S. 476 (1957). This case actually represents a pair of cases. One involved the prosecution of Samuel Roth under a federal obscenity statute and the other the prosecution of David Alberts under a California obscenity statute.

284. *Id.* at 476.

285. *Id.* at 488-90.

286. *Id.* at 489. The Court cited the obscenity definition of the A.L.I., Model Penal Code, § 207.10(2): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 488.

287. *Id.* at 487.

288. It is worth noting that there are commentators that think that, in *Roth*, "the Warren Court used a liberal test that made convictions for obscenity very difficult to obtain." Richard L. Pacelle, *The Dynamics and Determinants of Agenda Change in the Rehnquist Court*, in CONTEMPLATING COURTS 263 (Lee Epstein ed., 1995).

289. *United States v. Roth*, 354 U.S. 476, 507 (1957) (Douglas, J., dissenting).

290. *United States v. Roth*, 237 F.2d 796 (2d Cir. 1956) (holding constitutional the statute declaring "every obscene, lewd, lascivious, or filthy book, pamphlet," etc. to be "unmailable" and finding no error in the trial judge's instruction to the jury regarding the meaning of the word "filthy").

291. *Id.* at 804 (Frank, J., concurring).

The evolution of obscenity discourse shows how courts became active promoters of conservative social change. They seem to have chosen this role because, as Justice Harlan stated in his concurring opinion in *Roth*, "Congress ha[d] no substantive power over sexual morality."²⁹² *Roth's* puritanical approach, in fact, translated or answered American society's intolerance for sexual discourse. It criminalized selling books that "tend[ed] to stir sexual impulses and lead to sexually impure thoughts,"²⁹³ even when the work was not necessarily "utterly without redeeming social importance."²⁹⁴

Two decades later, perhaps in an effort to mirror changes in social mores, the Supreme Court purported to relax its standard in *Miller v. California*.²⁹⁵ In *Miller*, the Court upheld the defendant's conviction for unsolicited mass mailing of sexually explicit materials in violation of the California Penal Code.²⁹⁶ Chief Justice Burger reaffirmed the principle that obscenity was unprotected by the First Amendment and that community standards should be applied to determine what constitutes obscenity.²⁹⁷ Under *Miller*, a book was deemed obscene if it was wholly without redeeming value²⁹⁸ and not if it stirred impure thoughts.²⁹⁹ *Miller's* guidelines for identifying obscenity are:

- (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁰⁰

It is worth noting that this three-prong test under which both the average person and the law must find the respective work obscene and without other

292. *Roth*, 354 U.S. at 504 (Harlan, J., concurring).

293. *Id.*

294. *Id.* at 484.

295. 413 U.S. 15, 24 (1973).

296. *Id.* at 36-37.

297. *Id.*; see also, Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 1005 (2002).

298. *Miller*, 413 U.S. at 24. In fact, in the decade preceding *Miller*, the Court decided fifty-four obscenity cases and only four in the following decade. Pacelle, *supra* note 288, at 263.

299. *Roth v. United States*, 354 U.S. 476, 507 (1957).

300. 413 U.S. at 24 (citations omitted); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497 (1985).

merit³⁰¹ has barely evolved since the first prosecution of obscenity in 1821.³⁰² Moreover, little has changed in the conservative role obscenity discourse has consistently promoted in both the courts and legislative bodies.

Justice Harlan's fear of a Congress powerless in the realm of sexual morality,³⁰³ arguably, proved unsubstantiated. For example, in 1873, Congress passed the first criminal obscenity statute designed "for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use."³⁰⁴ Despite being often judicially upheld (including once by Learned Hand in *United States v. One Package*),³⁰⁵ Congress finally repealed the Comstock Act that prohibited importing contraceptive devices in 1971.³⁰⁶

Congress did not stop there. As shown below, it positioned itself as a crusader on the forefront of policing sexuality. For example, in 1996, it passed the Communications Decency Act (CDA),³⁰⁷ which criminalized using any computer network to display "indecent" material unless the content provider uses an "effective" method to restrict access to that material by anyone under the age of eighteen.³⁰⁸ Shortly afterward, the Supreme Court intervened and declared the statute unconstitutional.³⁰⁹ In *Reno v. ACLU*, the Court held that CDA's "indecent transmission" and "patently offensive display" provisions

301. See *Brockett*, 472 U.S. at 497; *Miller*, 413 U.S. at 24; *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413, 418 (1966).

302. *Commonwealth v. Holmes*, 17 Mass. 336 (1821).

303. *Roth*, 354 U.S. at 504 (Harlan, J., dissenting).

304. Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873). The driving force behind it was Anthony Comstock, a prominent anti-vice crusader. Comstock believed that "anything remotely touching upon sex was ... obscene" and, in his diary, referred to the 1873 Act as "his law." See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70 n.19 (1983); PAUL S. BOYER, *PURITY IN PRINT 182-84* (2d. ed. 2002); HEYWOOD BROUN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* 265 (1927); James C. N. Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 UCLAL. REV. 44, 57 (1961).

305. 86 F.2d 737, 740 (1936).

306. For a detailed discussion of the Comstock Act and other, similar legislative acts, see RICHARD A. POSNER, *SEX AND REASON*, 78-80 (1992).

307. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (Supp. II 1996)). Title 47 U.S.C.A. § 223(a)(1)(B)(ii) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under eighteen years of age. 47 U.S.C. § 223(a)(1)(B)(ii) (2001). Section 223(d) prohibits the "knowin[g]" sending or displaying to a person under eighteen of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d) (2001). Affirmative defenses are provided for those who take "good faith, ... effective ... actions" to restrict access by minors to the prohibited communications and those who restrict such access by requiring certain designated forms of proof of age, such as a verified credit card or adult identification number. 47 U.S.C. § 223(e)(5)(A)(B) (2001).

308. *Reno v. ACLU*, 521 U.S. 844, 859-60 (1997).

