

**REGULATING SEX AND
SEXUALITY
LAW 235.6**

Week 1 Readings

marriage must be between a man and a woman. The portion of the majority opinion and the dissents concerning the jurisdictional issues, including standing, are presented in Chapter 1.

UNITED STATES v. WINDSOR

133 S. Ct. 2675 (2013)

Justice KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of "marriage" and "spouse." Section 3 of DOMA provides as follows:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing

state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

[II]

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the

beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States."

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities."

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the

States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–384, 50 S. Ct. 154, 74 L. Ed. 489 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington—prohibit the practice).

Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas* (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's

considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal

law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

Chief Justice ROBERTS, dissenting.

On the merits of the constitutional dispute the Court decides to decide, I also agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something — as the majority puts it — “thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.” That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising — and hardly enough to support a conclusion that the “principal purpose,” of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was

a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their “historic and essential authority to define the marital relation,” may continue to utilize the traditional definition of marriage.

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case.

Justice SCALIA, with whom Justice THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I [concerning jurisdiction], dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below. In accord with my previously expressed skepticism about the Court's “tiers of scrutiny” approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all

the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare . . . desire to harm" couples in same-sex marriages. It is this proposition with which I will therefore engage.

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal

definition of marriage. Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice*—with the "purpose" "to disparage and to injure" same-sex couples.

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." I have heard

such "bald, unreasoned disclaimer[s]" before. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

Justice ALITO, with whom Justice THOMAS joins as to Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of the Defense of Marriage Act (DOMA), which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution" suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that § 3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of “heightened” scrutiny, and that § 3 cannot survive such scrutiny.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.

Underlying our equal protection jurisprudence is the central notion that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”

In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that

unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today’s opinion of the Court will soon be scattered to the wind.

In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by § 3, Congress has the power to define the category of persons to whom those laws apply.

For these reasons, I would hold that § 3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.

SEX IN AMERICA

A DEFINITIVE SURVEY

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5

HOW MANY SEXUAL PARTNERS
DO WE HAVE?

sexual lives of married people are similar. Despite the popular myth that there is a great deal of adultery in marriage, our data and other reliable studies do not find it. Instead, a vast majority are faithful while the marriage is intact. And, as we will explain, there is a good reason for this.

So, yes, many young people probably are having sexual intercourse with a fair number of partners. But that stops with marriage. The reason that people now have more sexual partners over their lifetimes is that they are spending a longer period sexually active, but unmarried. The period has lengthened from both ends and in the middle. The average age at which people have their first sexual intercourse has crept down and the average age at which people marry for the first time has edged up. And people are more likely to divorce now, which means they have time between marriages when they search for new partners once again.

To draw these conclusions, we looked at our respondents' replies to a variety of questions. First, we asked people when they first had heterosexual intercourse. Then, we asked what happens between the time when people first have intercourse and when they finally marry. How many partners do they have? Do they have more than one partner at any one time or do they have their partners in succession, practicing serial monogamy? We asked how many people divorced and how long they remained unmarried. Finally, we asked how many partners people had in their lifetimes.

In our analyses of the numbers of sex partners, we could not separately analyze patterns for gay men and lesbians. That is because homosexuals are such a small percentage of our sample that we do not have enough people in our survey to draw valid conclusions about this aspect of sexual behavior.

If we are going to look at heterosexual partners from the beginning, from the time that people first lose their virginity, we plunge headfirst into the maelstrom of teenage sex, always a turbulent subject, but especially so now, in the age of AIDS.

While society disputes whether to counsel abstinence from sexual intercourse or to pass out condoms in high schools, it also must grapple with a basic question: Has sexual behavior among teenagers changed? Are more having sexual intercourse and at younger ages, or

SOMETIMES, the myths about sex contain a grain of truth. The common perception is that Americans today have more sexual partners than they did just a decade or two ago. That, it turns out, is correct. A third of Americans who are over age fifty have had five or more sexual partners in their lifetime. But half of all Americans aged thirty to fifty have had five or more partners even though being younger, they had fewer years to accumulate them.

Still, when we ask older or younger people how many partners they had in the past year, the usual reply is zero or one. Something must have changed to make younger people accumulate more partners over a lifetime, yet sustain a pattern of having no partners or only one in any one year. The explanation is linked to one of our most potent social institutions and how it has changed.

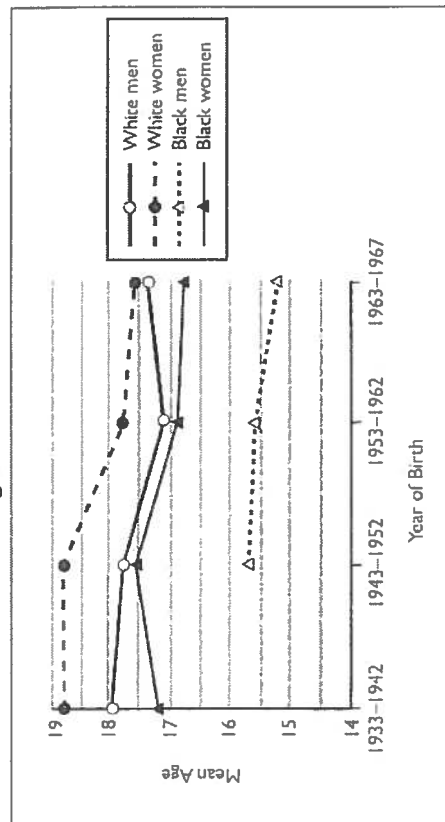
That institution is marriage, a social arrangement so powerful that nearly everyone participates. About 90 percent of Americans have married by the time they are thirty and a large majority spends much of their adulthood as part of a wedded couple. And marriage, we find, regulates sexual behavior with remarkable precision. No matter what they did before they wed, no matter how many partners they had, the

is the overheated rhetoric a reaction to fears, without facts? The answer is both troubling and reassuring to the majority of adults who prefer teenagers to delay their sexual activity — troubling because most teenagers are having intercourse, but reassuring because sexual intercourse tends to be sporadic during the teen years.

We saw a steadily declining age at which teenagers first had sexual intercourse. Men and women born in the decade 1933–1942 had sex at an average age of about eighteen. Those born twenty to thirty years later have an average age at first intercourse that is about six months younger, as seen in Figure 6. The figure also indicates that the men report having sex at younger ages than the women. It also shows that blacks report a younger age at first intercourse than whites.

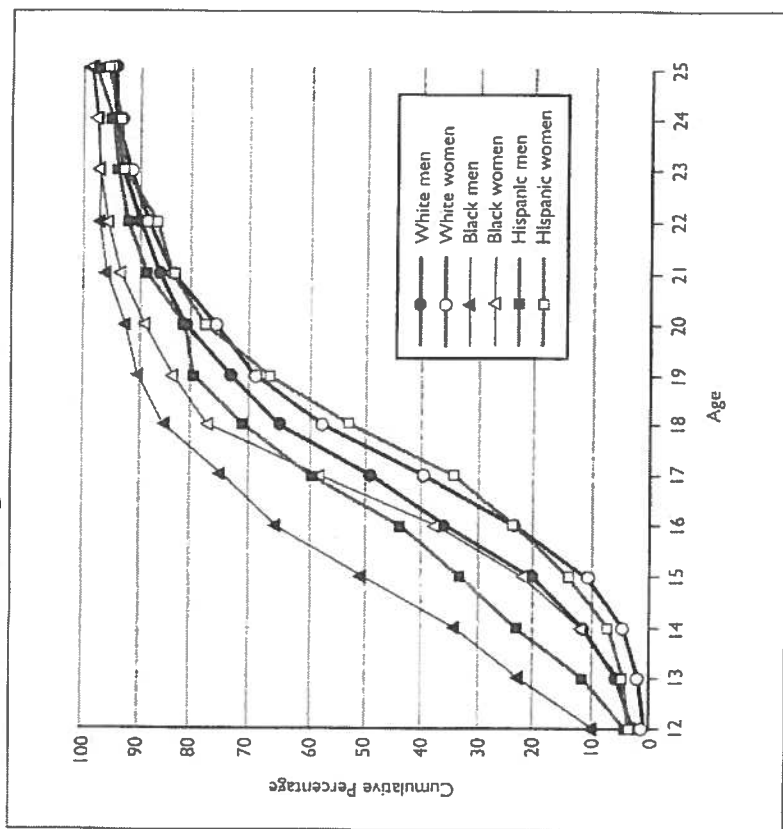
Another way to look at the age at first intercourse is illustrated in Figure 7. The figure shows the proportions of teenagers and young adults who experienced sexual intercourse at each age from twelve to twenty-five. To see at what age half the people had intercourse, for

FIGURE 6:
Mean Age at First Intercourse



Note: This includes respondents who had vaginal intercourse no later than age twenty-five and who have reached their twenty-fifth birthday by the date of the interview. Missing line segments indicate insufficient number of cases for a particular category (less than 30). Whites computed from cross section sample; blacks computed from cross-section and the oversample.

FIGURE 7:
Cumulative Percentage Who Have Had Intercourse



Note: Cumulative percentage indicates the proportion of respondents of a given group at a given age. This figure only includes respondents who have reached their twenty-fifth birthday by the date of the interview.

example, follow the dotted horizontal line that corresponds to a cumulative frequency of 50 percent. It shows that half of all black men had intercourse by the time they were fifteen, half of all Hispanic men had intercourse by the time they were about sixteen and a half, half of all black women had intercourse by the time they were nearly seventeen, and half the white women and half the Hispanic women had intercourse by the time they were nearly eighteen. By age twenty-two, about 90 percent of each group had intercourse.

The patterns are crystal clear. About half the teenagers of various

racial and ethnic groups in the nation have begun having intercourse with a partner in the age range of fifteen to eighteen, and at least four out of five have had intercourse by the time their teenage years are over. Since the average age of marriage is now in the mid-twenties, few Americans wait until they marry to have sex.

Our data, in fact, show that the proportion of women who were either virgins when they turned twenty or had had sexual intercourse with only one person declined from 84 percent, among women born in 1933 to 1942, to about 50 percent for those born after 1953.

It's a change that built up for years, making it sometimes hard to appreciate just how profound it is. Stories of what sex among the unmarried was like decades ago can be startling. Even people who were no longer teenagers, and who were engaged, felt overwhelming social pressure to refrain from intercourse before marriage.

For example, Diana Trilling, a member of the literary and intellectual avant-garde, might have been expected to be most open and unashamed of her sexual activities. Yet she wrote of her own secret sex life with her future husband, Lionel Trilling, around 1930: "It was of the utmost urgency that this violation of the conventions not be known to our families. Even four or five years later, in the mid-30's, when Lionel's mother discovered that a college friend of Lionel's sister, Harriet, had asked Harriet to go to bed with him, she expected Lionel (in her quaint phase) to horsewhip him. Of our friends at the time of our marriage, we knew only one other couple that engaged in so irregular a form of courtship, and I am still convinced that if my father had found us out, he would have — he would have what? There was no talk of sin in my family or, for that matter, of virtue, whether maintained or sacrificed. I was never taught that I would burn in hell for my misdeed. But I had my own scorching hell of the imagination, a terrible unmapped place to which I would be remanded in punishment for any major infringement of family law, and as I thought of my father's discovering that Lionel and I had gone to bed together, I thought I could hear the creaking of its gates."

Although stories like Trilling's may indicate that the reasons why people do — and why they do not — have sexual intercourse before marriage have changed over the decades, we probed that question directly by asking our respondents what led them to have sex the first

time. Did they want to? Were they forced? Or did they go along with it to please a partner? This is one way to discern what social factors may have dissuaded some teenagers from having sexual intercourse in earlier years, and what encouraged them to have it now. The results reveal that young men and young women tend to have very different reasons for having sex.

More than 90 percent of the men said they wanted to have sexual intercourse the first time. Fewer than 8 percent said they did not want it but went along with it, and just three in a thousand said they were forced. As seen in Table 4, more than half the men said they were motivated primarily by curiosity and only a quarter of those who wanted sex said they had sexual intercourse out of affection for their partner. In fact, most of the men said they were not in love with their first partner. Of those men who did not want their first experience of intercourse, 29 percent said they felt peer pressure.

The women, in contrast, often said they were in love, and although they too usually wanted to have intercourse, a higher proportion of them said they just went along. About 70 percent of women wanted sex the first time they had it, 24 percent said they only went along

Table 4
Reasons for Having First Sexual Intercourse

Attributed reasons	First intercourse wanted		First intercourse not wanted, but not forced	
	Men	Women	Men	Women
Affection for partner	25%	48%	10%	38%
Peer pressure	4	3	29	25
Curiosity/readiness for sex	51	24	50	25
Wanted to have a baby	0	1	0	1
Physical pleasure	12	3	7	2
Under influence of alcohol/drugs	1	0	3	7
Wedding night	7	21	1	3
	100%	100%	100%	100%

with it, and 4 percent were forced to have intercourse against their will. A quarter said they had intercourse the first time out of curiosity about sex, nearly half those who wanted it the first time said they did it out of affection for their partner (seen in Table 4). For one in five women who wanted their first sex, it occurred on their wedding night. The vast majority said they were in love with their partner the first time they had sex.

Looking in more detail, we can determine that the reasons for having first intercourse have changed over the decades, leading us to believe that peer pressure is now a stronger and more important factor in swaying teenagers than it was in the past. When we contrast women age eighteen to twenty-nine with those age fifty to fifty-nine, and look at only those whose first intercourse was not wanted but not forced, about 37 percent of the younger group said the reason was peer pressure while only 13 percent of the older group gave that reason. About 35 percent of that younger group cited affection for their partner, while 54 percent of the older group gave that reason.

The younger women who had intercourse the first time because they wanted to cited curiosity and affection for their partner as their leading reasons. The older women's main reasons were affection and the fact that it was their wedding night. Virtually no women said that they wanted or went along with sex for physical pleasure.

But having had intercourse once is not the same as having it often, with many partners. Lost in the polemics about teen sex are the findings by others that intercourse among teenagers is very episodic and that many younger teenagers do not have any sexual intercourse at all. Those who are sexually experienced may go many months without having intercourse.

One study, based on a national survey of young men conducted in 1988, found that "sexually active" young men age fifteen to nineteen did not have any sexual intercourse in at least six of the previous twelve months. And recent studies hint that teenagers are having less intercourse now than in previous years. For example, a 1978 study found that nineteen-year-old men, the teenage group who had the most sex, had sex an average of four times in the previous four weeks, while in 1988, a comparable group of nineteen-year-old men reported having intercourse an average of three times in the previous four weeks.

With constant talk about the threat of AIDS, many people have hoped that teenagers would be more wary about sex. Chariness might be revealed in a decision to have fewer partners or to delay the age of sexual initiation or to wait until marriage to have sexual intercourse.* We know there was no pronounced tendency to delay the age of sexual initiation or to have fewer partners in the teenage years. But, we asked, was there any other AIDS effect among teenagers?

The answer is that if the shadow of AIDS did encourage teenagers to change their behavior, it did not encourage many and the changes were not profound. We find that a small percentage of young men did abstain from intercourse, but we cannot say whether the effect we saw was due to a desire to avoid the risk of being infected with HIV or whether it had some other, unrelated, cause.

We can calculate, for example, the proportion of men and women who reach age twenty as a virgin. For the successive ten-year birth cohorts, that is, those born in the decades 1933 to 1942, 1943 to 1952, 1953 to 1962, and 1963 to 1972, the percentages of men who were virgins at age twenty rose from 1.0 percent to 1.7 percent to 6.0 percent to 8.3 percent. For women in these four age groups, the percentages who were virgins at age twenty were 4.6 percent, 4.7 percent, 3.6 percent, and 5.8 percent, respectively. But the increase in the number of men who were virgins at age twenty began before the AIDS scare, so we cannot attribute all of that increase to concerns about AIDS.

We are not certain why more twenty-year-old men are virgins now than forty years ago, and can only speculate that perhaps it has become more socially acceptable for a young man to refrain from having intercourse. We found, for example, that the proportion of men whose first sexual intercourse was with a prostitute declined from 7 percent of men who came of age in the 1950s to 1.5 percent of the men who came of age in the late 1980s to early 1990s.

The proportion of women who were virgins has traditionally been somewhat higher than the proportion of men who had had no sexual

*Re 1978 study: Melvin Zelnik and John F. Kauner, *Sex and Pregnancy in Adolescence* (New York: Sage, 1981). Re 1988 study: Leighton Ku, Freya Sonenstein, and Joseph Pleck, "Sexual Behavior in the 90s: Male Youth in the U.S." (mimeo presented at the Population Association of America Meetings, 1992).

intercourse by age twenty, but that gender difference has disappeared. We do not see any marked trend toward increasing proportions of young women who remained virgins until they turned twenty.

In addition to having intercourse at younger ages, many people also are marrying later — a change that is the real legacy of the late 1960s and early 1970s. This period was not, we find, a sexual revolution, a time of frequent sex with many partners for all. Instead, it was the beginning of a profound change in the sexual life course, providing the second reason why Americans have accumulated more partners now than in decades past.

Since the 1960s, the route to the altar is no longer so predictable as it used to be. In the first half of the twentieth century, almost everyone who married followed the same course: dating, love, a little sexual experimentation with one partner, sometimes including intercourse, then marriage and children. It also was a time when there was a clear and accepted double standard — men were much more likely to have had intercourse with several women before marrying than women were to have had intercourse with several men.

