

Exporting Identity

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I. INTRODUCTION

Now is the ideal time to study the limitations and possibilities of a global gay rights movement. The term "gay" has been borrowed into Japanese, Portuguese, Spanish, Thai, Turkish, and other languages, signifying its increasingly perceived universality.¹ Gay and lesbian organizations now exist in virtually every continent and in many major urban centers throughout the world.² A growing number of legislators and judges have taken up the cause of gay civil rights, and have actively supported protections based on sexual orientation in a host of areas, such as adoption, employment, domestic partnership, and immigration.³ Throughout these global developments, American activists, scholars and media figures have played a visible role, leading at least one commentator to characterize gay pride as "America's global gay export."⁴

Nevertheless, although the struggle for gay rights has attracted enormous global attention in the past decade, it has also encountered many challenges.⁵ A number of governments, particularly across the developing world, have mounted vocal, and often violent, attacks against nascent gay and lesbian movements within their borders. For example, in Namibia, just last year, Home Affairs Minister Jerry Ekandjo told the National Assembly that the existence of homosexuality was entirely attributable to Western influences, observing "[w]e take everything [from Western culture] lock, stock, and barrel without carefully analyzing what is good and what is harmful to us. Today it is homosexuality, tomorrow the right to walk naked, the day after it will be the right to abuse drugs. At the end the so-called rights will lead to our own

1. Stephen O. Murray, *Increasingly Gay Self-Representations of Male-Male Sexual Experiences in Thailand*, in LADY BOYS, TOM BOYS, RENT BOYS: MALE AND FEMALE HOMOSEXUALITIES IN CONTEMPORARY THAILAND 82 (Peter A. Jackson & Gerard Sullivan eds., 1999); Deborah P. Amory, *Mashoga, Mabasha, and Magai: 'Homosexuality' on the East African Coast*, in BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES 70, 76 (Stephen O. Murray & Will Roscoe eds., 1998).

2. Oliver C. Phillips, *Constituting the Global Gay*, in LAW AND SEXUALITY IN THE GLOBAL ARENA 17 (Carl Stychin & Didi Herman eds., 2000); Barry D. Adam, Jan Willem Duyvendak, & Andre Krouwel, in *Introduction to THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT 1* (Barry D. Adam et al. eds., 1999).

3. See generally THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS, *supra* note 2 (detailing worldwide developments).

4. FRANK BROWNING, A QUEER GEOGRAPHY 24 (1998). See also Dennis Altman, *Global Queering*, 5 AUSTRALIAN HUMANITIES REV. 2 (1996) (observing that the modern gay identity in Jakarta and elsewhere is influenced by Western trends and the marketing of gay culture internationally.); Neville Hoad, *Between the White Man's Burden and the White Man's Disease*, 5 GAY & LESBIAN Q. 559, 563 (1999) ("There is a certain banal truth to allegations of U.S. cultural imperialism particularly in regard to gay male identity in South Africa (and, arguably, in much of the world). Gay culture . . . like Coca-Cola, Madonna, and Calvin Klein underwear, has become a potent American export.").

5. Amnesty International lists at least eighty-three countries where homosexuality or sodomy is explicitly condemned in its criminal code. See Anissa Helie, *Hatred*, 328 NEW INTERNATIONALIST 21 (2000).

extinction.”⁶ In this leader’s view, “so-called gay rights can never qualify as human rights” because they are “inimical to true Namibian culture, African culture, and religion.”⁷ Such commentary represents the point of view shared by some political leaders that indigenous homosexuality fails to exist in non-Western countries, and that the formation of gay communities is an undesirable byproduct of foreign influence and globalization.

As we realize that the struggle for gay civil rights is becoming more global, we must necessarily also confront an uncomfortable reality: for many politicians, the identity “gay” or “lesbian” is perceived to be tantamount to a foreign threat. Yet rather than addressing the complex questions of identity, culture, and sexuality raised by the increasingly transnational posture of the gay civil rights movement, legal scholars have remained painfully silent. Their silence is vexing, particularly given the influx of recent anthropological and social constructionist scholarship that actively challenges the prevailing assumption that concepts of sexual orientation can be universally generalized across different cultures and behaviors.⁸ Even though the performance of same-sex sexual conduct has occurred throughout recorded history, the emergence of a tangible gay and lesbian identity is an extremely recent development.⁹ As one author observes, in India, to commit a homosexual act is one thing; to *be* a homosexual is an entirely different phenomenon.¹⁰ As this observation suggests, this divergence between identity and conduct raises the difficult question of whether sexual orientation itself is a culturally specific concept.¹¹

Such questions have undeniable legal consequences, particularly for the minoritizing discourse that animates the global gay civil rights movement. Traditionally, the law presumes that one’s sexual orientation—heterosexual, homosexual, bisexual—is a fixed identity defined by the gender of one’s chosen sexual partner. However, contrary to this view, some cultures view

6. *Namibian Call to ‘Eliminate’ Gays*, PLANET OUT NEWS, at <http://www.planetout.com/news/article/2000.10.02/1> (Oct. 2, 2000).

7. *Id.*

8. See, e.g., GILBERT HERDT, *SAME SEX, DIFFERENT CULTURES* (1997); Ken Plummer, *Speaking its Name: Inventing a Gay and Lesbian Studies*, in *MODERN HOMOSEXUALITIES: FRAGMENTS OF LESBIAN AND GAY EXPERIENCE* 17 (Ken Plummer ed., 1992); *ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR* (Evelyn Blackwood, ed. 1986).

9. See Nii Ajin, *West African Homoeroticism: West African Men Who Have Sex with Men*, in *BOY-WIVES AND FEMALE HUSBANDS*, *supra* note 1, at 129, 138 (observing that the terms “heterosexuality” and “homosexuality” are modern cultural productions), citing David Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in *HIDDEN FROM HISTORY* 37, 48 (Martin Duberman, et al. eds., 1989).

10. Rajesh Dhir, *Men who Have Sex with Men and the Law*, at www.hri.ca/partners/lc/unit/homosexuality.shtml (January 1999). See also Hoad, *supra* note 4, at 564 (“Lesbian and gay identity can be figured as a Western import, although no one can claim a monopoly on acts that to a Western eye look homosexual.”); and David Halperin, *Homosexuality: A Cultural Construct*, in *ONE HUNDRED YEARS OF HOMOSEXUALITY* at 41-53, 46 (1990).

11. See Kenji Yoshino, *The Epistemic Content of Bisexual Erasure*, 52 *STAN. L. REV.* 353, 461 n.2 (2000).

homosexuality as an activity, not an identity;¹² others view it as a necessary phase in a quest for full-fledged adulthood,¹³ and still others equate it with transgenderism.¹⁴ Although there is certainly an appreciable emergence of self-identified “gay” or “lesbian” individuals throughout the world, many Western activists and scholars often fail to recognize that arguments for legal protection on the basis of sexual orientation often collide with, rather than incorporate, these preexisting social meanings of same-sex sexual activity. In other words, the presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework.¹⁵

These complexities are not just differences in translation; they have profound implications for the constitutional, civil and criminal rights affecting sexual minorities across the world. In this Article, I argue that gay and lesbian activists have made a divisive mistake by singlehandedly focusing on identity-based protections in order to achieve equality for sexual minorities. When considered in a cross-cultural context, identity-based protections actually reveal their own inherently self-destructive limitations, demonstrating a central paradox of global gay rights discourse. Instead of liberating sexual minorities, the use of identity-based frameworks may paradoxically exclude them from protection. I contend, therefore, that a global gay rights movement must take into account sexualities and behaviors that fall outside of traditional categories of sexual orientation. If a constitutional framework for protection of sexual minorities is to be globally effective, it must recognize that many individuals who fall outside of neatly circumscribed categories of sexual identity are just as deserving of a model of liberation that includes them.

While this Article stops short of advocating a culturally relativistic approach to gay civil rights in general, it does argue that the changing social

12. Rudolf P. Gaudio, *Male Lesbians and Other Queer Notions in Hausa*, in *BOY-WIVES AND FEMALE HUSBANDS*, *supra* note 1, at 117-118. One man reported after studying homosexual activity in Nigeria:

If “gay” is seen to refer only to the overt, politicized gay communities that have emerged in the West in the past one hundred years, it surely does not apply to the Hausa men I met in Nigeria, most of whom have little if any knowledge of Western gay life. If, however, “gay” is understood to refer to men who are conscious of themselves as men who have sex with men, and who consider themselves to be socially (if not temperamentally) distinct from men who do not have this kind of sex, then these Hausa men are undoubtedly “gay,” and it is in this sense I use it. This is not to say that Hausa gay men understand their sexuality as do North American gay men. For example, Hausa people generally refer to homosexuality as an act rather than a psychological drive or predisposition, and homosexual men are more often described as men who *do* homosexuality than as men who *want* other men sexually.

Id. (emphasis in original).

13. HERDT, *supra* note 8, at 109-125.

14. Matthew W. Roberts, *Emergence of Gay Identity and Gay Social Movements in Developing Countries: The AIDS Crisis as Catalyst*, 20 *ALTERNATIVES* 243, 247 (1995).

15. In this article, I define “sexual orientation” as the “erotic or affectational impulse to the same and/or opposite sex.” JOHN C. GONSEIRECH & JAMES D. WEINRICH, *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 1 (1991). I define one’s “sexual identity” as the outward expression of one’s sexual orientation, although others have used the term to refer to one’s gender identity as well. See e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2002) (discussed *infra* Part IV).

meanings surrounding gay or lesbian sexual identities raise deeply complex questions that are often ignored by scholars and activists in the name of globalizing gay civil rights. For laws based on sexual orientation impose—and require—a certain relationship between identity and conduct that is deeply context-specific. By exploring other permutations of the relationship between identity and same-sex sexual conduct, we can come to a better understanding of some of the complexities that accompany nascent gay civil rights movements in other cultural contexts. This understanding, in turn, casts a new light over America's own battles over gay civil rights, because these differences highlight the importance of sexual autonomy and sexual self-determination over identity-based categories of protection.

I begin, therefore, by exploring the roots of the most prominent model of gay civil rights (particularly in domestic American law) which is based upon a specific relationship between sexual identity and sexual conduct that I call “substitutive.” The substitutive model assumes that one's public sexual identity and private sexual conduct are interchangeable; that is, individuals who engage in same-sex sexual conduct can be legally classified by a fixed and clearly demarcable gay, lesbian, or bisexual sexual identity. Based on this equation, gay civil rights activists tend to opt between two strategies of constitutional protection: *privacy*-based strategies (which protect same-sex sexual conduct) or *identity*-based anti-discrimination strategies (which protect against discrimination based on sexual orientation). In the United States, I argue that identity-based strategies became uniquely necessary in the wake of *Bowers v. Hardwick*. Because that opinion foreclosed constitutional protection for private sexual behavior between members of the same sex, future generations of litigants were forced to explore protections based on sexual identity as an alternate means of protection.

Such efforts, although markedly successful in decentering the import of *Hardwick*, masked the potentially uncomfortable reality that sexual identity is not always a fixed and central category. In the sections that follow, drawing upon both anthropological and public health literature, I explain why the presumed equation between sexual behavior, sexual desire and sexual identity in such strategies swiftly unravels when viewed in a cross-cultural framework.¹⁶ By focusing on a series of examples from Thailand and India, among other places, I demonstrate how this “substitutive” model of sexual

16. As this Article points out, there are various typologies of homosexualities that defy the label of “gay,” “lesbian,” or even “bisexual” and therefore pose serious challenges to the bedrock of assumptions upon which gay civil rights movements are premised. See, e.g., the typologies introduced in HERDT, *supra* note 8 at 23; Peter Drucker, *In the Tropics there is no Sin*, 218 NEW LEFT REVIEW 76 (1996) (observing that five hundred years before, many kinship-based structures in Africa and Americas had a predominance of transgendered homosexuality, whereas the Islamic West, Central Asia and North Africa had a predominance of age and class-structured homosexual social organization).

identity and conduct may be a profoundly inadequate means of obtaining protection for the vast numbers of sexual minorities throughout the world.

In each context, I argue that the introduction of this substitutive model clashes with preexisting social meanings of same-sex sexual conduct. In Thailand, for example, although a similarly substitutive model of sexual identity is swiftly emerging, the social meaning of homosexuality has been traditionally associated with transgenderism (what I call a *transformative* model of the relationship between identity and conduct). In contrast, in India, public health activists claim that many individuals view the performance of same-sex sexual conduct as totally separate from, rather than representative of, their sexual identity (what I call an *additive* model of the relationship between identity and conduct).¹⁷ Yet, rather than incorporating these different variations of sexuality and sexual identity, the substitutive model actively excludes them from its purview, both simplifying and ignoring their richness and complexity.

The concluding section of this piece argues that the vast differences in the social meaning of homosexuality across different cultures require a more nuanced and thoughtful formulation of the public and private aspects of sexual identity. Here, I argue that what is needed is an alternative paradigm to the problematic assumptions upon which identity-based categories are based. Consequently, instead of concentrating on sexual identity, I argue that legal scholars in the West and elsewhere might benefit from exploring other paradigms of equality which focus on sexual autonomy instead.

II. FROM PRIVATE TO PUBLIC

To understand the complexities of nascent lesbian and gay identity-based movements worldwide, I first examine identity-based claims to lesbian and gay civil rights in the United States, which provide the richest examination of the stark dichotomy between protections based on *identity* from those based on *conduct*. Although there are various municipalities which openly embrace gay and lesbian citizens by providing protections based on sexual orientation, there are still thirteen states which persist in prohibiting sodomy.¹⁸

This uniquely ironic contrast—between the presence of antidiscrimination protections for gays and lesbians, along with the continued criminalization of sodomy—is almost entirely attributable to the outcome of *Bowers v. Hardwick*.¹⁹ As a result of the decision, I argue that activists chose to redefine the legal meaning of homosexuality to focus on a public, collective sexual

17. See Tom Boellstorff, *The Perfect Path: Gay Men, Marriage, Indonesia* 5 GAY & LESBIAN Q. 475, 490 (1999) (reaching this conclusion with respect to some men in Indonesia).

18. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=11> (last visited May 20, 2002).

19. 478 U.S. 186 (1986).

identity, rather than a type of private sexual behavior. The success of this approach, however, depended upon sustaining a model of sexual orientation that presumed that one's outward, expressive sexual identity—gay, lesbian, bisexual, or heterosexual—was representative of one's preferred sexual conduct. However, as I explain, this unyielding focus on identity-based strategies excludes those who fall outside of such neatly demarcated categories; and, as further sections will point out, faces some severe limitations when placed in a cross-cultural context.

A. *Bowers v. Hardwick: Towards Identity Based Protections*

It is now fifteen years after *Bowers v. Hardwick* was handed down, and supporters of gay civil rights in America are still smarting from the injury.²⁰ The intricacies of the *Hardwick* decision have been explored elsewhere in greater detail, particularly with astute reference to the history of privacy jurisprudence from which the case emerged.²¹ For the purposes of this article, I focus on *Hardwick* for its discursive effect in framing the legal goals of the contemporary lesbian and gay rights movement after the decision was handed down.

In 1960, 'sodomy' laws prohibiting oral or anal intercourse between men, women and between a man and a woman existed in all fifty states and the District of Columbia.²² Although they were rarely enforced, they later became instrumental in propagating other forms of sexual orientation discrimination in the realm of employment, social services, or child custody, and in providing legislators with the basis for refusing to enact legislation prohibiting discrimination on the basis of sexual orientation.²³

In 1961, Illinois became the first state to decriminalize sodomy by adopting the Model Penal Code's recommendation that the law refrain from regulating consensual private sexual behavior between two adults of the same

20. For an excellent summary of major gay civil rights litigation in the United States, see Patricia Cain, *Litigating for Lesbian and Gay Rights, A Legal History*, 79 VA. L. REV. 1551, 1589-1640 (1993).

21. For a list of scholarship on the decision, see DAVID J. GARROW, LIBERTY AND SEXUALITY, 902-904 nn. 97-98 (1994). See also Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739-802 (1989); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1436-1516 (1992); Thomas B. Stoddard, *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987).

22. ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 20 (1995). These laws were largely an outgrowth from the mid to late nineteenth century, which saw a marked increase in state and cultural surveillance of sex acts in Britain. Ellen Ross & Rayna Rapp, *Sex and Society*, in THE GENDER/SEXUALITY READER, 161 (Roger N. Lancaster & Micaela di Leonardo eds., 1997); Jeffrey Weeks, *The Construction of Homosexuality*, in QUEER THEORY/SOCIOLOGY 41, 44 (Steven Seidman ed., 1996).

23. WINTEMUTE, *supra* note 22, at 20-21.

sex.²⁴ Nearly half of the states followed suit.²⁵ Yet, starting in the 1970s, as Professor Nan Hunter has explained, a countertrend began, wherein states amended their laws to specify that oral or anal sex was prohibited *only* between persons of the same sex.²⁶ This trend toward specification, as opposed to decriminalization, coincided with two important events in U.S. history: the emergence of a contemporary lesbian and gay rights movement and the simultaneous renewal of a movement for religious fundamentalism in American politics.²⁷

The gay and lesbian movement, by this time, had achieved significant recognition as a discrete subculture in America, propelling lesbians and gay men to seek legal recognition of their right to engage in same-sex sexual conduct.²⁸ Amidst this background, gay and lesbian rights activists looked to the Supreme Court for redress; hoping that the Court would extend the right of privacy to protect the rights of individuals to engage in same-sex sexual activities.²⁹ Despite the lofty goals by which gay rights advocates originally conceived of litigating *Hardwick*, its ascent to the nation's highest court "ran headlong" into this emerging trend towards legislative specification of homosexual activity—with disastrous results.³⁰

The facts of the case are well-documented. An Atlanta police officer entered Michael Hardwick's bedroom while he was engaged in oral sex with another man and arrested him for violating a Georgia statute criminalizing sodomy.³¹ Although the prosecution was formally dropped, Hardwick chose instead to challenge the constitutionality of the statute itself, arguing that it violated his fundamental right to privacy.³²

The Court answered with a stinging, and ultimately incoherent, response. Its principal holding was that the Constitution does not protect a fundamental

24. See Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992); Richard Green, *The United States*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY 145 (Donald J. West & Richard Green eds., 1997).

25. Hunter, *supra* note 24, at 538-40.

26. *Id.* at 538-40.

27. *Id.* at 539.

28. *Id.*

29. WINTEMUTE, *supra* note 22, at 22-24. See also Rebecca Mae Salokar, *Beyond Gay Rights Litigation*, 3 GAY & LESBIAN Q. 385, 392 (1997).

30. Hunter, *supra* note 24, at 540.

31. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

32. Interestingly, a married couple, John and Mary Doe, had originally joined in the litigation, arguing that they desired to engage in sodomy but had been "chilled" and "deterred" by the statute. Hunter, *supra* note 24, at 540. However, the Court of Appeals dismissed the married couple for lack of standing, holding instead that:

Hardwick's status as a homosexual adds special credence to his claim . . . While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.

Hardwick v. Bowers, 760 F.2d 1202, 1205 (11th Cir. 1985). By dismissing the two plaintiffs, as Hunter suggests, the Court was able to adjudicate the case solely with regard to consensual homosexual sodomy. Hunter, *supra* note 24, at 541.

“right of homosexuals to engage in sodomy,” nor, alternatively, did it contain a “fundamental right to engage in homosexual sodomy.”³³ First, the Court rejected the proposition that the right to privacy as outlined in its prior jurisprudence on procreation, marriage, child rearing and education, and abortion extended to homosexual sodomy.³⁴ “We think it evident,” Justice White wrote, “that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”³⁵

Second, the Court defined fundamental rights as “those fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’”³⁶ It then concluded that it was “obvious” that neither formulation would extend to homosexuals to engage in acts of consensual sodomy, principally because proscriptions against homosexual conduct have “ancient roots” and were criminalized in nearly half of the states at the time the opinion was written.³⁷ Because the laws against sodomy were based on “notions of morality,” the Court then declined to overturn the law due to its majoritarian origins.

Third, the opinion also declined to immunize the conduct based on the fact that it took place entirely within the confines of Hardwick’s home. In reaching this conclusion, the Court admitted that homosexual conduct between consenting adults was essentially a “victimless crime,” but concluded that “it would be difficult . . . 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.”³⁸ Finally, in a sharply worded concurrence, Chief Justice Burger wrote to underscore his view that “there is no such thing as a fundamental right to commit homosexual sodomy,” referencing “the history of Western civilization” and “Judeo-Christian moral and ethical standards.”³⁹

The effect of *Hardwick* on the ensuing legal strategies for gay and lesbian equality cannot be underestimated.⁴⁰ One commentator described the opinion as an “utter rejection of the homosexual lifestyle;”⁴¹ others feared that it would mean the end of the movement for gay and lesbian civil rights and equality by

33. *Hardwick*, 478 U.S. at 192.

34. *See id.* at 190-91.

35. *Id.*

36. *Id.* at 191-92.

37. *Id.* at 193-94.

38. *Id.* at 195-96.

39. *Id.* at 196 (Burger concurring).

40. It also marked one of the rare times that a Supreme Court justice admitted to making a mistake. *See Ex-Justice Says He May Have Been Wrong*, THE NAT. L. J. 3 (Nov. 5, 1990); and JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 518-30 (1994).

41. WINTEMUTE, *supra* note 22, at 46.

foreclosing the utilization of other fundamental rights.⁴² The decision, in all of its unflattering comparisons of sodomy with incest and adultery, and its attendant rejection of protective notions of privacy, unquestionably brought forth a transformative moment in the future of civil rights for gays and lesbians in America.