309. *Id.* at 849.

abridge the freedom of speech protected by the First Amendment, as CDA fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value.³¹⁰

The Court balanced the need to keep the Internet as an inexpensive method of communication³¹¹ with the "congressional goal of protecting minors from potentially [obscenely] harmful materials."³¹² This time, individuals' interest in using the Internet prevailed because "the governmental interest in protecting children from harmful materials,"³¹³ which corresponds in this analysis to the collective right to police sexuality, was vaguely tailored.³¹⁴ Implicitly, the Court recognized one's right to "Sexual expression which is indecent but not obscene."³¹⁵

In 1998, Congress passed the Child Online Protection Act (COPA)³¹⁶ as a follow-up to the Supreme Court's invalidation of CDA. The COPA sought to shield minors from the commercial proliferation of pornographic material on adult websites.³¹⁷ The law called for criminal penalties for the commercial distribution of "material that is harmful to minors"³¹⁸ on the world wide web and required website operators to confirm the age and identity of its visitors or face criminal and civil penalties.³¹⁹ Thus, COPA contains two major changes from CDA that address the Court's concerns. It only targets, first, commercial websites³²⁰ and, second, material that is "harmful to minors."³²¹ The latter is statutorily defined according to the Court's own definition of obscenity in *Miller v. California*,³²² which relies on "contemporary community standards."³²³

310. *Id.* at 864-65.

311. *Id.* at 857.

312. *Id.* at 871.

313. *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

314. *Id.* at 879.

315. *Id.* at 874 (quoting *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)).

316. Eric E. Breisach, Lisa Chandler Cordell & Shari L. Wilkozek, *Challenges Facing Cable Online Service Providers*, 723 PLI/PAT 729, 762 (2002).

317. *Id.*

318. 47 U.S.C. § 231(a)(1) (2000).

319. 47 U.S.C. § 231(a).

320. 47 U.S.C. § 231(e)(2)(A) (2000); *cf.* 47 U.S.C. § 223 (2000); *see infra* text accompanying note 329.

321. 47 U.S.C. § 231(e)(6) (2000); *cf.* 47 U.S.C. § 223; *see infra* text accompanying note 329.

322. 413 U.S. 15, 23-25 (1973).

323. *Id.*

In 1998, a federal district court found COPA unconstitutional and issued a preliminary injunction barring its enforcement.³²⁴ Eventually, in *Ashcroft v. ACLU*,³²⁵ the Supreme Court vacated and remanded the case for further examination by the lower court while it maintained the injunction against enforcement.³²⁶

Continuing its fearless, although somewhat impotent, sexual policing of free expression, Congress also enacted the Children's Internet Protection Act (CIPA) and the Neighborhood Internet Protection Act (NCIPA).³²⁷ The CIPA conditions schools' and libraries' federal funding on the installation of filtering software that would purportedly screen out potentially obscene materials.³²⁸ The CIPA became effective on April 20, 2001³²⁹ and almost immediately started its battle for survival in courts. On May 31, 2002, a federal district court declared it unconstitutional.³³⁰

As of November 2000, five states had passed filtering legislation and another nineteen were debating it.³³¹ The federal statute put pressure on public libraries as well as on state universities to use filtering software to restrict access to all who use university computers, including faculty members and researchers.³³² In addition, the statute placed restrictions on the use of state-owned computers by state employees in general.³³³ It also increased pressure to place filters on elementary and secondary schools.³³⁴ This witch

324. *ACLU v. Reno*, 31 F.Supp.2d 473, 477, 497-98 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir 2000), *vacated by*, 122 S.Ct. 1700 (2002).

325. 535 U.S. 564, 585 (2002).

326. *Id.* For an analysis of *Ashcroft v. ACLU*, see also John W. Borkowski, Alexander E. Dreier & Maya R. Kobersy, *The 2001-2002 Term of the United States Supreme Court and Its Impact on Public Schools*, 167 ED. LAW REP. 1, 13-14 (2002); *Supreme Court Update* 49 FED. LAW. 43, 43 (2002).

327. Pub. L. No. 106-554, 2763A Stat. 335 (to be codified at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h) (2000)); see *ACLU Contests, Filtering Supporters Argue for, New Law's Constitutionality*, U.S. LAW WEEK, Apr. 10, 2001, at 2619 [hereinafter *ACLU Contests*].

328. *ACLU Contests*, *supra* note 327, at 2619.

329. *Id.*

330. *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 496 (E.D. Pa. 2002). A three-judge panel of the U.S. District Court agreed with arguments made by libraries, web site publishers, the American Civil Liberties Union, and others that blocking programs cannot effectively only screen out material deemed "harmful to minors." *Children's Internet Protection Act Struck Down*, 19 COMPUTER AND INTERNET LAW 23, 23 (2002).

331. ABC News, *Coping With Filtering Law*, Nov. 6, 2000, at <http://www.abcnews.go.com/sections/tech/DailyNews/netmonitoring001106.html> (last visited May 15, 2003).

332. See *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997) (holding that restricting access to internet material did not violate the First Amendment).

333. *Urofsky v. Gilmore*, 167 F.3d 191, 193 (4th Cir. 1999).

334. Anemona Hartocollis, *Board Blocks Student Access to Web Sites*, N.Y. TIMES,

hunt was apparently triggered by events like those that took place in Broward County, Florida. The Broward County Library was sued on grounds that “male patrons, both grown men and underaged boys used the public library for immoral and illegal purposes.”³³⁵

Because the statute denied both adults and minors’ on-line access to potentially protected speech, libraries, web site publishers, the American Civil Liberties Union, and others attacked it in court.³³⁶ The court admitted that it is currently impossible, given the Internet’s size, rate of growth, rate of change, and architecture, to develop a filter that neither underblocks nor overblocks a substantial amount of speech.³³⁷ The court also stated that the filtering software mandated by CIPA would block access to substantial amounts of constitutionally protected speech, the suppression of which serves no legitimate government interest.³³⁸ Accordingly, because there were alternative means of achieving the legitimate, legislative goal—preventing dissemination of harmful material for minors—and since the statutory request for a public library’s use of software filters was not narrowly tailored to further any of the state interests, the federal district court held the statute unconstitutional.³³⁹ On June 23, 2003, the Supreme Court held CIPA unconstitutional.³⁴⁰

It is worth noting that this type of restrictive legislation, although abundant, does not reflect a majority, conservative view. Statistics show that those that dislike individual freedom of sexual expression, either for religious

Nov. 10, 1999, at B1.