At the dawn of the millennium, we are left with a nation that still has this idealized heterosexual life course but whose actual course has fragmented in the crucial years before marriage. Some people still marry at eighteen, others at thirty, leading to very different numbers of sexual partners before marriage. Social class plays a role, with less-educated people marrying earlier than better-educated people. Blacks tend to marry much later than whites, and a large number of blacks do not marry at all.

But a new and increasingly common pattern has emerged: affection or love and sex with a number of partners, followed by affection, love, and cohabitation. This cycles back to the sexual marketplace, if the cohabitation breaks up, or to marriage. Pregnancy can occur at any of these points, but often occurs before either cohabitation or marriage. The result is that the path toward marriage, once so straight and narrow, has begun to meander and to have many side paths, one of which is being trodden into a well-traveled lane.

That path is the pattern of living together before marriage. Like other recent studies, ours shows a marked shift toward living together rather than marriage as the first union of couples. With an increase in cohabitation, the distinctions among having a steady sexual partner,

a live-in sexual partner, and a marriage have gotten more fuzzy. This shift began at the same time as talk of a sexual revolution. Our study shows that people who came of age before 1970 almost invariably got married without first living together, while the younger people seldom did. But, we find, the average age at which people first move in with a partner — either by marrying, or living together — has remained nearly constant, around age twenty-two for men and twenty for women. The difference is that now that first union is increasingly likely to be a cohabitation.

In our study, we find that 93 percent of women born between 1933 and 1942 married without ever living with their partner. And 90 percent of these women were either virgins when they married or had premarital intercourse only with the man they wed. In contrast, just 36 percent of women born between 1963 and 1974 got married without living with their spouse first. But among the majority who lived with a man, 60 percent had no other sexual partners or only one other before they moved in with their lover.

With the increase in cohabitation, people are marrying later, on average. The longer they wait, however, the more likely they are to live with a sexual partner in the meantime. Since many couples who live together break up within a short time and seek a new partner, the result has been an increase in the average number of partners that people have before they marry.

Figure 8 (on page 98) shows the pattern of acquiring the first partner for women born in two separate time intervals.

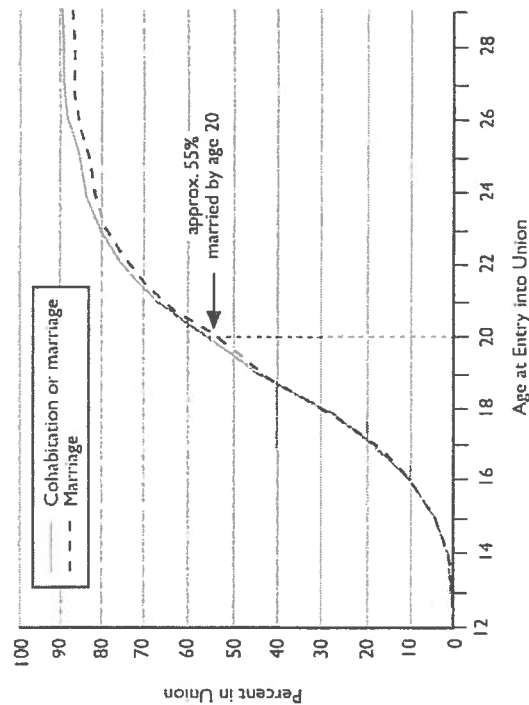
The top portion of the figure shows the pattern of marriage or cohabitation for women born between 1933 and 1942 and the bottom portion shows the comparable pattern for women born between 1963 and 1974.

These data show that in both the younger and the older groups of women, the vast majority formed a live-in partnership. By age 25, about 85 percent of both groups had done so. But, for the younger women, most formed their first partnership by cohabiting. For the older women, cohabiting was all but unheard of; nearly all formed their first partnership by marrying.

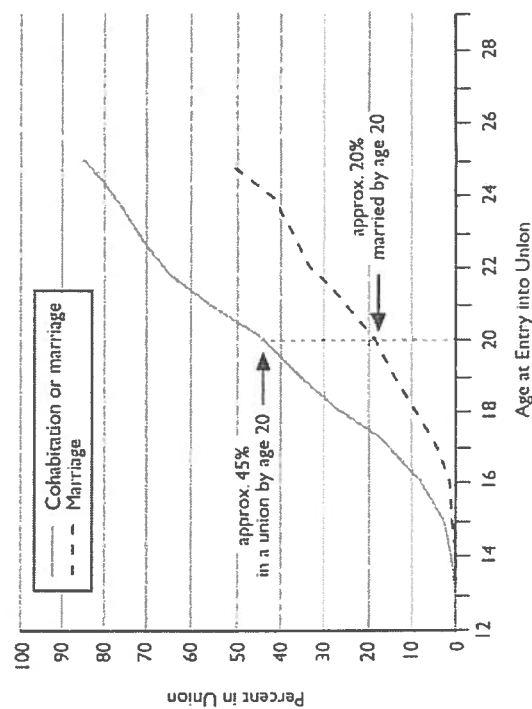
The top figure shows that by age eighteen, about 30 percent of these older women were married. By age twenty, 55 percent had married. The bottom figure shows that by age twenty, only about 20 percent

FIGURE 8:
Age at First Live-in Partnership (Marriage or Cohabitation)

PANEL A: Women Born 1933-1942



PANEL B: Women Born 1963-1974



of the younger women had married — less than half as many as the older women three decades past. But nearly as many had begun living with a man — by cohabiting or marrying. By age twenty, 45 percent of the younger women had either married or begun living with a man. That means that nearly equal numbers of these younger women were living with a man as were married by age twenty.

The vertical distance between the solid and the broken lines in Figure 8 shows the proportion who first entered a cohabitation instead of a formal marriage. In the top figure, the dashed and solid lines are almost on top of each other, which means that practically none of the women in that age group first lived with a sex partner — they almost all married when they entered their first live-in partnership.

The figure also shows that nearly all — 90 percent — of the older women had married by the time they turned twenty-nine. In the younger group, by age twenty-five, nearly 90 percent had formed a partnership. (The younger group had not lived long enough to complete the graph out to age twenty-nine, so it stops at a younger age. But the solid line is approaching 90 percent.) This shows, again, that the younger women are forming partnerships at about the same rate and at about the same age as the older women. It's just that the younger women often live with a man in a cohabitation relationship instead of a marriage.

The graphs for men are nearly identical; we don't show them here.

Another way to look at this trend is illustrated by Table 5. The table shows that 84.5 percent of the men born in the years 1933 to

Table 5
Percentage of First Partnerships
That Were Marriages

Birth Dates	Men	Women
1933-1942	84.5	93.8
1943-1952	66.7	75.7
1953-1962	46.6	57.3
1963-1974	33.9	35.3

1942 and 93.8 percent of the women born in those years married without ever living with their partner first. But just 33.9 percent of the men born in the years 1963 to 1974 married without first living with their partner and just 35.3 percent of the women born in those years married without cohabiting.

Finally, we can look at divorce rates, another key social change that began in the 1960s and that has led to increasing numbers of partners over a lifetime. Our data show this divorce pattern, as do many other data sets in the United States. For example, we can look at how likely it is that a couple will be divorced by the tenth anniversary of their marriage. For people born between 1933 and 1942, the chance was about one in five. For those born between 1943 and 1952, the chance was one in three. For those born between 1953 and 1962, the chance was closer to 38 percent. Divorced people as a group have more sexual partners than people who remain married and they are more likely, as a group, to have intercourse with a partner and live with a partner before they marry again.

These three social trends — earlier first intercourse, later marriage, and more frequent divorce — help explain why people now have more sexual partners over their lifetimes.

To discern the patterns of sexual partnering, we asked respondents how many sexual partners they had. We could imagine several scenarios. People could find one partner and marry. Or they could have sex with several before marrying. Or they could live with their partners first and then marry. Or they could simply have lots of casual sex, never marrying at all or marrying but also having extramarital sex.

Since our respondents varied in age from eighteen to fifty-nine, the older people in the study, who married by their early twenties, would have been married by the time the turbulent 1960s and 1970s came around. Their premarital behavior would be a relic from the past, telling us how much intercourse people had in the days before sex became so public an issue. The younger people in our study can show us whether there is a contrast between the earlier days and the decades after a sexual revolution was proclaimed. We can ask if they have more partners, if they have more than one sexual partner at a time, and if their sexual behavior is markedly different from that of the older generations that preceded them.

Most young people today show no signs of having very large numbers of partners. More than half the men and women in America who were eighteen to twenty-four in 1992 had just one sex partner in the past year and another 11 percent had none in the last year. In addition, studies in Europe show that people in the United Kingdom, France, and Finland have sexual life courses that are virtually the same as the American life course. The picture that emerges is strikingly different from the popular image of sexuality running out of control in our time.

In fact, we find, nearly all Americans have a very modest number of partners, whether we ask them to enumerate their partners over their adult lifetime or in the past year. The number of partners varies little with education, race, or religion. Instead, it is determined by marital status or by whether a couple is living together. Once married, people tend to have one and only one partner, and those who are unmarried and living together are almost as likely to be faithful.

Our data for the United States are displayed in Table 6 (on page 102).

The right-hand portion of Table 6 tells how many sexual partners people had since they turned eighteen. Very few, just 3 percent, had no partners, and few, just 9 percent, had a total of more than twenty partners.

The oldest people in our study, those aged fifty-five to fifty-nine, were most likely to have had just one sexual partner in their lifetimes — 40 percent said they had had only one. This reflects the earlier age of marriage in previous generations and the low rate of divorce among these older couples. Many of the men were married by age twenty-two and the women by age twenty.

The left-hand portion of Table 6 shows the number of sexual partners that people had in the past twelve months. These are the data that show how likely people are to remain faithful to their sexual partner, whether or not they are married. Among married people, 94 percent had one partner in the past year. Couples who were living together were almost as faithful. Seventy-five percent of people who had never married but were living together had one partner in the past year. Eighty percent of people who were previously married and were cohabiting when we questioned them had one partner in the past year. Two-thirds of the single people who were not living with a partner

Table 6
Number of Sex Partners in Past Twelve Months and Since Age Eighteen

	Sex partners past twelve months				Sex partners since age eighteen						
	0	1	2 to 4	5+	0	1	2 to 4	5 to 10	10 to 20	21 +	
Total	12%	71%	14%	3%	3%	26%	30%	22%	11%	9%	
Gender											
Men	10	67	18	5	3	20	21	23	16	17	
Women	14	75	10	2	3	31	36	20	6	3	
Age											
18-24	11	57	24	9	8	32	34	15	8	3	
25-29	6	72	17	6	2	25	31	22	10	9	
30-34	9	73	16	2	3	21	29	25	11	10	
35-39	10	77	11	2	2	19	30	25	14	11	
40-44	11	75	13	1	1	22	28	24	14	12	
45-49	15	75	9	1	2	26	24	25	10	14	
50-54	15	79	5	0	2	34	28	18	9	9	
55-59	32	65	4	0	1	40	28	15	8	7	
Marital status											
Never married, noncohabiting	25	38	28	9	12	15	29	21	12	12	
Never married, cohabiting	1	75	20	5	0	25	37	16	10	13	
Married	2	94	4	1	0	37	28	19	9	7	
Divorced, separated, widowed, noncohabiting	31	41	26	3	0	11	33	29	15	12	
Divorced, separated, widowed, cohabiting	1	80	15	3	0	0	32	44	12	12	
Education											
Less than high school	16	67	15	3	4	27	36	19	9	6	
High school graduate or equivalent	11	74	13	3	3	30	29	20	10	7	
Some college/ vocational	11	71	14	4	2	24	29	23	12	9	

Table 6, continued

	Sex partners past twelve months					Sex partners since age eighteen						
	0	1	2 to 4	5+		0	1	2 to 4	5 to 10	10 to 20	21+	
Finished college Master's/advanced degree	12	69	15	4		2	24	26	24	11	13	
Current Religion												
None	13	74	10	3		4	25	26	23	10	13	
Mainline	11	68	13	7		3	16	29	20	16	16	
Protestant	11	73	13	2		2	23	31	23	12	8	
Conservative												
Protestant	13	70	14	3		3	30	30	20	10	7	
Catholic	12	71	13	3		4	27	29	23	8	9	
Jewish	3	75	18	3		0	24	13	30	17	17	
Other religion	15	70	12	3		3	42	20	16	8	13	
Race/Ethnicity												
White	12	73	12	3		3	26	29	22	11	9	
Black	13	60	21	6		2	18	34	24	11	11	
Hispanic	11	69	17	2		4	35	27	17	8	9	
Asian	15	77	8	0		6	46	25	14	6	3	
Native American	12	76	10	2		5	28	35	23	5	5	

Row percentages total 100 percent.

Row percentages total 100 percent.

had no partners or only one in the past year. Only a few percent of the population had as many as five partners for sexual intercourse in the past year, and many of these were people who were never married and were not living with anyone. They were mostly young and mostly male.

Since most Americans are white and middle class, their experiences will dominate the overall data. So, we asked, does this picture of an essentially monogamous America reflect anything but the experiences of the white middle class? Conventional wisdom says that people of different educational backgrounds or different religions or different races will have different sexual histories. The popular myth is that

poor people have many partners, blacks have many partners, and conservative Christians have few.

But when we looked at our respondents' education, race, and religion, these patterns did not emerge. When we looked at education levels, for example, there was no relationship with the number of partners people had in the past year. Table 6 shows the percentages with five or more partners vary with education only 3 to 4 percent; these are not large enough differences to be significant.

There was one notable exception, however. We found that the more educated people were, the more partners they had over their lifetime. In Table 6, we can add together the final two columns and see that as education rose from less than high school to college graduates, for example, the percentage who report having ten or more partners in their lifetime rose from 15 percent to 24 percent. One important reason for this is that people with more education are more likely to postpone marriage while they finish their schooling. The longer they wait, the more time they have to meet, have intercourse with, and, often, live with a succession of partners. It's not that their sex drive is in overdrive. It's rather that they have a greater opportunity to have a succession of sexual partners before they form their monogamous or nearly monogamous marriages.

Blacks were more likely than whites to have had many partners over the past year, but the number of blacks or whites with multiple partners was small. Three percent of whites said they had more than five partners in the past year and 6 percent of blacks had more than five partners. On the other hand, 73 percent of whites and 60 percent of blacks had one partner in the past year and 12 percent of whites and 13 percent of blacks had no partner in the past year. When we look at the number of sexual partners over a lifetime (the right-hand side of Table 6), blacks no longer have more than whites.

One way to imagine the patterns of sexual partners is to think of a graph, with the vertical axis showing numbers of partners and the horizontal axis showing a person's age. The graph will be a series of blips, as the person finds partners, interspersed with flat regions where the person has no partners or when the person has just one steady partner. When the person marries, the line flattens out at a height of one, indicating that the individual has only one partner. If the mar-

riage breaks up, the graph shows a few more blips until the person remarries, and then it flattens out again.

For an individual, the graph is mostly flat, punctuated by a few areas of blips. But if we superimposed everyone's graph on top of each other, we would have a sort of supergraph that looked like it was all blips. That, in essence, is what has led to the widespread impression that everyone is having lots of partners. We see the total picture — lots of sex in the population — without realizing that each individual spends most of his or her life with only one partner.

These findings give no support to the idea of a promiscuous society or of a dramatic sexual revolution reflected in huge numbers of people with multiple casual sex partners. The finding on which our data give strong and quite amazing evidence is not that most people do, in fact, form a partnership, or that most people do, in fact, ultimately get married. That fact also was well documented in many previous studies. Nor is it news that more recent marriages are much less stable than marriages that began thirty years ago. That fact, too, was reported by others before us. But we add a new fact, one that is not only important but that is striking.

Our study clearly shows that no matter how sexually active people are before and between marriages, no matter whether they lived with their sexual partners before marriage or whether they were virgins on their wedding day, marriage is such a powerful social institution that, essentially, married people are nearly all alike — they are faithful to their partners as long as the marriage is intact. It does not matter if the couple were high-school sweethearts who married after graduation day or whether they are in their thirties, marrying after each had lived with several others. Once married, the vast majority have no other sexual partner; their past is essentially erased. Marriage remains the great leveler.

We see this, for example, when we ask about fidelity in marriage. More than 80 percent of women and 65 to 85 percent of men of every age report that they had no partners other than their spouse while they were married. These findings are confirmed by data from the General Social Survey, which reported virtually identical figures for extramarital sex.

The marriage effect is so dramatic that it swamps all other aspects

of our data. When we report that more than 80 percent of adult Americans age eighteen to fifty-nine had zero or one sexual partner in the past year, the figure might sound ludicrous to some young people who know that they and their friends have more than one partner in a year. But the figure really reflects the fact that most Americans in that broad age range are married and are faithful. And many of the others are cohabiting, and they too are faithful. Or they are without partners altogether, a situation that is especially likely for older women.

Most adults are married and so when we ask the adult population how many partners they had in the past year, the data, as presented in Table 6, will be dominated by the responses of married people. This is apparent in the raw reporting on married people near the middle of the table. We find only 3 percent of adults had five or more partners in the past year. Half of all adult Americans had three or fewer partners over their lifetimes.

In Europe, similar patterns have emerged. A study in the United Kingdom found, for example, that 73 percent of men had exactly one partner in the past year. In France, 78 percent of men had a single partner in the past year. The number for Finnish men was 78 percent. In our study, 67 percent of men had one partner in the past year.