Initially following the decision, a series of lower court decisions favored expansionist interpretations of *Hardwick* which precluded the use of other constitutional rights to protect gays and lesbians from discrimination.⁴³ As one author explained, "the implication of *Bowers v. Hardwick* was effectively to tar lesbians and gays, as a social group, as potential criminals—people whose very basis for being seen as a group was their shared propensity for engaging in sexual acts which the state could properly criminalize."⁴⁴ The most prominent of these decisions was *Padula v. Webster*, handed down by the D.C. Circuit, which interpreted *Hardwick* to foreclose the possibility of suspect classification by equating criminality with homosexuality:

It would be quite anomalous. . . . to declare status defined by conduct that states may conditionally criminalize as deserving of strict scrutiny If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that the state sponsored discrimination against the class is invidious. . . . there can hardly be any more palpable discrimination than making the conduct that defines the class criminal.⁴⁵

Other circuit courts, following similar rationales, denied constitutional protections to individuals based on their verbal assertion of sexual *desire* for members of the same sex under the military's ban against homosexuals. Despite the total absence of proof of same-sex sexual conduct, courts found that the public assertion of one's sexual orientation constituted sufficient proof for exclusion from military service. For example, in *Ben-Shalom v. Marsh*, the Seventh Circuit rejected First Amendment protections for an army member who had been denied re-enlistment based on her statement that she was a lesbian, despite the lack of proof that she had ever engaged in sexual activity with another woman. Although the court observed that the plaintiff was "free . . . to say anything she pleases about homosexuality and about the Army's policy to advocate that the Army change its stance to know and talk to homosexuals. . . .[she] cannot declare herself to be a homosexual"

42. See, e.g., Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 919-920 (1989).

43. See *High-Tech Gays v. Defense Indus. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1296 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 1295 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

44. NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 37 (1997).

45. 822 F.2d at 103.

and remain enlisted because her admission “reasonably implies . . . a ‘desire’ to commit homosexual acts.”⁴⁶ It was the “act of identification,” the Court observed, the simple assertion of an “identity that makes her ineligible for military service,” rather than the “speaking of it aloud.”⁴⁷

In such decisions, courts displayed an enthusiastic tendency to equate expressions of sexual desire for members of the same sex with static notions of homosexual identity.⁴⁸ And, by reading *Hardwick* in a similarly expansive fashion, courts also initially tended to equate this homosexual desire or identity with the prohibited act of sodomy. As long as courts persisted in identifying homosexual sodomy, now defined as a criminal, loathsome act after *Hardwick*, as one of the key underpinnings of gay sexual identity, gay civil rights activists were unlikely to garner any success in advancing the gay and lesbian civil rights movement.

Given the disastrous import of these decisions after *Hardwick*, gay and lesbian litigants were forced to explore alternative opportunities for constitutional protection. Their strategies led them to seek a discursive redefinition of homosexuality: as the next section explains, instead of mentioning the presence of same-sex sexual desire or conduct, post-*Hardwick* gay civil rights strategies focused almost exclusively on changing the social and legal meaning of homosexuality to denote a public, seemingly fixed and stable sexual identity of gay personhood.

46. 881 F.2d 454, 462 (7th Cir. 1989).

47. *Id.* The Ninth Circuit adopted a similar formulation in *Pruitt v. Cheney*, where it concluded that an army member’s statement that she was a lesbian in a newspaper without any evidence of same-sex sexual activity demonstrated that she “was discharged not for the content of her speech, but for being a homosexual”, i.e. a person who ‘desires to engage’ in ‘homosexual acts.’” 963 F. 2d 1160, 1163 (9th Cir. 1992); *Cf.* *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir. 1991) (finding that plaintiff was discharged for being a bisexual person, not for writing about bisexuality).

48. This was not the first time courts displayed a historically enthusiastic tendency to equate a homosexual identity with expressions of same-sex sexual desire or conduct. For example, in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967), the Supreme Court characterized a Canadian man as a “homosexual” and “afflicted with a psychopathic personality” under the 1952 Immigration Act because he admitted that he engaged in sexual activities with other men three or four times per year before and after his entry into the United States. The Court, without hesitation, assumed that performance of same-sex sexual activities three or four times a year amounted to “pathological homosexuality” and “sexual perversion.” *Id.* at 122.

In dissent, Justice Douglas drew a crucial distinction between Boutilier’s “occasional acts,” and the affliction of a “psychopathic personality,” arguing that the plaintiff’s activities were not a “way of life.” *Id.* at 125-30 (Douglas dissenting). Here, we see the emergence of a critical distinction between conduct and identity, between sporadic sexual activity with members of the same sex, and a “homosexual lifestyle.” Notwithstanding Justice Douglas’ incisive distinction, the Supreme Court reached the same conclusion in *Hardwick* that it reached in *Boutilier*: that the performance of same-sex sexual acts (or the tendency to engage in them) constitutes homosexuality, and therefore deserved criminalization.

B. From Conduct to Identity: The Substitutive Model

Despite the fact that *Hardwick* may have foreclosed constitutional protections for same-sex sexual conduct, the visibility of gay and lesbian identity—in politics and public life in the United States—has vastly increased in the fifteen years after the case was handed down. Six hundred people were arrested for protesting at the Supreme Court after *Hardwick* was announced, one of the largest instances of civil disobedience ever at the Court.⁴⁹ One paper addressed to gay readers:

What can you do—alone? The answer is obvious. You're *not* alone, and you can't afford to try to be. That closet door—never very secure as protection—is even more dangerous now. You must come out, for your own sake and for the sake of all of us.⁵⁰

The author's call to arms is an ingenious reversal of *Hardwick*'s incongruity: rather than attaining protection through privacy, as *Hardwick* might have done had it been decided differently, the author exhorts gay men and lesbians to "come out" as both an act of resistance and protection.⁵¹

As a result of the *Hardwick* decision, gay activists, understandably, turned away from seeking protection based on conduct and privacy and instead sought protections based on sexual orientation and identity.⁵² The success of this approach, however, depended upon propagating a model of "gay personhood" or "gay essentialism" which presumed the universality of a number of principles involving sexuality, sexual orientation, and sexual identity. Even though this model preexisted *Hardwick*'s outcome, it took on even greater legal importance after the decision—and, indeed, has today become a central fixture of the globalization of gay sexual identity.⁵³ Within this context, the performance of same-sex sexual behavior, however slight or occasional, is assumed to indicate a universal essence and meaning.⁵⁴

49. See *Hundreds Protest Supreme Court Sodomy Ruling*, N.Y. TIMES, Aug. 12, 1986, at A20; Douglas Jehl, *600 Gay Rights Activists Arrested in Capital Protest*, L.A. TIMES, Oct. 14, 1987, at 1.

50. See Philip Brockman, *A Fine Day*, 175 NEW YORK NATIVE 13 (August 25, 1986), quoted in EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 71 (1990).

51. See Steven Seidman, *Introduction to QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 20. ("[L]esbian and gay politics have often assumed that adopting an affirmative sexual identity is an emancipatory personal and political act. Indeed the process of coming out or publicly declaring a lesbian, gay, or bisexual identity has been considered the most authentic sexual political act.")

52. The decision also spawned a wealth of legal scholarship that overwhelmingly and deeply criticized the decision. See WINTEMUTE, *supra* note 22, at 31 (observing the publication of over fifty articles on the decision, many highly critical).

53. There is a rich literature tracking the historical development of homosexual identity. See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1*, 43 (1981) (observing the transition from same-sex sex acts to a discrete identity around 1870); JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS IN GAY HISTORY, POLITICS, AND THE UNIVERSITY* (1992); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD* (1995).

54. See Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, SOCIAL PERSPECTIVES ON LESBIAN AND GAY STUDIES 160 (Peter M. Nardi & Beth E. Schneider, eds., 1998) (discussing this view).

I define this model as “substitutive” because it implies a legal, as well as personal, interchangeability between sexual conduct and sexual identity. First, at its most basic level, proponents of this model presume that the gender of one’s object choice determines a person’s sexual orientation.⁵⁵ Second, the model also presumes that a person’s subjective sexual orientation comprises a foundational and central aspect of a person’s sexual identity.⁵⁶ Third, and most significantly, this model also assumes the interchangeability (or “substitutive” nature) of gay sexual identity, orientation, and conduct. As expert Richard Troiden explains,

Homosexual identities are most fully realized, that is, brought into concrete existence, in situations where self-identity, perceived identity, and presented identity coincide—where an agreement exists between who people think they are, who they claim they are, and how others view them.⁵⁷

This focus on personal expression and identity also takes on legal import in gay civil rights. Because such cases often depend upon an identity that is not immediately visible, as Nan Hunter has explained, the identity—gay, lesbian, bisexual—must be expressed in order to become cognizable.⁵⁸ Thus, since a lesbian or gay identity cannot exist without representation, expression has become a component of the very identity itself.⁵⁹ Under this substitutive relationship between identity, conduct, and expression, “coming out” is largely viewed as an essential, political instrument to build a community instead of a largely personal decision.⁶⁰

55. “[W]e learn from our culture that the key determinant of sexual orientation is whether the subject and object have the same or different physical sex.” Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 207 (1998).

56. See AMNESTY INTERNATIONAL, *BREAKING THE SILENCE* 4 (1994) (observing that “sexual orientation is a fundamental dimension of human identity”) (quoted in Paul EeNam Park Hagland, *International Theory and LGBT Politics*, 3 GAY & LESBIAN Q. 357, 385 (1997); ELLEN LEWIN & WILLIAM L. LEAP, *OUT IN THE FIELD* 13 (1996) (noting the central importance of coming out or revealing one’s homosexuality to some segment of the social world).

57. See Richard Troiden, *The Formation of Homosexual Identities*, in Gilbert Herdt, ed., *GAY AND LESBIAN YOUTH* 46 (1989).

58. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. REV. 1, 5 (2000).

59. *Id.* at 9. See also JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* at 2, 25 (1997) (observing that the process of recognizing an identity also creates and constitutes the identity itself).

60. See Hunter, *supra* note 59, at 7 (“[t]he moment of affiliation, of realization of exclusion, is a (perhaps the) moment of identity formation. It is the moment when identity’s social meaning becomes manifest to the individual in the matrix of community. It is part individual, part social; part viewpoint, part status.”); see also William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 373-74 (1992) (“Coming out involves first, recognition that one’s sexuality profoundly involves feelings toward people of the same gender, and that these feelings are important to one’s identity; second, knowledge that this self-recognition links one to many others with similar feelings and identity; and third, acknowledgment to others of these discoveries and conclusions about oneself.”); HERDT, *supra* note 8, at xvi (observing that the “rituals of ‘coming out,’” thus “paved the way for new conditions of selfhood: a new kind of social contract with the self and gay community.”); KATHYRN WOODWARD, *IDENTITY AND DIFFERENCE* 25 (1997) (“Identity politics involve claiming one’s identity as a member of an oppressed or marginalized group as

This focus on the *expressive*, rather than constitutive, elements of a gay or lesbian identity, both legally and culturally, builds upon changing the meaning of homosexuality towards a public, collective social group identity, rather than an activity.⁶¹ According to Joshua Gamson,

[L]esbians and gay men have made themselves an effective force in the USA over the past several decades largely by giving themselves what civil rights movements had: a public collective identity. Gay and lesbian social movements have built a quasi-ethnicity, complete with its own political and cultural institutions, festivals, neighborhoods, even its own flag. Underlying that ethnicity is typically the notion that what gays and lesbians share—the anchor of minority status and minority rights claims—is the same fixed, natural essence, a self with same-sex desires. The shared oppression, these movements have forcefully claimed, is the denial of the freedoms and opportunities to actualize this self. In this ethnic/essentialist politic, clear categories of collective identity are necessary for successful resistance and political gain.⁶²

The “substitutive” model of gay sexual identity that emerged—a model that assumes the interchangeability of sexual identity and conduct—also began to play a powerful role in legal decisions, which further emphasized a growing trend towards minority-based claims for civil rights and equality. By exploiting the presumption that one’s sexual orientation is a fixed and stable marker of personhood (and defined by the sex of one’s partner rather than a particular sexual activity),⁶³ activists were eventually able to decenter the disastrous import of *Hardwick* in American jurisprudence.⁶⁴

As a result, strategies for legal equality turned away from focusing on sexual conduct (and a concurrent right to *privacy*), and towards sexual identity (and a concurrent right to *nondiscrimination*). As Professor Patricia Cain has observed:

... *Hardwick* has changed the course of gay rights litigation. In the federal courts at least, litigators now avoid privacy arguments and corresponding claims that sexual conduct is constitutionally protected.

a political point of departure and thus identity becomes a major factor in political mobilization.”); and Barry Dank, *Coming Out in the Gay World*, 34 *PSYCHIATRY* 60-77 (1971).

61. See Steven Epstein, *Gay and Lesbian Movements in the United States*, in Adam, *supra* note 2, at 30, 42-59 (tracking this development since the 1970s).

62. Joshua Gamson, *Must Identity Movements Self Destruct?: A Queer Dilemma*, 42 *SOCIAL PROBLEMS* 390-407 (1995), in *QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 395.

63. See *Brief of Amici Curiae Human Rights Campaign Fund in Support of Respondents* at 29, *Romer v. Evans*, 517 U.S. 620 (“Logically, what defines the class of homosexuals or heterosexuals is not the act of engaging in oral or anal sex – since both homosexuals and heterosexuals engage in those acts in large numbers. Rather what defines the class is the gender of one’s partner.”).

64. As Professor Nan Hunter explains:

Left without a privacy-based defense against criminalization of that conduct, advocates and some judges argued that sexual orientation was first and foremost a status, not contingent on conduct. This riddle—is homosexuality status or conduct—was purely an artifact of the categories of legal doctrine and the outcome of a single case.

Nan Hunter, *Identity, Speech, and Equality*, 79 *Va. L. Rev.* 1695, 1717 (1993).

The conduct/status distinction . . . has now become the driving force in shaping new constitutional challenges to discrimination against gays and lesbians. Relying on the conduct/status distinction, gay men and lesbians as plaintiffs have challenged governmental discrimination in employment and other public spheres, always careful to separate questions about what they do in private from who they are in public.⁶⁵

In the wake of *Hardwick*, activists also turned to legislative solutions, presumably hoping that the enactment of legislative protections based on sexual orientation could serve as imperfect stand-ins for constitutional protection. These nondiscrimination protections have the benefit of not specifying a particular class of individuals to be protected, meaning that anyone—gay, straight, or bisexual—can be protected from discrimination on the basis of sexual orientation.

On the other hand, however, such protections implicitly assume—if not impose—a convergence between an individual's public or perceived identity, sexual desire, and sexual orientation, and continue to emphasize the public aspects of these three.⁶⁶ In this manner, such protections rely upon a presumed clarity in the boundaries of sexual identity, and require individuals to be capable of labeling themselves, and their subjective desires, in clearly marked categories.

This assignation of identity is one that has remained largely unquestioned in the discourse surrounding gay civil rights; one's sexual identity is taken to be a foundational, fixed, and stable expression of personhood.⁶⁷ And courts have responded to this shift, embracing an alternate conception of homosexuality to *Hardwick* in which the class of homosexuals is defined by a shared personality, rather than a sexual activity.⁶⁸ Indeed, the most successful cases for gay rights have unerringly capitalized on expressions of gay personhood, framed by reference to sexual orientation, in exploring other fundamental rights affecting speech, assembly, association, or the right to participate in the political process.⁶⁹

The first case to successfully mark this transition is *Watkins v. U.S. Army*, which involved a challenge to the military's ban against homosexual

65. Cain, *supra* note 20, at 1617.

66. See Janet Halley, *Misreading Sodomy: A Critique of the Classification of 'Homosexuals' in Federal Equal Protection Law*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 356 (Julia Epstein & Kristina Straub eds., 1992); Hunter, *supra* note 64, at 1696 (observing that notions of identity increasingly form the basis for gay and lesbian equality, merging status, conduct, and viewpoint into a single whole).

67. See Hunter, *supra* note 64, at 1717; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739-802 (1989); Halley, *supra* note 66, at 356; Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 93/94 SOCIALIST REVIEW 9 (1987), reprinted in SOCIAL PERSPECTIVES ON LESBIAN AND GAY STUDIES, *supra* note 54, at 134, 138.

68. *Meinhold v. Department of Defense*, 808 F.Supp. 1455 (C.D. Cal. 1993); *Steffan v. Cheney*, 920 F.2d 74, 75 (D. C. Cir. 1990). See also Janet Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET 91 (Michael Warner, ed. 1993).

69. WINTEMUTE, *supra* note 22, at 49.

enlistments. Here, the Ninth Circuit neatly distinguished the class defined in *Hardwick* as "those who engage in homosexual sodomy," from the class in *Watkins*, which was composed of "those with a homosexual orientation."⁷⁰ The court distinguished *Hardwick* as a "conduct case" and *Watkins* as an "orientation" case.⁷¹ Under this bifurcation of the two, the court found that same-sex sexual orientation "has never been criminalized," and therefore the Army's ban on homosexual service unlawfully excluded persons engaging in "many forms of homosexual conduct other than sodomy such as kissing, handholding, caressing, and hand-genital contact."⁷² Here, by separating prohibited sexual conduct from protected sexual identity, *Watkins* thus signified the end of treating gays and lesbians as potential criminals, and marked instead the beginning of recognizing them as a clear and definable class of minorities.

In these developments, the boundaries of public and private give way to a renewed emphasis on the *public expression* of one's sexual orientation, rather than the private aspects of sexuality. This development is partly based on increasing juridical protection of the expressive content of identifying oneself as gay, of "coming out."⁷³ For example, in *High Tech Gays v. Defense Industrial Security Clearance Office*, a court ruled that a refusal to grant a security clearance based on membership in a gay organization violated the plaintiff's First Amendment rights.⁷⁴ Similarly, a court found that gay and lesbian Roman Catholics were constitutionally protected in appearing on the sidewalk before St. Patrick's Cathedral, and in organizing other parades and festivities.⁷⁵ In turn, federal circuit courts have required universities to officially recognize gay and lesbian organizations⁷⁶ and their activities as well as the expressive activities of gay or lesbian-identified individuals.⁷⁷

As a result of the enormous visibility of gay-identified individuals in public and political life, the notion of sodomy as an index of both conduct and

70. 875 F.2d 699 (9th Cir. 1989).

71. *Id.* at 716-18.

72. *Id.* at 725.

73. See, e.g., *Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.*, 595 P.2d 592, 611 (Cal. 1979), codified in Cal. Labor Code § 1101 and 1102; *Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980).

74. 668 F.Supp 1361, 1378 (N.D. Cal. 1987), *rev'd* 895 F.2d 563 (9th Cir. 1990). Judge Henderson's opinion was reversed on appeal by the Ninth Circuit, which characterized homosexuality as a function of behavior rather than an immutable characteristic worthy of heightened scrutiny. *Id.* at 573-74.

75. *Olivieri v. Ward*, 801 F.2d 602, 606 (2nd Cir. 1986); *Irish Lesbian & Gay Organization v. Bratton*, 882 F. Supp. 315, 319 (S.D.N.Y. 1995).

76. *Gay Alliance of Students v. Mathews*, 544 F.2d 162, 165-67 (4th Cir. 1976); *Gay Lib v. University of Mo.*, 558 F.2d 848, 852-57 (8th Cir. 1977); *Gay Activists Alliance v. Board of Regents of Univ. of Okla.*, 638 P.2d 1116, 1122-23 (Okla. 1981); *Student Services for Lesbians/Gays and Friends v. Texas Tech Univ.*, 635 F. Supp. 776, 781-82 (N.D. Tex. 1986).

77. *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984); *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

identity has virtually disappeared from recent federal jurisprudence.⁷⁸ For example, in *Romer v. Evans*,⁷⁹ even the United States Supreme Court focused exclusively on discrimination based on status and identity rather than *Hardwick's* permissive criminalization of same-sex sexual conduct. In that case, the Court overturned Amendment 2, a Colorado amendment to the state constitution that prohibited enactments of protections for gays, lesbians, and bisexuals from discrimination based on sexual orientation. The Court found that Amendment 2's existence was motivated solely by animus towards a particular group and therefore could not survive rational basis scrutiny under the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws. "[Amendment 2] identifies persons by a single trait," the Court wrote, "and then denies them protection across the board."⁸⁰ The Court also concluded, failing to mention *Hardwick*, that Amendment 2 was a "status based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."⁸¹ In this sentence, the Supreme Court focused exclusively on the contours of gay personhood, demonstrating that the laws governing sexual orientation are far more preoccupied with an identity-based definition of homosexuality, rather than a conduct-based definition.⁸²

Yet this transition—from conduct to identity, and from privacy rights to antidiscrimination—represents an ironic and unsettling culmination of the gay civil rights movement. Both culturally and legally, this seminal focus on identity remains confusing and contradictory.⁸³ *Hardwick's* legacy leaves gays and lesbians in the rather ironic predicament of facing imprisonment for sexual displays of affection in some states, although they have won the right to enjoy formalized domestic partnerships, the right to adopt and raise children, the right

78. See Mary Eaton, *Homosexual Unmodified: Speculations on Law's Discourse, Race and the Construction of Sexual Identity*, in LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 65 (Didi Herman & Carl Stynchin eds., 1995).

79. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

80. *Id.* at 633.

81. *Id.* at 635.

82. Later cases that have come before the Court have continued this trend. While *Hardwick* equated homosexual identity with conduct, *Romer* and its progeny have restricted their contemplations of homosexuality entirely to questions of identity and visibility, rather than *Hardwick's* implications. See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). For excellent commentary on each case, see CARL F. STYNCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS AND THE DISCOURSE OF RIGHTS* 45 (1998) and Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley*, 49 STAN. L. REV. 143 (1996). As Janet Halley has noted, the Supreme Court has utterly failed to mention *Hardwick*, thereby leaving unquestioned whether states enjoy the power to criminalize homosexual sodomy in *Romer's* wake. See Janet Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429 (1997).

83. See WINTEMUTE, *supra* note 22, at 89 ("So long as *Hardwick* stands, analysis of sexual orientation discrimination issues under the U.S. Constitution is doomed to incoherence."); and Cain, *supra* note 20, at 1641.

to serve quietly in the military, and the right to nondiscrimination in employment in other places throughout the country.⁸⁴

At the same time, however, it is a virtual miracle and a testament to the skill and power of civil rights activists that protections based on sexual orientation even exist, given *Hardwick's* vituperative tone. Yet an optimistic reading of cases like *Watkins* represent the best that gay rights activists can hope for until *Hardwick* is overturned: a fragile kind of equality that is based not on sexual privacy, but on a notion of personhood that emphasizes protecting sexual identity rather than the act of sex itself, thereby permitting identity-based protections to overshadow privacy-based protections.⁸⁵ As the following sections will describe, however, this redefinition has encountered its fair share of challenges from both inside and outside of the United States.