335. Leah M. Perkins, *Children's Internet Protection Act Signed into Law*, 3 LAW. J. 2, 2 (2001).

336. *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 408 (E.D. Pa. 2002).

337. *Id.*

338. *Id.* at 410.

339. *Children's Internet Protection Act Struck Down*, *supra* note 330, at 23-24.

340. *United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297 (2003).

or political reasons, are in the minority.³⁴¹ Only forty-three percent of republicans, thirty-six percent of democrats, and thirty-five percent of independent voters favor such restrictions when adults are involved.³⁴²

341. Laws forbidding distribution of pornography to whatever age:

1996: (%)			
Religion	Protestants 45	Politics	Republican 43
	Catholics 30		Democrat 36
	Jews 24		Independent 35

1998: (%)			
Religion	Protestants 46	Politics	Republican 43
	Catholics 33		Democrat 37
	Jews 19		Independent 36

BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1998, *supra* note 205, at 166-67.

342. *Id.* Indeed, the public view is different when minors are the perceived target. The following table illustrates laws forbidding distribution of pornography to persons under eighteen:

1996: (%)			
Religion	Protestants 51	Politics	Republican 53
	Catholics 65		Democrat 59
	Jews 63		Independent 61

1998: (%)			
Religion	Protestants 50	Politics	Republican 53
	Catholics 62		Democrat 58
	Jews 72		Independent 59

Obscenity discourse has historically promoted conservative goals by preserving and expanding the criminalization of public expression deemed obscene. Presently, laws only criminalize this form of expression. Since they do not appear to answer the majority view, these laws seem to foster political interests, such as legitimizing political actors within conservative enclaves. This could be the reason that former President Clinton, who had his own encounters with sexual legal discourse, nevertheless signed CIPA into law as part of the year-end spending bill.³⁴³ The statute was supposed to represent “an attempt to protect [the] children [that have access to computers] from pornography on the Internet.”³⁴⁴

D. Megan’s Laws and the Collective Interest in Sexual Policing

If legal discourse regarding obscenity can be described as discounting liberal demands on behalf of communal moral standards,³⁴⁵ the next sexual legal discourse annihilated any demands for individual rights on behalf of communal anxieties and political fears of appearing unsympathetic.

The so-called “community notification statutes”³⁴⁶ are one of the most recent examples of relentless (and successful) use of sexual legal discourse to pursue a conservative social agenda. Their benefit had been so aggressively marketed³⁴⁷ that federal legislators spent little time arguing the virtues of this very regressive law.³⁴⁸ As Pratt pointed out in his work, these laws answer

Id.; see also Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) (“Child pornography law is the least contested area of First Amendment jurisprudence.”).

343. Perkins, *supra* note 335, at 2.

344. *Id.*

345. No empirical evidence links obscenity and violence against women in a causal *but-for* relationship and, as a result, the author disregards the liberal values of such ambiguities, if any. For statements about the “undoubtedly empirical[, causal] link” between obscenity and violence against women, see, e.g., Melanie Pearl Persellin, *Sticks and Stones May Break My Bones, but Your Words are Sure to Kill Me: A Case Note on United States v. Alkhabaz*, 50 DEPAUL L. REV. 993, 1042 (2001) (citing additional works on the theory that pornography and obscenity produce imminent lawless activity in those who contribute to those industries).

346. For a history of the legislative process, see generally Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

347. For example, see Representative Schumer’s (democrat) reasoning for the law: “No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse, and in the worst cases, to kill.” 142 CONG. REC. H4451-02 (daily ed. May 7, 1996) (statement of Rep. Schumer). Similarly, see Representative McCollum’s suggestion that “sexual predators are remarkably clever and persistently transient.” 143 CONG. REC. H7626-01 (daily ed. Sept. 23, 1997) (statement of Rep. McCollum).

348. See generally Filler, *supra* note 346.

mostly collective anxieties and, of course, pre-September 11, the only collective need of the moment—sexual policing.³⁴⁹

Easily passed at the federal and state level,³⁵⁰ these statutes require that local communities where sex offenders relocate at the end of their prison term be notified.³⁵¹ Collectively referred to as “community notification statutes” or “sexual predator laws,” these require internet registry that only contains negative information about the offenders and do not mention any rehabilitation.³⁵² Despite any statistical support, these laws assume that sex offenders are more likely to reoffend than other criminals.³⁵³ During the federal congressional debate, “The single most common dehumanizing term used to describe convicted sex offenders was ‘sexual predators.’ It was used as a metaphor, comparing the actions of animals that hunt and kill other animals to sexual offenders’ pursuit and sexual victimization of children.”³⁵⁴

The related federal law is known as “Megan’s Law”³⁵⁵ in memory of Megan Kanka. Megan was raped and murdered by a twice-convicted pedophile living anonymously across the street in her New Jersey neighborhood.³⁵⁶ The 1996 “Megan’s Law” (and its state counterparts)³⁵⁷ requires America’s 386,000 convicted sex criminals to register their whereabouts with the police who, in turn, inform the public.³⁵⁸ In approximately thirty states, these lists have been posted on the Internet “sometimes with accompanying pictures and street-maps. In many states, the police are also required to go door-to-door to warn people when a high-risk, former sex offender moves in.”³⁵⁹ Supporters of these methods believe that by knowing the history of the individuals that come into a community, the community can better defend its young and defenseless members.³⁶⁰

349. John Pratt, *The Rise & Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society*, 4 PSYCHOL. PUB. POL’Y & L. 25, 45-46 (1998).