In the United Kingdom, 79 percent of women had one partner in the past year; in France, 78 percent had only one partner; in Finland, 79 percent had one partner. We found that 75 percent of women in the United States had exactly one partner in the past year.

The extraordinary fidelity in marriage is all the more striking because of the length of time that people spend before, in, and between marriages. They are married for so much longer than they are unmarried that if they were somehow equally at risk of being unfaithful at any time, they should be likely, after years or decades of marriage, to have extramarital partners. On average, the length of time people spend between marriages is four years. The average marriage lasts a quarter century. Yet during that quarter century, most people report that they do not have additional sexual partners.

Nonetheless, the myth of the joys of easy sex with lots of partners has led many a middle-aged man, and some middle-aged women, to wonder whether they missed something by being born too soon for

the sexual revolution. We have the persistent myth that men, in particular, get a seven-year itch that makes them look around for a new partner to revive their flagging sex lives. Or, another myth says, the men shed their dull wives and start life anew, leaping headfirst into the new society where sex is abundant and always available.

Instead, it looks as if most people of each generation find a partner, marry in their twenties, and remain sexually faithful unless the marriage breaks up. If a couple divorces, the man usually finds one or more partners; the woman is less likely to find new partners, especially if she is middle-aged or older. For example, about half of the forty- to fifty-nine-year-old men in our study who had been widowed or divorced said they had two or more sexual partners after their first marriage ended. But only 40 percent of the women in that age range found two or more partners after their marriage ended. After a brief period of searching for a new partner, many people marry again and remain faithful.

That is not surprising, for two reasons that have nothing to do with the joys of sex with your spouse. First, once someone marries, there are profound social pressures to stay faithful and to stay married. And as family life and work become more central and take their toll, there is less and less time even to think of finding a partner for extramarital sex, to say nothing of finding time to have that sex.

Another reason why so many people remain married and faithful is that most people realize that finding a new partner and getting married a second time may not be so easy. They sense that the older a person is, the more difficult it is to find a partner. The advice columnist Ann Landers used to reply to women who wrote asking if they should divorce their husbands by telling them to ask themselves: Are you better off with him or without him? It was a question meant to get to the heart of the matter of whether it is easier and more pleasant to remain in a less-than-perfect marriage or try to go it alone, possibly without finding another partner at all.

Lance Compa, a Washington lawyer, said these are the sorts of pressures and complicated emotions that kept him faithful in his marriage even though, he confessed, "I'm not so sure I want to be faithful." Yet, he wrote in the *New York Times Magazine*, "With both of us working, raising kids and running a household, married life takes

on a draining routine. Lingerings mornings of love play are long gone now; little feet and little stomaches and quirky faucets and job deadlines see to that, just as they lengthen the intervals between loving nights.

"I know this is a normal, healthy, happy life that I'm intellectually committed to not betraying. But emotionally, it's not easy. In a busy home the relentless demands of keeping things organized bring a hankering for an uncomplicated liaison. This isn't just a male trip, either. My wife feels the same pressures. Will neither of us again know the helpless thrill of a new love? It's an unsettling thought only halfway through life.

"Fortunately, for fidelity, it's not a simple contest of intellectual constancy versus renegade emotion. There's no such thing as an uncomplicated affair. Besides the excitement, I remember the lies, the sneaking and remorse that accompanied extra-relationship affairs when I was single. Even when I wasn't serious about a steady girlfriend, I could barely face her after seeing someone else."

We have shown that a large majority of adults form a partnership — a marriage or cohabitation — during their twenties, and during the length of these partnerships very few adults acquire many sex partners. Nonetheless, as Table 7 shows, the small percentage of adults who do report having many sex partners within the past twelve months or who had twenty-one or more partners within their adult lifetime, are a large number of people. (Table 7 uses weighted data to obtain national estimates, and projecting these rates onto the U.S. population as a whole.) From this table several points emerge.

First, the table shows that men are many times more likely than women to have large numbers of partners. Second, adults seem to accumulate most of their partners while they are in their twenties. This is the conclusion from the figures showing that less than 1 percent of those in their forties had more than five sex partners in the past year and that just 1.9 percent of those in their thirties had that many partners. But 8.1 percent of those aged eighteen to twenty-four had five or more partners in the past year. At the same time, the percentages of those who accumulate more than twenty partners over a lifetime change little after adults reach age thirty. These two observations, taken together, indicate that it is the young who are having multiple partners.

Table 7
Estimated Number of U.S. Adults with Numerous Sex Partners

	Adults with five or more sex partners in past twelve months		Adults with twenty-one or more sex partners since age eighteen	
	Percent estimated from NHLS	Number in U.S. population	Percent estimated from NHLS	Number in U.S. population
GENDER				
Men	4.1	2,965,000	15.1	10,920,000
Women	1.6	1,166,000	2.7	1,968,000
AGE				
18-24	8.1	2,155,000	2.9	771,000
25-29	4.4	917,000	8.7	1,813,000
30-39	1.9	813,000	11.5	4,924,000
40-49	0.7	230,000	11.0	3,617,000
50-59	0.3	66,000	7.9	1,743,000
RACE/ETHNICITY				
White	2.5	2,862,000	9.0	10,305,000
Black	5.5	927,000	10.2	1,720,000
Hispanic	2.5	321,000	8.2	1,051,000

Note: NHLS weighted data

Third, the very sexually active people in the population, who are most at risk of being infected with HIV, did not seem to have been slowed by fears of AIDS. This is seen in Table 7 by considering that 8.7 percent of the people ages twenty-five to twenty-nine had twenty-one or more partners since they turned eighteen and that 11.5 percent of people ages thirty to thirty-nine had that many partners — percentages that are essentially the same for these two age groups. Yet the younger group came of age in the time of AIDS and most in the older group were already age twenty-five or so before the AIDS epidemic began.

Fourth, the small percentages with many partners translate into a large number of people in the population of over 250 million people. These would be the people who are most likely to have been infected with a sexually transmitted disease, because of the sheer number of partners that they had. This subject we discuss at some length in chapter 10.

While our findings include a small percentage who have many partners, and these small percentages imply substantial numbers of people in the population overall, still the general picture is one of relatively few adults who have many partners and relatively many adults who have very few. These findings seem rather tame. The general impression is that there has been an unraveling of the sexual life course in America, yet our data say that most people are not carelessly promiscuous. So why are so many people expressing such grave concerns about the apparently changing mores of society?

Perhaps it is that, in the context of our society, inundated with erotic images, our fears of AIDS, and our prevailing myths about sexuality, we have developed a fundamental misconception of what the sexual life course is and how very likely it is that people will marry and have regular and socially sanctioned sex for as long as they want it. It may be that the images of Woodstock are still playing on our minds.

The old standards of sexual behavior are not so much gone as made more fuzzy, more diffuse, in the time before and between marriages. But there definitely are standards of behavior. And if society's goal is to get people safely married and procreating and faithful to their spouses, the standards have been a roaring success.

In a way, it sounds boring. Where is the bed-hopping that supposedly spiced up the life of Americans and Europeans? But, as we will show in the next chapter, marriage has a surprise benefit that may be one of the best kept sex secrets.

6

HOW OFTEN DO AMERICANS HAVE SEX?

ANYONE looking at the allusions to sex that surround us every day would have to conclude that sex is an American obsession and that while some people most definitely are the sexual winners, others clearly are the losers. From the sultry young women eyeing a man in a liquor advertisement, to the posters of Marky Mark in his Calvin Klein underwear, muscles bulging on his naked torso, to the women's magazines at the grocery store checkout counter, each with its cover photo of a clear-skinned young model, grinning happily amidst screaming headlines calling out SEX, the message clamors. All the images are of the young and beautiful with perfect teeth, gleaming hair, and hard bodies, glistening with vibrant good health. These are the sexy ones.

Even if, realistically, we dismiss the media bombardment, deep down it is hard to ignore the implications. We see and are told over and over again that all young, healthy Americans are very likely to be having a great deal of sex, and when they are not, they are encouraged to get back into the fray as quickly as possible. And while all attractive Americans are having a good deal of sex, some people are having more sex than others. Blacks are having more sex than other racial groups. Religious conservatives are certainly having less.

SEXUAL CITIZENS

*The Legal and Cultural Regulation
of Sex and Belonging*

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Stanford University Press
Stanford, California
2007

1 Consensual Sex and the Practices of Citizenship

IN *SEX AND THE CITY*, HBO's acclaimed television show about the intimate, erotic, and neurotic pursuits of four single women in New York, Carrie Bradshaw and her posse are either having sex or talking about sex. While single women have been having sex on television for a long time, what distinguishes Carrie and company is the extent to which their sexualities are a crucial part of their citizenship in the republic of New York City. Carrie makes her living as a journalist who writes about sex. Samantha, a highly successful public relations agent, is unapologetically sexual in all aspects of her life—refusing the distinction between public and private. Miranda negotiates the tensions of the demands of an asexual profession—she is a lawyer—and her more intimate pursuits. And Charlotte is the traditionalist, the one who speaks about sex in hushed tones. Episode after episode explore once-racy topics, from the etiquette of oral sex and public sex to older women/younger men intergenerational relationships and lesbianism, all while Carrie reflects upon the deep inner truths of human intimacy.

The intimate public sphere explored in *Sex and the City* is part of the broader transformations of sexual citizenship, a process of becoming, which transgresses the borders of old and domesticates the citizens of new. These women are strong and independent and unapologetically sexual. But, they are also responsible market citizens, impeccably attired, with aspirations of relational and domestic happiness. They are part of the new sexual citizenry—a citizenry that, although highly sexualized, can be relied upon to self-discipline.

This normalization of the sexualized subject in popular culture signals a transformation in the terms of sexual citizenship. One-time sexual outlaws—like sexually active single women—are no longer so. Their sex lives are no longer hidden from public view, nor reason enough to cast them on the outside of citizenship. Indeed, their sex lives have become part of who they are. But this normalization of sex and recuperation of the sexual outlaw in popular culture is not without its detractors. The culture wars of the 1980s and 1990s witnessed social conservatives pushing back against the liberalization of sex in the public sphere. From the obscenity prosecutions of Robert Mapplethorpe's photography in the 1980s to the Clinton impeachment in the 1990s to the kauffle over Janet Jackson's breast during Super Bowl halftime early in the 2000s, the status of sex and sexuality in the public sphere remains deeply contested.

While the status of the sexual subject may still be controversial within popular culture, it is even more so within law. Indecency, obscenity, and until recently sodomy are but a few examples of law continuing to regulate consensual sexual practices. Criminal law explicitly prohibits these practices and punishes those who engage in them—admittedly in an uneven and intermittent fashion. As some forms of consensual sex are marked as bad and thereby proscribed, the law not only draws lines between good sex and bad sex but also constitutes subjects as good and bad citizens: good citizens who learn to discipline themselves against the backdrop of the legal proscriptions and bad citizens who fail to self-discipline and who must then be punished by the law. The legal prohibitions of these sexual practices exemplify the ways in which the law operates both in juridical ways through repression and in more disciplinary ways through the construction of the subject and its appropriate modes of self-governance (Stychin 2003, 3).

This chapter considers some of the ways in which sexual citizenship is produced through the legal regulation of consensual sexual practices. First, it explores cases in which the idea of sexual privacy has been used to challenge legal prohibition on sodomy and the use of sex toys. Next, it looks at the regulation of sexual speech through indecency and obscenity laws, focusing on two legal controversies: the indecency charges against hip-hop artist Sarah Jones by the FCC and the federal government's obscenity prosecution of Extreme Associates, a company that produces extremely violent pornography. The chapter uses these cases to explore the contestations and transformations in contemporary sexual citizenship. Subjects continue to challenge

their outlaw status, claiming inclusion within a new modality of explicitly sexualized citizenship. Some have successfully become citizens; others are in the process of becoming, and yet others continue to be cast as outlaws, unworthy of belonging.

The chapter highlights the role of the border in producing good and bad citizens. Much of the work done by law in this area is about border control—the judicial activity of patrolling the grid between good and bad sex, between legitimate sexual citizenship and illegitimate sexual outlaw. The idea of border patrol is hardly new to law; much has been written of the legal obsession with slippery slopes (Schauer 1985; Volokh 2003). The chapter highlights the extent to which the legal regulation of consensual sex is preoccupied with a similar border anxiety, heightened by a fear of sexual chaos. It also explores what happens when subjects cross borders. The process of crossing the border—from bad to good—is a process of incorporations and transformation, in which the sexual subject is reconstituted and reframed within the privatizing, domesticating, and self-disciplining discourses of contemporary citizenship. The chapter interrogates the ways in which subjects are normalized through the process of inclusion without, however, entirely negating the “unruly edges” (Stychin 2001, 290). It is not only the subjects who are changed through the process of inclusion but also citizenship itself, as explicitly sexualized subjects are incorporated into its folds. *Sex and the City* is a new modality of citizenship; Carrie and her gang of single women may be changed through their inclusion in it, but so too have their explicitly sexualized identities reshaped the contours of contemporary citizenship.

Sexual Privacy and the Borders of Citizenship

From its inception, the zone of protected sexuality, as judicially articulated by the constitutional right to privacy, was demarcated by what it was not: the good distinguished from and defined in relation to the bad. In *Poe v. Ullman*—the precursor to *Griswold v. Connecticut*—the majority of the Supreme Court dismissed a challenge to Connecticut's prohibition on the use of contraception on the ground of the lack of a constitutionally justiciable issue. Justice Harlan in dissent both recognized a right to privacy and asserted its limitations: “The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are

immune from criminal enquiry, however privately practiced" (Poe, 552). He further elaborated this limitation:

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. (Poe, 553)

In these passages, the zone of privacy was highly circumscribed—marital sex good, nonmarital sex bad—with the articulation of good sex quivering in the shadow of the bad.

These passages were echoed by several of the justices in *Griswold v. Connecticut*, where the Supreme Court struck down Connecticut's prohibition on contraception use for married couples. Justice Douglas, writing for the Court, made it clear that the decision—and the right to privacy that it recognized—was all about marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (*Griswold*, 486)

Justices Goldberg, Warren, and Brennan in their concurring opinion, citing Harlan's words with approval, made it clear that the right to privacy was not about bad sex: "it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct" (*Griswold*, 499).

While this zone of privacy has evolved beyond marital sex—in *Eisenstadt v. Baird* the right to use contraception was extended to unmarried persons, and in *Roe v. Wade*, to a right to abortion in the first trimester, regardless of marital status—many of its extensions continue to be accompanied by an

anxiety about patrolling the borders between legitimate and illegitimate sex. In this section, I examine two recent legal debates about the scope of the right to sexual privacy: sodomy and sex toys. In these debates, border control remains a central anxiety, with proponents of an expanded sexual citizenship building new borders and opponents defending the old against imminent collapse. This vigilance with border patrol is, on one hand, endemic to law in general and judicial review in particular, which by definition involves an exercise in demarcation. Yet, in the context of sexual citizenship, this border patrol is constitutive. Subjects who are allowed to cross borders are constituted in this process of becoming; they are partially remade in the disciplinary and domesticity terms of membership.

From Sodomite to Citizen

The late 1990s were marked by a Wildean moment (Plotz 1998). From the release of the film *Wilde* in 1998 and two Off Broadway plays (Moise Kaufman's *Gross Indecency* and David Hare's *The Judas Kiss*), to a statue in central London and a proliferation of books, Oscar Wilde was everywhere. As one film critic observed, "In the last few years, there has been a veritable Wilde explosion. It's not so much a revival of his work—that never really died—as a resurrection of the man himself" (Lloyd 1998). This Wilde revival coincided with two significant centenaries: 1995 marked the hundredth anniversary of his infamous trial and conviction for sodomy, and 2000 was the hundredth anniversary of his death. But the revival was more than simply an anniversary; it was animated by the rise of the gay citizen. Throughout the 1990s, the gay and lesbian sexual subject was on the move toward cultural citizenship—from Tony Kushner's Pulitzer Prize-winning play *Angels in America* and the Academy Award-winning film *Philadelphia*, to situation comedies like *Mad About You* and *Friends* featuring gay men and lesbians as minor characters, to shows like *Will and Grace* and *Ellen* with gay and lesbian characters in starring roles, to the coming out of celebrities like Ellen DeGeneres, Melissa Etheridge, and k. d. lang.

The resurrection of Wilde was very much part of the entry of the gay subject into sexual citizenship. The film *Wilde*, although marking the fourth film about the life of Oscar Wilde, was all about Wilde's sexuality; the multidimensional facets of his life, including his domestic marital life, faded into the background as the camera lens focused on his homosexual exploits and his relationship with Lord Alfred Douglas ("Boise"). As more than one film critic

observed, *Wilde* seemed to remake Oscar Wilde in the discourse of respectability. The Wilde of the 1890s—sodomite, social outcast, mocker of society's social mores—was recast as a hero of the 1990s—sexual citizen, victim of injustice, critic of outdated values and sexual hypocrisy. He was transformed from sodomite to sexual citizen, and in the process much of his unruly edge was left behind. As Carol Lloyd observed, "the domestication of Oscar epitomizes the dangers of our current make-nice culture. Embracing perversity can also draw the delicious, vital poison from it" (1998). David Plotz similarly noted, "there is very little wildness in today's Wilde" (1998). The subversiveness of Wilde with his endless transgression of Victorian social mores had given way to a new respectability (Plotz 1998).