C. *Social Construction: Challenging the Substitutive Model*

As I have suggested, the predominant gay civil rights movement in the United States has displayed a yearning tendency to substitute a discernible sexual orientation and identity for same-sex sexual conduct; and then to attach a categorical imperative to “coming out.” Just as gay and lesbian activists in the United States have successfully sought to transform the social meaning of homosexuality in a legal context, they have also asserted significant leadership over the global constitution of that identity, exerting enormous power in determining the manner by which individuals define their sexual identities.⁸⁶ Gay pride parades have become a global phenomenon; and gay and lesbian activists have made their way around the globe to assist the formation of nascent movements.⁸⁷

Yet this monopoly power over sexual self-definition can also be deeply problematic. Categories of gay, lesbian, heterosexual, or bisexual identity, as a basis for individual and collective identity, often obscure a deeper question of whether such categories of sexual orientation can—or should—serve as universal categories for everyone. Moreover, imposing a gay, lesbian, or bisexual identity on individuals who may engage in same-sex sexual behavior,

84. For further information on each of these developments, see the web site of LAMBDA LEGAL DEFENSE AND EDUCATION FUND, at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=18> (last visited May 20, 2002).

85. See Browning, *supra* note 4, at 23:

[F]rontline gay activists militate for the sacredness of the homosexual while dismissing . . . the subject of sexual desire itself. Rather than press the society to enlarge and enrich its sexual culture, they argue, agitate, and seek to legislate for the rights and interests of the gay movement. Instead of sex, they demand sexual identity.

86. See *supra* note 4; DENNIS ALTMAN, *GLOBAL SEX* 75 (2001).

87. *Id.* See Dennis Altman, *Global Gaze/Global Gays*, 3 *GAY & LESBIAN Q.* 417, 421, 426 (1997) (observing that the development of gay or lesbian identities in Asia are strongly affected by Western models of homosexuality).

but who do not fit a substitutive paradigm between identity and conduct, can be unduly confining, exclusionary, and inappropriate.

These insights draw much of their power from the social construction movement, which has flourished almost entirely outside of—and yet parallel to—the global gay civil rights movement. In the last twenty years, even though gay legal activists continued to focus on emphasizing the importance of identity-based claims to gay civil rights, scholars in other fields—historians, anthropologists, sociologists, and others—have actively deconstructed the presumed equation between identity, desire, and sexual conduct that animates a gay or lesbian sexual identity. For example, a proliferation of studies on the social construction of identity have argued that gay personhood, or gay essentialism, is utterly incapable of capturing an emerging divide between act and identity.⁸⁸ Many of these scholars are sympathetic to the work of Michel Foucault,⁸⁹ who critiqued the centrality of sexuality to personhood in Western society. Under a social constructionist perspective, sexual acts, in and of themselves, lack an inherent meaning. Rather, culture, society, and history *assign* particular meanings to sexual behavior, desire and experiences.⁹⁰ Thus, social constructionists argue that notions of sexuality and sexual identity can only be understood in terms of their sociohistorical and political contexts.⁹¹

According to this view, the presumed substitutive relationship between sexual acts and identity that characterizes gay personhood is instead a semiotic conflation that obscures the growing complexities of sexuality, modernity, and socialization. Since sexual acts carry different meanings in different cultural and temporal contexts, it is largely impossible to universalize clear definitions of identity, and the relationship between act and identity is not nearly as “fixed” as the model of gay personhood presupposes.⁹² Instead, constructionists argue that sexual identity is rarely a matter of sexual practice, and rarely a matter of the gender of one’s object choice.⁹³ Jeffrey Weeks, for

88. See Lenore Manderson & Margaret Jolly, *Introduction to SITES OF DESIRE, ECONOMIES OF PLEASURE* 4-5 (Lenore Manderson & Margaret Jolly eds., 1997); Richard A. Parker & John Gagnon, *Introduction to CONCEIVING SEXUALITY* 11 (Richard A. Parker & John H. Gagnon eds., 1995); *SAME-SEX RELATIONS AND FEMALE DESIRES: TRANSGENDER PRACTICES ACROSS CULTURES* (Evelyn Blackwood & Saskia E. Wieringa eds., 1999).

89. See MICHEL FOUCAULT, *supra* note 53, at 43 (observing the transformation from those who performed sodomy to the “species” of the homosexual); Steven Epstein, *Gay Politics, Ethnic Identity, in SOCIAL PERSPECTIVES ON LESBIAN AND GAY STUDIES*, *supra* note 54, at 137.

90. See Epstein, *id.* See also JOHN GAGNON, *HUMAN SEXUALITIES* (1977).

91. See, e.g., Rosalind Morris, *Three Genders and Four Sexualities*, 2 *POSITIONS* 15, 17 (1994) (following Foucault, arguing that sexuality and sexual identity in the West must be contextualized in terms of capitalism, in which sexual relations are situated within a lens of commodity exchange, consumption, and object choice).

92. See Vance, *supra* note 54, at 163 (discussing this view).

93. Morris, *supra* note 91, at 17. See also Dana Takagi, *Maiden Voyage, in QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 245:

A definition of sexualities is fraught with all sorts of definition conundrums, what exactly does it mean, sexualities? The plurality of the term may be unsettling to some who recognize three (or two, or one) forms of sexual identity: gay, straight, bisexual. But there are those

example, argued that an important distinction must be made between homosexual *behavior* (which is universal) and a homosexual *identity* (which emerged only at the end of the nineteenth century).⁹⁴ As explained eloquently by Steven Epstein:

Where essentialism took for granted that all societies consist of people who are either heterosexuals or homosexuals (with perhaps some bisexuals), constructionists demonstrated that the notion of “the homosexual” is a sociohistorical product, not universally applicable, and worthy of explanation in its own right. And where essentialism would treat the self-attribution of a “homosexual identity” as unproblematic—as simply the conscious recognition of a true, underlying “orientation”—constructionism focused attention on identity as a complex development outcome, the consequence of an interactive process of social labeling and self-identification.⁹⁵

In so doing, social constructionist insight echoed many observations made by feminist legal and critical race scholars—that identities are always multiple, and intersected with other identity components.⁹⁶

Such perspectives brought to the table of gay civil rights an unyielding commitment to reexamine—and openly challenge—the foundational categories upon which much of the movement was based upon. As Joshua Gamson has eloquently pointed out, the social constructionist movement, “shakes the ground on which gay and lesbian politics have been built,” by taking apart concepts like “‘sexual minority,’ ‘gay community,’ indeed of ‘gay’ and

who identify as straight, but regularly engage in homoeroticism, and, of course, there are those who claim the identity gay/lesbian, but engage in heterosexual sex. In addition, some people identify themselves sexually but do not actually have sex, and, there are those who claim celibacy as a sexual practice.

94. See generally JEFFREY WEEKS, *COMING OUT* (1977); *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES* (1985).

95. See Epstein, *supra* note 89, at 138. Excellent examples of social constructionist work includes JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (1983); KENNETH PLUMMER, *THE MAKING OF THE MODERN HOMOSEXUAL* (1981); DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988). See also FEAR OF A QUEER PLANET, *supra* note 68.

96. SEIDMAN, *supra* note 22, at 11. See, e.g., Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN’S STUDIES 25 (1995). These scholars have illuminated the multiple dimensions of personhood by introducing concepts such as multiplicity and intersectionality. Multiplicity has yielded the insight that “each individual embodies multiple aspects of personhood like sex, gender, race, ethnicity, class and sexual orientation at once, and that social experience is constructed from and shaded by the configuration of those traits as a particularized sum that creates an individuated whole.” *Id.* at 55. In contrast, intersectionality highlights how law and public policy has failed to recognize the social and legal significance of discrimination that is propagated along a person’s multiple dimensions. *Id.* For additional discussion, see Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Elvia Rosales Arriola, *Gendered Inequality: Lesbians, Gays and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L. J. 103, 107 (1994); Jeffrey C. Mingo, *More Colors than the Rainbow*, 8 LAW & SEX. 561 (1998); Julie A. Nice, *Intersectionality and the Strategy Question*, 75 DENV. U. L. REV. 1131 (1998), and other articles in the DENVER Symposium.

'lesbian' and even 'man' and 'woman.'"⁹⁷ Instead of viewing homosexuality as a natural, biologically driven, psychological condition, social constructionists approached homosexuality as a social role, rather than a discrete identity.⁹⁸ "If we focus only on the 'subculture' of homosexuality, and if we never interrogate the conditions which engender its marginalization, we shall remain trapped within a theoretical framework which refuses to acknowledge its own complicity in constructing its object (or subjects) of study," one author, Ki Namaste, explained.⁹⁹

Such observations built upon important early work by Mary McIntosh, who argued in the late 1960s that the category of "homosexual" was *created* largely as a means to deflect contagion because homosexual practices are so widespread. Instead of exploring the cause of homosexuality, she inquired about the *social conditions* that produced the notion that homosexuality constituted a distinctive, discrete human identity.¹⁰⁰ By singling out a particular group as "homosexuals" on the basis of conflating act and identity, she argued that the rest of society remains facially "pure" and unmarred by sexual ambiguity.¹⁰¹ McIntosh's work contributed an important insight: that homosexuals are not born, but *created* in order to sustain a division between gay and straight.

Following these insights, many scholars rejected the necessity of a natural, essential, or universal gay identity to mobilize and to legitimate minority-based claims to civil rights in the United States. Drawing on French poststructuralist theorists like Jacques Lacan, various scholars and activists embraced an alternative paradigm, labeled queer theory, that loosely referred to gay, lesbian, bisexual, and transgendered individuals in terms of their resistance to heteronormative structures, and to essentialist claims to identity itself.¹⁰² This form of "anti-identity" politics argued powerfully against the idea that one's identity or sexuality should be fixed, stable, or nameable.¹⁰³ Instead, queer theorists noted that specific identity constructs are arbitrary, unstable, and

97. Gamson, *supra* note 62, at 395. As Annamarie Jagose has written in her insightful summary, under this perspective, gay identity has become eviscerated "not only by the differences *between* subjects but the irresolvable differences *within* each subject." ANNAMARIE JAGOSE, *QUEER THEORY* 83 (1996).

98. Steven Seidman, *Introduction to QUEER THEORY/SOCIOLOGY* *supra* note 22, at 15.

99. Ki Namaste, *The Politics of Inside/Out: Queer Theory, Poststructuralism, and a Sociological Approach to Homosexuality*, in *QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 194.

100. Seidman, *supra* note 98, at 14 (discussing McIntosh).

101. Mary McIntosh, *The Homosexual Role*, 17 *SOCIAL PROBLEMS* 262-70 (1968), *reprinted in QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 33-40.

102. *See generally* SEDGWICK, *supra* note 50; JUDITH BUTLER, *GENDER TROUBLE* (1991); TERESA DE LAURETIS, *TECHNOLOGIES OF GENDER* (1989); *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* (Diana Fuss ed., 1991); ALEXANDER DOTY, *MAKING THINGS PERFECTLY QUEER* (1993); SEIDMAN, *supra* note 22, at 11. *See also* Gamson, *supra* note 62, at 591 (tracing emergence of queer politics to 1980s backlash against lesbians and gays, the AIDS crisis, and eruption of differences around race, sex, and class).

103. Epstein, *supra* note 61, at 61.

ultimately exclusionary.¹⁰⁴ Their function, it is thought, is to discipline, regulate, and silence the multiplicity of different ways one can identify oneself.¹⁰⁵

Judith Butler, perhaps the most influential queer theorist of this period, argued that gender categories were similarly problematic in her book *Gender Trouble: Feminism and the Subversion of Identity*. In *Gender Trouble*, Butler argued that there was no natural core or essential nature of gender categories, that “gender” instead constituted a series of performative acts that, taken together, created the appearance of an authentic “core” of gender identity. Gay rights advocates, she argued, subverted many of the interests of their movement by relying on clearly demarcated categories of gender, sex, or sexuality. A commitment to such delineated categories, Butler argued, erases certain kinds of identities—that is, those in which gender does not follow from sex and those in which the practices of desire do not follow from either sex or gender.¹⁰⁶ Thus, instead of normalizing or essentializing same-sex sexual desires or conduct, which is the traditional strategy of lesbian and gay rights activists, Butler argued that gay rights advocates should seek to challenge, rather than replicate, gender categories.

Others who embraced queer theory also pointed out that vast numbers of individuals who engaged in same-sex sexual activity were routinely excluded from the frameworks that ostensibly protected “sexual orientation” as a category.¹⁰⁷ For example, bisexual and transgendered activists found a welcome place at the table of queer theory—quite unlike their experiences under the mainstream gay civil rights model, where their concerns were often dismissed or alienated.¹⁰⁸

The rift between gay civil rights activists and queer theorists is startling and compelling. While gay rights activists sought to use the language of minoritization and sexual identity in order to protect gays and lesbians from discrimination in the wake of *Hardwick*, queer theorists powerfully argued that such categories were entirely arbitrary, simplistic, and assimilationist; and that they failed to take into account the importance of challenging categorization itself. Indeed, perhaps because of the polarization that such theories produced between queer theorists and gay rights activists, queer theory has remained a predominantly academic, rather than a legal, enterprise.

104. Seidman, *supra* note 98, at 11-12.

105. *Id.* at 12.

106. See BUTLER at 17 (1990) (cited in JAGOSE, *supra* note 97, at 84). See also Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1 (1995).

107. See Takagi, *supra* note 93, at 225 (“For those who prefer a form of sexual identity that is, at some point, at odds with their sexual practice or sexual desire, the idea of a single, permanent, or even stable sexual identity is confining and inaccurate”).

108. Epstein, *supra* note 61, at 61; Ki Namaste, *The Politics of Inside/Out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality in QUEER THEORY/SOCIOLOGY*, *supra* note 22, at 205.

Yet there has never been a better, or more important time to take account of its insight—particularly where gay civil rights circles have emerged in nearly every corner of the globe. Following many of the insights of queer theory, one wonders whether the assumed conflation of act and identity in the substitutive model utilized by gay rights circles translates as successfully in other cultural contexts. For, as social constructionists have pointed out, there is a space of deep complexity between sexual acts and sexual identities; the two are not always as substitutive as legal categories might suggest. This complexity forces us to be mindful of the legal limitations of exporting this substitutive model to other contexts. As the following sections will argue, the substitutive model is only one of a few different models of the relationship between identity and conduct. Yet, the increasing globalization of the substitutive model of gay identity has created complex fissures between *legal* strategies towards gay and lesbian equality and *social* meanings of same-sex sexual activity. Instead of embracing these other variations of identity and conduct, I argue that the global propagation of the substitutive model actively excludes them from legal recognition.

III. THE GLOBALIZATION OF A GAY IDENTITY

Given the global visibility of gay and lesbian activists in the United States and throughout the West, it is therefore somewhat unsurprising that contemporary human rights discourse mirrors much of the preoccupation with sexual identity that I have just described.¹⁰⁹ A host of human rights courts and nongovernmental organizations have emphasized the seeming universality of lesbian and gay identity.¹¹⁰ In 1994, for example, in a groundbreaking report

109. See, e.g., Wayne Morgan, *Queering International Human Rights Law in LAW AND SEXUALITY IN THE GLOBAL ARENA*, *supra* note 2, at 208-225, 216:

In the legal and academic texts which expound human rights law on sexuality, identity is taken as a given. Each individual has a fixed identity which can be categorized according to a set of logical terms whose meaning is relatively clear (gender, race, class, sexual orientation and so on). These categories correspond to attributes of individuals which pre-exist the labels attached to them. Pursuing legal strategies based upon human rights notions means validating this theory of identity (at least, when such strategies are pursued without analyzing their potential discursive effects).

For summaries of recent developments in human rights and sexual orientation, see Lawrence R. Helfer and Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. L. J. 61 (1996); Note, *Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection*, 17 B.C. THIRD WORLD L.J. (1997); and Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity*, 22 MICH. J. INT'L L. 283 (2001). For a critical view of these developments and their effects on identity, see Martin F. Manalansan's excellent piece, *In the Shadow of Stonewall*, in *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 488 (Lowe ed., 1999).

110. For example, in *Dudgeon v. United Kingdom*, handed down in 1981, the European Court of Human Rights found that criminalization of the act of sodomy violated a man's right to privacy and equality under the European Convention. 45 Eur. Ct. H.R. (ser. A) (1981). See also *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993). The Court has also embraced transgender equality by holding that discrimination on the basis of one's transgender status violates the

on the international rights of lesbians and gay men entitled *Breaking the Silence*, Amnesty International observed that

As a grass-roots, international human rights organization, Amnesty International has a particular and useful role to play in locating gay and lesbian rights in the consideration of human rights generally—not as special rights, but as fundamental rights assured to each and every member of society.¹¹¹

The report goes on to declare that “sexual orientation is a fundamental dimension of human identity.”¹¹²

Throughout the world, the strategic focus on “coming out” and the quest for juridical protection of gay identity has taken on seemingly universalized dimensions.¹¹³ The rainbow flag has become the symbol of the global gay rights movement—an emblem which tacitly suggests that homosexuality and gay identity exists everywhere throughout the world, and in every cultural community.¹¹⁴ As one anthropologist has written:

And over the years I discovered that, despite differences of dialect, the language of gay men in places I have been is the same; we are one tribe in diaspora, whether living in Trondheim or Zagreb, San Juan or Oaxaca, San Francisco or Atlanta, Las Vegas, or Chicago. We are indeed everywhere and in all walks of life.¹¹⁵

The author, tellingly, observes that “[t]here are no boundaries, only untraversed territories,” a statement which suggests that the only factor differentiating gay identity among men is geographical space, rather than psychological difference. And it also, significantly, suggests that it is only a matter of time

international prohibition against discrimination on the basis of sex. Case C-13/94, P. v. S. and Cornwall County Council, 1996 E.C.R. I-2143 (1996). However, the same court has also held that international prohibitions against sex discrimination do not prohibit discrimination against same-sex couples. Case C-249/96, Grant v. S.W.T., 1998 ECR I-621 (1998).

111. AMNESTY INTERNATIONAL, *supra* note 56, at 385.

112. *Id.*

113. A recent book, *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS*, documents nascent civil rights movements in over sixteen countries, predicting that such movements are only the beginning of a worldwide trend. Adam, *supra* note 2, at 1-2, 9. Instead of a predisposition towards same-sex sexual conduct, a “gay” identity has become defined in terms of self-awareness and “a sense among homosexuals of community, affinity, and common interest with other homosexuals globally.” Roberts, *supra* note 14, at 249. See also SEIDMAN, *supra* note 22, at 19. Seidman writes:

A key assumption of the sociology of homosexuality and gay politics has been the notion that there is a common or more or less identical experience of being homosexual. For example, some sociologists argue that because all homosexuals experience “the closet” and “coming out” they share certain core experiences that form the basis of their identity. This notion of a common sexual identity has been understood as the basis for community building and politics.

Id.

114. For an excellent study on the globalization of sexual identities, see generally DENNIS ALTMAN, *GLOBAL SEX*, *supra* note 86.

115. Ralph Bolton, *Coming Home*, in *OUT IN THE FIELD*, *supra* note 56, at 153.

before the author's notion of gay identity permeates every cultural milieu, replicating itself throughout the globe.¹¹⁶

To some extent, the author's observations have come to pass, bringing undeniably positive results for gay rights advocates.¹¹⁷ In 1994, in *Toonen v. Australia*, the United Nations Human Rights Committee embraced principles of sexual nondiscrimination when it invalidated the criminalization of sodomy in Tasmania. In direct contrast to *Hardwick*, the court found that such laws violated the male plaintiff's right to privacy and equality under the International Covenant on Civil and Political Rights.¹¹⁸ And, in 1996, South Africa became the first national constitution to bar discrimination based on sexual orientation; two years later, it invalidated South Africa's sodomy laws on the grounds that such laws violated constitutionally guaranteed rights to dignity, privacy, and equality.¹¹⁹

Yet such positive developments are perhaps even more striking when compared to some of the vociferous attacks launched against gay and lesbian-identified citizens in other countries. For example, just recently, in a sensational trial, an Egyptian court charged fifty-two men for engaging in immoral acts or religious offenses, or, more formally, for "practicing debauchery with men."¹²⁰ And, in 1998, in India, a Hindu Nationalist party launched a series of nationwide attacks against *Fire*, a film that depicted two middle-class sisters-in-law falling in love with one another.¹²¹ It was the first

116. *Id.* See ALTMAN, *supra* note 86, at 93 (observing "those who take on gay identities often aspire to be part of global culture in all its forms. . .").

117. See ALTMAN, *supra* note 86, at 75:

Even while recognizing the diversity of sexualities, and the fact that for most people behavior does not necessarily match neat categories, there is a gradual shift towards conceptualizing sexuality as a central basis for identity in most parts of the world in which HIV programs have played a significant role.

118. U.N. Doc. CCPR/C/50/D/488/1992. (March 31, 1994).

119. See Heidi Joy Schmid, *Decriminalization of Sodomy under South Africa's 1996 Constitution: Implications for South African and U.S. Law*, 8 CARDOZO J. INTL. & COMP. L. 163 (2000), citing National Coalition for Gay and Lesbian Equality v. Minister of Justice, CCT 11/98 (Const. Ct. Oct. 9, 1998). For an excellent discussion of law's constitutive effects in shaping social norms regarding sodomy, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643 (2001).

120. See Neil MacFarquhar, *Egypt Tries 52 Men Suspected of Being Gay*, N.Y. TIMES (July 19, 2001) at A10. Two of the men were also charged with religious offenses, including falsely interpreting the Koran, and exploiting Islam to promote deviant ideas. *Id.* See also INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (IGLHRC) Emergency Release Network Newsletter on Egypt at http://www.iglhrc.org/news/press/pr_010703.html (July 3, 2001).

121. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUSTICE 69 (2000); Gayatri Gopinath, *On Fire*, 4 GAY & LESBIAN Q. at 631 (1998); Ratna Kapur, *Cultural Politics of Fire*, ECONOMIC AND POLITICAL WEEKLY (May 1999); Campaign for Lesbian Rights in India (CALERI), *Lesbian Emergence* (August 1999). For news reports about the Fire controversy, see Barry Bearak, *A Lesbian Idyll, and the Movie Theaters Surrender*, N.Y. TIMES, Dec. 24, 1998, at A4; *Controversial Film Incites Violence in India; 'FIRE' Burns up Extremist Faction with Sexually Explicit Scenes*, BUSINESS WIRE, Dec. 19, 1998; Soumitro Das, *Fire In Our Belly- Suddenly*, THE STATESMAN, Dec. 15, 1998; *Feminist Appeals India's Top Court to Allow Screenings of Lesbian Film*, AGENCE FRANCE-PRESSE, Dec. 7, 1998; *Fire Explores Women's Dilemma in Modern World*, THE HINDU, Dec. 20, 1998; *Fire on Trial*, BUSINESS LINE (THE HINDU), Dec. 8, 1998 at C1; *India OKs Film*

Indian film to “explicitly acknowledge the existence of lesbianism,” as well as compulsory marriage.¹²²

As a result of the depiction of a sexual and emotional relationship between married women, the film was attacked as a threat to family, marriage, reproduction, nation, and religion. Tens of theatres were attacked by fundamentalists throughout India, who broke display windows, ticket counters, and burned posters advertising the film.¹²³ Critics of the film dismissed lesbianism as “a pseudo-feminist trend from the West and no part of Indian motherhood.”¹²⁴ An editor from India Today agreed, expressing disappointment that “the militant gay movement, which has hitherto operated as website extensions of a disagreeable trend in the West, could come out into the open and flaunt banners in Delhi suggesting that ‘lesbianism is part of our heritage.’”¹²⁵

Suddenly, the emergence of a public, collective, gay identity in some parts of the world has become deeply fraught with accusations of cultural inauthenticity and Western decadence. The clash of these different forces, I argue, has produced a global—and cultural—crisis of sexual identity. This section argues that the simultaneity of such developments—the globalizing of gay rights discourse, and its attendant backlash—is striking, not just for its temporal coincidence, but also for its entrenchment of the substitutive model of sexual identity.¹²⁶

Despite marked differences in the social meaning of same-sex sexual conduct across cultures, a substitutive model of identity and conduct has become increasingly touted as the singular “cure-all” formula for gay liberation. Yet that is a tragic and oversimplifying mistake. As anthropologist Beth Povinelli has written, at the same time that many post-colonial nations are facing the emergence of social movements whose political rhetoric and tactics seem to mimic or reproduce Euro-American forms of sexual identity, such movements have also posed significant challenges to the universalization of

About Lesbian Love, ASSOCIATED PRESS, Feb. 14, 1999; Madhu Jain, *Controversy: Ire over Fire*, INDIA TODAY, Dec. 21, 1998 at 78; *Lesbians too Hot for India*, Ian Mackinnon, *Film's Followers Fight Fire with Fire*, BRITISH BROADCASTING CORPORATION, Dec. 9, 1998; *Supreme Court Chides Film Personalities*, THE STATESMAN, Dec. 9, 1998; *Supreme Court Disposes of Petition on 'Fire'*, THE HINDU, Feb. 26, 2000; and Ashwini Sukthankar, *For People Like Us*, 328 NEW INTERNATIONALIST MAG. (October 2000).

122. INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION AND THE CENTER FOR WOMEN'S GLOBAL LEADERSHIP, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING 96-97 (2000). For more literature on same-sex love in India among women, see GITI THADANI, SAKHIYANI (1996); ASHWINI SUKTHANKAR, FACING THE MIRROR: LESBIAN WRITING FROM INDIA (1999); and also SAME SEX LOVE IN INDIA (Ruth Vanita & Saleem Kidwai, eds., 2000).

123. INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION AND THE CENTER FOR WOMEN'S GLOBAL LEADERSHIP, *supra* note 122, at 96-97.

124. *Id.* at 98.

125. *Id.*

126. See Manalansan, *supra* note 109, at 489.

Western notions of desire, self, and identity-based rights.¹²⁷ For this reason, it is important for legal scholars to examine the insights that these emergent movements yield regarding the limitations of a global gay rights movement.

As this section points out, these episodic clashes over gay rights further demonstrate the danger that both opponents *and* proponents of global gay rights have replicated the substitutive model of sexual identity. Yet the model, as I have suggested, suffers from a critical flaw. Its presumed equation between identity and conduct fails to recognize and incorporate different social meanings for same-sex sexual practices. Moreover, it represents a peculiarly stunted view of the complex relationship between identity and conduct, ignores the need for privacy and autonomy, and runs the risk of excluding many individuals from concurrent models of constitutional protection. This Section, therefore, examines the events of the Zimbabwean Book Fair in 1994, which serve as a representative example of this recurrent phenomenon.

A. *The Zimbabwean Book Fair*

In 1995, the theme for the Zimbabwean Book Fair was headlined as “Human Rights and Justice.” Despite the idealistic proclamation in its title, the fair gave rise to one of the most visible incidents of injustice against gays and lesbians, and marked the transnational creation of a global gay and lesbian rights movement.¹²⁸ Just one week before the fair was to begin, the organizers received a letter from the Zimbabwe Director of Information, which stated:

The government is dismayed and shocked by the decision of the Book Fair Trustees to all of the so-called Gays and Lesbians of Zimbabwe (GALZ) to participate in the Zimbabwe International Book Fair which will be officially opened by the President of the Republic of Zimbabwe, His Excellency Cde R.G. Mugabe. The Government strongly objects to the presence of the GALZ stand at the Book Fair which has the effect of giving acceptance and legitimacy to GALZ.¹²⁹

While the government willingly acknowledged “the dynamic nature of cultures,” the letter emphasized that “both Zimbabwean society and government do not accept the public display of homosexual literature and

127. Elizabeth A. Povinelli & George Chauncey, *Thinking Sexuality Transnationally*, 5 GAY & LESBIAN Q. 439-50 (1999). Others have supported similar views. See, for example, Mark McLelland, *Male Homosexuality and Popular Culture in Modern Japan*, 3 Intersections at www.she.murdoch.edu.au/intersections/issue3/mcllelland2.html (January 2000) (challenging view that Japanese homosexuality replicates Western models); Gayatri Gopinath, 3 RUNGH MAG., *Notes on A Queer South Asian Planet* at 20 (observing that many non-Western sexualities do not mimic, but instead rework and resignify Western models of gay identity); Lisa Rofel, *Qualities of Desire*, 5 GAY & LESBIAN Q. 451-474 (1999) (observing the same with respect to Chinese gay identities).

128. Chris Dunton & Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*, 19 CURRENT AFRICAN ISSUES 8 (June 1996).

129. *Id.* at 9.

material."¹³⁰ Finally, the letter concluded that the Trustees of the Book Fair should not "force the values of gays and lesbians onto the Zimbabwean culture."¹³¹ Although the trustees asked GALZ to voluntarily drop out of the Book Fair, it refused to do so, and the trustees decided instead to withdraw their permission for GALZ to participate.

The Trustees' decision was marked by global protest.¹³² In response to such attacks, President Robert Mugabe publicly delivered a "stinging attack on homosexuals."¹³³ He defined the gay and lesbian movement in Zimbabwe as persons who "believe [in] their alleged rights to have sex in public," and then declared:

If we accept homosexuality as a right . . . what moral fibre shall our society ever have to deny organised drug addicts, or even those given to bestiality, the rights they might claim and allege they possess under the rubrics of individual freedom and human rights, including the freedom of the press to write, publish and publicise their literature on them?¹³⁴

Mugabe then continued his attacks on sexual minorities, declaring that homosexuals "behave worse than dogs and pigs,"¹³⁵ and stating that "if you see people parading themselves as lesbians and gays, arrest them and hand them over to the police."¹³⁶ One member of GALZ who had received substantial publicity had his home burned to the ground, and was arrested twice in a single day.¹³⁷

As a result of Mugabe's attacks, the world focused its attention on the Book Fair. Amnesty International declared that Mugabe's remarks constituted "a heavy handed attack upon the fundamental human right to freedom of expression."¹³⁸ Seventy United States congressmen sent a letter to the President, accusing him of bigotry and pointing out the South African's Constitutional Clause supporting nondiscrimination on the basis of sexual orientation.¹³⁹ In response, Mugabe declared, "Let the Americans keep their sodomy, bestiality, stupid and foolish ways to themselves, out of Zimbabwe . . . Let them be gay in the U.S., Europe and elsewhere. They shall be sad people here."¹⁴⁰ Members of Parliament in New Zealand and the

130. *Id.*

131. *Id.*

132. *Id.*

133. *Zimbabwe Leader Condemns Homosexuality*, N.Y. TIMES, Aug. 2, 1995, at A7.

134. Dunton & Palmberg, *supra* note 128, at 10.

135. *Id.* at 12.

136. *Id.* at 13.

137. *Id.* at 14-15.

138. *Id.* at 11.

139. *Id.* at 13.

140. *Id.* (omissions in the original). One parliamentarian observed:

What is at issue in cultural terms is a conflict of interest between the whole body, which is the Zimbabwean community and part of that body represented by individuals or groups of individuals—The whole body is far more important than any single dispensable part. When

Swedish government also condemned the attacks, observing that Mugabe's statements flatly contradicted covenants regarding human rights of which Zimbabwe was a signatory.¹⁴¹ And a group of British activists hounded Mugabe when he visited Britain, attempting to undertake a citizen's arrest for his statements.¹⁴²

Since then, little has changed. In March 1998, before the United Nations Human Rights Committee, the Zimbabwe delegation refused to overturn or repeal its sodomy enactments, citing the localized stigma that attached to homosexuality in Zimbabwe. Consequently, the delegation observed that homosexuality:

was not accepted by Zimbabwe's varied cultures, which had only been introduced to the concept of human rights upon the attainment of independence 18 years earlier. Legislative change was usually effective only when it was culturally acceptable; to that end, much remained to be done in the field of education.¹⁴³

In March of 2000, Mugabe identified sexual diversity with national economic decline, and responded to Britain's stated concerns for gay civil rights by charging that the British government is seeking to promote homosexuality.¹⁴⁴ Relations with Britain soured shortly thereafter.¹⁴⁵

B. Implications for Globalizing Gay Rights

Significantly, such incidents highlight a very important aspect of anti-gay persecution: rather than persecuting sodomy (or same-sex sexual conduct) specifically, antigay activists in the developing world often instead accuse gay and lesbian citizens of falling victim to Westernization and foreign influence. In this manner, instead of such debates being "new" or unique to gays and

your finger starts festering and becomes a danger to the body you cut it off—the homosexuals are the festering finger.

Id. at 14.

141. *Id.* at 16.

142. See *British Gay Rights Activist Offers to Talk with Mugabe*, AGENCE FRANCE-PRESSE, Nov. 13, 1999; *Gay Activist Charged for Threatening Zimbabwe President*, AGENCE FRANCE-PRESSE, Nov. 16, 1999; *Gay Slur by Mugabe Mars Blair's Visit; UK Government Branded 'Queer'*, SCOTTISH DAILY RECORD, Nov. 13, 1999 at 17; Dumisani Muleya, *CIO Quizzed Over Gay Ambush of Mugabe in UK*, AFRICA NEWS SERVICE, Nov. 5, 1999; *No Trial in Attempted Citizen's Arrest of Zimbabwe Leader*, ASSOCIATED PRESS NEWSWIREs, Dec. 10, 1999.

143. Phillips, in STYNCHIN & HERMAN, *supra* note 2, at 26 (citing text of report from UN Human Rights Committee, 1998).

144. See Cosmas Nyamutamba, *Zimbabwe: Gays and Lesbians Fight Entrenched Homophobia*, INTER PRESS SERVICE, December 2, 1999; *Blair Hits Back at Mugabe*, AFRICA NEWS SERVICE, November 15, 1999. Eventually GALZ won the ability to participate in the Book Fair by winning a court ruling allowing it to participate. See *Gay Zimbabweans Win Fight to Open Booth at a Book Fair*, N.Y. TIMES, Aug. 2, 1996, at A4.

145. Somewhat ironically, as early as 1997, police were investigating charges of rape and sodomy against Mugabe's mentor, Canaan Banana; he later stood trial for the commission of various acts of sodomy. Stephen O. Murray, *Sexual Politics in Contemporary Southern Africa*, in BOY-WIVES AND FEMALE HUSBANDS, *supra* note 1, at 242-250.

lesbians alone, they represent part of an age-old conflict between cultural sovereignty, modernity, human rights, and tradition.¹⁴⁶ Lesbian and gay human rights are often attacked as a “threatening imperialist import,” not necessarily because of the identities themselves, but because of their transnational circulation.¹⁴⁷

Second, as the Zimbabwe episode illustrates, anti-gay rights discourse involves the framing of homosexuality as a “Western” threat, rather than a question of individual rights. Under this paradigm, in stark contrast to the perception of Western decadence, non-Western nations are depicted as “true” placeholders of traditional culture and authenticity.¹⁴⁸ In this equation of “gay identity” with “Westernization,” gay civil rights then become a symbol of recolonization. As one editorial published in Zimbabwe concluded:

Painful experience reminds us Zimbabweans and all other Africans on the continent of moves orchestrated by colonialists to wipe out anything that had to do with African culture constituted mainly by our customs and traditions. This was done in ways that included the imposition of foreign languages on our indigenous languages to try to superimpose cultural values on our own values.¹⁴⁹

One women’s group, for example, issued a supportive statement of Mugabe, citing their position “as mothers and custodians of our heritage. . .[h]uman rights should not be allowed to dehumanize us.”¹⁵⁰

In this manner, the debate over lesbian and gay rights in Zimbabwe operates as a stage that tends to play out the conflict between “modern,” seemingly Western values and traditional, “culturally authentic” ones.¹⁵¹ Yet the question posed by such events is whether a self-conscious, gay identity in Zimbabwe can *ever* be considered to be indigenous or whether it will always be viewed in terms that equate it with a Western export. For Mugabe’s statements suggest an implicit denial of citizenship: one cannot ‘come out’ as a lesbian or gay individual in Zimbabwe and maintain a culturally authentic identity.

It is important to recognize, however, that sexual *identity* per se, not same-sex sexual *conduct*, is the central target of such attacks. As Oliver Phillips, an expert on Zimbabwe, explains, “[t]he vilification directed at gay men and

146. See Hoad, *supra* note 4 at 561.

147. *Id.*

148. Dunton & Palmberg, *supra* note 128, at 19.

149. *Id.* at 12.

150. *Id.* By using the rhetoric of sovereignty in conjunction with a commitment to “true” African values, Mugabe scripted his role as a cultural purist and protector of moral values, standing steadfastly in opposition to gay visibility as a symbol of increasing globalization. As one author argues, speaking from an assumed position of cultural authenticity carried the secondary benefit of diverting the public’s attention away from serious economic and political problems. Oliver Phillips, *Zimbabwean Law and the White Man’s Disease*, 6 SOC. & LEGAL STUD., 471, 484 (1997).

151. For example, as the Fair opened, one defender of the Board’s handling of the issue explained, “It must be remembered that it has taken many years for homosexuality to be accepted in the West. It is not reasonable to expect it to be quickly accepted in Zimbabwe.” Dunton & Palmberg, *supra* note 128, at 10.

lesbians in Zimbabwe recently is not the result of an increase in the commission of or convictions for unnatural offences, so much as it is the result of a growth in visibility for lesbians and gay men."¹⁵² In this manner, Mugabe's anti-gay reaction must also be understood as part of an increasing discomfort with visible assertions of sexuality.¹⁵³ For example, a representative of the Catholic Commission for Human Rights in Zimbabwe explained that "[g]ays and lesbians have the right to privacy but if they display it (their sexuality) in public, it becomes public indecency."¹⁵⁴ Consequently, there is a marked desire among anti-gay leadership to silence any public debate on homosexuality, in order to prevent further experimentation.¹⁵⁵

This conflation of homosexuality with tripartite perceptions of Westernization, criminality, and modernization is a particularly difficult hurdle for Zimbabwean gay rights advocates to overcome. Quite unlike the West, gay and lesbian individuals in many non-Western contexts face an extreme difficulty of overcoming accusations of Westernization. But even though the debate is different, the result is largely the same. The essentializing view of culture put forth by Mugabe was answered by gay rights advocates in equally essentializing terms. In other words, Mugabe's repeated characterization of homosexuality as a "white man's disease" propelled many black gay men and lesbians to "come out" as acts of resistance to this perception.¹⁵⁶ According to Oliver Phillips:

While previously, GALZ had found it difficult to negotiate many of the social, economic, and racial barriers that exist so endemically in Zimbabwe, homosexual men and women in Zimbabwe now found themselves asserting a common identity regardless of their backgrounds. Black men and women who identified themselves as gay or lesbian 'came out' to insist that they did exist, making themselves publicly visible on an unprecedented scale. Many Zimbabwean same-sex lovers and transgendered people who had previously not heard of GALZ or had not considered membership now contacted and joined the organization.¹⁵⁷

152. Phillips, *supra* note 150, at 484. As his work has explained, common law in Zimbabwe has proscribed "unnatural offences," which have been described as sodomy between two men, bestiality, and a residual of other sexual acts between men that does not amount to sodomy. *Id.* at 477. However, while early years of colonialism reflected a predominance of convictions of black men; recent cases between the mid-sixties and mid-nineties almost entirely involved white men as the offenders. *Id.* at 478. The increasing visibility of the convictions of white male offenders has thus contributed to the perception of homosexuality as a white man's disease.

153. Dunton & Palmberg, *supra* note 128, at 18 ("questions of sexuality—of any kind—are not often debated openly and frankly.")

154. *Id.* at 12.

155. *Id.* at 14.

156. See Phillips, *supra* note 150, at 485.

157. See Oliver Phillips, *Zimbabwe*, in RICHARD GREEN & DONALD J. WEST, *SOCIOLEGAL CONTROL OF HOMOSEXUALITY* 53 (1997).

By publicizing his homophobia, President Mugabe “has given an identity to many who were previously ignorant of or uncaring about it.”¹⁵⁸ Here, contrary to his efforts to contain the spread of gay identity, he actually played a formative role in producing it.

Indeed, the constant assertion of homosexuality as a “foreign” influence has only provided fuel for the diverse array of sexual minorities throughout southern Africa to band together under a common, global platform. In this process, both lesbians and gays implicitly utilized the substitutive model as an interpretative tool to demonstrate the historical existence of homosexuality.¹⁵⁹ For example, in response to statements by public leaders that homosexuality does not exist in Africa, various groups uncovered research demonstrating same-sex sexual conduct in various African cultural groups, and provided a list of terms describing the expression of same-sex relationships and customs.¹⁶⁰ This historicizing project was directed towards confirming a gay and lesbian existence in Africa by relabeling same-sex conduct in terms of a continuum of gay or lesbian identity.¹⁶¹

In this manner, both neo-traditionalists like Mugabe, and gay rights activists both set out to manufacture their own versions of tradition and modernity. While Mugabe’s cultural script actively excluded gays and lesbians from its purview, activists sought to demonstrate that gays and lesbians had been part of Zimbabwe’s cultural fabric for generations by relabeling same-sex sexual behavior and conduct as authentically African (and potentially foundational evidence of a “gay” or “lesbian” identity). Yet such essentialisms tended to replicate—and enforce—the substitutive model of sexual identity, which equates same-sex sexual preferences and activity with the existence of a discernible lesbian, gay, or bisexual identity.¹⁶² Like the United States, the social meaning of homosexuality shifted in focus from “doing” homosexual acts to “being” gay or lesbian persons.

As we have seen in the United States, a reliance on the substitutive model in such contexts can be extraordinarily beneficial in terms of creating unity and as a tool towards mobilization. Yet, this overreliance on substitutive models of

158. Phillips, *supra* note 2, at 31.

159. See Dunton & Palmberg, *supra* note 128, at 20; Jennifer H. Spruill, *A Post with/out a Past? Sexual Orientation and the Post Colonial ‘Moment’ in South Africa*, in *LAW AND SEXUALITY IN THE GLOBAL ARENA*, *supra* note 2, at 12 (quoting one South African newsletter that declares that “there have always been gay people in African society. They have not always been accepted, but they have been there.”); and Hoad, *supra* note 4, at 566 (“Activists . . . have asserted the existence of a range of precolonial sexual practices and ‘traditions,’ which could be called homosexual.”).

160. Dunton & Palmberg, *supra* note 128, at 20.

161. See Spruill, *supra* note 159, at 13 (“This desire to find a pre-colonial gay self may be read as specifying a historical identity by conflating conduct and identity.”); and Marc Epprecht, *Homosexual ‘Crime’ in Early Colonial Zimbabwe*, in *BOY-WIVES AND FEMALE HUSBANDS*, *supra* note 1, at 198-99 (“The obvious bigotry behind Zimbabwe’s ‘anti-homo’ campaigns, as well as a wealth of new scholarship from elsewhere in the region, demand a revisit to the history of homosexual practices among the African people of Zimbabwe.”).

162. *Id.*

gay sexual identity can also be deeply problematic for several reasons. First, under this paradigm, a singular, unified and stable emanation of gay personhood becomes touted as a universal global fixture. Regardless of cultural context, sexual acts—and their seemingly corresponding identities—are assumed to bear identical significance in global civil rights terms.¹⁶³ As Martin Manasalan has aptly observed, those who ascribe to such models of sexual identity often use terms like *closet*, *homophobia*, *gay*, and *lesbian*, as if they were universally applicable to all types of behaviors, individuals, and scenarios.¹⁶⁴ Yet contrary to the prevailing assumption that individuals who have sexual relations with members of the same gender are identified as “homosexuals” or “bisexuals,” there are numerous individuals (both in the United States and elsewhere) who would never conceive of identifying as such and yet who routinely engage in same-sex sexual activity.¹⁶⁵ As Gilbert Herdt explains, “[t]hey may regard themselves as ‘heterosexuals,’ ‘straights,’ or just ‘human beings’ who on occasion participate in homoerotic encounters for various reasons, including pleasure, money, social expectations, and the absence of other sexual opportunities.”¹⁶⁶

Second, these endeavors into the cultural production of a gay identity in cross-cultural settings, regrettably, often fail to include the complexity of potential meanings that attach to same-sex sexual activity, thus marginalizing those individuals who fall outside of such substitutive paradigms.¹⁶⁷ As one anthropologist has explained:

163. For example, a September 1994 issue of the GALZ Newsletter, is titled (in traditional gay activist rhetoric) *Come Out, Come Out, Wherever You Are!!*. Emblazoned on the opening pages is a photograph of two men bearing a sign that reads “Closets are for Clothes,” and a poem by Liliane Lijn, a British poet that declares:

out the you of yesterday
the leavings of yourself
the you that never was you

Id. at 3. The issue continues to exhort gays and lesbians in Zimbabwe to come out of the closet, and includes a handy half-page guide entitled “How to Come Out.” The issue states, in typical stridence:

It is long overdue that Zimbabwean gays and lesbians, like their brothers and sisters in America, Europe, Australia [sic], and even across our Southern border, had the courage to chant, “We’re here, we’re queer, get used to it!” Now that’s courage. And that’s political. Where is our pride? Where our courage? And where our dignity?