350. Filler, *supra* note 346, at 316, 339-40.

351. *Megan’s Law: A Scarlet Letter—Are Sex Offenders Being Punished too Bluntly?*, THE ECONOMIST, Nov. 16, 2002 at 27 [hereinafter *Megan’s Law: A Scarlet Letter*].

352. *Id.*

353. *Id.*

354. Filler, *supra* note 346, at 338-39 (citations omitted).

355. Pub. L. No. 104-145, § 1, 110 Stat. 1345 (1996).

356. Zevitz & Farkas, *supra* note 86, at 375-76.

357. Linda Greenhouse, *Court Looks at Sex-Offender Lists*, N.Y. TIMES, Nov. 14, 2002, at A24 (stating that all fifty states and the District of Columbia have currently adopted such statutes).

358. *Megan’s Law: A Scarlet Letter*, *supra* note 351.

359. *Id.*

360. 142 CONG. REC. H. 4451-02 (daily ed. May 7, 1996) (statement of Rep. Zimmer) (“If Megan Kanka’s parents had been aware of the history of the man who lived across the street from them, they would have been able to warn Megan. They believe, and I believe, that

Indeed, studies show³⁶¹ that these laws have empowered communities.³⁶² This is mostly psychological, as there is no data to support the assumption that unregistered sex offenders will strike more often than the registered ones.³⁶³ This empowerment comes at a very high cost to individuals. The offenders, after they have finished their prison terms, have lost housing³⁶⁴ and employment.³⁶⁵ Furthermore, they and their families have often been harassed.³⁶⁶ In fact, commentators have noted these nefarious statutory effects on democratic institutions³⁶⁷ and, even as they support this legislation, that the law:

targets a narrow segment of the criminal-offender population, sex offenders, subjecting them to public shame and, potentially, vigilante violence. Offenders' names and faces are distributed throughout the community. Schools send notices home with the children, police mail grainy pictures to anxious neighbors, and an entire nation peruses sex offender photos on state-operated Web sites. Legislators openly acknowledged that the provisions' benefits came at significant cost to offenders' privacy and security.³⁶⁸

It is worth noting that during oral argument in two cases focusing on the Alaska³⁶⁹ and Connecticut³⁷⁰ community notification laws,³⁷¹ the positions of the Supreme Court Justices mirrored their conservative views. For example, Justice Ginsburg questioned the laws' lack of information regarding the rehabilitated offenders.³⁷² Chief Justice Rehnquist, on the other hand, supported the idea that a dangerous offender "deserves stigmatization,"³⁷³ even when the

little Megan would be alive today. This legislation is meant to protect other young lives.").

361. See generally Zevitz & Farkas, *supra* note 86, at 375-91 (discussing the current criminal sentencing of sex offenders who face long prison sentences followed by stringent release conditions, which arguably make impossible reintegration of the former offender within the community).

362. *Id.*

363. *Id.* at 387.

364. *Id.* at 381-82.

365. *Id.*

366. Zevitz & Farkas, *supra* note 86, at 382-84.

367. *Id.*

368. Filler, *supra* note 346, at 318.

369. See *Smith v. Doe*, 123 S. Ct. 1140 (2003).

370. See *Connecticut Dep't of Pub. Safety v. Doe*, 123 S. Ct. 1160 (2003).

371. Greenhouse, *supra* note 357, at A24.

372. *Id.*

373. *Id.*

offender was a “17-year-old convicted on statutory rape charges for having a consensual sexual relationship with a 14-year-old.”³⁷⁴

Megan’s Laws thrive on the back of a political witch-hunt that depicts sex offenders as “beasts”³⁷⁵ and “monsters”³⁷⁶ undeserving of legal protection. This is not necessarily borne out by the statistics. Figures released in “1994 show that by 1997 only 78 (or 2.5%) of the 3,138 rapists released from prison had gone on to rape again.”³⁷⁷ Meanwhile, one in five of those released after serving sentences for assault and murder had attacked another victim.³⁷⁸ Furthermore, there is no data that Megan’s Laws really shield children from sex offenses.³⁷⁹ However, policing sexuality seems more of an interest to our present society than, for example, finding solutions for stopping the growing divide between the haves and the have-nots.³⁸⁰ Again, this sexual discourse, like obscenity, has been hijacked in its totality to sponsor a conservative agenda and buttress conservative social change while liberals and their demands are scared away.

IV. SEXUAL HARASSMENT AND THE COLLECTIVE INTEREST IN SEXUAL POLICING

If obscenity laws, for example, promote general sexual policing by criminalizing all public conduct deemed obscene, the law of sexual harassment promotes a more limited collective interest—that of policing all sexuality in the work place.³⁸¹ If the obscenity discourse is overtly sponsored to ensure conservative change, the law of sexual harassment, on the other hand, is overtly sponsored to achieve gender equality in the workplace and its conservative social effects—an asexual workplace where all sexual behavior is equated with illegal behavior—seem to be utterly disregarded.

374. See *Megan’s Law: A Scarlet Letter*, *supra* note 351, at 27.

375. 140 CONG. REC. S11293-01 (daily ed. Aug. 11, 1994) (statement of Sen. Dole) (describing the man who raped and killed Megan Kanka as “the beast who committed this horrendous crime”).

376. Senator Hutchison called sex offenders “monsters.” 142 CONG. REC. S83636-03 (daily ed. July 24, 1996) (statement of Sen. Hutchinson).

377. *Megan’s Law: A Scarlet Letter*, *supra* note 351, at 27.

378. *Id.*

379. Koresh A. Avrahamian, *A Critical Perspective: Do ‘Megan’s Laws’ Really Shield Children From Sex-Predators?*, 19 J. JUV. L. 301, 309 (1998) (making the case against Megan’s Laws).

380. Davis & Neacsu, *supra* note 30, at 778 (describing the impact of globalization on the haves and the have-nots).

381. Abigail C. Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 LAW & SOC’Y REV. 1091 (2000) (pointing out that, in France, sexual harassment is a criminal matter).