Yet, the domestication of Wilde—no doubt part of the journey from sodomite to sexual citizen—should not be overstated. Much of the popular culture representation of the gay and lesbian subject in the 1990s was a highly desexualized one. The characters appeared on stage and on screen, but they did not have sex. The depiction of Oscar Wilde in *Wilde* was a rather more sexualized one. Oscar Wilde was shown having sex with men. While the focus was on the tortured relationship between Oscar and Boise, even their sexual relationship was not entirely domesticated: Both Oscar and Boise are shown having sex with other men. Unlike the other cultural representations of the moment, it was perhaps more difficult to avoid the sexual—Wilde was after all on trial for engaging in sodomy. Yet, unlike earlier depictions, the return to Wilde in the 1998 film version is all about the recuperation of sodomy as a defining gay male act. Oscar Wilde could not be as transgressive in the 1990s as he was in the 1890s. Yet his transformation from sodomite to sexual citizen was not accomplished through an erasure of the act of sodomy but, rather, in and through it.

Much the same can be said of the challenges to the sodomy laws and to the recent arrival of the gay sexual subject into the legal discourses of citizenship. The sodomite as sexual outcast survived surprisingly intact in legal discourse through much of the twentieth century. Although the gay liberation moment in the late 1960s and early 1970s began to challenge the criminalization of gay sex, gaining momentum in cultural and social discourses, the infamous Supreme Court case of *Bowers v. Hardwick* upheld Georgia's sodomy laws as recently as 1986. The majority opinion written by Justice White held that the Constitution did not confer a right to privacy that extended to homosexual sodomy. He distinguished the sexual privacy cases

from *Eisenstadt* to *Carey* as dealing primarily with issues of family, marriage, and procreation and concluded that "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated" (*Bowers* 1986). In a single paragraph review of the history of the legal regulation of sodomy, the Court stated that "Proscriptions against that conduct have ancient roots," prohibited at common law, by the thirteen original states when they ratified the Bill of Rights, by all but five of the thirty-seven states when the Fourteenth Amendment was ratified, and until 1961, by all fifty states. With this brief history, the majority concluded: "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious" (*Bowers* 1986).

Justice White rejected the argument that the Court should follow the precedent of *Stanley v. Georgia*, in which the Supreme Court held that the First Amendment prevents criminal prosecution for possessing and using obscenity within the privacy of one's own home. In his view, "otherwise illegal conduct is not always immunized whenever it occurs in the home," noting, for example, that possession of drugs was not protected by *Stanley*. White further held: "And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road" (*Bowers* 1986).

Much has been written about the decision in *Bowers*, critiquing and condemning its reasoning (see, for example, Halley 1993; Thomas 1992). My point is that *Bowers* was characterized by many of the hallmarks of border patrol of sexual citizenship. The emerging right to sexual privacy was highly circumscribed—good sex and good citizenship being limited to the familial sphere, and the outlaw being cast as an outsider to this sphere. Good citizens were familial, marital, heterosexual. Sodomites were not. The Court expressly stated its border anxieties: that recognizing a right to engage in consensual gay sex would make it difficult if not impossible to continue to police other forms of consensual sex like adultery and incest—both clear violations of the highly circumscribed sphere of good familial sex. In addition to the obvious homophobic discourse informing the decision that has been well rehearsed in the literature, *Bowers* is a classic instantiation of the anxieties of patrolling a

moving border: It must be contained and controlled, lest the center does not hold, and sexual chaos results.

In the two decades that followed, *Bowers* was very much out of sync with the cultural discourse around gay sex. Although social conservatives continued to denounce the immorality of homosexuality, popular culture embraced the gay and lesbian subject throughout the 1990s. While the image of the gay and lesbian subject was for the most part a desexualized one—these were not folks having public, promiscuous sex; in fact, they did not seem to be having any sex—it was a far cry from the image of outlaw. And it was an image in the public sphere that began to set the stage for the legal transformation.

In 2003, the Supreme Court reversed its ruling in *Bowers*. In *Lawrence v. Texas*, Justice Kennedy, writing for the majority, struck down a Texas sodomy law (*Lawrence*). The law stated that “a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex” and defined “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person” or “the penetration of the genitals or the anus of another person with an object” (*Lawrence*, 563 quoting Texas Penal Code). The definition of the proscribed sexual acts was thus expressly directed against same-sex sex; heterosexuals were free to engage in all the oral and anal sex they desired without fear of criminal prosecution.

Kennedy framed the right at issue as a liberty right, as a right to make certain private choices about intimate matters, that is, about matters “touching upon the most private human conduct, sexual behavior, and in the most private of places, the home” (*Lawrence*, 567). In his view, the decision to enter into a homosexual sexual relationship in the privacy of one’s own home was precisely such a matter: “It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice” (*Lawrence*, 567).

But, that liberty right was at the same time carefully circumscribed. Throughout the opinion, Kennedy emphasized the private, the domestic, the home as the location of the liberty interest. Katherine Franke argues that the Court in *Lawrence* recognized a highly domesticated liberty right—“the lib-

erty interest at stake is one that is tethered to the domestic private” (Franke 2004, 1403). She argues that “gay men are portrayed as domesticated creatures, settling down into marital-like relationships in which they can both cultivate and nurture desires for exclusivity, fidelity and longevity in place of other more explicitly erotic desires” (1408). As a result of this focus on the domestic, Franke worries that *Lawrence* will be of little assistance in advancing alternative “nonnormative notions of kinship, intimacy and sexuality” (*Lawrence*, 1414). Franke specifically ties her analysis to the idea of sexual citizenship, arguing that “[t]he world post-*Lawrence* remains invested in forms of social membership and, indeed, citizenship that are structurally identified with domesticated heterosexual marriage and intimacy” (1416). In her view, the sexual citizenship that emerges from *Lawrence* is a domesticated one, a “domestically normative sexual citizenship” (1416).

This domestication of the liberty right exemplifies the kind of border patrol of sexual citizenship evident in the sexual privacy cases. As the right is extended to nonheterosexuals—a radical transformation in its own right—it must simultaneously be contained; its radical edges must be controlled. Supplementing this focus on the domestic, there is in *Lawrence* an emphasis on what the right is not. Kennedy writes: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution” (*Lawrence*, 578). In other words, the sexual conduct in question does not involve children, harmful sex, nonconsensual sex, public sex, or commercial sex. The gay sex that is being protected is carefully circumscribed: It is not all gay sex, nor is it all sex.

The sexual citizenship of *Lawrence* is articulated against the backdrop of what it is not; it is always against an identifiable border. Kennedy then returns to the trope of the domestic, which is deployed to constitute and patrol the border: “The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime” (*Lawrence*, 578). Kennedy is thus able to shift the homosexual from bad to good citizen by carefully ensuring that the borders between good and bad citizenship themselves are sustained. The normative content of good sexual citizenship remains—consensual, private, noncommercial—while gay men are reconstituted in its image. And the

normative content of bad sexual citizenship similarly remains intact, with anything involving children, harm, coercion, public, and/or commercial as its harbingers.

There is one other thing in Kennedy's "what it is not" list: "It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" (*Lawrence*, 578). The sexual citizenship of *Lawrence* is carefully articulated as not involving same-sex marriage or even same-sex relationship recognition. The gay subject is removed from outlaw status, but the process of legitimization is not one that grants the full rights of citizenship. This may simply be border patrolling compelled by political expediency: The Court wanted to make crystal clear that it was not deciding anything about gay marriage or civil unions or formal relationship recognition at a moment when these issues were politically explosive. Yet, it is an interesting limitation on the domestication of the gay subject. Although Franke quite rightly worries "that *Lawrence* and the gay rights organizing that has taken place around it have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy and sexuality" (1414), the decision itself attempts, perhaps unsuccessfully, to preempt this domesticated subjectivity by patrolling the borders of marriage.

It is precisely the anxiety over the majority's failed border patrolling that is amplified in Justice Scalia's dissent. Scalia vehemently opposes the majority conclusion that moral approbation is no longer a legitimate state interest sufficient to pass constitutional review. In his view, removing morality would lead inexorably to a collapsing of the borders between legitimate and illegitimate sex, and of government regulation thereof: "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity are . . . sustainable only in light of *Bowers* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding" (*Lawrence*, 590). In Justice Scalia's eyes, this is nothing less than "a massive disruption of current social order" (591). On the majority assertion that the present case does not involve same-sex relationship recognition, Scalia retorts "Do not believe it" (604); in his view, the majority has dismantled the very "structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions" (604).

For Scalia, the outrage of the majority opinion is thus not only the overruling of *Bowers* and the recognition of the right of homosexuals to engage in sodomy, but also the utter failure of border patrol: Sodomy today, bestiality and same-sex marriage tomorrow. It is, on the one hand, a typical legal trope—the slippery slope is frequently invoked in judicial reasoning to justify a limitation on recognizing new rights or cognizable injuries (Lode 1999; Schauer 2003; Volokh 1985). But, it takes on a heightened salience in the context of the legal regulation of consensual sex where there are deeply embedded social anxieties about the excesses of sexual desire and the ever-present possibility of descent into sexual chaos. Indeed, the issue of border patrol is actually one on which Kennedy and Scalia tacitly agree: It must be ensured. Kennedy is of the view that the inclusion of gay men and lesbians can be done within secure borders, whereas Scalia believes that such inclusion actually calls into question the national security of sexual citizenship. Kennedy normalizes through inclusion, while Scalia demonizes through exclusion. But both maintain the importance of the border.

But, the domestication of the newly arrived sexual citizen is not without its "unruly edges" (Stychin 2001, 290). Much like the film *Wilde*, the transformation of the gay subject from sodomite to sexual citizen occurs not through an erasure of the sexual practices of sodomy, but in and through them. John Geddes Lawrence and Tryon Garner were, in the words of the Supreme Court, found by the police "engaging in a sexual act" (*Lawrence*, 563). The Court also referred to the sex as described by the complainants within the language of the statute as "deviate sexual intercourse, namely, anal sex, with a member of the same sex" (*Lawrence*, quoting the complainants, 563).¹ While the term "sodomy" is used in the description of the history of its legal regulation, the actual sex that Lawrence and Garner had is otherwise described by the majority only in terms of "adult sexual intimacy" (564) or "sexual practices common to a homosexual lifestyle" (578). Despite this avoidance of the language of sodomy—or even anal sex—the fact that this is the "sexual practice common to a homosexual lifestyle" is unavoidable.

The case is all about the right to engage in sodomy and, in turn, the transformation of sodomite as outcast to gay subject engaged in sodomy as sexual citizen. Just like in *Wilde*, this transformation must occur on a highly sexualized terrain: Lawrence and Garner must be entitled to sexual citizenship in the face of their sexual performance. And while Lawrence and Garner may have actually had sex in the privacy of one of their homes, the performance

of sodomy became rather more public, occurring on a legal stage with considerable public spotlight. Notwithstanding the efforts at domesticating the newly arrived sexual citizen, this performance of sodomy pushes at the edges of the previously respectable and desexualized citizen. There is no escaping the sexual desire and sexualized bodies of the new sexual citizen. Lawrence and Garner's newly acquired sexual citizenship is not one that disavows sex but, rather, is forced to embrace sex within its folds.

No Right to Vibrate? Sexual Privacy After Lawrence

In the first season of *Sex and the City*, Miranda introduces Charlotte to a vibrator—the candy-colored Rabbit (*Sex and the City* 1998). Despite her initial reserve, Charlotte takes to it like a fish to water—so much so that Carrie and Samantha have to stage an intervention; Charlotte is repeatedly canceling her social engagements in order to stay home with her new friend. The day after the show aired, sex shops across North America reportedly sold out of the model (George 2004). What Manolo Blahniks were to shoes, the Rabbit now was to vibrators, with the show again epitomizing the new sexual citizenship as a merging of sex and shopping. Although this was neither the first nor the last depiction of vibrators on the series—Miranda keeps one in her bedside table, Samantha spends an unsuccessful day at home with several vibrators in an attempt to get her orgasm back—it nevertheless represented a new high-water mark, as vibrators came out of the closet and into the public sphere.

While some might imagine that this new vibrating sexual citizen is limited to the city, there are tremors being felt well beyond the urban republics. Saucy Lady is a small Alabama-based company that conducts in-house Tupperware™-style parties for women at which sex toys are sold. Owner B. J. Bailey has been organizing these parties since 1993. Vibrators, dildos, lingerie, massage oils, lubricants, anal beads, and instruction manuals are among the products displayed and sold at these parties. Like larger scale direct-marketers specializing in sex products, such as Passion Parties™ based in Brisbane, California, and Ann Summers in the United Kingdom, Saucy Lady brings sex toys to women through local distributors—or party planners—who host house parties. The idea behind the parties is to take these sex products to the women who may otherwise be too timid to go to the sex products. By bringing them into the domestic sphere, these retailers demystify and normalize them for use by otherwise proper housewifely

citizens. Passion Parties, described in a *New York Times Magazine* article as “one of the country’s tamest, most pro-family peddlers of sexual paraphernalia,” does good business in the southern Bible Belt: In 2003, Mississippi, Arkansas, and Tennessee ranked third, fourth, and ninth, respectively, in sales (Senior 2004). The company’s home page describes itself as the “premier sensual party planner in the United States,” “designed to promote intimacy and communication between couples.” As further described in the *New York Times*:

The Passion Parties training video, sent to all new representatives, begins with an endorsement from a board-certified sex therapist and licensed marriage, family and child counselor, and before the demonstration segment begins, one of the company’s executive directors, a woman dressed in a bright indigo suit, declares: “Now, ladies, if you did come tonight looking for any vulgarity or pornography, you’re going to be very disappointed. I don’t have it. But if you came here for a fun evening, plus some tips to keep the excitement in your relationship, plus the parts to work with, you are definitely in the right place.” (Senior 2004)

Despite their increasing popularity, the legality of these sex toys is at issue in some of the southern Bible Belt. Several states, including Texas, Alabama, Georgia, and Mississippi—have laws that criminally prohibit the sale of sex toys. In November 2003, Joanne Webb, a Texas-based Passion Party representative, was arrested for selling two vibrators to undercover agents, in violation of a state law prohibiting the sale of any device used to stimulate the genitals. While the charges were eventually dropped, a constitutional challenge to the state law was launched. Several years earlier, B. J. Bailey—the owner of Saucy Lady—along with Sherry Williams, who owns Pleasures, an upscale sex boutique in Alabama, challenged a similar law in Alabama. The Alabama Anti-Obscenity Enforcement Act, passed in 1998, prohibits the commercial distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value” and was based on the Texas law (Ala. Code 2003). The ACLU, on behalf of Williams, Bailey, and several other plaintiffs described as users of the sexual devices, challenged the law as violating the constitutional right to privacy and personal autonomy under the Fourteenth Amendment. The district court held that there was no recognized fundamental right to use sex toys, but in reviewing the statute under the rational basis review, concluded

that the statute lacked any rational basis and enjoined its enforcement (*Williams* 1999). On appeal, the Court of Appeals for the Eleventh Circuit reversed the district court's conclusion, holding instead that the promotion and preservation of public morality was a rational basis for the legislation and remanded the case to the district court for further consideration of the as-applied fundamental rights challenge (*Williams* 2001).

On remand, the district court once again struck down the statute, holding that the statute burdened a constitutionally protected right to use sexual devices within private, adult, consensual relationships (*Williams* 2002). The decision included a detailed discussion of the history of sexual privacy in the United States, from the seventeenth century to the present, tracing the trend towards liberalization and the withdrawal of state regulation throughout the twentieth century. According to the court, this trend toward legislative and social liberalization supports the finding of a fundamental right to sexual privacy. This right was, in turn, burdened by the prohibitions on the sexual devices. The state of Alabama argued that it had a compelling state interest for this burden: specifically, to protect children from obscenity, to prevent assault on the sensibilities of the unwilling adult, to suppress the proliferation of adult-only stores, and more generally, to uphold the belief that "[t]he commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil, an obscenity . . . detrimental to the health and morality of the state" (*Williams* 2002, 1301, citing the brief of the attorney general of Alabama). In the court's view, the statute was not sufficiently tailored to meet a compelling state interest. For example, the fact that the statute could apply to the Tupperware-style parties organized in private homes advertised solely by word of mouth meant that the statute was not narrowly tailored to prevent public exposure to children and unwilling adults. Nor was the statute sufficiently tailored to meet the objective of preventing "the commerce of sexual stimulation . . . unrelated to marriage, procreation or familial relations" (*Williams* 2002, 1301).