Id. at 12.

164. See Manalansan, *supra* note 109, at 489.

165. HERDT, *supra* note 8, at 4.

166. *Id.* See also Maura Reynolds, *Kandahar’s Lightly Veiled Homosexual Habits*, L. A. TIMES (April 4, 2002) at A5.

167. See Steven O. Murray & Will Roscoe, *Diversity and Identity: The Challenge of African Homosexualities*, in *BOY-WIVES AND FEMALE HUSBANDS*, *supra* note 1 at 267- 273 (recognizing the presence of indigenous same-sex relationships among men and women that comprise particular identities (such as age-structured relationships) that are analytically distinct from contemporary “gay” identities). See also JUDITH HALBERSTAM, *FEMALE MASCULINITY* 46-47 (1998) (critiquing the presumption that historical emanations of female masculinity simply represent “early forms of lesbianism,” arguing that such equations denies them their historical specificity and simplifies the multiplicity of forms of same-sex desire); Manderson & Jolly in *SITES OF DESIRE, ECONOMIES OF PLEASURE*, *supra* note 88, at 25 (citing more general problems in examining cross-cultural sexuality,

The adoption of an identity, a process that may involve enormous suffering and defiance, always implies the closing off of other options. In this way, an identity gets a fixed character that, once adopted, does not change easily, blurring even for the individuals themselves any distinction between possible innate propensities (that, once expressed, are labeled in certain ways), one's sexual behavior, and the social category into which one has been slotted.¹⁶⁸

Under the substitutive model of sexual identity relied upon by contemporary lesbian and gay activists, same-sex sexual behaviors that do not take on explicitly "gay" or "lesbian" labels are dismissed as "unliberated," largely because they fail to develop into individual political subjects.¹⁶⁹ Instead, they are cast as "prepolitical," and "closeted," in stark contrast to the "liberated," "out," politicized, "modern" gay identity.¹⁷⁰

Third, on a deeper level, proponents of the substitutive model often fail to grapple with the important question of whether one's sexual orientation universally—and necessarily—comprises a central aspect of personhood.¹⁷¹ Because people from different cultures may have different ideas about the intersection between sexual desire, behavior, and identity, the very concept of a gay and lesbian "community" may be open to question.¹⁷²

Gay civil rights advocates, traditionally, would argue that to demand protection against harassment and discrimination based on one's sexual identity, it is often necessary to openly acknowledge one's sexual orientation; in other words, to perform the act of "naming oneself," that is, "coming out" as gay, lesbian, or bisexual.¹⁷³ However, this prerequisite of "naming oneself," in practice, translates into excluding large numbers of individuals who engage in same-sex sexual conduct. The self-referential character of the substitutive model of sexual identity thus lends itself to the perception (shared by many gay rights activists) that a presumed equation between public sexual identity and private sexual behavior is the only "proper" way to conceive of the relationship between the two.¹⁷⁴

among them a "lingering imperialism" of scholars in judging sameness and difference from a Western perspective).

168. See Blackwood & Wieringa, *Introduction* to SAME-SEX RELATIONS AND FEMALE DESIRES, *supra* note 88, at 15.

169. Manalansan, *supra* note 109, at 486-87. See also Dunton & Palmberg, *supra* note 128, at 19 (observing that questions of sexual identity must be raised before addressing human rights).

170. Manalansan, *supra* note 109, at 486-87.

171. See LEWIN & LEAP, *supra* note 56, at 13 (observing that "the management of information about our homosexuality is still a *central* theme in how we move around in the world.") (emphasis added).

172. See Dunton & Palmberg, *supra* note 128, at 19.

173. *Id.* at 20. See generally GALZ Newsletter, *supra* note 163 (espousing this view).

174. Yet, even if some individuals feel a strong need to perform this act of self-identification, others feel an equally strong desire to resist labels and categorization. For example, some women in Thailand actively resist using the term "lesbian" because the term entered the Thai language to describe female homosexual pornography largely produced for the heterosexual male audience; and also is thought to describe women-women relationships in overly sexualised, rather than emotional terms. See

Finally, and perhaps most importantly, this model suffers from an overwhelming predisposition in favor of visibility and politicization of sexual identity, unwittingly privileging certain formations of identity over others.¹⁷⁵ For example, *The Pink Book*, a global study of gay and lesbian rights across the world, has unequivocally observed that “the increased visibility of lesbians, gay men, and bisexuals, supported by a strong movement, has proved to be a successful *formula* for confronting and fighting homophobic tendencies in *all* types of society.”¹⁷⁶

Yet, is this “formula” always translatable?¹⁷⁷ As I have argued, in stark contrast to the substitutive models’ presumed equation between identity and conduct, many who engage in same-sex sexual conduct *separate* their sexual identity from their sexual conduct.¹⁷⁸ As one study on African homosexuality observes:

One comes across situations in which same-sex sexual intimacy is tolerated and benevolently overlooked, as long as there is no risk it will interfere with a heterosexual marriage and prevent the bearing and raising of children. Same-sex intimacy is here tolerated, as long as it remains unnamed, and as long as it does not exclude sexual acts with members of the opposite sex.¹⁷⁹

Graeme Storer, *Performing Sexual Identity: Naming and Resisting ‘Gayness’ in Modern Thailand*; 2 INTERSECTIONS 11 (1999), at <http://www.sshe.murdoch.edu.au/intersections/issue2/storer.html>.

Moreover, due to variances in language, the terms “lesbian” or “gay” may not be universally translatable. For example, in June of 1995, a visiting American professor of psychology gave a talk at a Bangkok university on homosexuality. His statement, “[s]ome women have sex with other women but do not consider themselves as lesbians” was mistakenly translated with the word “man” replacing “lesbian.” After murmurings from the audience, and a discussion between the translator and speaker, the sentence was retranslated with the English word ‘lesbian’ carried over into the Thai.” Megan Sinott, *Masculinity and Tom Identity in Thailand*, in LADY BOYS, TOM BOYS, RENT BOYS, *supra* note 1, at 108. Apparently, as the author explained, the term ‘lesbian’ was an “untranslatable culturally specific term.” Yet by no means should one assume that there is an absence of lesbian relationships in Thailand; rather, the terms used to describe such relationships are far more complex and subtle than the use of the term “lesbian” to describe them. *Id.* at 108-116. For similar observations, see Evelyn Blackwood, *Falling in Love with An-Other Lesbian: Reflections on Identity in Fieldwork*, in TABOO: SEX, IDENTITY, AND EROTIC SUBJECTIVITY IN ANTHROPOLOGICAL FIELDWORK 51-75 (Kulick and Willson, eds., 1995); and Gayatri Gopinath, *Homo-Economics: Queer Sexualities in a Transnational Frame*, in BURNING DOWN THE HOUSE 111 (Rosemary Marangoly George, ed., 1998).

175. See e.g., the GALZ Newsletter, *supra* note 163, at 11, which asks, albeit rhetorically, whether it is “even possible” to be “gay without being political.” *Id.* at 11.

176. Manalansan, *supra* note 109 at 490 (quoting from A. HENDRIKS, R. TIELMAN, & E. VAN DER VEEN, THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN/GAY LIBERATION AND OPPRESSION 17 (1993)) (emphasis added).

177. See Chandan Reddy and Javid Syed, *I Left My Country for This?!*, TRIKONE MAG. at 8-9 (October 1999) (challenging “the general imperialistic rhetoric that suggests the West is the site of liberation and freedom and that we come to the States to experience gay and lesbian liberation.”).

178. SHIVANANDA KHAN, SHAKTI REPORT: KHUSH 29 (Naz Foundation 1993) (“[F]or many Asian men, the term “gay” reflects their sexual activity, rather than the context that the term has in defining a person. Lifestyle and sexual behavior is separated.”).

179. Dunton & Palmberg, *supra* note 128, at 21. Instead of using the term “gay” or “lesbian,” this study recommends speaking about “men who love men” and “women who love women” in order to include both individuals who have a sexual preference for members of their own sex, and those who

Thus, what is being liberated, and what is being imprisoned—is not universally applicable to different cultures and behaviors.¹⁸⁰ Some cultures might target gay identity instead of same-sex sexual conduct; and others might target precisely the opposite.

The difference in targeting identity over conduct for moral and legal opprobrium represents one of the most striking challenges faced by sexual minorities in the non-Western world. Such differences carry enormous legal implications for transnational gay civil rights, because they suggest that preferencing identity-based rights in the absence of privacy-based rights—a key function of the substitutive model in the United States—may ultimately backfire in other contexts. For example, a recent case from Colombia involved a law student and gay rights activist who was repeatedly kicked by school guards who shouted anti-gay epithets as he waited inside a University campus.¹⁸¹ After his complaint against the University went unaddressed, various letters of protest on his behalf were answered by the observation that “exteriorization of sexual preference goes against the University principles and will not be tolerated.”¹⁸² In other words, it was the assertion of the identity, the act of naming oneself, or the “exteriorization” of sexual preference—that was singularly objectionable, rather than the tendency or desire to engage in same-sex sexual conduct. Although, as we have seen, there are certainly many situations in the United States that reflects a similar targeting of identity over conduct, sexual minorities elsewhere face an additional, crucial, burden: in some places, an emergent gay identity is not attacked for its visibility alone, but for its equation with “Westernization.”

In sum, as further sections of this Article will elaborate, the predominant equation of identity with conduct in the substitutive model is dangerous in that it risks backlash in many parts of the globe; and exclusionary because it does not offer protection to many who need it. Consequently, as this “modern” invention takes root on a global scale, it is imperative that legal scholars consider whether the substitutive model of sexual identity rests on a particularly limited view of culture, identity, and the self. These differences in both subjectivity and social meaning illuminate some potential limitations of an identity-based global gay or lesbian rights movement.¹⁸³

may occasionally undertake same-sex sexual activity, but who do not consider themselves part of a homosexual community. *Id.* at 20.

180. See Gilbert Herdt, *Gay and Lesbian Youth*, in SOCIAL PERSPECTIVES ON LESBIAN AND GAY STUDIES, *supra* note 54, at 287.

181. See INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, Emergency Response Network Newsletter, *Colombia: University Guards Abuse Student in Retaliation for Complaints*, at <http://www.iglhrc.org/world/southamerica/colombia2001Jul.html> (July 2, 2001).

182. *Id.*

183. See Dennis Altman, *Political Sexualities: Meanings and Identities in the Time of AIDS*, in CONCEIVING SEXUALITY, *supra* note 88, at 101.

IV. A 'TRANSFORMATIVE' MODEL: TRANSGENDERAL HOMOSEXUALITIES

There are a variety of types of same-sex sexual relations that fall outside of the commonly used terms of heterosexual, homosexual, and bisexual sexual orientation. While transgendered persons are also quite visible in the United States, anthropologists have also observed that, in many non-Western contexts, the social meaning of homosexuality is actually defined by transgressions of *gender*, instead of the tendency to engage in same-sex sexual conduct.¹⁸⁴ Consider, for example, the taxonomy of the term "homosexual" in parts of West Africa:

'Homosexual' is mainly used in describing a rather queer, feminine man who likes to play the passive sexual role. Homosexuality itself connotes transvestism and transsexuality. Although there are many same-sex partners in West Africa, only a small portion of them will identify themselves as homosexual. Sex between men is not automatically labeled as homosexual behavior.¹⁸⁵

In this section, I argue that individuals who transgress male/female categories and who engage in same-sex sexual activity *transform* the substitutive relationship between identity and conduct that appears in legal discourse. In other words, transgenderal homosexualities turn the notion of sexual orientation on its head by demonstrating that the "class" of homosexuals or heterosexuals is not defined by same-sex sexual conduct or sodomy (as *Hardwick* suggests) or by the gender or sex of the chosen partner (as the substitutive model suggests).

The destabilization of sexual categories does not simply illustrate the difficulty of labeling; it has integral effects on social justice. As I have suggested in the previous section, particularized terminologies, identities and sensibilities are often lost in the global use of categories of gay or lesbian identity.¹⁸⁶ As Professor David Greenberg explains:

Homosexuality is not a conceptual category everywhere. To us, it connotes symmetry between male-male and female-female relationships When used to characterize individuals, it implies that erotic attraction originates in a relatively stable, more or less exclusive attribute of the individual. Usually it connotes an exclusive orientation: the homosexual is not also heterosexual; the heterosexual

184. In this article, I use the terms "transgender" as an umbrella term to describe a wide range of identities and experiences, including, but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross dressers (also referred to as "transvestites," "drag queens," or "drag kings"); intersexed individuals (also known as hermaphrodites); and men and women, irrespective of their sexual orientation, whose appearance or characteristics are perceived to be atypical. See PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3* (National Center for Lesbian Rights 2000) and the more detailed definitions also listed at note 194.

185. Roberts, *supra* note 14, at 247.

186. Shivananda Khan, *Kothis, Gays, and (other) MSM*, *TRIKONE MAG.*, Oct. 2000, at 14.

is not also homosexual. Most non-Western societies make few of these assumptions. Distinctions of age, gender and social status loom larger. The sexes are not necessarily conceived symmetrically.¹⁸⁷

In terms of law and legal strategy, I argue that the global influx of a gay-identified, substitutive model of homosexuality actively runs the significant risk of alienating other types of homosexualities from protection. As expert Dennis Altman aptly observes, “modern” ways of being homosexual actually *threaten* the position of “traditional” forms of homosexuality, especially those centered around gender nonconformity and transvestism.¹⁸⁸

A. *The Construction of the Transformative Model of Homosexuality*

Gender-transgressive definitions of homosexuality, which some term “transgendered” homosexuality is widely reported throughout parts of Africa, Asia, and Latin America, and represent perhaps the most overlooked and fundamental variation in the different social meanings that surround homosexuality across the world.¹⁸⁹ Transgendered homosexualities are deemed by some to be completely different than the substitutive identities explored in Part I.¹⁹⁰ In contrast to age-structured sexual relations between men (examined in the next section), which suggest widespread cultural acceptance of homoeroticism, transgendered female identities tend to be stigmatized because they are typically regarded as demasculinizing in character.¹⁹¹ Moreover, contrary to the substitutive model, which is defined largely by the gender of one’s object choice, in a transgendered regime, a “homosexual identity” is *not* defined by the sex of the preferred partner. Instead, one’s homosexuality is determined by the conflation of the sexual acts one is perceived to engage in with a person’s gender identity.¹⁹² As David Greenberg explains:

187. DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 3 (1988)

188. ALTMAN, *supra* note 86, at 88.

189. See Drucker, *supra* note 16, at 77; Michael Tan, *From Bakla to Gay*, in *CONCEIVING SEXUALITY*, *supra* note 88 at 92; Roy Chan, Ashok Row Kavi, Greg Carl, Shivananda Khan, Dede Oetomo, Michael L. Tan, and Tim Brown, *HIV and Men who Have Sex with Men: Perspectives from Selected Asian Countries*, in 12 *AIDS JOURNAL* (suppl. B) at S60-61. Similar phenomena have also been reported throughout the world, including some Native American cultures through the persona of the *berdache*. For a very insightful discussion of the *berdache*, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society*, 83 *CAL. L. REV.* 1 (1995), and Mary Anne Case, *Unpacking Package Deals: Separate Spheres are Not the Answer*, 75 *DENV. U. L. REV.* 1305 (1998). For more general treatments of transgendered lives across the world, see GILBERT HERDT, *THIRD SEX, THIRD GENDER* (1993); and SERENA NANDA, *GENDER DIVERSITY: CROSS-CULTURAL VARIATIONS* (1999).

190. See, e.g., Drucker, *supra* note 16, at 77; Michael L. Tan, *From Bakla to Gay*, in *CONCEIVING SEXUALITY*, *supra* note 88, at 92.

191. See Peter Jackson, *Kathoeys <Gay> <Man: The Historical Emergence of Gay Male Identity in Thailand*, in *SITES OF DESIRE, ECONOMIES OF PLEASURE*, *supra* note 88, at 184.

192. Amory, *supra* note 1, at 83. As Jan De Lind van Winjgaarden notes in his study of male Thai sex workers:

in terms of traditional values it does not really matter whether a man’s sex partner is another male (which would stigmatise him as a ‘homosexual’ in the West). Instead, it is the sexual

In the transgendered type, one of the parties abandons an original gender identity. Usually the gender abandoned is male, but sometimes it is a female. The gender-changer may be regarded as a member of the opposite sex, or as an occupant of a 'third' gender role. Often they take a sexual partner of the same anatomical sex, but this is not invariably so. It is gender behavior and identity, not sexual expression, that is critical in this classification scheme; our highlighting this phenomenon as "transgenderal homosexuality" reveals the priorities of a modern Western classification scheme not shared by the peoples among whom this phenomenon is found.¹⁹³

Transgenderal homosexualities represent a crucial break with the substitutive model of homosexuality presented in Part I. I call this model "transformative" for three key reasons. First, in contrast to the West, where the discourse surrounding gay rights has traditionally premised itself on maintaining clear distinctions between types of genders and sexualities, homosexuality in such contexts *is equated with—and thus defined by—*gender-transgression. Put another way, in contrast to the substitutive model of gay homosexuality where sexual identity is taken to be the visible expression of one's preferred sexual behavior and desire, the transgenderal model suggests that a third factor, one's gender identity, instead *transforms* the presumed substitutive relationship between identity and conduct; demonstrating that a transgender identity straddles—and transgresses—the difference between the two.¹⁹⁴

act that a man performs with his sex partner that counts. That is, in terms of sexual behavior, it does not matter much with whom one has sex, but rather what position one takes in penetrative sex. This means that if a male sex worker wants to be seen as a 'real man' in his social environment, he can do so by limiting his sexual script with clients to 'masculine' sex acts, at least in his public accounts of his interactions with clients.

De Lind van Winjaarden, *Between Money, Morality, and Maculinity: Bar Based Male Sex Work in Chiang Mai*, in LADY BOYS, TOM BOYS, RENT BOYS, *supra* note 1, at 196.

193. David F. Greenberg, *Transformations of Homosexuality-Based Classifications*, in THE GENDER/SEXUALITY READER *supra* note 22, at 180. In contrast to the perceived "receptive" transgendered individual, an "insertive" male is considered to be a heterosexual male. Chan, et. al., *supra* note 189, at S60-61.

194. It is important to define what is meant by the term "gender identity" and "transgenderism." The term "transgenderism" refers to an activity or identity that "conflicts with established societal norms of gender construction, such as transvestism and transsexualism." James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1007, 1050 n.1 (1997). Like Wilets, I utilize the same definitions used by the San Francisco Human Rights Commission:

[T]he term 'transgender' is used as an umbrella term that includes male and female cross dressers, transvestites, female and male impersonators, pre-operative and post-operative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.

Gender identity is the deeply felt knowledge of an individual that he or she is male or female; in transgendered persons, the gender identity and anatomical sex may not be in alignment . . . It is the expression of gender identity that results in discrimination because that expression is perceived as conflicting with the expectations placed upon the individual solely because of the form of his or her body, particularly the genitals.

Second, as a related point, the *social meaning* of homosexuality in the community at large reflects this transformation by equating homosexuality with transgenderism, rather than same-sex sexual behavior. Thus (to generalize), unlike gay-identified men who may usually choose other gay-identified men as sexual partners, in a transgenderal regime, there are two kinds of individuals: “heterosexually-identified men” and transgendered partners. This is partly because a “homosexual identity” is defined by *public* transgressions of gender, rather than the comparatively more private same-sex aspects of sexual behavior. Indeed, the continued prevalence of this transformative model throughout the world highlights that the distinction between gender identity and sexual identity has little relevance for transgendered individuals who engage in same-sex sexual behavior.¹⁹⁵

Third, transgenderal homosexualities are deeply entrenched with cultures of masculinity that carry a greater stigma attached to *effeminacy* rather than same-sex sexual conduct. As Stephen Murray observes:

In their widely recognized womanly inferiority, the *maricon* and the *kathoe*y [both transgendered females] visibly reinforce gender stratification. They perpetuate men’s fear of appearing effeminate and the equation between being sexually penetrated and being like a woman in other ways. Those privately involved in receptive homosexuality, but who maintain a masculine public appearance, are obviously unwilling to forgo male privileges, and have a vested interest in ensuring that the stigma remains on effeminacy rather than homosexuality.¹⁹⁶

The following section discusses some of the implications raised by the transformative, transgenderal models of homosexuality in terms of global civil rights. As I will argue, the alleged irreconcilability of these two types of homosexuality—one substitutive, one transformative—thus demonstrates the need for a much more inclusive gay civil rights movement than has been propagated by the substitutive model. In fact, the transformative model of the relationship between identity and conduct illustrates how some groups may be paradoxically excluded from needed protections.

B. Collision of the Substitutive and Transformative Models in Thailand

In recent years, the emergence of “gay” identified social movements across the world has illustrated a hidden danger: the substitutive model upon which the global gay identity is based actively excludes transgendered homosexuals

Id. (quoting JAMISON GREEN, INVESTIGATION INTO DISCRIMINATION AGAINST TRANSGENDERED PEOPLE, ch. 4 (SF Human Rights Comm’n, Sept. 1994)).

195. Peter Jackson and Gerard Sullivan, *A Panoply of Roles: Sexual and Gender Diversity in Contemporary Thailand*, in LADY BOYS, TOM BOYS, RENT BOYS, *supra* note 1, at 6.