From the beginning, sexual harassment laws seem to have benefitted from the ubiquitous nature of the word “sex.” Sex meaning gender,³⁸² as in feminine versus masculine, came to cover sexual behavior.³⁸³ The term “sex” soon became ubiquitous and covered gender—perhaps for legitimacy purposes—as well as sexual behavior.

Under sexual harassment law, an employer’s policy or acquiescence in the practice of compelling female employees to submit to the sexual advances of male supervisors is unlawful³⁸⁴ “on the ground that it creates an artificial barrier to employment or advancement which is placed before one gender and not the other, despite the fact that both genders are similarly situated.”³⁸⁵ Thus, workplace harassment of a sexual nature³⁸⁶ was born as a group-defined injury that was suffered by women because of their sex³⁸⁷ and became a well-established form of gender discrimination.³⁸⁸ Ironically, because of its sexual content, it eventually became easier to prove sexual harassment than gender discrimination.³⁸⁹ Even more ironic, although its content is wrongful sexual behavior, the law of sexual harassment is not part of any guide to America’s sex laws.³⁹⁰ However, the substance of sexual harassment law is strictly related to sex as an activity (or verb)³⁹¹ and its goal is to police sexuality at work.

The first Supreme Court decision to favorably decide a claim of sexual harassment was *Meritor Savings Bank v. Vinson*.³⁹² The unanimous opinion written by the archconservative Justice Rehnquist³⁹³ incorporated the radical

382. Franke, *supra* note 1, at 203.

383. *Id.*

384. 42 U.S.C. § 2000e-2 (2000).

385. Andrea G. Nadel, *On-the-Job Sexual Harassment as Violation of State Civil Rights Law*, 18 A.L.R.4th 328, 329 (1982).

386. Franke, *supra* note 16, at 693.

387. *Id.* at 729 (“The sexual nature of the offending conduct figures prominently in all three of the dominant accounts of the wrong of sexual harassment.”).

388. *Id.* at 691 (explaining the thesis that sexual harassment targets gender non-conformity; specifically, “overly assertive” women and/or “effeminate” men).

389. Vicky Schultz points out that because sexual harassment jurisprudence equates sex with discrimination and discrimination with sex, there is very little room for conceptualizing non-sexual discrimination (as well as non-discriminatory sex). Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1732 (1998).

390. POSNER & SILBAUGH, *supra* note 3, at 1.

391. Franke, *supra* note 1, at 203.

392. 477 U.S. 57 (1986).

393. President Nixon appointed Justice Rehnquist, a republican activist and Nixon’s former Assistant U.S. Attorney General. ENCYCLOPEDIA OF WORLD BIOGRAPHY (2d ed. 1998) (Providing an in-depth profile of William H. Rehnquist’s life and career).

views of Professor Catharine MacKinnon.³⁹⁴ It is interesting to note that Justice Rehnquist's political activism³⁹⁵ and judicial record do not stand for gender equality in the workplace, but do favor sexual policing.³⁹⁶

Catharine MacKinnon's *Sexual Harassment: Its First Decade in Court*³⁹⁷ summarized her views and helped create this new area in the law.³⁹⁸ As shown below, this new legal arena helped forge a conservative social agenda, which inevitably legitimizes fears of sex as verb (and desire).

Of course, policing sexuality at work—to the extent that it means to fight a hostile work environment³⁹⁹—is truly commendable. A hostile work environment, however, is illegal irrespective of content,⁴⁰⁰ whether sexual or not. Thus, in the present, sexually-conservative climate, what sexual harassment law seems to bring is only more social stigma for sexuality.

MacKinnon envisaged the law against sexual harassment as a remedy for the “group” injury of the heterosexual women; for the first time, she noted, “women have defined women’s injuries in a law”⁴⁰¹ and sexual harassment became advanced as a way to ensure “equality”-within-the-work-place discourse.⁴⁰² With *Sexual Harassment of Working Women: A Case of Sex Discrimination*,⁴⁰³ MacKinnon became the promoter of a compelling case for

394. Franke, *supra* note 16, at 716.

395. See, e.g., STANLEY H. FRIEDELBAUM, *THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM* (1994).

396. See, e.g., FRIEDELBAUM, *supra* note 395; D.F.B. TUCKER, *THE REHNQUIST COURT AND CIVIL RIGHTS* (1995).

397. Catherine MacKinnon, *Sexual Harassment: Its First Decade in Court-1986*, in 3 *GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN—THE EMPLOYMENT CONTEXT* 53 (Karen J. Maschke ed., 1997).

398. According to Title VII of the Civil Rights Act, hostile work environment exists when the sexually oriented misconduct is both pervasive and unwelcome. 42 U.S.C. § 2000e-2(a)(1) (2001); see also Valerie Harris, *Front Pay and Sexual Harassment Cases: What It Is, Why It Is Important and How to Make It Better*, WM. & MARY J. WOMEN & L. 217 (2000).

399. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring). *Meritor Savings Bank, FSB v. Vinson* held that Title VII prohibits sexual harassment that takes the form of a hostile work environment. The Court stated that sexual harassment is actionable if it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” Today’s opinion elaborates that the challenged conduct must be severe or pervasive enough “to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”

Id. (citations omitted).

400. 42 U.S.C. § 2000e-2(a)(1) (2000).

401. MacKinnon, *supra* note 397, at 55.

402. *Id.*

403. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF*

sexual harassment as a form of gender discrimination. Within her work, “sex” in “sexual harassment” covered both the gender of the victim and the content of the wrong.⁴⁰⁴ In fact, her theory ultimately conflating sex and sexism⁴⁰⁵ prevailed, despite some modifications.⁴⁰⁶ MacKinnon argued that sexual harassment enforces “Practices which express and reinforce the social inequality of women to men”⁴⁰⁷ thus employs heterosexual “subordination” stereotypes—“Unwanted sexual advances made simply because she has a woman’s body.”⁴⁰⁸ With this theory in place, courts and legislatures⁴⁰⁹ began treating sexual harassment as gender discrimination.⁴¹⁰ In 1986, ten years after its legal inception, Catherine MacKinnon acknowledged that sexual harassment as sex-based discrimination was legally established.⁴¹¹ Since then, “sex-based discrimination” has come to mean discrimination that is illegal because it is gender-based and it covers sexual behavior.⁴¹²

In its present form, the law of sexual harassment is both a judicial and statutory construct. It is covered by federal gender discrimination legislation—Title VII—through the Civil Rights Act of 1991⁴¹³ and various state statutes.⁴¹⁴ Under the federal statute, it is unlawful for an employer “to ... refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

SEX DISCRIMINATION (1979).