According to the court, the law "in fact, has the effect of accomplishing the reverse for the user plaintiffs. Each of the user plaintiffs has stated that use of sexual devices during marital and dating relationships has enabled them to, among other things, improve the quality of their marital communications, better their sexual relationships, encourage intimacy in their marital relationships, eradicate fears of infidelity between spouses, and to combat

embarrassing or painful medical conditions" (*Williams* 2002, 1305). The court continued:

... "a great many" of vendor plaintiff B. J. Bailey's customers have "reported to Ms. Bailey that the products they purchased helped them to become orgasmic and greatly improved their marital and sexual relations." . . . The parties further have stipulated to the opinions of two experts in the study of human sexuality that "sexual aids help in the revitalization of potentially failing marital relations," and that the use of sexual devices is recommended in "therapy for couples who are having sexual problems in their marriage. . . ." Also compelling is the fact that the State of Alabama's own University Health System Internet site advocates applying a "powerful vibrator on the glands of the penis" to enable men who have suffered spinal cord injuries to ejaculate, for the specific purpose of "impregnat[ing] their wives and hav[ing] normal, healthy children." (*Williams* 2002, 1305, footnotes omitted)

The court thus goes to some lengths to emphasize the role of these sexual devices within marriage—improving marital relationships, preventing infidelity, even promoting procreation. It does so to make its point that the law is too broad, since it captures these legitimate marital uses. But in so doing, the reasoning effectively recuperates the legitimacy of sex toys by normalizing them within the domestic sphere. Rather like the Saucy Lady parties themselves, the legal discourse is redrawing the lines of good sex and legitimate sexual citizenship to include sex toys by recasting these toys as legitimate marital aids. The parties, and the legal discourse, are literally giving these toys a Good Housekeeping Seal of Approval.

This district court decision was appealed to the Eleventh Circuit, which despite the intervening development of the Supreme Court's decision in *Lawrence*, upheld the constitutionality of Alabama's statutory prohibition of the sale of sex toys (*Williams* 2004). The court held that there was no fundamental, substantive due process right of consenting adults to engage in private, intimate sexual conduct, as would trigger a strict scrutiny review of any infringement of that right. In the court's view, *Lawrence* simply did not establish a right to sexual privacy: "To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny. Moreover, it would be answering questions that the Lawrence Court appears to have left for another day" (*Williams* 2004, 1238). Not, the court held, should

any new fundamental right be recognized. Applying the *Glucksberg* analysis for the recognition of new fundamental rights,² the appeals court held that the district court had failed to carefully describe the alleged right:

In searching for, and ultimately finding, this right to sexual privacy, the district court did little to define its scope and bounds. As formulated by the district court, the right potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited. At oral arguments, the ACLU contended that "no responsible counsel" would challenge prohibitions such as those against pederasty and adult incest under a "right to sexual privacy" theory. However, mere faith in the responsibility of the bar scarcely provides a legally cognizable, or constitutionally significant, limiting principle in applying the right in future cases. (*Williams* 2004, 1240)

The court observed that the only limitation provided by the district court was that the right would only apply to consenting adults. However, this "consenting adult formula" was not an appropriate constitutional standard. "If we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults" (*Williams* 2004, 1240). This passage was followed by a quotation from the Supreme Court's ruling in *Paris Adult Theatre I*: "The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults'" (*Williams* 2004, 1240). The court was thus explicitly concerned with patrolling the borders of sexual privacy, articulating the trope of potential sexual chaos: Sex toys would open the doors to prostitution and adult incest.

The court further articulated its anxiety over border control in addressing and rejecting the argument of the ACLU that the right to privacy and sexual privacy were at issue in this case. In its view, "[t]he statute invades the privacy of Alabama residents in their bedrooms no more than does any statute restricting the availability of commercial products for use in private quarters as sexual enhancements" (*Williams* 2004, 1241). In a footnote, the court further elaborated on this point: "The mere fact that a product is used within the privacy of the bedroom, or that it enhances intimate conduct, does not in itself bring the use of that article within the right to privacy. If it were otherwise, individuals whose sexual gratification requires other types of material

or instrumentalities—perhaps hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute—likewise would have a colorable argument that prohibitions on such activities and materials interfere with their privacy in the bedroom." Once again, the court is concerned with its ability to patrol the borders of good sex. If the privacy of the bedroom becomes the dividing line between good and bad sex and therefore between legitimate and illegitimate regulation, the use of child pornography and/or prostitution will necessarily fall on the side of good and, therefore, unregulated sex. This time, allowing sex toys would lead inexorably to the court's inability to prevent a free market of child pornography and prostitution.

The court concluded its discussion of the first part of the *Glucksberg* test by framing the alleged right as the right to use sexual devices and then turned to a consideration of the second part of the *Glucksberg* test: namely, whether the right can be said to be deeply rooted in the nation's history or implicit in the concept of liberty. In rejecting this right, the court criticized the district court for focusing on the history of sex in American culture rather than sexual devices, for overemphasizing the importance of contemporary practices, and for equating nonintervention in the access to sexual devices with historical protection. The majority referred several times to, and disagreed with, the district court's discovery of a constitutional "right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas." Casting the right in these terms, as opposed to a more general right to sexual privacy (*Williams* 2004, 1244, 1247, 1250), is a way of belittling the interest at stake. A constitutional right to vibrators and dildos is intended to caricature the claim, by demeaning the seriousness of constitutional protection. It framed the right narrowly and thereby was able to dismiss the district court's discussion of the history of the legal regulation of sex and sexuality in America since it was simply not relevant to the right to use vibrators and dildos.

The court similarly rejected the district court's discussion of the "contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity" (*Williams* 2002, 1294, cited in *Williams* 2004, 1243) and the "spectrum of twentieth century sexual liberalism" (*Williams* 2002, 1291, cited in *Williams* 2004, 1243), on the basis that this contemporary practice is simply not relevant for the *Glucksberg* analysis. Indeed, in the majority's view, this focus on contemporary practice "ultimately proves too much. The fact that there is an emerging consensus scarcely provides

justification for the courts, who often serve as an antimajoritarian seawall, to be swept up with the tide of popular culture" (Williams 2004, 1244). Popular culture—rather than influencing or shaping legal tradition—is held out as the very thing that law must resist. No *Sex and the City* for this court.

Williams is an example of law's reluctance to cede its policing power to the power of self-discipline. Not unlike Justice Scalia's dissent in *Lawrence*, the obsession with border patrol and containing the inevitable sexual chaos that would result from a failure to adequately protect these borders preempts the possibility of recognizing self-disciplining subjects. An irony lies in the fact that these new sexual subjects are an intensely self-disciplining lot. The women with sex toys—sellers and consumers alike—are constituted in and through the discourses of domesticity and self-discipline. The parties are private affairs: They are conducted in one of the women's homes, and the invitations are by word of mouth. Men are excluded, since a male presence would contaminate the pristine female domesticity. There is an implicit code of conduct at these parties: Women can talk about sex, they can laugh, and they can let their hair down. But, as the promotional materials caution, "if you did come tonight looking for any vulgarity or pornography, you're going to be very disappointed." Martha McCaughey and Christina French, in their participant-observation research of women's sex toy parties, similarly observe that despite the sexual explicitness of these parties, the "atmosphere attempts to retain some sense of refinement by avoiding putatively dirty words for body parts. . . . Saleswomen use nice-nellyisms such as 'button' for clitoris, 'lily' for vulva and/or vagina and 'unit' for penis" (McCaughy & French 2001, 81).

The parties and their emphasis on women's sexual pleasure are also often contained with the discourses of romance and self-help.³ Passion Parties uses the tag line "Where every day is Valentine's Day" and has a flagship product line entitled *Romantic Therapy*. These products are expressly marketed as relationship enhancing. Indeed, the products are often described by the distributors as relationship saving. Joanne Webb, the Passion Party representative charged under the Texas obscenity statute, described her work as helping keep couples together: "I thought . . . if I could educate women on how to get the most out of their sensuality, how to give the most in their relationship through their sensuality, maybe, just maybe some of these divorce rates would go down" (ABC News 2004). Kim Airs, who runs two retail sex toy stores specifically directed to women, similarly says: "I cannot tell you how many times I hear, 'This saved my marriage, this has saved my relationship'"

(Alexander 2004). The distributors see themselves not only as saleswomen but as sex educators and therapists, helping women to help themselves toward more fulfilling sexual relationships. This role was not lost on the district court in *Williams*, which considered the marital-enhancing use of these products in striking down the law.

McCaughy and French have suggested that these sex toy parties be seen through the lens of Anthony Giddens's life politics, that is, as self-actualization projects (Giddens 1991; McCaughy & French 2001, 91, 97). They argue that these sex toy parties are part of a self-help narrative in which women can enhance their sexual pleasure and their relationships by "expect[ing] less from men and learn[ing] to satisfy themselves" (McCaughy & French 2001, 93).

I would argue that these sex parties are part of an increasing emphasis on self-help and self-actualization, but they are also about women taking greater responsibility for the couple's sex life. It is part of a related project of responsabilization in which individuals are being called upon to make their lives a project and to take responsibility for this project (Rose 1996). It is part of a new modality of self-governance that includes an emphasis on taking responsibility for one's intimate, romantic, and sexual life (Rose 1996). As I discuss in greater detail in Chapter 2 on the role of sex in marriage, sexual citizens are being asked to take responsibility for their sex lives as part of a broader responsibility for the health of their marriages. Women's sex toy parties are located within this project of self-governance. As some of the distributors suggest, women are being taught to make sex a priority, to make their sex lives a project, and in so doing, to save their relationships.

The sex toy parties can then be framed within a discourse of the self-disciplining of sexual citizenship. Rather than challenging the heteronormativity of sexual citizenship, women are assuming a central role in the project of intimate self-governance, with a view to sustaining the marital relationship. It is admittedly a modality of citizenship with a new emphasis on women's sexual pleasure—one that disrupts the foreclosure on women's sexual agency. It makes women's sexual pleasure speakable, but not entirely for its own heteronormative sake. Rather, this pleasure is contained with the marital, the heterosexual, the domestic, where it is put to work to produce a better relationship.

It is also important to recognize that Passion Parties is big business. In 2003, it sold \$20 million of goods, and projected sales for 2004 were \$35 million. Sales have been growing at a rate of 50 percent annually between 2001 and 2004 (Alexander 2004). And Passion Parties is not alone: Its major competitors,

Slumber Parties and Pure Romance, each have more than 3,000 consultants across the United States. The economic success of these sex toy parties has been incorporated into the marketing of the parties. For example, Passion Party promotes becoming a Passion Party associate as an avenue for women's financial independence and economic empowerment. The sex toy Tupperware parties are partially framed and legitimated within the discourse of market citizenship. The distributors—the party planners—are good citizens by virtue of the norms of market self-reliance. The consumers are similarly being constituted as good citizens by virtue of the norms of market consumption. As McCaughy and French have argued, the consumption of sex toys—like the consumption of a range of novel lifestyle goods, becomes part of the project of self-actualization (McCaughy & French 2001, citing Giddens, 91). Self-help, sexual enhancement, and market consumption are integrated into a new synthetic citizen.

Women's sexual pleasure is incorporated into sexual citizenship, but in a way that ensures its containment. The discourses of domesticity, marketization, and self-discipline ensure that any recognition of women's sexual pleasure does not lead inexorably to sexual chaos. Rather, just as Carrie and Samantha stepped in to discipline Charlotte in the face of her inability to control her desire for her vibrator, the discourses within which women's access to these sex toys is being constituted ensures that sexual excess will be controlled by the women themselves. Women themselves will provide all the lessons in self-governance. But, in *Williams*, the Eleventh Circuit was unable or unwilling to recognize the ways in which these sexual practices and the citizens they constitute will discipline themselves. The court, in its zeal to protect the borders of traditional sexual citizenship, refuses to recognize the new modalities of normalization, which would make the kind of regulation imposed by the court redundant. Charlotte, like the women who attend Saucy Lady parties or Passion Parties, does not need the Eleventh Circuit to ensure that she does not descend into sexual chaos: She has her friends who can hold up a mirror and make sure that she does it herself.

It is important not to underplay the extent to which the sexual citizen is being reconstituted on the terrain of the sexual. Notwithstanding the domestication of sex toy party participants, this performance pushes at the edges of the previously respectable and desexualized citizen. This is a sexual citizenship that is explicitly sexual; it is a desiring, pulsating, pleasure-driven, orgasmic body. This is a new modality of sexual citizenship. It is also an explicitly gendered sexual citizenship. *Williams*, and the broader Passion Parties

phenomenon, are all about women—otherwise respectable, often married women who are buying and selling sex toys. There is no escaping the sexual desire and sexual pleasure of women—married or otherwise.

But, it is a modality of citizenship that has its detractors, from Justice Scalia and the Eleventh Circuit, to the townspeople of Burleson, Texas, who simply could not tolerate the sexualized citizenship of Joanne Webb. Webb, the Passion Parties distributor in Burleson, Texas, was charged under the Texas statute for selling an obscene object. She ran into trouble because she failed to conduct herself according to the local norms.⁴ Her infraction? She was a little too sexy. She wore her skirts a little too short and her shirts a little too low cut. But she was no Bible Belt Carrie Bradshaw. Joanne Webb was married for over twenty years to a veteran, a former major in the U.S. Army. She and her husband were Southern Baptists. Her short skirts, indeed, her whole overly sexualized appearance, was described as exclusively for her husband's pleasure: "more than anything else, my husband likes them. It's one of the basic things he asks me to do." Like a good Southern Baptist wife, she was following the authority of her husband. But, for the citizens of Burleson, Texas, her husband was telling her to be a little too sexy. In fact, they both were too sexy. He was flirtatious and had a collection of 1940s advertising trinkets featuring voluptuous women. She not only wore her skirts too short, but she had breast enhancement, sexy blond hair, and drove a red convertible. In other respects, Joanne Webb was a model citizen—she was a member of the Chamber of Commerce, she was involved in her church, she was married and dedicated to her husband—all markers of good citizenship. But her overtly sexualized appearance outweighed these factors. The local community attempted to sanction her; they even tried to impose a dress code for members of the Chamber of Commerce. The pastor of their church demanded that her husband make her dress differently. He refused, and they left the church. All of this led to swirling rumors of sexual excess: They were having affairs, they were causing divorces, they were swingers.

When Joanne became a representative for Passion Parties, the rumors erupted into a full-scale sexual panic. They must be having orgies. An anonymous complaint lodged with the local police led to a police investigation. Two undercover police officers posing as a married couple asked to see Joanne's catalogues. She encouraged the woman to get some friends together for a party, but the couple insisted on buying two vibrators right away. The 30-minute operation was captured on video. Several weeks later, Joanne was under

arrest. She hired a lawyer, BeAnn Sisemore, who made Joanne's case a personal crusade. They got the national media involved, with stories in the *New York Times*, and on CNN, NPR, and some of the networks, all belittling the town of Burleson.³ Joanne's trial was supposed to take place in the summer of 2004, but the charges were subsequently dropped.

The controversy around Joanne Webb might be dismissed as the machinations of small-town, red-state politics, in much the same way as the national media portrayed the story and the town of Burleson. But, the fault lines of this controversy have broader ramifications. Joanne Webb was constituted as a subject who failed to self-discipline, despite repeated warnings by the community. She and her husband chose to flout the local norms of appropriate sexual citizenship. In so doing, they aroused a series of border anxieties of sexual chaos: They must be committing adultery, they must be having orgies. Their sexual excess could not be contained, nor could it be reined in through self-discipline, despite repeated efforts. When all else failed and when the sexualized behavior reached unprecedented proportions—when Joanne started having sex toy parties that were perceived as a cover for orgies—the law had to be called in. Community efforts to cast her as a sexual outlaw were not enough to make her self-discipline. The punitive and constitutive power of the law was then deployed to mark her as an outlaw. This is a story very familiar to the legal regulation of consensual sexual practices; the law is called in when the borders appear to be at stake and when the subjects have failed to self-discipline.

Joanne Webb fought back, though at considerable personal cost. Her husband lost his business, and they declared personal bankruptcy. Yet, she refused to self-discipline. She continues to be a Passion Party distributor. She has filed a federal civil suit seeking to have the Texas law declared unconstitutional. Joanne Webb has refused to accept her status as a sexual outlaw. Rather, she continues to demand her citizenship status: as a sexual being, as an entrepreneur, as a mother and wife. She is emblematic of those subjects challenging the contours of traditional sexual citizenship from the perspective of a marketized and self-disciplined but explicitly sexual subject.

Joanne Webb also exemplifies the normalizing role played by those sexualized subjects who challenge the borders of sexual citizenship. Her contested citizenship creates space for others to live more sexualized lives. In this respect, Joanne Webb, like B. J. Bailey of Saucy Lady parties charged in the *Williams* case, has rather more in common with Samantha from *Sex and the City* than with Charlotte.

Throughout the series, Samantha is unapologetically sexual. Indeed, her character is framed through a discourse of sexual excess; she has sex with multiple partners, often with virtual strangers. She dresses provocatively. She interacts with men seductively—both professionally and socially, often mixing the two. Her life project seems to be the pursuit of sexual pleasure. Samantha's character does more than provide the show with sexual titillation; her sexual excess helps to normalize the sexuality of the other three characters. Carrie, Miranda, and particularly Charlotte seem tame in comparison. While they, too, are explicitly sexual citizens pursuing their sexual desires, Carrie, Miranda, and Charlotte are also pursuing their romantic desires. Sex and romance are more intricately interwoven for these three characters. Their sex—whether good, bad, or otherwise—simply never appears as outrageous as Samantha's sex. Further, while Samantha's explicit sex talk and her sexual exploits often shock her friends, it also creates space for the foursome to share their sexual desires and anxieties. Samantha is constituted in the discourse of sexual excess, and her role is to push the boundaries of legitimate sexual citizenship; indeed, at times her role is to exceed those boundaries. In so doing, her character creates more citizenship space and more normalized citizenship space for the others to inhabit. Much like the border dweller contesting the lines between good and bad citizenship discussed in the next section, Samantha—like Joanne Webb and B. J. Bailey—reconstitutes the domain of legitimate sexual citizenship, allowing others to become more explicitly sexual without losing their citizenship status. Others can be good precisely because they are just a little bit bad; good citizenship is once again constituted in the shadow of the bad.