196. Murray, in LADY BOYS, TOM BOYS, RENT BOYS, *supra* note 1, at 83; HERDT *supra* note 8 at 141.

from its purview. This situation has become especially apparent in places where a gay-identified community has first emerged, and then collided with, pre-existing transgendered meanings of homosexuality. For example, Thailand's sexual identity system (which historically predated the arrival of gay-identified sexualities) comprised three genders: male, female, and *kathoey*.¹⁹⁷ A *kathoey* originally referred to a "person, male or female, who expressed hermaphroditic features or exhibited behavior considered inappropriate for their sex, and [was] commonly called a 'third sex' within both popular and academic discourses."¹⁹⁸ Now, the term is used to refer to biological males almost exclusively who exhibit feminine identities.¹⁹⁹

Twenty five years ago, in Thailand, the social meaning of the term "gay" was most likely to conjure up the image of a *kathoey*.²⁰⁰ Yet, today, the recent emergence of masculine-identified gay men has transformed such preexisting notions. As one author explains,

[i]n the 1990s, the Thai image of "gay" is increasingly masculine—gym-enlarged biceps and pectoral muscles, accentuated body and facial hair—and the Thai gay male is likely to confidently proclaim, 'I'm gay and I'm a man.'²⁰¹

In contrast to a *kathoey* identity, the term "gay" denotes a masculine, gay-identified homosexual man who ascribes to a substitutive model of sexual identity, and is clearly and actively distinguished from transgender persons or *kathoeyes*.²⁰² As Peter Jackson, an expert on Thai homosexuality, explains:

The radical nature of Thai gayness is not that it breaks the old sex/gender system but that it renders explicit what was previously implicit, and transforms into an identity what was previously a behavior. Thai gayness has emerged from within the traditional sex/gender system and challenges that system by making public what was previously private and by seeking general approval for the conferral of masculine status upon exclusive male homosexuality.²⁰³

197. Peter A. Jackson, *Homosexual and Transgender Rights in Thailand* (unpublished manuscript, on file with author). However, there is some evidence that a "gay" identity may have existed long beforehand. In October 1965, the Thai press in Bangkok reported the existence of several hundred Thai homosexual men who collectively belonged to "the gay association." *Id.* at 3.

198. Jackson, *supra* note 191, at 169. Thais now distinguish between "genuine *kathoeyes*," or hermaphrodites; and "artificial *kathoeyes*," or males who exhibit cross-gender characteristics. In more recent years, the term has also been used as a derogatory slur by heterosexuals to refer to homosexual men, irrespective of whether or not they exhibit cross-gender behavior. *Id.* at 171.

199. *Id.*

200. *Id.* at 166.

201. *Id.*

202. Those who identify as "gay" also distinguish themselves from predominantly heterosexually-identified men who may have sex with other men. The following section will discuss this identity as well. Prudence Borthwick, *HIV/AIDS Projects With and For Gay Men in Northern Thailand*, in *LADY BOYS, TOM BOYS, RENT BOYS*, *supra* note 1, at 62.

203. Jackson, *supra* note 191, at 187.

Indeed, some argue that the term “gay” developed precisely as a mechanism to disengage homosexuality from the label of *kathoey* and its feminine connotations.²⁰⁴

This recent emergence of a gay or substitutive model of sexual identity in Thailand has led some to suggest that it is a Western imposition on traditional sexual and gender norms. Rosalind Morris suggests that this recent gay-identified system of identification is a Western import that is largely irreconcilable with the *kathoey* category.²⁰⁵ While the latter category is indigenous and premised on a tripartite system of gender relations; the former category, Morris observes, is borrowed and premised on Western binary constructions of sexuality.²⁰⁶ And, in Thailand, the conventional, preexisting idioms that determined sexual identity actually *conflict* with this “new” sex/gender system which conflates sexual practice with sexual identity.²⁰⁷ “In the earlier, but persisting regime,” Morris writes, “gender identity was a matter of social form, behavior, and comportment.”²⁰⁸ While it was assumed, and generally required that men and women engage in sexual relations (*kathoeyes* were excluded from this requirement), “there was nothing to prohibit other forms of erotic desire and experience.”²⁰⁹ Under this traditional logic, Morris writes that “virtually any act is acceptable if it neither injures another person nor offends others through inappropriate self-disclosure.”²¹⁰ In contrast, the modern Western system, Morris writes, puts forth a notion of sexuality that “dissolves the separation of private and public by bringing homoerotic desire into the public domain as *identity*.”²¹¹

The collision of the two systems in Thailand is a deeply instructive lesson of the legal repercussions of failing to consider preexisting social meanings of homosexuality. Most significantly, the emergence of this “gay” substitutive model of sexual identity has contributed to increased alienation of the *kathoey*. In other words, Thai gay men who subscribe to the substitutive, gay model have attempted to shift the social stigma from homosexuality onto effeminacy by actively distancing themselves from gender-deviant *kathoeyes*.²¹² As a more acceptable, “modern” model of exclusive male homosexuality emerges, it has

204. Storer, *supra* note 174, at 8.

205. See Morris, *supra* note 91. Others disagree with Morris’ formulation. For example, Graeme Storer argues that Thai gay men draw as much on their own cultural traditions as those from the West in forming gay identities. Storer, *Rehearsing Gender and Sexuality in Modern Thailand: Masculinity and Male-Male Sex Behaviors*, in *LADY BOYS, TOM BOYS, RENT BOYS*, *supra* note 1, at 153 (pointing out that it would be wrong to suggest that Thai gay identity is an ‘importation from the West,’ because such perspectives deny Thai gay men agency in creating their own social and political conditions).

206. See Morris, *supra* note 91, at 19, 23 (observing that the radically different notions of body and personhood that define Thai and Western sex/gender systems makes them culturally intranslatable).

207. *Id.* at 31.

208. *Id.*

209. *Id.* at 32.

210. *Id.*

211. *Id.*

212. Jackson, *supra* note 191, at 185.

defined itself in *opposition to* transgendered persons, thereby labeling them as the “‘unacceptable’ old face of homosexuality.”²¹³

The increased stigmatization of *kathoeyes* by gay-identified individuals becomes even more striking when one considers the discrimination that transgendered persons already face by virtue of their public persona. Contrary to the “tolerance” which some might associate with the absence of sodomy laws in Thailand, *kathoeyes* face much greater social and legal sanctions against their unconventional gender status than their masculine counterparts because the *kathoeyes*’ deviance from gender norms is publicly visible.²¹⁴ For example, in stark contrast to the absence of laws prohibiting sodomy, Thai civil and criminal law has failed to recognize sex changes, which means that post-operative transsexuals are unable to change the sex listed on their official records.²¹⁵ In a 1981 decision, the Supreme Court of Thailand held that a male-to-female transsexual was unable to change her legal sex status. The Court held that a person’s gender could only be decided by genetic and chromosomal factors, and that the only definition of a woman would be “a person who can deliver a baby.”²¹⁶

And, as the global gay rights movement takes hold in Thailand, the military, police, and other state leaders have increasingly targeted transgendered persons due to their visibility. For example, in December of 1996, the Rajabhat Institutes Council, which serves as the governing body for all of Thailand’s teacher training colleges, ruled that all “sexually deviant” and “wrong gendered” students would be prevented from enrolling in its courses.²¹⁷ This decision marked the first “legal” anti-homosexual ordinance since an abolished law was passed in the early 1900s criminalizing acts “against human nature.”²¹⁸ Although it was unclear whether the Institute was targeting visible homosexuals or transgendered persons (or both), evidence suggests that it was

213. See *id.* at 181. As one author observes, “like their ‘straight’ counterparts, Thai gay men now define their identity in opposition to the effeminised *kathoey*.” Storer, *supra* note 205, at 153.

214. Those who criticize *kathoeyes* in Thailand commonly focus on four main points of perception: gender-inappropriate-behavior, abnormal sexuality, social irresponsibility or selfishness for not marrying, and the inherent suffering of leading such a life. Jackson, *supra* note 191, at 176.

215. Jackson, *supra* note 197, at 11. At times, the failure to reassign gender status has led to results where male-to-female transsexuals have been incarcerated in men’s prisons, where they have been raped and subjected to sexual harassment. *Id.*

216. *Id.*

217. See Jackson, *supra* note 197, at 19.

218. Currently, Thailand has no laws prohibiting sodomy. However, this has not always been the case. In the early 1890s, homosexuality and bestiality were jointly outlawed as being “against human nature.” The statute was introduced by a Thai king after visiting Europe, presumably to make Thailand appear “modern” to the West. However, not a single prosecution under the statute ever took place and the law was eventually abolished in the 1950s during a review of the criminal code. Jackson, *supra* note 197, at 10. Yet, despite the absence of legal sanction of homosexuality, some argue that “[c]oming out is almost never considered to be a culturally appropriate option for Thai g/l/t people, except for transgender and transsexual people whose gender transgression cannot be hidden.” Jackson, *supra* note 191 at 177; and Jackson, *supra* note 197, at 12.

the second, rather than the first.²¹⁹ “Teachers must be ‘role models’ who pose no threat of instilling sexual deviancy in young minds. Boys must be taught to be men, and girls must be taught to be women,” proponents of the ban declared.²²⁰ In this sense, like the situation in Zimbabwe, the objectives of the ruling involved limiting public discussions and visibility of homosexuality or gender transgression, rather than outlawing particular behaviors.²²¹

Despite the ban’s eventual lack of success, the Thai government has continued to single out transgendered individuals by enacting regulations to exclude them from television programs and military service. For example, in 1997, the government exempted male-to-female transsexuals from a draft in order to avoid “turmoil” among the troops.²²² And, in 1999, the government of Thailand asked television networks to avoid broadcasting shows “that promote sexual abnormalities” (referring specifically to transgendered persons) in order to prevent “innocent youngsters from imitating unfavorable examples.”²²³

As such examples suggest, transgendered persons may be subject to an increased level of discrimination because they are often the most publicly identifiable sexual minorities. But it is important to also compare how such discrimination fares under traditional protections premised on sexual orientation in the United States. Under the substitutive model typical of anti-discrimination norms, transgendered individuals are excluded from protection from discrimination on the basis of *both* sex and sexual orientation.²²⁴ For

219. Jackson, *supra* note 197, at 20.

220. See Storer, *supra* note 174, at 4.

221. Eventually, the Commission on Justice and Human Rights in Thai Parliament decided that the ban contravened basic human rights principles and decided against its institution. See Jackson, *supra* note 197, at 21.

222. “Its not that we are resorting to discrimination,” a Major General explained. “Those people really belong in beauty parlors, movie studios or bars.” See Rex Wockner, *Thailand Exempts Transsexuals from Draft*, at <http://www.wockner-news.com> at #192 (December 29, 1997).

223. See Rex Wockner, *Thai Gays, Trannies Protest*, at <http://www.wockner-news.com> at #268 (June 14, 1999). Two months later, the Rajabhat Institute announced that male students will no longer be permitted to dress as women. See Rex Wockner, *Thai Male Students Must Wear Pants*, at <http://www.wockner-news.com> at #276 (August 9, 1999).

224. See Taylor Flynn, *Transforming the Debate: Why we Need to Include Transgender Rights in The Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001). For example, although Title VII and numerous state statutes protect employees against discrimination on account of sex in employment, housing, credit, and education; courts have regularly excluded transgendered persons from such protections. Similarly, although ten states and the District of Columbia have statutes that prohibit discrimination on the basis of sexual orientation, and Congress has considered the Employment Non Discrimination Act, which would prohibit employment discrimination on the basis of sexual orientation, transsexuals and transgendered persons are completely unprotected. See Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1323, 1359 nn. 5-13 (listing cases and statutes); Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 285-286 (1997) (observing that transgendered persons enjoy no specific civil rights protections or any other statute prohibiting sex discrimination, handicap/disability discrimination, or discrimination based on sexual orientation.); Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories and Law*, 5 AM. U.J. GENDER & L. 343 (1997); Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L.

example, courts in the United States have concluded that the types of discrimination that transgendered individuals may experience cannot be characterized as discrimination based on “sexual orientation” because such discrimination is motivated by their non-sexual forms of expression.²²⁵ And, using similar reasoning, courts have also concluded that transgendered persons are discriminated against by virtue of their gender identities, not their sex.²²⁶ Moreover, aside from the courts’ exclusion of protections for transgendered persons under the current models of “sex” and “sexual orientation,” many gay civil rights activists in the United States have chosen to actively *exclude* protections based on gender identity in order to ensure a smooth passage for civil rights protections based on sexual orientation.²²⁷ In this manner, the substitutive model again places itself in a hierarchical relationship to another, alternative model of sexual identity. As I have explained, this relationship can translate into leaving one category protected at the cost of excluding another.²²⁸

This exclusionary potential often extends past the United States. For example, a case handed down by the Commission of Human Rights in the Phillipines also exemplifies precisely the growing trend of alienating transgendered persons from current models protecting sexual orientation. The case involved a male-to-female transgender person who was barred from entering the premises of a club on the grounds that she had failed to wear “proper attire” for a male.²²⁹ A gay rights organization presented a complaint to the Commission, calling on them to investigate the case and take appropriate measures. Yet rather than doing so, it dismissed the case on the following, illuminating grounds:

In the instant case nobody can begrudge the complainant’s sexual preference or tendencies, nor his choice of clothes to wear. He has all the rights to practice them, providing, in doing so, it may not violate existing laws, rules, or regulations. In the privacy of his room, he may, alone or together with others of similar persuasions, wear even the most outrageous attire. But he cannot do it in a place like Club Royale, which caters to clients belonging to the middle and upper class

REV. 329 (1999); Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L. J. 1363, 1363-68 (1997); Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled “Other,”* 48 HASTINGS L.J. 1223 (1997).

225. See Wilets, *supra* note 194, at 1007.

226. Several courts have reached this conclusion. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984) (construing “sex” to mean anatomical sex, instead of gender); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977) (declining to extend protections of Title VII to transgendered persons because such discrimination is not properly construed to fall under “sex”).

227. See CURRAH & MINTER, *supra* note 184, at 21-22, 51.

228. See *id.* at 51, discussing a popular fear shared by many GLB people that including transgender protection will undermine efforts to secure civil rights for gay people.

229. See *Commission and Court Send Mixed Messages on Transgender Rights*, IGLHRC Emergency Response Network, Phillipines (August 9, 2001), at <http://www.iglhrc.org/philippines2001Aug.html>.

markets. It is not farfetched that the sensibilities of other patrons may be offended by a male customer wearing a woman's outfit. Club Royale, engaged in a legitimate business endeavor, has all the prerogative to adopt rules and regulations to ensure the protection and satisfaction of customers. Adoption of a dress code falls under this prerogative.²³⁰

Later, the Regional Director of the Commission on Human Rights suggested that the complainant would have only been granted relief if the Court had chosen to formally change his status from male-to-female, as another Manila court had done just recently.²³¹

As the Commission's observations suggest, in the absence of explicit protection of "gender expression" or "gender identity," a transgendered person is usually interpreted to escape existing protections based on gender or sexual orientation. As the Court aptly implied, protection of the latter does not include the former, and vice versa. Thus, unless a transgendered person is willing and able to adopt a formal status change—an option that is foreclosed to most individuals—he or she will escape protections based on gender, sex, and sexual orientation.

This lamentable situation, which has already played itself out in the United States, can be readily replicated in Thailand and elsewhere, particularly since so many *kathoey*s already face exclusion at the hands of "gay" identified persons. Put more directly, the social exclusion faced by transgendered persons can have undeniable legal repercussions. A Thai gay man who subscribes to a substitutive model of identity might seek identity-based protections that focus on sexual orientation, whereas a *kathoey* might seek protection based on gender identity instead. Yet both aims exclude each other: the legal protections that might protect a *kathoey* from discrimination on the basis of gender identity do not, under current models in the United States, include protections based on sexual orientation or conduct; and conversely, protections based on sexual orientation would leave out the principal manner in which a *kathoey* faces discrimination. In sum, the transformative nature of the transgendered identity, with its focus on transgressing both normative categories of same-sex sexual conduct and gender identity, renders it completely unprotected from discrimination under the substitutive model promulgated in the discourse surrounding gay civil rights.

C. *Gender Identity and Sexual Orientation in Global Civil Rights*

The independent co-existence of gay-identified males and transgendered individuals in Thailand exemplifies a number of limitations of the substitutive

230. *Id.*

231. *Id.*

model of sexual identity, and thus underlines the need to reimagine a new, more inclusive model upon which gay rights discourse is based. As the Thai experience suggests, activists in other countries should rightfully be wary of importing the substitutive models of gay identity in their discourse on civil rights, particularly since so many of the most visible homosexualities which exist across the globe are transgendered in nature. Here, the protracted social and political alienation of transgendered individuals suggests the need for a more nuanced understanding of the profound inadequacies of a substitutive model of gay liberation. In sum, the current state of affairs in Thailand—"gays" on one side, *kathoeyes* on the other—demonstrates that the language of gay liberation may render some even more alienated than before.

These competing models of the relationship between identity and conduct—one substitutive, one transformative—present us with a couple of possibilities in terms of imagining how to protect each identity—gay, lesbian, bisexual, and transgendered—from categorical exclusion. At present, the governing discourses on law and civil rights present us with three choices: (1) to enact protections on the basis of transgender identity as a separate category; (2) to expand the definition of sexual orientation to include transgender identity; or (3) to expand the definition of "gender" to include protection of transgendered individuals.²³²

The first approach is most often used by gay rights activists who often recognize the transformative nature of a transgendered sexual identity, and who choose to include "transgendered" individuals within their list of sexual minorities; or, alternatively, to include "gender identity," in addition to "sexual orientation," in a list of protected categories.²³³ The United Nations, for example, follows this approach, and chooses to address violations of civil rights based on both "sexual orientation" and "gender identity" separately.²³⁴ Proponents of this option also favor a separate category of protection to signify that transgendered persons should be treated equally to other protected categories, and that subsuming transgender identity under the purview of gender or sexual orientation masks the unique difficulties faced by transgendered persons.²³⁵

232. See CURRAH & MINTER, *supra* note 184, at 41.

233. The mandate of International Gay and Lesbian Human Rights Commission is one example: IGLHRC's mission is to monitor, document, and mobilize response to human rights violations on the basis of sexual orientation, gender identity, and HIV sero-status. www.iglhrc.org/about/index.html (last visited May 19, 2002).

234. See *Historic Progress: UN Officials Move to Address Human Rights Violations Based on Sexual Orientation, Gender Identity*, ACTION ALERT, at http://www.iglhrc.org/world/us_canada/UnitedStates2001June.html (June 5, 2001).

235. As one transgender activist pointed out, if gender identity is subsumed under the protected category of sexual orientation, most people will never realize that transgendered persons are protected, and will continue to violate the law. However, one danger in utilizing this approach is that it can often replicate unduly narrow requirements for protection based on gender identity. For example, a New Orleans ordinance that aims to protect transgendered persons contains a four-part definition of gender

On the other hand, treating the two types of discrimination separately also suggests that they are distinguishable in expression and motivation. However, some authors suggest that they may not be as causally distinct as the categories suggest. Professor James Wilets, for example, has suggested that "to the extent societies are uncomfortable with homosexuality, it is usually because that activity is perceived as crossing *gender*, rather than sexual, boundaries."²³⁶ Wilets argues that the oppression of sexual minorities in such contexts is inextricably linked to rigid polarities of gender, which oppresses both women and minorities in similar ways.²³⁷ Thus, he argues that a society that broadens its conception of appropriate gender roles will also embrace same-gendered sexual behavior.²³⁸ Consequently, Wilets argues that feminism and gay social movements share an important, and often overlooked, commonality of challenging gender norms. For this reason, it is important to link anti-gay and transgender discrimination in one corrective strategy, not merely because gay rights activists usually sacrifice one in favor of the other, but because anti-gay discrimination is often manifested by discomfort with *both* transgendered and gay persons.

Consequently, the second approach, which is far more desirable, takes the position that both homosexuality and gender transgression are integrally related and need to be protected under a single category. This inclusive strategy involves recognizing the particular visibility of those who are often targeted for abuse. Consider the state of affairs in Thailand: since many men, women, and transgendered people who engage in sexual conduct with one another do so in private, and escape detection, the law restricts itself to interfering with *public* conduct, rather than private behavior. This translates into a strategy that restricts the expression of *both* publicly-identified gay and lesbian individuals and those who are visibly transgendered. In such places, the law tends to restrict itself to persecuting groups who *visibly* deviate from social, sexual, and gender norms: namely, openly gay persons or transgendered entities.²³⁹ Another example is Mexico, where although consensual homosexual acts have been legal in private for more than a hundred years, and personal sexual freedom is considered very important, the government has actively repressed

identification, and excludes cross-dressing from protection unless the person can document being diagnosed with gender identity disorder. See CURRAH & MINTER, *supra* note 184, at 41-42.

236. Wilets, *supra* note 194, at 1005 (emphasis added).

237. *Id.*

238. *Id.*

239. Gay groups locally and in Mexico City have taken strong stands against the murder, persecution, and incarceration of transvestite prostitutes in Chiapas in 1995 and 1996. Juan Luis Alvarez-Gayou Jurgenson, *Mexico*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY, *supra* note 24 at 93. As one activist observed, "[t]he government has said it will not protect transvestites unless they are dressed like men, insinuating that it is okay to kill homosexuals if they are visible." *Anti-Queer Violence Continues in Mexico*, S.F. BAY TIMES, Feb. 25, 1993, at 43 (quoted in *Hernandez-Montiel*, 225 F.3d at 1096-97).

public expressions of homosexuality by utilizing laws against public indecency to prey upon visible homosexuals and transvestites.²⁴⁰

The Mexican and Thai examples suggest an important difference from the *Hardwick* experience in the United States and compel us to re-imagine a strategy for gay civil rights that includes the transformative model of sexual identity. Whereas the presence of sodomy laws pierce the realm of sexual privacy between consenting adults; the *absence* of sodomy laws may create an incentive for law enforcement to regulate *public* manifestations of sexuality instead. Thus, one possible strategy towards ensuring protection for both visibly gay and lesbian-identified individuals and transgendered minorities requires *broadening* the definitional category of sexual orientation and identity to include transgendered persons. This situation can be illustrated domestically with reference to the case of Geovanni Hernandez-Montiel, described by the Ninth Circuit Court of Appeals in the United States as a “gay [man] with [a] female sexual identity” who applied for political asylum after escaping from Mexico.²⁴¹

Hernandez-Montiel realized that he was attracted to members of his biological sex by the time he reached the age of eight, but he also began to dress and behave as a girl by the time he was twelve. His behavior prompted numerous reprimands from family, school authorities, and classmates, and brutal harassment and sexual assault at the hands of Mexican police officers.²⁴² Mexican officials arrested Geovanni twice, telling him that it was illegal for men to dress as women and for homosexuals to walk down the street.²⁴³ After a failed attempt to escape to the United States, Geovanni returned home to Mexico to live with his sister, who enrolled him in a program to “cure” his sexual orientation and gender identity by altering his feminine appearance.²⁴⁴

After abandoning the program, Geovanni returned to the United States and applied for asylum.²⁴⁵ The Ninth Circuit adopted the testimony offered by a professor, who testified that certain types of homosexuals are subjected to greater abuse than others:

... it is “accepted” that “in most of Latin America a male before he marries may engage in homosexual acts as long as he performs the role of the male.” A male, however, who is perceived to assume the

240. Gayou Jurgenson, *supra* note 239, at 87-96, 89.

241. Although I would prefer to use the female pronoun, I will refer to Geovanni in male terms because the court did so, notwithstanding the importance of recognizing her female gender identity. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000). At one point, his school asked his parents to consent to his expulsion, and then barred him from transferring elsewhere unless he agreed to change his sexual orientation. A day after his expulsion, his parents threw him out of the house. *Id.* at 1088.