404. *Id.*

405. Franke, *supra* note 16, at 692-93.

406. *Id.*

407. MacKinnon, *supra* note 397.

408. *Id.*

409. MacKinnon did not analogize sexual harassment with gender discrimination in the same way one may analogize sexual orientation discrimination with race discrimination, see Marc A. Fajer, *A Better Analogy: 'Jews,' 'Homosexuals,' and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37 (2001).

410. *Id.*

411. MacKinnon, *supra* note 397, at 59; see also, Miranda Oshige, *What's Sex Got to Do with It?*, in 3 GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN—THE EMPLOYMENT CONTEXT 327 (Karen J. Maschke ed., 1997).

412. MacKinnon, *supra* note 397, at 59.

413. 42 U.S.C. § 1981 (2000).

414. See, e.g., N.Y. EXEC. LAW § 296(1)(a) (McKinney 2001):

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Id.

privileges of employment, because of such individual's ... sex."⁴¹⁵ Basically, sexual harassment is "quid pro quo" when one makes sexual demands in exchange for employment opportunities⁴¹⁶ and "hostile environment harassment,"⁴¹⁷ which covers misconduct that is "sufficiently severe and pervasive to constitute sexual harassment."⁴¹⁸ In the words of Professor Franke,

Three principal justifications have emerged for considering workplace sexual harassment a violation of Title VII...: "(1) it is conduct that would not have been undertaken but for the plaintiff's sex; (2) it is conduct that violates Title VII precisely because it is sexual in nature; and (3) it is conduct that sexually subordinates women to men."⁴¹⁹

In *Meritor Savings Bank v. Vinson*,⁴²⁰ the Supreme Court held that "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."⁴²¹ The sexual harassment in this case primarily consisted of a voluntary sexual relationship between a male supervisor and female subordinate that covered fifty to sixty instances of sexual intercourse which ended when the respondent became involved in a steady relationship.⁴²²

But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.⁴²³

Justice Rehnquist adds that "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"⁴²⁴

415. 42 U.S.C. § 2000e-2(a)(1) (2000).

416. MacKinnon, *supra* note 397, at 59.

417. For a summary of the legal requirements to prove sexual harassment, see Harris, *supra* note 398, at 217, 224.

418. *Harris v. Forklift Sys., Inc.*, 510 U.S., 17, 22 (1993); *see also* Maresa Torregrossa, *Sexists, Misogynists and the Male-Dominated Workplace: Whether Prevailing Workplace Norms Should Discredit a Hostile Work Environment in Williams v. General Motors Corp.*, 46 VILL. L. REV. 613, 615 (2001).

419. Franke, *supra* note 16, at 693.

420. 477 U.S. 57 (1986).

421. *Id.* at 64.

422. *Id.* at 60.

423. *Id.* at 68.

424. *Id.*

Lower courts also use "sex" interchangeably to mean both gender and sexual behavior.⁴²⁵ However, courts seem to distinguish between the wrongful conduct, which they describe as being of sexual content, and the reason for its illegality, which they describe as being the gender of the plaintiff.⁴²⁶

In those cases, courts perceive the victim's gender as the "weakest link" in need of legal protection.⁴²⁷ In *Zabkowitz v. West Bend Co.*,⁴²⁸ for example, the court stated that "the sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man."⁴²⁹ The offensive and abusive language at issue took place during the plaintiff's employment as a warehouse worker in Oak Creek, Wisconsin at the beginning of the 1980s.⁴³⁰ The perceived harassment started with a conversation initiated by one of the plaintiff's co-workers, a relative of her husband, who asked her whether she was wearing a bra.⁴³¹ The climax of the perceived harassment was reached in 1982—not when the plaintiff "was pregnant and under a 25-pound lifting restriction" and another male co-worker "allegedly grabbed his crotch and remarked [that the plaintiff would] 'have trouble handling this 25-pounder,'" but when the plaintiff, three days before starting her medical leave of absence on April 26, 1982, observed several of her co-employees celebrating what they called "her imminent departure."⁴³² That celebration caused the plaintiff to break into tears and, shortly afterward, file a complaint with the Equal Employment Opportunity Commission (EEOC).⁴³³

There are also situations when both sexual and non-sexual conduct constitute sexual harassment. For example, in *Harris v. Forklift Sys., Inc.*,⁴³⁴ the harasser often addressed plaintiff with language such as "You're a woman, what do you know?"⁴³⁵ or you are "a dumb ass woman."⁴³⁶ In addition, it was suggested that she "go to the Holiday Inn to negotiate [her] raise."⁴³⁷ The Court refused to provide a mathematical test for defining actionable sexual harassment, but, in writing the majority opinion, Justice O'Connor stated:

425. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

426. *Id.*

427. *Id.*

428. 589 F. Supp. 780, 784 (E.D. Wis. 1984).

429. *Id.*

430. *Id.* at 782.

431. *Id.*

432. *Id.* at 782-83.

433. *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 783 (E.D. Wis. 1984).

434. 510 U.S. 17 (1993).

435. *Id.* at 19.