Sexual Speech, Sexual Subjects

"If the First Amendment will protect a scumbag like me, then it'll protect all of you—'cause I'm the worst," declares *Hustler Magazine* publisher Larry Flynt in the midst of one of his many court cases represented in *The People vs. Larry Flynt*. The controversial film, released in 1996, tells Flynt's story—from poor boy selling moonshine to strip club manager to multimillionaire CEO of *Hustler's* empire and political crusader against America's morality police. Flynt's idea was a fairly simple one: provide a graphic and crass alternative to *Playboy* and *Penthouse*. It was a matter of being in the right place at the right time—a photo series of Jackie Kennedy Onassis sunbathing nude put *Hustler*

over the top, and it never looked back. But along come the antipornography crusaders and so began his seemingly endless legal battles defending himself against charges of obscenity. He pays a high price—arrest, imprisonment, and paralysis as a result of an attempt on his life. He is also sued by none other than Jerry Falwell, the self-appointed head of America's Moral Majority. The suit involves a parody advertisement for the alcoholic drink Campari in which Falwell reminisces about his first sexual experience—an incestual one with his mother. Falwell sued Flynt for libel, invasion of privacy, and intentional infliction of emotional distress. The trial court awarded Falwell damages for the intentional infliction of emotional distress. But, Flynt was ultimately vindicated by the U.S. Supreme Court.

In the film, a sexual outlaw is reconstituted as a political citizen. Larry Flynt—the unapologetic pursuer of sexual pleasure and scandal—becomes Larry Flynt—the defender of America's civil liberties and freedom of speech. Flynt is represented sympathetically: He loves his unconventional wife in unconventional ways, he overcomes drug addiction when the pain of his back injury is relieved through successive surgeries, and he adamantly defends the constitutional rights of Americans. He is, basically, a good guy, notwithstanding his self-description as a “scumbag.” It is a story of becoming, of transformation, and of normalization. But this normalization of the sexual subject occurs not so much through a transformation in the sex itself—Flynt and *Hustler* are represented as the sexual extreme, as “the worst.” Instead, the story of citizenship is told through Flynt's impassioned legal struggles and his unrelenting commitment to America's constitutional principles. It is a kind of modern-day sexualized version of *Mr. Smith Goes to Washington*: instead of a naïve protagonist, we have a crass one; instead of a fight against graft and corruption, we have sexual hypocrisy and censorship. Yet both men stake their futures and that of their country on their unshakable belief in democracy and its institutions. And they both win.

The People vs. Larry Flynt is a story of political idealism and constitutional vindication. But, Flynt's story is at the same time a story about sexual citizenship that traffics in the ongoing tension between sex and politics, between the sexual edginess of its protagonist and his political commitment. The story of pornographer as citizen is effective precisely because the sex is more than a little bit bad. It is titillating because it is illicit: The sex that *Hustler* celebrates is crass, raunchy, and promiscuous. And while Larry Flynt's legal struggles and the representation of these struggles in the film are intended to defend

the right of Americans to engage in this sex, the film does this more by shifting the lines of legal liability than by redrawing the lines between clean and dirty sex. The message of the film is this: This is dirty sex, and it is our right to have it. Even in the mid 1990s, pornography was still an outlier.

Fast forward to 2004, and much of the landscape has shifted. It is no longer clear that pornography is a genre of the sexual outlaw. Jenna Jones—one of the pornography industry's hottest stars—has written an autobiography that appeared on the *New York Times* best-seller list. The fashion industry has assimilated pornography's style. Fortune 500 companies distribute pornography. Its audience has expanded, with women and couples as new target markets. While pornography has long been marketized—sexual images for sale—its mass marketization and aestheticization have begun to reconstitute the genre. Its outlaw status has made it hip, and in the process it has become rather less outlaw.

And Larry Flynt is no longer “the worst.” He is, in the corporate world of the adult entertainment industry, the mainstream. He funds Democrats, runs for mayor, takes out full-page newspaper ads soliciting information about the adulterous relationships of members of Congress, and distances himself from the new sexual outliers. In the new sex wars discussed below, where the Ashcroft/Gonzales administration is cracking down on what it has identified as extreme pornography—particularly sex with violence—not only is Larry Flynt no longer the worst, but he has declined to provide financial assistance to the new worst. There has been a transformation in the relative outlier status of the pornographic genre, with much of it coming in from beyond citizenship.

It is a story of transformation—of the assimilation and domestication of much of the genre—that presents new and interesting challenges to legal regulation and its mandate of drawing the lines between good and bad sex. Drawing these lines has long been the very *raison d'être* of obscenity. As Joan DeJean has argued, obscenity has a long history of operating as “a boundary maker, signaling the frontier between the indecent and the decent, the filthy and the clean” (DeJean 2002, 6). From the introduction of obscenity laws in Victorian England to the Comstock laws of the early twentieth century to the culture wars of the 1980s and 1990s, sexually explicit representations have been seen as posing a threat to the family, to the social order, and to the nation. The law has evolved over time, allowing a broader range of representations to cross into the realm of legitimate speech. Yet, the urge to draw lines between

legitimate and illegitimate speech and protecting society from the corrosive effect of sexual representations endures. The law continues to try to draw the line on speech, by declaring that some has gone too far and that it represents too great a threat to our children, our communities, and our nationhood. Each era seems to produce its own set of cultural contestations and anxieties over legitimate sexual representations.

Drawing lines in an era of cybersex presents new challenges—technological and discursive. At a time when the availability of sexual imagery has virtually exploded—when the Internet is flooded with adult websites always only a click away, and cable and digital television offer a veritable menu of sexually explicit videos—it has become more difficult to restrict access. The profusion of sexual imagery has also presented challenges to the law of obscenity and indecency, which has long relied on the concept of community standards, that is, on whether the sexual representation violates contemporary community standards. As explicit sexual imagery becomes ubiquitous on the Internet as well as on television, and spills over into popular culture through music videos, advertising, fashion, and best-selling novels, it becomes more difficult to argue that it violates community standards. The ubiquity of sexual imagery is producing a range of border anxieties and skirmishes. While social conservatives seek to prop up the borders between legitimate and illegitimate speech, commercial pornographers push back against any curtailment of the expanded borders of presentability. But, beneath these border scuffles that erupt in censorship controversies lie deeper questions of border patrol.

The ubiquity of sexual imagery, for example, also challenges the categories of pornography and obscenity themselves. Obscenity was, by definition, that which was not presentable; it acquired its meaning in and through transgression. Pornography similarly has acquired much of its erotic meaning through its prohibitions—legal or otherwise. Its titillation lay, at least in part, in its transgression of the norms of presentability and speakability. But, what happens to pornography as more and more sexual imagery crosses into the realm of the presentable? To what extent does pornography need borders to be pornography?

The shifting borders of legitimate sexual speech is thus about more than the shifting lines of the judicial power of law. Rather, as more recent scholarship on obscenity laws and censorship have begun to highlight, these shifting borders also implicate the productive power of these laws. Judith Butler, for example, has argued that censorship “is not merely restrictive and priva-

tive, that is, active in depriving subjects of the freedom to express themselves in certain ways, but also formative of subjects and the legitimate boundaries of speech” (Butler 1997b, 132). This productive and constitutive power of censorship “operates to make certain kinds of citizens possible and others impossible” (132).

The line between legitimate and illegitimate speech is then not simply about the law repressing the speech of individual subjects but, more profoundly, involves constituting the line between legitimate and illegitimate subjects. “To become a subject means to be subjected to a set of implicit and explicit norms that govern the kind of speech that will be legible as the speech of a subject” (Butler 1997b, 133). According to Butler, these norms are constitutive of the “domain of the sayable,” of “speakable discourse.” To move outside of this domain is then not simply to risk the sanction of the law but to risk one’s very “status as a subject” (133). By contrast, to speak within the domain, “[t]o embody the norms that govern speakability in one’s speech is to consummate one’s status as a subject of speech” (133).

Butler’s analysis has been criticized for collapsing marginal and normatively disfavored speech with that speech that is impossible to utter—the domain of the truly unspeakable. Despite the significant limitations in her analysis of implicit censorship, her passing observations on the paradoxical nature of explicit censorship may nonetheless be helpful in analyzing the marginal and normatively disfavored.

Explicit forms of censorship exposed to a certain vulnerability precisely through being more readily legible. The regulation that states what it does not want stated thwarts its own desire, conducting a performative contradiction that throws into question that regulation’s capacity to mean and do what it says, that is, its sovereign pretension. Such regulations introduce the censored speech into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt. (Butler 1997b, 130)

Explicit censorship—like indecency and obscenity legislation—constitutes the site of public contestation over legitimate and illegitimate speech (rather than between utterable and unutterable speech). In the analysis that follows, I borrow the idea of speakability but attempt to loosen it from its Butlerian moorings. More specifically, I deploy it to explore explicit censorship and the speech of “border speakers”—subjects who speak at the borders

of legitimate, rather than utterable, speech. I use speakability to capture not only the contested lines between legitimate and illegitimate speech, but also to illustrate the constructive nature of this speech producing legitimate and illegitimate subjects, citizens, outlaws, or something in-between.

Border Seekers, Border Speakers

A subject who speaks at the border of the speakable takes the risk of redrawing the distinction between what is and is not speakable, the risk of being cast out into the unspeakable.

Judith Butler (1997b, 139)

Sarah Jones, a hip-hop poet, playwright, and performance artist, was censored and then uncensored by the FCC for her song, "Your Revolution." Lizzie Borden, a pornographic filmmaker specializing in depicting graphic sexual violence, is currently being prosecuted by the federal government for obscenity. Both of their cases raise deeply contested questions of the appropriate line between speakable and unspeakable sexual representations. Both of their cases also raise questions of the gendered nature of this speech: Can women say what men can say, or is the domain of speakability a gendered domain? Both cases require an analysis that moves sexual citizenship beyond heteronormativity since the alleged border violations are not along a hetero/homo axis. Both of their cases raise questions of explicit censorship, of the law's juridical power being deployed to punish those subjects who fail to discipline themselves. Both of their cases also raise questions of the constitutive power of law, of the ways in which explicit censorship operates to constitute some subjects as legitimate sexual citizens and relegate others to the unspeakable beyond.

But, while Sarah Jones and Lizzie Borden may both be border speakers, they could not be further apart. Some border speakers move the lines. They become sexual citizens, and in the process, change the domain of citizenship and themselves. Other border speakers fall over the line and are cast right back into the domain of the outlaw. Sarah Jones is a border seeker on the side of speakability. Lizzie Borden is not. Borden's speech is unspeakable, and by virtue of its utterance, she is risking her status as a subject and confirming her status as an outlaw. Sarah Jones is a border speaker who ended up on the side of speakability and legitimate sexual citizenship by shoring up the very borders that divide citizen from outlaw. In yet another instantiation of the paradoxes of the process of becoming sexual citizens, Sarah Jones transformed

sexual citizenship while reinforcing its limits. Lizzie Borden, from the other side of the border, also reinforced its limits, yet she does so in a way that disrupts its foreclosure. Her speech may be unspeakable, but it has been spoken.

The Revolution of Sarah Jones

Your revolution will not happen between these thighs
Your revolution will not happen between these thighs
Your revolution will not happen between these thighs
Will not happen between these thighs
Will not happen between these thighs
The real revolution ain't about booty size

After receiving a listener complaint for airing Sarah Jones's poem/rap song, "Your Revolution," the FCC issued a notice of apparent liability for forfeiture (NAL) to the radio station KBOO-FM in Portland Oregon. According to the FCC, "Your Revolution" "contains unmistakable patently offensive sexual references" (KBOO 1991, para. 8) and was indecent within the meaning of the federal Communications Act. The radio station was issued a fine of \$7,000 for having willfully aired the indecent material. As a result of the NAL, other radio stations ceased airing the song. With the support of People for the American Way, Sarah Jones then sued the FCC in federal court. The suit was dismissed on procedural grounds, and Jones filed an appeal in the U.S. Court of Appeals for the Second District. February 23, 2003, the day before its brief was due, the FCC reversed its earlier ruling and concluded that "Your Revolution" was not indecent.

"Your Revolution" is a feminist critique of the misogyny of hip-hop music. Based on Gil Scott-Heron's "The Revolution Will Not Be Televised," it parodies the degradation of women by many hip-hop artists such as LL Cool J and Notorious B.I.G. by quoting and then denouncing their macho lyrics. The lyrics are, as a result, sexually explicit but also politically explicit.

You will not be touching your lips to my triple dip of
French vanilla, butter pecan, chocolate deluxe
Or having Akinyele's dream, um hum
A six foot blow job machine, um hum
You wanna subjugate your Queen, uh-huh
Think I'm gonna put it in my mouth just because you
Made a few bucks

Jones is no outsider to hip-hop. In an interview with the *Washington Post*, Jones stated, "I'm not attacking hip-hop. . . . I'm attacking sexism in the larger culture. I'm a cultural critic and a member of the hip-hop generation" (O'Neal Parker 2002). She describes her work as creating an alternative conversation within hip-hop culture and emphasizes the need to appreciate the different voices within hip-hop music. Her song is written in its codes, while challenging the increasingly dominant representation of women as little more than sex objects. Perhaps more explicitly political than some—she was after all talking about the revolution—Jones is part of a generation of women in hip-hop, from rappers Yo-Yo and Missy Elliott to neo-soul artists Erykah Badu, Lauryn Hill, and Jill Scott, who each challenge the unidimensional image of hip-hop as hypermasculine and sexist. Nor were her lyrics any more sexually explicit than those of the rappers she was quoting.

But, her words—spoken by an African American woman whose citizenship is always at best precarious—produced a rupture. The failure of the listener (and in turn the FCC) to appreciate that Jones was citing the lyrics of others, never mind criticizing them, erased all possibility of parody, replacing it with a reductive literalism. The words were interpreted through the mainstream image of hip-hop—a ghetto culture of violence, drugs, misogyny, promiscuous sex, threatening the fabric of the American nature. What was heard, instead, was an African American speaking of graphic, explicit, misogynist sex. And so came the call for the censor.

According to FCC guidelines, indecent speech is defined as language that "describes or depicts sexual or excretory organs or activities" in a manner that is "patently offensive as measured by contemporary community standards for the broadcast medium" (Federal Communications Commission 2001, para. 7 & 8). The guidelines state that three factors are central in determining indecency: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value" (para. 10). The guidelines emphasize the importance of context in examining each of these factors, as well as noting that the factors are not exclusive and that "[n]o single factor generally provides the basis for an indecency finding" (para. 10).

In the NAL issued in the Sarah Jones case, the FCC found that "[t]he rap song 'Your Revolution' contains unmistakable patently offensive sexual refer-

ences" (KBOO 2001, para. 8). The FCC rejected KBOO arguments that the song should be considered in its cultural context as "a feminist attack on male attempts to equate political 'revolution' with promiscuous sex" and therefore not indecent. According to the FCC, "considering the entire song, the sexual references appear to be designed to pander and shock and are patently offensive." The mere fact that the song may have merit does not mean that it is not indecent. Similarly, the contemporary social commentary in "Your Revolution," although a factor to be considered, is not determinative (para. 8). The FCC concluded that KBOO willfully broadcast the material and imposed the basic forfeiture of \$7,000.

Sarah Jones filed a suit against the FCC in federal court. Jones claimed that the FCC labeling of "Your Revolution" as indecent caused her harm and violated her constitutional rights. She sought a declaration that "Your Revolution" is not indecent and an injunction barring the FCC from indecency enforcement against the song. In her petition, Jones sought to establish her credentials as an accomplished poet, playwright, and performance artist, highlighting the venues and critical acclaim of her most recent play, *Surface Transit*. The petition sought to explain the content of "Your Revolution," placing it within its hip-hop tradition and noting that the song both incorporates and critiques the denigrating lyrics from popular songs that are regularly broadcast on the radio and featured on music videos:

"Your Revolution" exposes the highly offensive treatment of women in popular hip hop by referencing its vocabulary and thereby criticizing the message that these songs are sending. At the same time, "Your Revolution" celebrates hip hop by using the hip hop form and vocabulary that so often denigrates women to instead send a message of self-determination to women. (Jones, para. 21)

The petition emphasizes the many feminist messages of the song, including its warning "against the dangers of sexual promiscuity and unwanted pregnancy" (para. 24), its protest against "the subjugation of women to male sexual fantasy and women's compliance, where sex is considered quid pro quo for material comfort and status" (para. 25), and its message of abstinence and "women reclaiming traditional values of sex as an expression of intimacy, love and commitment" (para. 26). It concludes that "Your Revolution" does not pander or titillate in its sexual references, but rather, "is a political and cultural critique that challenges young women and men to reject a social order that is foisted upon them by much of popular radio, television, and

magazines and seek a true revolution, which promotes relationships based on equality rather than power" (para. 29).