242. In one incident, he was forced to perform oral sex on a male officer; in the second, he was raped while the officer held a gun to his temple. *Id.*

243. *Id.*

244. *Id.* at 1088.

245. *Id.* at 1089.

stereotypical “female,” *i.e.*, passive role, in these sexual relationships is “ostracized from the very beginning and is subject to persecution, gay bashing as we would call it, and certainly police abuse.”²⁴⁶

For this reason, the court concluded that gay men with female sexual identities comprise a separate society in Mexico, and are often blamed for present economic and political problems.²⁴⁷

Nevertheless, the lower court which heard Geovanni’s case found that he had failed to demonstrate persecution because he could *choose* to alter his feminine appearance. The lower court viewed the manifestation of Geovanni’s sexual orientation as a volitional choice, rather than an immutable characteristic of his personhood. It observed:

If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent’s decision to dress as a women [sic] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it.²⁴⁸

Upon review, the Ninth Circuit squarely rejected this finding, and concluded that the particular social group Geovanni belonged to comprised gay men with female sexual identities. The court found *both* Geovanni’s sexual orientation and female sexual identity to be transformative in nature; *i.e.* “immutable because it is inherent in his identity.”²⁴⁹ The court remarked that gender identity and sexual orientation “are so fundamental to one’s identity that a person should not be required to abandon them.”²⁵⁰

Significantly, the court used a hybrid of the substitutive and transformative models by describing Geovanni, not as a transgendered person, but as a “gay man with a female sexual identity.” The court’s unique response highlights the possibility of redefining transgenderism to fall along a continuum of sexual orientation, without conflating the two, and without excluding one in favor of the other. Citing to various cases and texts that noted how fundamental sexual orientation is to a person’s sexual identity, the court observed that sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.²⁵¹ Given the trauma which Geovanni faced throughout his life, the court concluded that his “female sexual identity must be

246. *Id.*

247. *Id.* at 1090.

248. *Id.*

249. *Id.* at 1093.

250. *Id.*

251. *Id.* at 1094.

fundamental, or he would not have suffered this persecution and would have changed years ago.”²⁵²

Here, by focusing equally on the interior and exterior aspects of Geovanni’s personality (his “homosexual” sexual orientation and “female” sexual identity, respectively), the Ninth Circuit’s formulation ably transcended the overly rigid equation between identity and conduct favored by the substitutive model. It accomplished this by protecting both Geovanni’s gay subjectivity as well as his outward female appearance by concluding that Geovanni *manifested* his sexual orientation by adopting gendered traits characteristically associated with women.²⁵³ By rejecting the lower court’s finding that he was not persecuted on account of his sexuality, the court observed that Geovanni’s effeminate dress and sexual orientation could not be classified as volitional behavior, observing, “[t]his case is about sexual identity, not fashion.”²⁵⁴

In this manner, the court broadly construed sexual orientation to include transgendered identification, drawing a key linkage between harassment based on transgender appearance and harassment based on sexual orientation. The opinion’s conflation of the two is actually a protective move that captures protections for both sexual orientation and transgender identity through a single theory. It represents a milestone in ensuring protections for transgendered individuals and other sexual minorities because it unquestionably broadens the category of sexual orientation to include transgenderism. This linkage represents a complete break with many other cases in the United States which have refrained from protecting transsexuals on the basis of their sexual orientation or on the basis of gender. In sum, by observing that one’s gender characteristics *can* comprise an outward manifestation of one’s sexual orientation, the court ensures protection for both transgendered and gay-identified sexual minorities.

Hernandez-Montiel is also significant because it transcends the exclusions of the substitutive model by recognizing the cultural differences that distinguish transgendered from both self-identified gay and heterosexual individuals who engage in same-sex sexual conduct. While the opinion admirably refrains from imposing a “gay” sexual identity on all three groups, it ensures that all three receive protections on the basis of sexual orientation. In sum, by broadening the category of “sexual orientation” to include transgendered individuals, who are thought to manifest their homosexuality by virtue of the adoption of female characteristics, the Ninth Circuit demonstrates

252. *Id.* at 1095.

253. *Id.* at 1096.

254. *Id.*

precisely the direction that identity-based claims to gay and lesbian civil rights must take if they are to be inclusive.²⁵⁵

V. HOMOSEXUALITY WITHOUT IDENTITY: 'RITUALIZED' AND 'ADDITIVE' MODELS

Transgendered persons are not the only alternative configurations of identity and conduct that are excluded by the substitutive model. This section will introduce two other alternative formulations of the relationship between identity and conduct, which I call "ritualized" and "additive" models, respectively. In the "ritualized" model of homosexuality, the performance of same-sex sexual behavior is *required* as a formal rite of passage for men passing into adulthood.²⁵⁶ Here, no particular name or identity attaches to such male homoeroticism; instead, it is considered an appropriate, even integral, aspect of male social development.²⁵⁷

Ritualized homosexuality conclusively demonstrates that legal definitions of sexual orientation are extraordinarily context-specific. Contrary to the perception that one's "gay" or "lesbian" sexual orientation is defined by a predisposition towards sexual activity with members of a particular sex, some cultures may view same-sex sexual behavior as a normal *part* of social development rather than an identity-based phenomenon. Such differences force us to recognize, following the insights yielded by social construction, that same-sex sexual behavior does not always relate to sexual desire, sexual orientation, or sexual identity and underscores the point that a community can have different social meanings for such behavior. Yet all too often, these important examples are cast as "archaeological artifacts" or anthropological differences²⁵⁸ rather than crucial legal considerations.

However, such cultural differences undoubtedly translate into the social meanings that surround homosexuality, and, at the very least, bear some

255. Finally, aside from seeking a possible hybrid of the substitutive and transformative models suggested by the *Hernandez-Montiel* case, a third option involves redefining definitions of *gender* to include transgender identity. See CURRAH & MINTER, *supra* note 184, at 41. Here, courts and lawmakers might choose to define gender stereotyping as a kind of sex discrimination. However, because the success of this method depends principally upon the existing jurisprudence on gender and sex within each individual country, it is beyond the scope of this Article. In the absence of well-defined protections for women (or men) against gender and sexual stereotyping, the *Hernandez-Montiel* option of defining sexual orientation to include the transformative model of sexual identity appears to be the most suitable manner to ensure that the transformative model of sexual identity is accorded equal protection to the substitutive model.

256. Age-stratified homosexuality has been noted throughout literature and history in various cultures. See Martha C. Nussbaum, *Platonic Love and Colorad Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994) (observing the presence of age-structured sexuality among men in ancient Greece).

257. Today, there are tribes in Irian Jaya, Indonesia and Papua New Guinea which have institutionalized male initiation rites. See Chan, et. al., *supra* note 189, at S60.

258. Manalansan, *supra* note 109, at 488.

importance for the future of globalizing gay civil rights. In the second main section, in order to highlight the legal ramifications of such differences, I discuss how the public health movements *against* categories of sexual identity in India aptly demonstrates the limited relevance of the post-*Hardwick* paradigm of identity politics. Compared to the gay civil rights movements that we have seen, which tends to reify and polarize essentialisms in sexual identity, culture, and gender, the public health movement in India has emphasized the importance of creating a movement that transcends these categories.

A. Ritualized Homosexuality: Age-Structured Relations Between Men

In 1974, Gilbert Herdt, a classically-trained anthropologist, set off for New Guinea to live among Sambian warriors and to perform research on the existence of sexual activity among men there.²⁵⁹ When he first arrived, Herdt recalled that asking his new Sambian contacts about homosexuality or male-male sexual behavior typically brought about outright denial, laughter, or puzzlement.²⁶⁰ Yet months later, Herdt observed a series of secret Sambian rituals in which boys were “inseminated” by slightly older men, involving the placement of semen on or in a younger male.²⁶¹ The boy-insemination ritual is used in Sambia to separate boys from their mothers and to develop strength and masculinity.²⁶²

Age-structured models of ritualized homosexuality challenge traditional perceptions of sexual identity and desire in both culture and law.²⁶³ First, at its most basic level, such rituals demonstrate the possibility that other cultures may completely lack a concept of homosexuality as a sexual identity or a type of person, and yet routinely engage in same-sex sexual practices.²⁶⁴ Second, such patterns also challenge the very definition of homosexual identity as deviant or abnormal, reminding us that homosexual relations do not always take on a social meaning that is external to preexisting organizations of gender, kinship and economy. Indeed, as Herdt observes, in Sambia, “to be ‘normal and natural’ [male] is to be inseminated by another man and then to take the role of inseminator, first to a boy, and then to a woman, at a later stage following marriage.”²⁶⁵

Third, as Herdt explains, boy-insemination rituals challenge the very essence upon which sexual desire (and therefore sexual identity) is placed. As Herdt asks,

259. HERDT, *supra* note 8, at xi.

260. *Id.*

261. *Id.* at xii.

262. *Id.* at 13, 115.

263. For an insightful discussion of Herdt’s work, see Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998).

264. HERDT, *supra* note 8, at xiii, xiv.

265. HERDT, *supra* note 8 at xiii.

[d]oes the Sambia boy desire sexual intercourse with the older male? Is the older male sexually attracted to the boy? Indeed, what does 'erotic' or 'sexual' mean in this context, and is 'desire' the proper concept with which to gauge the ontology? Or do other factors, such as power or kinship, produce the sexual attraction and excitement (conscious or unconscious) necessary to produce arousal and uphold the tradition?²⁶⁶

Patterns of age structured homosexual relations therefore challenge deeply held notions of the origin and function of sexual desire and eroticism among male relationships.²⁶⁷ Rather than sexual activity existing as a function of sexual desire, ritualized homosexuality suggests that such activities can exist as a function of culture and tradition. In sum, Herdt's work also demonstrates a point that is virtually ignored within legal frameworks governing sexual orientation: that sexual identity can be entirely divorced from sexual activity.

In Sambia, sexual activity between males is considered an acceptable, even integral ritual, but the very notion of a sexual *identity* based on such same-sex sexual behavior is ultimately considered incomprehensible. Herdt comments that he "had reached the limits of cross-cultural understanding" when he tried to translate the word or notion of "gay."²⁶⁸ For this reason, Herdt refrained from labeling individuals who prefer sexual activity with other males as homosexuals, explaining that in the absence of "homosexual" or "gay" categories of identity, it would be ethnocentric to project these meanings onto such behavior.²⁶⁹

In contrast to dominant perceptions of sexual orientation and identity, neither partner is considered to be a distinct *type* of person in Sambia; rather, the practice of same-sex sexual relations among men is considered to be universal and mandatory. This represents a radical shift from the presumed substitutive relationship between the two that figures prominently in legal discourse and highlights the necessity for recognizing cultural variations in the social meaning of homosexuality.

Why is a study of this model worth exploring in contexts that are so obviously different than the conditions in the United States and elsewhere throughout the world? The answer is very simple. Such experiences highlight the continuing danger associated with universalizing categories of sexual orientation that attempt to equate same-sex behavior with certain types of identity. As Part I has suggested, a substitutive relationship between identity and conduct is usually considered to be the preferred trajectory of gay sexual

266. *Id.* at 122.

267. While Herdt reports the existence of emotional intimacy among men, he observes that its form is entirely different from the traditional 'couple' form that Western models often create. *See id.*

268. HERDT, *supra* note 8, at xiii (observing that "[Sambian] society did not have a concept for homosexual or gay, and these notions, when I translated them in the appropriate way, were alien and unmanageable.").

269. *Id.* at 5, 122.

identity. However, it is important to recognize that this formulation may not translate as successfully in other cultural contexts.

This situation has both positive and negative consequences for individuals who prefer members of the same sex. Speaking from a gay civil rights perspective, it is obviously a good thing that individuals who engage in same-sex sexual behavior are not stigmatized as deviants. The absence of a stigma attached to same-sex sexual activity thus suggests the accompanying absence of legal prohibition of same-sex sexual activity.

However, if homosexuality is not considered 'deviant,' but instead is considered a normal *part* of male social behavior and development, then an identity that is based on one's homosexuality is an identity without a distinguishing substance. Here, the preclusion of a gay identity—and a gay community—has real, potentially negative, consequences. Because the social meaning of sexual activity among men is connected to—rather than separated by—the institutions of masculinity and marriage, an independent gay existence is thought to be incomprehensible in Zambia.

In practical terms, this means that individuals who *do* exclusively prefer members of the same-sex are prohibited from developing an identity and community with others who share this preference. For example, Herdt interviewed one man, Kalutwo, who revealed a history of broken, childless marriages and an exclusive attraction to males throughout his interviews. In another cultural context, Herdt comments that Kalutwo might have been viewed as a "gay" man:

In a society that had a homosexual role, Kalutwo might have found more social support or comfort and perhaps might have been able to make a different transition into middle age. But his village still accepts him, and he has not been turned away or destroyed—as might have occurred in another time had he lived in a Western country.²⁷⁰

As this anecdote explains, the compulsory nature of marriage and procreation makes it virtually impossible for individuals who are exclusively attracted to members of the same sex to form a lifestyle, identity, or concept of personhood based on this preference in Zambia. In other words, same-sex sexual conduct in Zambia is not considered part of a "gay" identity; thus, the "coming out" paradigm, cast as a function of one's sexual orientation and identity, is vastly inapposite.

Ironically, although it may be considered socially acceptable in Zambia to have sexual contact with members of the same sex, the fact that Zambian culture failed to recognize the possibility of homosexual or gay *personhood* meant Kalutwo would never be able to form cognizable relationships with others based on a shared sense of sexual identity. As Kalutwo's experience illustrates, the absence of an independent gay identity may be profoundly

270. HERDT, *supra* note 8, at 122-23.

alienating even if one can enjoy social acceptance as a man who engages in same-sex sexual activities.²⁷¹

Such observations highlight the need for a greater recognition of the legal differences between concepts of homosexuality based on *personhood* (as in the substitutive model), versus concepts of homosexuality that are based solely upon sexual behavior. As the ritualized model demonstrates, a self-concept that is based on the latter, rather than the former, renders the legal issues typically associated with gay civil rights, like recognition of same-sex partnerships or civil rights protections based on sexual orientation, somewhat untranslatable in the Sambian cultural context. Taking such differences into account ultimately reveals the necessity for a more nuanced understanding of some of the limitations of universalized concepts of gay personhood and underscores the need for a valuable reassessment of identity-based civil rights in other cultural contexts.

B. Challenging Compulsory Identification in India

The Sambian scenario is not merely a relic of pre-modernism. In the past few years, several other movements outside of the West have also emphasized how an overreliance on identity also excludes other individuals who engage in same-sex sexual conduct. For example, at a recent civil rights conference in South Asia, the leader of a Sri Lankan gay rights group declared, “[w]e need to look at the way our people are identified in Asia and whether there is a need to change the traditional Western labels and identities like gays, lesbians, transsexuals, etc. and come out with our own identities that reflect Asian society and are acceptable to local cultural norms.”²⁷² Such rethinking of these labels of identity has also extended to the realm of law, where many have recognized that the exclusion of alternative models of sexual identity has resulted in an excessively limited scope of protection.

The most visible movement advocating this view stems from the global public health movement surrounding men’s sexuality, which, in the wake of the AIDS epidemic, has expressly resisted using terms of gay or bisexual identification because of the risk of alienating individuals who engage in same-sex sexual conduct, but who do not identify as “gay,” “bisexual,” or “homosexual.” Because individuals who engage in such contact do not self-identify under these terms, they are not necessarily represented in the identity-based strategies often used by legal activists who subscribe to a substitutive model.

271. Herdt observes that Kalutwo was increasingly at odds with his male peers socially and was often teased for his lack of wife or children. *Id.* at 123.

272. Feizal Samath, *Rights-Asia: Sri Lankan Gay-Lesbian Rights Groups Plan [to] Meet*, INTER PRESS SERVICE, Dec. 8, 1999.

Consequently, instead of focusing on certain identities, public health strategies have focused on *behavior*. This anti-identity approach, I would argue, has emphasized the existence of a different construction of the relationship between identity and conduct in which same-sex sexual behavior is considered to be additive (or separate from), not substitutive to, sexual identity.²⁷³ This represents an important break with conventional notions of sexual identity and teaches us a number of complex lessons regarding the need for privacy and autonomy-based strategies across the world. As I argue, the existence of ritualized and additive models demonstrate that such protections implicitly require privacy protections as a *precondition to*, rather than a *substitute for*, other non-discrimination provisions based on sexual orientation.

1. *The Additive Model of Sexual Identity and Conduct*

In India, in the public health field, several prominent activists have concluded that the language of “identities” and Western constructions of sexuality are markedly inappropriate in delivering culturally specific HIV/AIDS health services to some men in South Asia.²⁷⁴ Instead of the term “gay” or “homosexual,” public health activists have opted to use the term “men who have sex with men” (MSM).²⁷⁵ The term MSM refers to men from all age groups, marital status, economic classes, educational backgrounds, caste and religious communities, sexual identities, and gender identities who engage in sexual activity with other men.²⁷⁶ Use of the term, they argue, is necessary for effective health interventions, because MSM do not possess a “gay” self-identity, do not see themselves as bisexual, yet are not “conventionally straight.”²⁷⁷ In other words, the term is used to denote those for whom homosexuality connotes a behavior, not an identity. By examining the reduced salience of terms like “gay” and “homosexual” among MSM, we can come to a greater understanding of the culturally specific assumptions underlying them.

273. See also Tom Boellstorff, *The Perfect Path, Gay Men, Marriage, Indonesia*, 5 GAY & LESBIAN Q. 475-510 (1999).

274. Shivananda Khan, *Culture, Religion and Human Rights*, 15 NAZ KI PUKAR 18 (Oct. 1996).

275. Shaffiq Essajee, *Interview with Anjali Gopalan, Executive Director of the Naz Foundation*, TRIKONE MAG., Oct. 1996, at 7 (“Not to say there are no gay men in India but this identity is sort of a luxury that doesn’t really extend beyond the educated upper classes. The majority of men who have sex with men don’t see themselves as gay or even homosexual.”).

276. Deep Purkayastha, *MSM Networks: Identity Categories versus Identity Continuum*, 27 NAZ KI PUKAR 16 (Oct. 1999).

277. JEREMY SEABROOK, *LOVE IN A DIFFERENT CLIMATE* 141 (1999). According to Shivananda Khan, use of the term MSM slowly came into being because the term “gay men” or “homosexuals” inadequately conflated identity with behavior. However, as Khan points out, even this term fails to include transgendered entities, like the *waria* of Indonesia; the *bakla* of the Phillipines, and *hijras* in India. See Shivananda Khan, *The Risks of Categorization*, 21 NAZ KI PUKAR 3 (Apr. 1998). A related scenario is reported among some male sex workers in Thailand who engage in sexual intercourse with both men and women, but who prefer having sex with women. Though they might describe themselves as heterosexual in orientation and sexual preference, society sees them as homosexual or bisexual. Roberts, *supra* note 14, at 245.

Although I use India as a primary example of this phenomenon, largely due to the body of literature that has developed on this topic, I do not mean to suggest that the circumstances discussed here are entirely unique to India (or to males) alone.²⁷⁸ However, the public health debates surrounding global efforts at AIDS prevention have provided a fascinating and largely overlooked arena in which dominant Western paradigms of gay identity have been soundly rejected in favor of broader, more inclusive strategies of public health intervention. A brief glimpse at this debate therefore exposes some limitations in translating gay identity paradigms to cultures which lack the same assumptions regarding the centrality of sexuality to personhood as in the West.

In South Asia, public health advocates report that they have found the word "gay" to have "little meaning, political or otherwise," to many men who have sexual relations with other men.²⁷⁹ Even where it appears, the term "gay" is used to refer to a sexual behavior alone, rather than an identity in and of itself, reflecting a perception shared by many public health experts that male-to-male sexual activity is not a "widely acceptable criterion around which all MSM can define themselves as a community."²⁸⁰ In stark contrast to the United States' focus on identity as a mode of community building, for some MSM, building a demarcable community around sexual conduct is characterized as "unnecessary" and "devoid of meaning."²⁸¹ Thus, instead of taking on a "gay" self-identity, MSM may adopt instead a variety of indigenous terms and identities to describe particular sexual behaviors; or none at all.

The proliferation of competing identities demonstrates the difference between the concept of a fixed and stable perceptions of gay identity and the more fluid sexuality of many men and women throughout the world.²⁸² As a prominent public health activist describes,

In India, for the majority of men who have sex with men, personal identity is not seen as the main [] issue. Behaviours are constructed within cultural frameworks of compulsory marriage and procreation, in terms of homosociability, lack of privacy, extended and joint family networks and so on. What we have then is a range of sexualities, a range of homosexualities and homosexual behaviours, a range of

278. See, e.g., Stephen O. Murray, *Male Homosexuality in Guatemala*, in *OUT IN THE FIELD*, *supra* note 56, at 239. I focus on India for two key reasons. First, because the literature produced by public health activists who work among men in India is incredibly sophisticated in its approach to non-Western organizations of gender, sexual identity, and sexuality. Second, the current state of affairs in India represents yet another interesting model of how the emergent gay or lesbian-identified movement negotiates its newfound visibility with preexisting social meanings concerning sexual behavior between individuals.