436. *Id.*

437. *Id.*

[W]e can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.⁴³⁸

Finally, there have been instances where simple, gender-based disparaging comments constituted the illegal misconduct. Nonsexual, gender-based conduct may be harassing, for example, when male employees are called “men” and female employees “girls.”⁴³⁹

Sexual harassment law, which became legitimized as gender discrimination⁴⁴⁰ either as a form of female subordination or violence against women,⁴⁴¹ evolved to cover any instance that might make a woman uncomfortable. Currently, sexual harassment law seems to thrive in its repressive results for stigmatizing sex as a verb and desire.⁴⁴²

Sexual harassment jurisprudence proves to be “working surprisingly well for women by any standards, particularly when compared with the rest of sex [gender] discrimination law.”⁴⁴³ The fact that victims are not held to the same demands of proof as in any other tort case⁴⁴⁴ clearly helps.

It is true that MacKinnon’s theory of sexual harassment broke with its restrictive, heterosexual approach emphasizing female sexual subordination. From “Sexual harassment [as] a clear social manifestation of male privilege incarnated in the male sex role that supports coercive sexuality reinforced by

438. *Id.* at 23.

439. Franke, *supra* note 16, at 709.

440. 42 U.S.C. § 1981 (2000).

441. Martha Davis, *Panel VI: Fighting Gender and Sexual Orientation Harassment*, 9 J.L. & POL’Y 387, 387 (2001) (describing sexual harassment as a form of violence against women).

442. Of course, other scholars have taken the task of developing the theory behind the law of sexual harassment, pointing out the fact that “sex is the method” of sexual harassment, but sexism is the meaning of sexual harassment in that it remains gender discrimination because sex is only “[the] means through which power is articulated.” See Franke, *supra* note 16, at 729.

443. MacKinnon, *supra* note 397, at 55 (noting the obvious interchangeability of the terms of “sex discrimination” and “gender discrimination”).

444. *Id.* at 63 (“In 1983 the EEOC found sexual harassment on a woman’s word alone.... Perhaps they recognized that women don’t choose to be sexually harassed in the presence of witnesses.”).

male power over the job,"⁴⁴⁵ sexual harassment incorporates same-sex harassment claims, such as those in *Oncale v. Sundowner Offshore Services, Inc.*⁴⁴⁶ Thus, concrete forms of sexual harassment have been held to victimize both heterosexual and homosexual workers.⁴⁴⁷ As Professor Franke observed, MacKinnon's "group injury" is not limited to women anymore.⁴⁴⁸

However, the dominant conclusion is that sexual harassment remains sex (meaning gender) discrimination.⁴⁴⁹ Sexual harassment claims continue to be part of gender discrimination,⁴⁵⁰ even in the form of "sexual orientation discrimination."⁴⁵¹ Some scholars deplore this obsession with sexual conduct as a form of gender-based harassment,⁴⁵² despite the fact that the importance of distinguishing "between the two constructs" "sex" and "gender" has become widely accepted.⁴⁵³ On the other hand, there are scholars who differentiate between "sex harassment"⁴⁵⁴ and "sexual harassment"⁴⁵⁵ and further the debate whether "sex" in Title VII refers to "a class of human activity"⁴⁵⁶ or "the identity category."⁴⁵⁷ Even courts have started to distinguish between "sexually oriented harassment"⁴⁵⁸ and gender-based harassment.⁴⁵⁹

While sexual harassment legislation promotes legitimizing any type of sexual behavior as a social wrong,⁴⁶⁰ it competes for positive effects with the hostile work environment tort.⁴⁶¹ If all "Offensive behavior not only degrades

445. *Id.*

446. 523 U.S. 75 (1998).

447. For further examples, see Franke, *supra* note 16, at 709 *et seq.*

448. *Id.* at 759.

449. *Id.* at 729.

450. *See id.*; Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001).

451. Richard F. Storrow, *Same-Sex Sexual Harassment Claims after Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 680 (1998).

452. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL'Y 417, 421 (2001).

453. Gary W. Harper, *Contextual Factors that Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization and Sociocultural Factors*, 50 DEPAUL L. REV. 897, 900 (2001).

454. Franke, *supra* note 16, at 716.

455. *Id.*

456. *Id.* at 715.

457. *Id.*

458. *Id.* at 716 n.126. (explaining that sexually oriented harassment "refers to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature").

459. Franke, *supra* note 16, at 716-17 n.127. *See also* Stephanie Levy, *Prescription Birth-Control Coverage Cannot Be Excluded from Benefit Plan*, *Court Rules*, TRIAL, Sep. 1, 2001, at 91.

460. Schultz, *supra* note 452, at 432 (discussing instance when management banned any sexual interaction whether it was welcome or not).

461. *Id.* at 433 ("The basic idea is to create a body of law that gives companies the

subordinate employees, [but] it [also] constitutes a misuse of government time and property,"⁴⁶² some sexual discourse is "benign"⁴⁶³ and, as Professor Vicki Schultz noted, should not be suppressed and controlled in the name of gender equality.⁴⁶⁴ Furthermore, even words that may sound sexual, as with MacKinnon's example of being called a "fucking cunt,"⁴⁶⁵ sometimes have a neutral, harassing meaning that could be constrained accordingly. In other words, "fucking" is not Justice O'Connor's "dangling modifier,"⁴⁶⁶ but a meaningful direct, modifier of the vulgar denomination of the female sexual organ—"cunt."

Policing sex at work, while not necessarily a bad idea,⁴⁶⁷ has caused a collective, anti-sexual hysteria⁴⁶⁸ based on gender revenge.⁴⁶⁹ It has also helped discredit sexual expression while validating old beliefs of sex as a means of subordination and exploitation.⁴⁷⁰ Oddly enough, the law of sexual harassment has proved helpful to a conservative agenda of banishing any hint of sexuality from the workplace—e.g., employees being fired on accusations of "show[ing] a dictionary definition of the word 'clitoris' to a female co-worker."⁴⁷¹

incentive to fully integrate their workplaces along sex/gender lines, but does not spur them to censor benign sexual expression in the name of protecting women from sexual harassment.").

462. PETER B. BROIDA, *A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE*, ch. 8, F, 1 (2002).

463. Schultz, *supra* note 452, at 431.

464. *Id.* at 433.