Throughout the petition, the focus of the argument is that "Your Revolution" is not indecent. It argues that the FCC failed to consider the "full context" of the song and failed to apply the community standard, concluding that the FCC "censored speech that is not indecent and that is entitled to the highest First Amendment protection" (para. 45). It emphasized that it has been "extremely damaging to her reputation to have 'sexually indecent' attached to her name. The Commission ruling is particularly unjustified since 'Your Revolution' is a strong statement against indecency" (para. 46). Over and over again, the petition states "'Your Revolution' is not indecent" but is, rather, "a protest against indecency in popular culture" (para. 49).

The main argument of the petition does not challenge the FCC criteria for indecency. Rather its message is that "Your Revolution"—properly understood—is itself a condemnation of indecency in popular culture. The FCC and "Your Revolution," it is implicitly argued, are actually on the same side—the side of legitimate speech and sexual citizenship—defending decency against its encroachments. This was, of course, a most reasonable defense. Jones did not need to challenge the criteria for indecency in order to argue that she had been sanctioned inappropriately. She could rightly argue that the FCC had simply drawn the wrong line given its own criteria. She was wrongly singled out—as an artist, a dissenter, an African American woman. Yet, her argument is one that tacitly accepted the power of the FCC to draw these lines and reinforced the category of indecency for future use. Notwithstanding her defense of hip-hop music, her legal arguments could be seen to implicitly sanction future prosecutions of the very hip-hop artists that she critiques, since the implication of her arguments is that their work is in fact indecent.

Such is the paradox of being cast into the world of legal defenses—Jones needed to deploy the available legal categories, which in turn operate to reinforce the legitimacy of those categories. Yet, there is a question of the extent to which the category of indecency was used—its repetition, not unlike the rhythmic repetition of her songs, is intended to discursively construct the proposition as true. And the category is deployed complete with its internal dichotomies: Jones's work is a critique of the indecency of others; Jones's work is not indecent, but others are; Jones is good, others are bad.

The U.S. District Court rejected the petition on procedural grounds (*Sorrell Jones v. FCC* 2002). The court held that there was an absence of final agency

action in the matter, since Jones could have filed a request for further action with the FCC and, subsequently, with the circuit courts, where exclusive jurisdiction resides for the review of agency decisions. In discussing the narrow exception to this rule of exclusive jurisdiction, the court held that only broadcasters and not artists were entitled to this recourse.

Jones appealed, arguing that the district court erred in ruling that Jones needed to wait for further action from the FCC. She argued that if the FCC were allowed to censor her speech and force her to wait for years before making a final determination that she could then appeal, then the FCC indecency enforcement regime constituted a form of prior restraint in violation of the First Amendment. While there was less emphasis on the question of indecency in this appeal, a new term appeared in the appeal—"indecency blacklisting"—that was used throughout to describe the FCC action in issuing the NAL against "Your Revolution."

The appeal to blacklisting is an effort to frame the censorship in explicitly political terms, by discursively linking the FCC actions with those of other notorious censorship moments in U.S. history. It is intended to cast the FCC action as illegitimate, by deploying the normativity of blacklisting. The appeal petition as a whole, despite its heavily technical language of judicial review and constitutional law, is one that shifts the emphasis from indecency to citizenship. Jones is now presented as a citizen who has been denied her First Amendment rights and her right to procedural fairness. She is an artist and political actor, whose political speech was censored arbitrarily through a regime of prior restraint. Again, this is an entirely reasonable and persuasive argument, given the nature of the district court ruling denying her any recourse. It is nonetheless interesting to see how the legal argument deploys—and attempts to constitute—notions of citizenship. The sexual dimensions of the speech are downplayed, while its political dimensions are highlighted.

The appeal was never heard. Several days before the FCC's response was due to be filed, the enforcement bureau rescinded the NAL against KBOO-FM (KBOO 2003). The decision states that although it is "undisputed that KBOO-FM aired material that describes sexual activity . . . we now conclude that the material is not patently offensive and therefore not indecent" (para. 8). The following is the sum total of the explanation provided for the change in opinion:

While this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song

are not sufficiently graphic to warrant sanction. For example, the most graphic phrase ("six foot blow job machine") was not repeated. Moreover, we take cognizance of the fact presented in this record that Ms. Jones has been asked to perform this song at high school assemblies. While not controlling, we find that this is evidence to be considered when assessing whether material is patently offensive. In sum, we find that The KBOO Foundation has demonstrated that the lyrics of "Your Revolution" measured by contemporary community standards, are not patently offensive and therefore not indecent. (para. 9)

The district court ruling was vacated as moot, and the case was dismissed. "Your Revolution" was removed from the indecency blacklist, and Sarah Jones's battle with the FCC was over.

Jones successfully challenged a dubious decision on the part of the FCC enforcement bureau. Her case highlighted the arbitrary nature of censorship, particularly the ways in which the discretionary and often unaccountable power of the censor is used against artists and political dissidents. Her case could be—and was—framed as a classic case of the juridical power of censorship law and the sovereign individuals who battle it. But, it was also a case about the productive power of censorship that constitutes the very terms of speakability and makes certain forms of sexual citizenship possible and others not. Sarah Jones was produced as a subject within "the domain of the sayable"; she embodied the norms of speakability consummating her status as a subject, and as a citizen. Jones's defense deployed all of the codes of speakability: political speech, blacklisting, prior restraint. The structure of indecency remained firmly intact. Indeed, the consummation of her status of a speaking subject was performed to a considerable degree through the denunciation of indecency itself, rather than its regulation. As Butler argues, "[a] structure only remains a structure through being reinstated as one. Thus, the subject who speaks within the sphere of the speakable implicitly reinvoles the foreclosure on which it depends and thus, depends on it again" (Butler 1997b, 139). Sarah Jones's legal challenge to her FCC censorship reinstated the structures of speakability, denying her status as a border speaker, arguing only that she had been misclassified. Her successful defense thereby reinvoled the very foreclosure that puts other border seekers on the other side.

Further, while claiming her place within hip-hop culture, Jones's defense echoed some of the troubling images of it in the mainstream imagination. While making the obvious points of parody—deployment of the hip-hop form and inappropriate censorship—part of the success of Jones's defense lay

in her critique of the hypermasculinity and sexualized violence of the male rappers. Once she was able to convey that her song was parody and critique, it could be reinterpreted through the lens of the dominant discourse and its condemnation of the sexual violence of hip-hop. She was successful at least in part because she was able to play to the anxieties of the dominant culture.

Try as she might to position herself within hip-hop culture, the Jones controversy becomes all too similar to the many controversies in which the dominant culture selectively deploys African American women against African American men (see, for example, Crenshaw 1982). Jones ultimately falls on the right side of the border, because she has the right message about the other more insidious border speakers. Not only does the structure of indecency remain intact, but so too does the mainstream image of male hip-hop artists as falling on the wrong side of it.

The Jones controversy thus tells an enormously complex story about citizenship, racialization, and the speakability of sex. Her citizenship is precariously balanced on the border of speakability; she is reconstituted as a good citizen through the very discourses that produce the erasure of women like her and the outlaw status of the men that she critiques. Establishing her citizenship was no small feat—indeed, "Your Revolution" marks a disruption in the terms of sexual citizenship for African American women. Her process of becoming is simultaneously a process of transformation, normalization, and exclusion; her membership is accomplished through the repeated foreclosure of other possibilities. Yet, this foreclosure is never complete; the mere utterance of that which should not be spoken creates its own future possibilities, sustaining the unruly edges of sexual and racialized citizenship.

The Extremes of Lizzie Borden

Extreme Associates, owned and operated by Robert Zicari and Janet Romano, is a company that produces extremely violent pornography. It has created a niche market, sometimes called slasher porn, distinguishing itself from the mainstream pornography industry by virtue of the often shocking and violent nature of its videos. Janet Romano—who goes by the name Lizzie Borden—produces many of the films. She describes herself as a gender warrior of sorts, doing things that women do not do, in fact, doing things that many men do not do. She intends to shock.

Zicari and Borden were featured in a PBS *Frontline* documentary entitled "American Porn" in 2002. During their exploration of the pornography industry, the *Frontline* producers visited the set where Borden was filming her latest

work *Forced Entry*. The producers were so disturbed by what they saw—rape and violence—that they filmed themselves walking off the set. The *Frontline* documentary also included an interview with Zicari, in which he defended the material that his company produced and set out his readiness to do battle with government censors and their conservative agenda: “I’m not out there saying I want to be the test case. But I will be the test case. I would welcome that. I would welcome the publicity. I would welcome everything, to make a point in, I guess, our society” (*Frontline* 2002).

In April 2003, reportedly as a result of the *Frontline* documentary, the federal government seized five of Extreme Associates videos, including “Forced Entry,” and shortly thereafter laid charges against Zicari and Romano. They were indicted on ten counts relating to the production and distribution by mail and Internet of obscene materials. The charges were the first major federal prosecution for obscenity in ten years, and many have suggested that it signals an effort by the Ashcroft administration to crack down on the pornography industry by targeting its most extreme elements. Despite the location of the company’s operations in California, the arrests and indictments occurred in the western district of Pennsylvania, a state where it is believed convictions for obscenity come more easily. (Videos were allegedly sent there, and video clips allegedly downloaded there).

Mary Beth Buchanan, the federal prosecutor in the case, said in an interview with *60 Minutes*: “We have just had a proliferation of this type of material that has been getting increasingly worse and worse. And that’s why it’s important to enforce the law, and to show the producers that there are limits. There are limits to what they can sell and distribute throughout the country” (“Porn in the USA” 2003).

The case against Extreme Associates is a test case of the limits of pornography. The federal government chose the most extreme and violent within the genre and laid charges in what is perceived to be the most conservative of jurisdictions. It is determined to establish that, despite the proliferation of pornography, there are still limits between the speakable and unspeakable.

There is little doubt that Extreme Associates represents the extreme of the genre. Indeed, their videos traffic in their unspeakability. *Forced Entry* depicts a graphic beating, rape, and murder of women by a serial killer. The Extreme Associates website describes it as “the most controversial movie” in their “video arsenal”: “A Stunningly Disturbing Look at a Serial Killer, Satanic Rituals, and the Depths of Human Depravity.” The other films listed in the

indictment are equally extreme, involving representations of sexual violence and a host of bodily fluids including spit, excrement, and vomit.

Both Zicari and Borden admit—and celebrate—the fact that their films are shocking and disgusting. In an interview with *Salon Magazine*, for example, Borden says “It’s disgusting but I like to watch it because it’s shocking” (Brown 2002). Both Zicari and Borden compare their films with slasher movies and the new wave of reality television, such as *Fear Factor*, which people watch in order to be shocked. Again, Borden says, “Those reality shows, where people eat bugs and shit: That’s disgusting! How can you watch it? But I watch it. It’s the same with what we do: People are shocked by it, but they watch it” (Brown 2002).

The U.S. Supreme Court defined obscenity in the 1973 case of *Miller v. California*. The Court established a three-part test: “(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” (*Miller* 1973). The Court in *Miller* specifically stated that the community standards were local rather than national standards.

Applying the legal category of obscenity to the Extreme Associate films, it is difficult to argue that the material does not appeal to the prurient interest. The films are located within the pornographic genre; their objective is to sexually arouse their viewers. It is also hard to argue that the material does not depict sexual conduct: They include graphic depictions of vaginal intercourse, oral sex, and anal sex. It is similarly difficult to argue that the depiction is not patently offensive, given that both Zicari and Borden acknowledge that their very intention in creating this niche material is to shock and offend. They could try to argue that the material does not offend the local community standard. Yet, the decision of the federal attorney general to seek the indictment in the western district of Pennsylvania seemed specifically intended to neutralize any possibility of this argument. It is considered to be a very conservative community, which by all accounts, would be patently offended by depictions far less extreme than those in the Extreme Associate films.

Unlike the Sarah Jones case, there is rather less room to maneuver within the legal category. Borden and Zicari are challenging the limits of speakability. Their graphic and violent sexual representations effect their shock by

virtue of their transgression of these limits. Given the structure of obscenity law and the Court's repeated affirmations of its constitutionality, it seemed likely that they would be convicted on obscenity charges and thereby reaffirmed as sexual outlaws, as subjects who must be disciplined. But, they were not, at least not initially. The defendants moved to dismiss the indictments on the ground that the federal obscenity statutes violated the constitutional guarantees of liberty and privacy protected by the due process clause. Relying on *Lawrence v. Texas*, as well as *Stanley v. Georgia* (1969), they argued that there is a broad fundamental right to sexual privacy that includes a right to possess and view sexually explicit material in the privacy of one's own home. This right, they argued, was not diminished by the fact that the material was devoid of literary or artistic merit. They argued that because the federal obscenity laws imposed a complete ban on the distribution of materials that individuals have the right to possess, the law is unconstitutional.

The Court agreed (*U.S. v. Extreme Associates* 2005a). District Judge Lancaster held that the law violated an individual's fundamental right to possess and read what he chooses in the privacy of his own home. Given that a fundamental right was violated, the law was therefore subject to strict scrutiny level of review, according to which the government must establish a compelling state interest. But, the two interests argued by the government—protecting unwitting adults from exposure to obscenity and protecting minors from exposure to obscenity—were rejected by the Court. Even assuming that these were legitimate government interests, the Court held that the federal statute was not sufficiently narrowly tailored to meet these interests and could not justify a total ban on obscene material.

The deployment of *Lawrence* in the decision is noteworthy. The Court agreed with the government that *Lawrence* did not create a broad and new fundamental right to engage in private sexual conduct. Instead the Court relied on *Stanley v. Georgia*, which established a fundamental right to private possession of obscene material. However, the Court did rely on *Lawrence* for the proposition that the government could not rely on public morality as a legitimate state interest justifying the infringement of adult, consensual, private sexual conduct. It further relied on the dissenting opinion of Justice Scalia for the idea that the holding in *Lawrence* calls the nation's obscenity laws into question, since the government could not legislate a "moral code" of conduct. Lancaster wrote, "It is reasonable to assume that these three members of the Court came to this conclusion only after reflection and that the opinion

was not merely a result of over-reactive hyperbole by those on the losing side of the argument" (590). He then cited the numerous constitutional scholars who have similarly observed that the majority's ruling on *Lawrence* calls these obscenity laws into question.

Paradoxically, the district court ruling relies on the border anxieties of the dissenting opinion in *Lawrence* to move the borders of obscenity law. For Justice Scalia, highlighting the implications of the majority ruling was intended as a call to arms to defend the borders. It was not only hyperbole; it was also a grave concern about the imminent collapse of the borders between legitimate and illegitimate sex. It was all about defending the borders of contemporary sexual citizenship. Yet, in the *Extreme Associates* case, these border anxieties are deployed to move the borders of contemporary sexual citizenship: Border dwellers like Zicari and Borden are brought within its constitutional folds. Their representations were protected—not through the First Amendment protection of speech but rather through the privacy rights of substantive due process. The rights of some citizens to possess these materials—regardless of just how offensive they may be—is extended to provide a kind of umbrella protection for those who produce the materials.

But, the legal battle over the lines of speakability continued. The federal government appealed the decision to the Court of Appeals for the Third Circuit. The Justice Department said that ruling, if upheld, "would undermine not only the federal obscenity laws, but all laws based on shared view of public morality, such as laws against prostitution, bestiality and bigamy" (U.S. Department of Justice 2005). The Third Circuit reversed the district court and reinstated the indictment (*U.S. v. Extreme Associates* 2005b). In its view, the lower court was bound to follow Supreme Court precedent upholding federal obscenity legislation. The district court should not have struck down the obscenity law based on "speculation" that *Lawrence* would undermine this precedent. *Extreme Associates* appealed, but the petition was dismissed by the Supreme Court.

This contestation over the legitimate borders of sexual citizenship gets even more complicated when one considers the response of the adult entertainment industry to the *Extreme Associates* case. Zicari and Borden's productions have been described as beyond the limits of acceptability even by those who defend their rights to produce it. Paul Fishbein, president of Adult Video News, the trade journal of the adult entertainment industry, described *Extreme Associates'* films as "horrible, unwatchable, disgusting,

aberrant movies." However, he added that they should be protected by the First Amendment (Tapper 2005).

Some within the adult entertainment industry have gone further and attempted to distance themselves from Extreme Associates, in no small part due to the industry's attempts to self-discipline and thereby avoid the prosecutorial threat of the Ashcroft and now Gonzales justice department. One such self-disciplining initiative is the Cambria list: a set of guidelines for the adult entertainment industry setting out sexual acts that should be avoided. Named after adult entertainment industry lawyer Paul Cambria who drafted it (and who, not coincidentally, is among Larry Flynt's lawyers), the list sets out a series of sexual acts that have attracted the attention of obscenity prosecutors in the past. The list of prohibited sexual acts includes sadomasochistic (s/m) sex ("No shots with appearance of pain or degradation . . . no blindfolds, no wax dripping . . . no bondage-type toys or gear unless very light . . . no forced sex, rape themes etc."); no bodily fluids and explicit or "nasty" sexual shots such as "no two dicks in/near one mouth . . . no shot of stretching pussy, no fisting." It also includes a range of other taboo topics including "no male/male penetration, no transsexuals, no bi-sex" and "no black men/white women themes." The list is an extraordinary example of the imperative to self-discipline in the shadow of the threat of criminal prosecution. Although controversial within the adult entertainment business, it is intended to provide guidelines for those who wish to avoid obscenity prosecutions. It is a graphic list of "bad sex," the kind of sex that will get its producers in trouble. The list signals a transformation in the terms of sexual citizenship: Sexually explicit sex is no longer a marker of bad sex: only a subset of sexually explicit sex now qualifies and identifies its makers as sexual outlaws.

There is little concrete evidence of the influence of the Cambria list. A quick perusal of Internet sex sites reveals a plethora of the alleged bad sex acts: from bodily fluids to transsexuality to interracial sex of all varieties. Indeed, each one appears as a specialty niche, readily available to the consumer. However, there are suggestions within the industry that the mainstream players within the adult entertainment industry, like Vivid Video, VCA Pictures, and *Hustler*, are carefully monitoring the content of their films according to the Cambria guidelines. This internal divide within the pornography industry is an interesting indication of the extent to which the Cambria list is intended to capture—but is simultaneously constituting—the prevailing sense of good and bad in sexual representations. Good citizens within the industry

are self-disciplining, agreeing to produce representations within a realm of legitimate sexually explicit sex. Bad citizens are not. The mainstream adult entertainment industry may not agree with the definition of good and bad sex, but it is agreeing to discipline itself along its lines, thereby reinforcing the dichotomy.

Further, according to Paul Cambria, law enforcement authorities are themselves using the list in their prosecutions (Calvert & Richards 2004). The self-disciplining list—intended to reflect the morality of the obscenity prosecutors—is thus being used by the obscenity prosecutors themselves as a marker of good and bad industry citizens. And according to the Cambria list, Borden and Zicari are unapologetically bad citizens. They traffic in the very images proscribed by the list. They are border speakers, flouting the distinction between good and bad sex, and thereby reproducing themselves as bad citizens, not only in the eyes of social conservatives but also those within the mainstream adult entertainment industry.

Even Larry Flynt, who once prided himself in being "the worst," now casts Borden and Zicari in these terms. In his words, "Most of the obscenity cases being brought today involve pretty rough stuff that's demeaning and humiliating to women—pedophilia, rape, necrophilia. They're aberrations and they're out of the norm. I like to think that we stick to plain old vanilla sex . . . it seems to keep us out of trouble" (Flynt 2004). A debate between Flynt and Zicari has been seen in the pages of the *Adult Video News*. Zicari solicited financial assistance for his legal defense from others in the adult entertainment industry, including Larry Flynt, who declined. While Flynt stated that Zicari deserves First Amendment protection since "all forms of expression are legally protected by the First Amendment," he does not believe that he is under any obligation to provide him funding. Moreover, he is highly critical of Zicari for bringing on the prosecution (Farrar 2004). "I had a request from them for money for their defense fund. I spoke with (other producers) who just echoed my feelings, we've got a guy who's bringing a lot of heat on the adult industry" (Farrar 2004). Flynt did not shy away from the financial dimensions of his position. "What we're talking about here is an industry that everybody is doing very well in," Flynt said. "Everyone is following certain guidelines. Not just what they produce but where they ship them to, where they're being sold from. And as a result, this industry has grown from a \$600 million industry in the early 1970s to an \$11 billion industry today. But it's because, you know, we have businessmen running it, not people that wanted to see how kinky or weird

they could get" (Farrar 2004). Flynt added that very few adult entertainment industry directors are "bent on doing, you know, things that are real demeaning toward women. . . . You don't want a jury of at least half women sitting there seeing this. It's cutting your own throat. This has nothing to do with the First Amendment; it takes an idiot to create a product that he knows he can't defend in court that's going to send him to prison" (Farrar 2004).

Zicari responded with an open letter to Larry Flynt, stating that Flynt was hypocritical for suggesting that Extreme Associates has gone too far. In Zicari's view, he was only doing what Flynt had done years before, namely, pushing the envelope of pornography:

What I am under indictment for tests the limits of the current administration position of obscenity, much the same as you did Larry, before I was born. In 1974, showing a close-up of a woman's open vagina was undeniably extreme. You brought to the masses crude and extreme pictures of naked women. It was a magazine with a controversial and some said dangerous edge and I proudly say, what you achieved was revolutionary and still remains a defining moment for freedom of speech and expression. It changed the world of print pornography forever. (Zicari 2004)

Zicari argues that his videos are simply the contemporary version. Flynt again responded, rejecting Zicari's attempt to draw parallels between their work. "I have never been in favor of forced sex, whether real or imagined. I have always promoted consensual sex and portrayed consensual sex," Flynt wrote. "Bad taste should not be confused with physical abuse. This is where I part company with Mr. Black [Zicari]" (Brown 2004).

We come full circle then, back to Flynt's conversion to citizenship, which is now far more complete. While the Larry Flynt in *The People vs. Larry Flynt* was still a sexual outlaw of sorts, defining himself on the outer edges of speakability, he has since circled the wagons of speakability around himself—and others like him. It is Flynt himself who is now producing and policing the lines between good and bad sex, between what can be said and what remains unspeakable, precisely because his own citizenship depends on it. The legitimacy—and profitability—of the adult entertainment industry depends on these new lines, and all of its members, from AT&T to *Playboy* to *Hustler*, are prepared to discipline themselves accordingly. Flynt has now subjected himself to "a set of implicit and explicit norms" that constitute the realm of the speakable and constitute subjects as cognizable, if not entirely legitimate, subjects

(Butler 1997b). The new sexual citizen—the sexual entrepreneur—acquires its status as a subject through self-discipline, and an implicit recognition that a legitimate subject requires a shadow of illegitimacy cast elsewhere. There is a convergence of the multiple dimensions of contemporary sexual citizenship—sexualization, marketization, aestheticization, and moral regulation.

The commodification of sex was once enough to cast it into the domain of the bad. And there is no doubt that its commodification is still highly suspect. For example, the very regulation of prostitution continues to be premised on the idea that the commodification of sex is, in and of itself, a social or moral harm. Yet, the commodification of sex, particularly of sexually explicit imagery, has become so widespread across a multiplicity of genres, from the expressly pornographic to advertising to music videos, that it has become more difficult to suggest that the marketization of sex is *per se* a transgression, an act of border crossing between legitimate and illegitimate sex. The "adult entertainment industry"—the phrase itself a legitimating rhetorical device—has become such a successful financial enterprise that it has begun to dissolve the lines between legitimate and illegitimate economic citizenship.

No longer relegated to the disreputable, the economic players in the industry are increasingly located near the epicenter of American capital. More Mouseketeer than black marketeer, the new industry leaders are successful entrepreneurs and CEOs who speak in the language of product, audiences, profit, and shareholders. Their citizenship is constituted in the neo-liberal discourse of the market—provided that they remain on the right side of the new line. The marketization of sex—once the marker of illegitimacy—has provided a measure of legitimacy, as long as these new market citizens abide by the new norms of unspeakability. As long as they do not venture into the realm of the Cambria list—of s/m sex, nonconsensuality, bodily fluids, transsexuality—as long as they self-discipline, the transformation of pornographer to adult entertainment industry entrepreneur is complete. Larry Flynt does; Robert Zicari does not.

This difference is itself no mere failing on the part of Zicari. He is not simply a sexual anarchist or nihilist, transgressing for the sake of transgression. Zicari is an entrepreneur—in fact, he is a small business entrepreneur, attempting to carve out a space for his company in an industry increasingly dominated by large corporations. He is a small player, creating a niche market based on taboo and transgression. His market is constituted in and through the very lines between good and bad sex that the mainstream adult

entertainment industry has produced. It is his way to produce for a small target audience that will return a profit. Yet, for Zicari, the market language of product, audiences, and profit are not enough to constitute him as a legitimate economic citizen, since his business is premised on violating the stated and unstated codes of the legitimate adult entertainment industry citizen; his is a market in unspeakability. He needs the border if he is to transgress it.

The mere utterance of this unspeakability challenges the borders between legitimate and illegitimate sexual citizenship. The fact that Zicari and Borden have spoken their unspeakable words operates to rupture the foreclosure on speakability. The trial court finding, despite being overruled, suggests the extent to which the legitimacy, or at least the criminality of their representations, has become contested. The story of Extreme Associates exemplifies Butler's argument about the vulnerability of explicit censorship, since the very regulation of this speech introduces it "into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt" (Butler 1997b, 130). While Borden and Zicari may continue to be constituted as outlaws, they will simultaneously have transformed the limits of unspeakability. The images of graphic sexual violence and bodily secretions have been introduced in the public sphere and have been rendered a site of contestation.

The Contested Citizenship of Border Dwellers

There is a degree of incommensurability to the indecency charges against Sarah Jones and the obscenity charges against Extreme Associates. Indecency regulation under the FCC and obscenity regulation under both federal and state law are judged by entirely different standards. Indecency for the purposes of the broadcast medium has a much lower threshold than criminal obscenity law, and the penalties are of an entirely different nature: fines and removal from the airwaves versus fines and imprisonment. There is also incommensurability to the speech in question: political poetry versus violent pornography; condemnation of the degradation of women versus its celebration.

Yet, a comparison of the speech of Sarah Jones and Extreme Associates highlights some uncomfortable equivalencies. Sarah Jones and Lizzie Borden both became border speakers by virtue of their sexualization of speech. If Jones had engaged in a critique of mainstream rap without reproducing their sexualized and misogynist speech, she would not have run afoul of the lines

of indecency. If Borden had produced a film about assault, rape, and murder without its sexualization, she would not have transgressed the lines of obscenity nor of speakability. It is, in other words, the sex that produces the transgression.

The NAL against Jones and the obscenity charges against Borden and Zicari are both the product of a crackdown on sexual speech. The censorship of Sarah Jones is an admittedly misfired missile in the FCC enforcement against broadcast indecency. Since the Jones controversy, the FCC has intensified its surveillance of broadcasting, in what many commentators are calling a new episode of the culture wars. While pressure had been building, the controversy that erupted as a result of the exposure of Janet Jackson's breast at the 2004 Super Bowl halftime show marked a turning point in the crackdown. Half a million complaints were lodged with the FCC, and in an act of almost immediate self-discipline, ABC added a 5-second delay to the Academy Awards, and CBS did the same for the Grammy Awards. CBS was eventually fined \$550,000 for the infraction. In October 2004, Fox was fined \$1.18 million for an episode of *Married by America* that depicted a blurred bachelor party calling it "sexually suggestive." The self-censorship continued, as a month later sixty-six ABC stations refuse to air uncensored *Saving Private Ryan* for fear of being fined by the FCC over expletives. NBC obscured shots of an 80-year-old woman's breast during *ER*. While some broadcasters initially sought a clarification of the indecency rules from the FCC, others rejected the idea.

Congress is considering increasing the fines for indecency for broadcasters and subjecting cable television to the same regulation. A bill to extend indecency rules to cable failed by one vote to pass the Senate Commerce Committee in 2004, chaired at the time by Senator John McCain. His successor, Senator Ted Stevens, has similarly stated that cable television programs should be subject to the same indecency rules as broadcasters using public airwaves. "We wonder why our children are sexually active at a young age," Stevens said in a speech to the National Association of Broadcasters. "The public airwaves are increasingly promoting sex. . . . Cable is often worse" (Hofmeister 2005).⁶ Despite their own battle against FCC censorship, it is a position that the broadcasters support. Broadcasters argue that cable operators have an unfair market advantage, since they are not subject to the same indecency guidelines and therefore are able to depict more sexual and violent content. The cable operators are overwhelming opposed to the move (with one notable exception—Walt Disney Co., which owns ABC). However, some cable providers are

beginning to talk about self-regulation, such as a voluntary rating code, and some have begun to rein in the content of their more explicit shows.

Similarly, the obscenity charges against Borden and Zicari are the first in a new wave of federal obscenity prosecutions against adult pornography. As Buchanan stated in an interview on *ABC Nightline*, "The current prosecution of Extreme Associates should put the pornography industry on notice that the U.S. Department of Justice is vigorously enforcing the federal obscenity laws" (*Nightline* 2003). According to the Department of Justice, since 2001 the department has significantly increased the prosecution of adult obscenity, with forty convictions and nineteen indictments pending as of spring 2005 (U.S. Department of Justice 2005, 2). By contrast, between 1993 and 2000 under the Clinton administration, there were only four obscenity cases (U.S. Department of Justice 2005, 2). "The renewal of obscenity prosecutions during this Administration is a direct result of the emphasis placed on the importance of obscenity law enforcement by the President and the Attorney General" (U.S. Department of Justice 2005, 2). Not all of these charges are directed at the likes of Extreme Associates but rather have included more mainstream adult entertainment videos—described by the Department of Justice as "hard core adultery pornography . . . depicting ultimate sexual conduct between adults with penetration clearly visible" (U.S. Department of Justice 2005, 4).

The intensification of the campaigns against indecency and obscenity are part of an effort by social conservatives to reestablish the lines between legitimate and illegitimate speech. These crackdowns on sexual speech are unlikely to reverse the proliferation of sexual speech into everyday life (only in their extreme do censorship regimes have such an effect). But, they are intended to signal the imperative of limits and self-discipline. In an era of the intense sexualization of everyday citizenship, social conservatives are determined to signal that there are limits and that those who fail to impose limits on themselves will have it done for them. While many social conservatives would like to see a more complete erasure of the pursuit of sexual pleasure from the public sphere (and many libertarians argue that these crackdowns are merely the tip of the impending iceberg), one of the discursive effects of these prosecutions might be a disciplining of the already highly sexualized citizen.

The adult entertainment industry has responded to the threat of pending indictments with the Cambria list. The broadcast industry is responding to the FCC crackdown and the congressional threat of significantly increased fines by more carefully monitoring its content. Even the cable industry is

beginning to discipline itself in an effort to avoid being brought under the same indecency standards as the broadcast industry. Representations of the sexualized citizen will not disappear, but they might become more circumspect. This disciplined sexual subject is one that must establish its legitimacy within the borders of legitimate citizenship that are being redrawn. The legal proceedings against both Jones and Extreme Associates were the harbingers of this re-disciplining of the sexual subject.

The juxtaposition of Sarah Jones and Extreme Associates, despite the incommensurability of their cultural productions, also tells a story about the limitations of the privatized discourse of market citizenship for some border citizens. Neither Zicari nor Jones could deploy this privatized discourse to reconstitute themselves as legitimate citizens but for entirely different reasons. Both Jones and Extreme Associates are entrepreneurs of sorts. Both are seeking to distribute their cultural productions; they are both seeking market commodification of their products. Yet neither was cast in the redemptive language of the market citizen. Zicari is a self-described small business entrepreneur, attempting to create a niche market in an adult entertainment industry virtually dominated by large corporations. But, his product is sexual transgression. The rhetorical weight of the small businessman battling corporate dominance could not displace that of sexual deviant.

Nor did the discourse of market citizen work for Sarah Jones, but the process of exclusion was quite different. Performance artist, poet, songwriter—Jones too is an entrepreneur, attempting to make a living, a profit, from her cultural productions. But, even upon redemption, she was not constituted in the neo-liberal discourse of market citizen and economic citizenship. The shadow of noncitizenship that still haunts the subject status of African Americans, in conjunction with the specifically racialized fears of hip-hop culture and the sexualization of African American women, made Sarah Jones highly susceptible to regulatory discipline. Caught up in the cultural representations of black women and hip-hop culture, her words were suspect and her citizenship precarious. But, once it was established that she was an artist, a cultural critic engaged in political critique of the very hip-hop culture that produced her as a border speaker, Sarah Jones was transformed into a full-fledged political citizen whose speech was deserving of the highest form of protection, unsullied by the pursuit of profit. Jones is produced as a good citizen against the backdrop of the questionable citizenship of many of her rapper colleagues. But neither she nor they are cast in the language of the

market. It is this exclusion from the cultural logic of citizenship—African Americans simply are not cast as potential market citizens—that operates to constitute Jones as a border speaker without the obvious possibility of market redemption. Jones is not Larry Flynt—successful entrepreneur—because that is not what African Americans are. And so the market offered little to no protection. Rather, Jones had to wrap herself in the flag—in the rhetoric of high political citizenship and its privileging of political speech—because it is that discourse alone that may, and in her case did, offer redemption. Jones's case suggests some of the ways in which the offerings of neo-liberal citizenship, as well as self-discipline, operate through highly racialized discourses.

Their juxtaposition also reveals something about the ways in which some border speakers can cross the lines into legitimate citizenship and reconstitute themselves in the language of sexual citizens, while others cannot. Those who cross do so by respecting the existence of the border. Jones crosses by repeating the mantra of the lines between decency and indecency. Flynt crosses but reinforces the idea of a realm of unspeakability beyond the border. Borden and Zicari are not ultimately allowed to cross—in large part because they refuse the legitimacy of a border. Their legal arguments constituted a wholehearted rejection of the line-drawing exercise of obscenity.

Border speakers may push the borders or cross the borders, but they cannot dissolve them, for it is the borders that produce them as legitimate citizens, or not. The self-disciplining citizen needs an unruly subject against which to emerge, an obscenity against which it can be produced as normal. But it is not only citizens that need borders; transgressors need them just as much. Borden and Zicari may have lost their legal battle, but they have ended up on the "right" side of the border if they are to traffic in the unspeakability that produces the appeal of the pornographic. They are resisting the banalization of pornography, reestablishing the very borders that are required if they are to be transgressed. While exclusion has its costs, for Borden and Zicari, it may also have its privileges. But borders are porous, seepage occurs, and even outlaws remain in the public sphere. Borden and Zicari refuse to be shamed. Their mere presence will continue to produce border anxieties and skirmishes, and the future borders of speakability—including a border that could undermine their own unspeakability—remains unknowable.