465. MacKinnon, *supra* note 397, at 65.

466. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 591 (1998).

The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press "Chairperson" into service). Even so, it is clear enough that the phrase is meant to apply to those who do the judging.

Id.

467. *See* Schultz, *supra* note 452, at 421-27.

468. MacKinnon, *supra* note 397, at 58 ("It was pointed out that too many people are victimized by sexual harassment to consider them all hysterics.").

469. Concern regarding potential monetary damages is perceptible through the entire piece although the author complains that evidentiary matters have to be taken into consideration in order to measure the damage and the compensation. *See, e.g.*, MacKinnon, *supra* note 397, at 60 ("Women being compensated in money for sex they had violates male metaphysics because in that system sex is what a woman is for.").

470. *Id.* at 65.

471. Miller Brewing Company was assessed \$26.6 million in damages after the company fired a male executive whom a female employee had accused of sexual harassment for showing her a dictionary page defining "clitoris." *See* James L. Graff, *It Was a Joke! An Alleged Sexual Harasser Is Deemed the Real Victim*, *TIME*, July 28, 1997, at 62.

V. CONCLUSION

Whether its pervasiveness stems from a much-needed social distraction similar to that of the gladiator shows in Roman times,⁴⁷² a desire for inclusiveness—promoting new individual rights such as same-sex marriages—or a need for social control that explains irrational, seven-year prison sentences for keeping a fictional diary about child pornography,⁴⁷³ sexuality is a pervasive part of our public discourse.

In the political sphere, the Clinton administration, for example, became tarred by an impeachment⁴⁷⁴ dominated by the legal definition of sexual intercourse between a male president and a female intern.⁴⁷⁵ The 2000 elections were heavily fought in the shadow of sexual issues and the choice between the democratic and republican presidential candidates was partially determined by their stances on reproductive rights.⁴⁷⁶ Currently, we live in a political climate that uses sexual issues to inculcate socially conservative change under the influence of a conservative religious right.⁴⁷⁷

This article suggests that the pervasiveness of sexual legal discourse stems from its usefulness in promoting limited social change for both liberals and conservatives. Its non-political, slippery nature makes it a kind of universal solvent that can be used to contain any situation or agenda. While political eye

472. *They, Too, Enjoyed Watching Violence And Death*, N.Y. TIMES, July 7, 2001, at B9 (interviewing Kathleen M. Coleman about the antique fascination with gladiators).

473. Bob Herbert, *The Thought Police*, N.Y. TIMES, July 19, 2001, at A25.

474. S. Res. 106-3, 106th Cong. (1999) (enacted).

475. Representative Ed Bryant implies that if a man can engage in salacious sexual acts and still command respect from people, then sex is irrelevant in itself, but meaningful as part of the legal discourse. *Impeachment Trial of President William Jefferson Clinton*, 1999 WL 13220 (F.D.C.H) (1999) (statement of Ed Bryant Representative of the 7th District of Tennessee).

476. Noting that:

Mr. Bush has tried to ease the anxieties of more centrist voters, suggesting that an actual ban on abortion was a far-off goal. But abortion rights groups fear that in the short term, he would be a reliable ally of the anti-abortion movement on decisions about spending, the regulation of the abortion pill, RU-486, and most important, the appointment of justices to the Supreme Court. Mr. Bush cultivated the anti-abortion movement throughout the primaries and embraced his party's adamantly anti-abortion platform.

Robin Toner, *The 2000 Campaign: Abortion, From Social Security to Environment, the Candidates' Positions*, N.Y. TIMES, Nov. 5, 2000, at 44.

477. For example, abstinence education programs have been enacted at both levels in a triumph of abstinence-unless-married pedagogy and as "the culmination of two decades' work by the religious right." 42 U.S.C. § 710 (2000). Regarding the re-authorization of such programs by the current Congress, see Marjorie Heins, *Sex, Lies and Politics: Congress is Poised to Reauthorize Fearmongering 'Abstinence-Only' Sex Ed.*, THE NATION, May 7, 2001, at 20.

candy, sexuality is not geared to generate any change that would shake the basic social or political structure. Furthermore, sexual legal discourse lends itself naturally as the political choice of the day in promoting social change. It only enables incremental changes or “incrementalism, which liberals have eagerly embraced.”⁴⁷⁸ However, as James Donovan recently noted, incrementalism is “less ‘improvement’ and no ‘progress’ by reducing clarity and increasing imprecision. If the statement of the goal is accurate, one must choose the wholesale ‘leaps.’”⁴⁷⁹

Indeed, the liberal changes resemble the results once achieved by casting all African-Americans, led by Dorothy Dandridge, in the 1954 Hollywood production of Bizet’s *Carmen* called *Carmen Jones*.⁴⁸⁰ It may have shocked mainstream sensibilities at the time; however, the movie won a Golden Globe award and Dandridge was nominated for an Oscar for best-performance-by-an-actress.⁴⁸¹ Using the Oscar awards as the standard for major achievements in the business, in 2002, Halle Berry was the first African-American actress to receive an Oscar.⁴⁸² Similarly, liberals should be aware of the limitations that come with using a legal discourse that has always enabled conservatives to achieve their own chimera of order—using sexually-oriented legislation only limited demands for liberal social change may be satisfied.

As both verb and desire, sex reaches across different social classes and creeds. And, of course, everyone has an opinion about sex, whether moral or religious, and, in most cases, that opinion inhibits sex. As a result, sexual legal discourse has become the only democratic discourse in America. Finally, everybody has an equal vote against sex.

478. Donovan, *supra* note 87, at 61.

479. *Id.*

480. CARMEN JONES (Twentieth Century Fox 1954).

481. Scott D. Pierce, ‘Introducing Dorothy Dandridge’ is Halle Berry’s Movie Mission, DESERET NEWS, Aug. 18, 1999, available at deseretnews.com, August, 1999, <http://deseretnews.com/dn/view/1,1249,115003884,00.html>.

482. *Id.*