279. Purkayastha, *supra* note 276, at 16. See also Chan et al., *supra* note 189, at S60; Debanuj Dasgupta & Deep Purkayastha, *Being in the Game*, *TRIKONE MAG.*, Apr. 1996, at 10.

280. Purkayastha, *supra* note 276, at 16.

281. *Id.*

282. SEABROOK, *supra* note 277, at 10, 13, 52.

identities that very often are very differently constructed than in the West.²⁸³

Instead, sexual identity in the MSM community (similar to the sexual systems described in the previous section on transgendered identity), is largely determined by perceived sexual *roles* rather than the sex of the chosen partner.²⁸⁴ This roughly translates into three different types of male homosexualities—for each of which the term “gay” is profoundly insufficient in India. For example, cultural norms in parts of South Asia suggest that a perceived “penetrator,” does not adopt a gay or homosexual identity.²⁸⁵ Instead, among MSM, he is labeled a “*giriya*” or “*panthi*,” which directly translates to a “real [presumably heterosexually-identified] man,” and who would be greatly offended if he were described as gay or homosexual. To him, only effeminate males can be thought of as such.²⁸⁶ A second group, deemed “*kothis*,” involves those who are thought to take a “passive,” or “receptive” role, and who exhibit gender variant characteristics, such as effeminacy. The individuals comprising this group have an entirely different sexual identity than the prior group, one which stems from their cultural association with norms of feminization.²⁸⁷ A third group consists of “*hijras*,” who constitute the most visible part of the MSM network because they are transgendered individuals.²⁸⁸ And finally, there are also other terms used to describe particular kinds of perceived behaviors and entities that fall outside of these groups.²⁸⁹ Because of the persistence of such diverse sexualities and the divergence between each

283. Shivananda Khan, *Community Action in Action*, 10 NAZ KI PUKAR 14 (July 1995); Shivananda Khan, *Sexuality and Sexual Health in India*, 14 NAZ KI PUKAR 15 (July 1996) (making same observation).

284. Chan, et al., *supra* note 189, at S60.

285. Carol Jenkins, *Varieties of Homosexuality in Bangladesh*, 24 NAZ KI PUKAAR 16 (Jan. 1999); Purkayastha, *supra* note 276, at 16.

286. See Marion Lloyd, *Out of India's Antigay Closet, Producer Tries to Ease Strictures*, BOSTON GLOBE, Oct. 24, 1999, at A34. As Jeremy Seabrook explains:

In many parts of the South, a distinction is sharply—and often falsely—made between the macho role of the insertive partner and the feminized role of the receptive partner. The male identity of the former is not thought to be impaired by the fact that he has sex with another man . . . This is why many people in the South do not recognize themselves in the “gay” paradigm.

Jeremy Seabrook, *Its What You Do*, NEW INTERNATIONALIST 328 (October 2000).

287. It is worth adding that these terms are merely indigenous descriptive terms used by public health specialists and others; there is wide anecdotal evidence that privately, individuals may undertake roles that differ from perceived assignations. Moreover, it is also important to note that only a small percentage of this second, “feminized” group of men are transgender-identified. See Purkayastha, *supra* note 276, at 16.

288. *Hijras* constitute a separate religious community, some of whom participate in ritualized castration, and others who are homosexual, transgendered, or impotent men. They are believed to be endowed with religious authority, worship the Hindu goddess Bahuchara Mata, and participate in theatrical blessings of children and newly weds. For more detailed discussion, see SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* (1998).

289. See Shivananda Khan, *Sexual Health Workshops in Bangladesh and India for Males who have Sex with Males*, 17 NAZ KI PUKAR 3-4 (Apr. 1996).

identity, some have claimed that establishing the universality of gay identity is impossible.²⁹⁰

Nevertheless, in the past few years, some public health activists have declared that MSM *is* an identity, in and of itself. One public health expert, Shivananda Khan, for example, who is an outspoken proponent of this view, suggests that an intervention strategy that requires the assertion of a particular sexual orientation will alienate those who desperately need public health education on HIV prevention. He continues to elaborate:

South Asia has an incredibly diversity of identities, desires, and frameworks of expression—a true queer space. Hijras, transvestites, transgendered, gay-identified men. . . men/males who have sex with other men/males, in all its variety of terminologies, behavioural choices, desires and constructions. Are we truly saying that we should reduce this diversity into the singular construction of a gay identity?²⁹¹

The increasing use of “MSM” to denote men who have sexual relations with other men as an alternative *identity*, instead of a descriptive behavioral term, has raised troubling questions and created fissures within the international gay rights and public health communities. On a deeper level, its very existence also challenges the dominant assumptions that often form the basis of a gay identity, demonstrating the complex questions that are raised when a person’s internal identities differs from the legal categories of identity that might apply to them.

At the most basic level, the question of whether MSM comprises a coherent self-identity in its own right further complicates the divide that exists between conduct and identity, forcing us to contemplate what comprises a “gay” identity in comparison to MSM. According to public health advocates, the ‘Western’ (or what I call ‘substitutive’) model of being gay is viewed as resoundingly inappropriate.²⁹² Rather, their observations suggest that the MSM model of sexual identity is “additive,” rather than substitutive, because it demonstrates that one’s sexual identity—heterosexual, homosexual, or bisexual—can be entirely *separated* from one’s sexual conduct or desire. Three ideas underlie this resistance to identity-based strategies. First, according to the MSM perspective, many who engage in same-sex sexual conduct do not identify, and will never identify, as gay, homosexual, or bisexual. They see their sexual orientation as heterosexual, and consider their same-sex sexual activities to be a completely separate pastime, rather than a determinative part of their identities. In contrast, as we have seen, a “gay” identity under the substitutive paradigm is thought to assume “an identification

290. See SEABROOK, *supra* note 277, at 86.

291. Shivananda Khan, *Kothis, Gays, and (other) MSM*, TRIKONE MAG. at 14 (October 2000).

292. See Shivananda Khan, *History of Alternate Sexualities in South Asia*, 5 NAZ KI PUKAR 6 (Feb. 1994).

of the self with a life-style based on a different sexuality, acquired after a struggle with the self and in solidarity with other 'different' individuals.'²⁹³

Yet, in some other contexts, as I have argued, the social meaning of homosexuality may be equated with *transgenderism* rather than a preference for same-sex sexual activity. Consequently, few non-transgendered persons may identify themselves as gay or lesbian to avoid raising such connotations.²⁹⁴ Many individuals who engage in same-sex sexual conduct will resist adopting identities that suggest any degree of gender role transgression.

Second, according to many public health activists, some MSM view the term "gay" as a Western, stigmatizing label, something to avoid rather than to embrace.²⁹⁵ Contrary to the focus placed on sexual identity and gay personhood in the substitutive model, among MSM, the constitution of the self may be conceived as entirely separate from one's sexual activities, a difference which often has determinative implications on whether or not people choose to "come out." Instead of sexual identity, these scholars argue, other roles determined by family, society, religious affiliation, or occupation may take on a central role, subsuming personhood, individuality and self.²⁹⁶ This observation is also made by an activist in India:

Most men who call themselves "gay" are married or desire to be married. For them being "gay" means being erotically aroused by men. . . The debate around marriage and identity is different in India. Identity is based on class, caste and religious affiliations. Sexual desire is not the focal point of our identities. Hence there is an acceptance of the multi-dimensional personality. One has to perform the duties of husband, or wives, daughters or sons, mother or father, intimate friend simultaneously.²⁹⁷

293. See *De Lind van Winjngaarden*, in *LADY BOYS, TOM BOYS, RENT BOYS*, *supra* note 1, at 216. In India, one man notes, "[i]t is a historical paradox that those who say to me "Why do you not come out?" are nearly all Westerners or Indians living in the West." SEABROOK, *supra* note 277, at 140. The absence of coming out narratives may also be complicated by the lack of individualism and privacy norms among many in India. *Id.* at 141; see also HERDT, *supra* note 8, at 20.

294. In India, for example, some men who have sex with men fear that having openly same-sex relationships may lead to being classified as a transgendered person (known as a *hijra*). HERDT, *supra* note 8, at 147. The same has been reported in the Philippines, where masculine-identified men may resist adopting terms that suggest a common identity with transgendered persons. For example, one Philippine man "described his alarm that he might be 'abnormal,' the abnormality being defined as a contradiction between his being attracted to other men, and yet never having the desire to cross-dress." Michael Tan, *From Bakla to Gay*, in *CONCEIVING SEXUALITY*, *supra* note 88, at 88. Another example discusses a man who wrote to a newspaper columnist about his feelings for other men, calling them "strange" because "I am cursed with an athletic body. . . . I cannot do what the *bakla* [transgendered female] would do externally—act effeminately, dress effeminately, etc." *Id.* at 89-90.

295. See Shivananda Khan, *Community Action in Action*, *supra* note 283 (noting perception that homosexual behavior is equivalent to Western "corruption.").

296. Dasgupta & Purkayashtha, *supra* note 279, at 10 ("Collective living, community shame or pride and social duty constitute the all-pervasive set-up within which we live our lives in India. The notion of 'self' is coterminous with the socialized self."); see also Essajee, *supra* note 275, at 7 ("We don't have a sense of self in our culture, we are brothers or daughters or sons or wives—so how can we form sexual identities?").

297. Dasgupta & Purkayashtha, *supra* note 279, at 10.

In many situations, material conditions force individuals to prioritize family over social identification, a factor that is complemented by the strong boundaries that exist between public identity and private conduct.²⁹⁸

Thus, the very idea of “coming out,” so revered in identity discourse, is considered by some to be based on an individualistic view of identity that is often unprecedented in many non-Western families.²⁹⁹ As one writer observed, an individual asserting personal space within the society is viewed as a threat.³⁰⁰ Since the community and family are often viewed as key vehicles of security, many Asian persons choose instead to place their sexuality and sexual identity as secondary in order to maintain family honor and harmony.³⁰¹ As one author concludes, “[f]or many Asians, the notion of ‘coming out’ as a means of breaking the silence around homosexuality is a ‘very white model.’”³⁰²

The constant pull of familial, rather than individual self-identification, represents a serious break with the “gay ghetto” model often referred to in the United States because it suggests that family identification may serve as a serious, preclusive obstacle to gay self-identification. “For many gay-identified men in the Western world, support for the self and social identification has been found within the context of a gay community, coupled with gay neighborhoods, establishments, and organizations. Such membership, however, is premised upon—and requires—a shift of referent group from the family to the peer group, which is a re-working of social support systems and personal loyalties away from the family of origin,” one scholar points out.³⁰³ Yet the required shift from family support to gay-identified peers thus represents one of the of the primary obstacles to gay self-identification throughout the non-Western world. Here, a joint family system often means that a person’s individual self-identity can be entirely precluded from developing into a substitutive, gay identity.

One contributing cause of this divergence between identity and conduct is the emphasis placed on fulfillment of the institution of marriage, which is often seen “as an essential requirement for maintaining the family, as a family duty, as a sign of obedience to one’s parents.”³⁰⁴ For this reason, many MSM—gay-identified or not, are often married to women in India and elsewhere.³⁰⁵ The notion that a person may be married and self-identify as a “gay man,” or

298. *Id.*

299. KHAN, *supra* note 178, at 17-18.

300. Dasgupta & Purkayastha, *supra* note 279, at 10.

301. SHIVANANDA KHAN, *supra* note 178, at 17, 29.

302. Storer, *supra* note 174, at 12 (quoting from Russell Leong, ed., *ASIAN-AMERICAN SEXUALITIES* (1995)). See also Manalansan, *supra* note 109, at 498 (reaching the same conclusion with respect to some Filipino men: “coming out is a ‘foreign thing’—totally American and not at all Filipino.”).

303. Rafael Diaz, *LATINO GAY MEN AND HIV* 102 (1998).

304. KHAN, *supra* note 178, at 21.

305. Essajee, *supra* note 275, at 7.

“homosexual” is vexing for some Western activists.³⁰⁶ However, contrary to many Western legal and cultural perceptions of homosexuality, a gay identity (and love relationships between men) is often viewed as entirely compatible with a heterosexual marriage.

Stories of married gay men also complicate the universality of the “coming out” rhetoric which dominates much of the discourse that surrounds gay rights in America and Europe.³⁰⁷ The combination of being married and gay, for one thing, markedly conflicts with Nan Hunter’s observation that “[s]elf-representation of one’s sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out—to act on and live out that identity.”³⁰⁸ It also similarly belies William Eskridge’s claim that “coming out of the closet as a gay person is also an explicitly political act.”³⁰⁹ Here, coming out as gay implies only a behavioral tendency, rather than a certain kind of political advocacy.³¹⁰

2. *Implications for Globalizing Gay Rights*

Such differences force us to rethink many of the foundational assumptions that many legal activists often associate with gay civil rights. MSM activists openly challenge the drive towards essentializing the public aspects of a “gay” or “homosexual” identity. On one hand, they exemplify that a singular focus on sexual orientation and sexual identity may actually alienate other individuals who engage in same-sex sexual conduct and who lack a predetermined assumption of sexual orientation as a determinative characteristic of personhood.³¹¹ Yet, on the other hand, those who demonstrate an

306. Boellstorff, *supra* note 273, at 490.

307. In India, it is reported that many men and women tend to not think of life outside marriage as an option. See Lloyd, *supra* note 286, at A34.

308. Hunter, *supra* note 64, at 1696 (“To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol.”).

309. William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2443 (1997).

310. As Tom Boellstorff has pointed out in his study of MSM in Indonesia, gay subjectivities do not hinge on the same concept of disclosure to spheres of home, workplace or God. Instead, gay identities are “additive, rather than substitutive: opening them does not necessarily imply closing” other identities. Boellstorff, *supra* note 273, at 496. As Boellstorff concluded in his study:

We find not an epistemology of the closet but an epistemology of life worlds, where healthy subjectivity depends not on integrating diverse domains of life and having a unified, unchanging identity in all situations but on separating domains of life and maintaining their borders against the threat of gossip and discovery.

Id.

311. As one Kuwaiti-born man (now living in the U.S. explained):

The Arab world is very much into the family unit and men must fulfill their family role. But as long as they do that, they are free to do whatever they want and this is not questioned. And since nobody talks about homosexuality, they don’t have to fear somebody is going to say this—or even think about them . . . To them, being gay is a sexual thing. It’s not emotional. And the tiny minority who do see themselves as gay in the Western sense—as loving men—are frustrated; they feel oppressed the most. The rest of the men are very comfortable. They think it’s the best of all possible worlds. Since nobody recognized homosexuality as even existing, they can get away with things we cannot get away with here

unwillingness to name oneself, or to “come out” as “gay” or “lesbian” in a political sense also precludes the possibility of inclusion in the advocacy and community building that is so integral to the gay community’s identity-based claims. However, the movement to overturn sodomy laws in India yields an interesting contrast to the identity-based paradigm that we see in the United States. The Indian example forces us to reconsider the various roles of privacy and nondiscrimination protections in law to decide which alternative is more preferable in a cross-cultural setting: privacy or identity-based strategies towards gay civil rights.

Although it may be true that the focus on overturning sodomy laws is a shared characteristic of many gay rights movements across the globe, the Indian example demonstrates some key insights that are often overlooked by activists who favor the substitutive model. In marked contrast to the Zimbabwe example (which largely embraced the substitutive model and emphasized the seeming universality of gay identity), the Indian gay rights movement has increasingly—and visibly—emphasized the substitutive model’s disutility in both culture and law.

In this section, I attempt to identify some of the significance put forth by this “additive” construction of sexual identity; and then to evaluate the implications of these differences in laws surrounding sexual orientation. While the additive construction yields some fruitful insights regarding the limitations of identity-based movements in global campaigns for gay civil rights, a *purely* additive construction, perhaps unwittingly, also runs the risk of echoing many of the cultural relativist arguments often used to oppose gay civil rights worldwide. Consequently, this section argues for the necessity of integrating both the additive and substitutive models of sexual identity in one coherent continuum.

How would integrating the additive and substitutive models of sexual identity alter current gay rights strategies in a legal sense? Consider this instructive example. In 1995, following the incident in Zimbabwe, the Netherlands government instructed their embassies in developing countries to provide support for lesbian and gay activists to challenge government abuse of their human rights.³¹² Consequently, Shivananda Khan, an AIDS public health expert in India, wrote to request support towards developing sexual health services for men who have sexual relations with men in India. His request, however, was denied on the grounds that the Netherlands government was only

[in the United States]. But if you start talking about homosexuality, they get very uncomfortable.

Stephen Murray & Will Roscoe, eds., *ISLAMIC HOMOSEXUALITIES*, at 16-17 (1997).

312. Shivananda Khan, *Culture, Religion and Human Rights*, *supra* note 274, at 18-19. For an excellent article on incorporating different forms of identity (transgendered and otherwise) within a strategy of AIDS prevention, see Sean Patrick Larvie, *Queerness and the Specter of Brazilian National Ruin*, 5 *GAY & LESBIAN Q.* 527-558, 537 (1999) (envisioning an inclusive strategy of AIDS prevention that embraces localized forms of identity).

specifically interested in *human rights* for lesbians and gay men in developing countries, not HIV/AIDS issues.³¹³

Yet, for many sexual minorities, this is a false distinction. As Khan remarks, under the paradigm offered by the Netherlands government, MSM are deemed to be “invisible,” and “nonexistent” unless they self-consciously adopted a lesbian, gay, or bisexual sexual orientation.³¹⁴ Yet, as the discussion above indicates, adoption of a self-conscious gay identity is not nearly as simple in contexts which lack the same assumptions of the centrality of sexual identity to personhood. “Within this context of meanings, cultures and religions,” Khan has emphasized, “Western constructions cannot just be transposed from one culture to another. They are not absolutes in themselves and culture free.”³¹⁵

On the other hand, however, a purely anti-identity approach puts some individuals in a politically vulnerable position, foreclosing the possibility of universalized categories of protection. An overreliance on behavior alone, without exploring its connotations for one’s sexual identity, can preclude gay self-identification and prevent the development of an autonomous, politicized gay community. This preclusion has several real-world disadvantages, among them, the absence of creating possibilities for community mobilization and building relationships between individuals who share similar predispositions towards a certain identity.

Nevertheless in a basic sense, the existence of MSM—an identity based on conduct alone—forces us to think more critically about how to build strategies of inclusion when personal desires, sexual behavior, subjective identity, and public identities take vastly different expressions.³¹⁶ For these reasons, rather than *enforcing* a substitutive lesbian or gay identity, many activists have recognized the diminishing utility of such categories, and made the *evaluation* of categories of sexual identity an essential, active part of their platform. And, on a more abstract level, these evaluations challenge others to recognize cultural difference while preserving a framework of civil rights for sexual minorities.

Here, again, India offers Western activists an interesting case study. One might think that a gay and lesbian civil rights movement and a public health movement might be diametrically opposed in interests. The first, as we have seen in the United States, focuses on *visibility* though identity; whereas the second focuses on *behavior*, rather than identity. Yet, I argue that the Indian gay and lesbian movement’s method of incorporating critiques of Western

313. *Id.*

314. *Id.*

315. *Id.*

316. See Shivananda Khan, *The Language of Sexuality*, 5 NAZ KI PUKAR 14 (Feb. 1994) (noting that differences in language, religion, gender constructions and roles affect whether the terms lesbian, homosexual, bisexual are appropriate terminology).

identity, while offering arguments for gay rights and sexual equality—aptly demonstrate the importance of integrating both the additive and substitutive formulations in gay civil rights.

The timing of such efforts is especially crucial. Like the situations I have reported in Zimbabwe and Egypt, Indian authorities are currently cracking down on lesbian and gay visibility through an increasingly common tactic of using sodomy laws to harass gay and lesbian activists. Indeed, it is perhaps most ironic that the laws that have been used towards prosecution are the very emblem of colonial exports, and have long been abandoned by the country from which it originated. Although there are no laws which expressly criminalize homosexual status, Article Three Hundred and Seventy-Seven, of British origin, criminalizes “unnatural offenses” and remains in force today.³¹⁷ The text of the Indian Penal Code reads as follows:

Of unnatural offences: whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall be liable to fine.³¹⁸

Section 377 has applied to males who engage in sexual relations with one another, particularly the “insertive” partner.³¹⁹ Although courts have reduced the sentence for some mitigating circumstances (like consent), it still remains in force.³²⁰ In one 1983 case, *Fazal Rab vs. State of Bihar*, the Supreme Court of India observed that:

The offence is one under Section 377 Indian Penal Code which implies sexual perversity. No force appears to have been used . . . nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking.³²¹

These laws have not lain dormant. Three years after the lesbian and gay rights movement gained international notoriety in the wake of the events surrounding *Fire*, discussed in Part III, police began a visible crackdown. In July of 2001, police in the city of Lucknow raided the offices of two organizations who work on behalf of MSM, confiscating AIDS-education materials, arresting, and detaining staff. The men were charged with possession of obscene materials (including under a statute prohibiting the

317. See SEABROOK, *supra* note 277, at 162.

318. Indian Penal Code, Section 377 (1860).

319. Dhir, *supra* note 10, at 4. The “passive” partner is considered an abettor to the offence, and may be charged under an additional section of the Code. *Id.* Between men and women, it has also served as grounds for divorce if the sexual behavior was not consensual. See Section 13, Hindu Marriage Act; Section 11, Divorce Act (permitting a wife to apply for divorce if her husband is guilty of sodomy or bestiality).

320. See Dhir, *supra* note 10, at 5.

321. Shrikant Bant, *Indian Law and the Homosexual*, 1(2) BOMBAY DOST 5 (1990). At the same time, however, given that the acts were consensual, the Supreme Court reduced the sentence from three years to six months rigorous imprisonment. *Id.*

indecent representation of women) and with conspiracy to commit sodomy.³²² The Senior Superintendent of Police concluded that both agencies were running “gay clubs” and spreading gay culture throughout Lucknow.³²³ A court refused bail for the employees on the grounds that the employees were “a group of persons indulging in these activities [sodomy] . . . and polluting the entire society by encouraging the young persons and abetting them [sic] them to committing the offence of sodomy.”³²⁴

At the outset, one can see a striking similarity between *Hardwick* and the discussion surrounding Section 377, because both statutes criminalize sodomy but are applied to (and equated with) criminalizing homosexual *identity*.³²⁵ Like *Padula*’s classification of sodomy as the “behavior that defines the class,” Section 377 has been used to label gays and lesbians as potential criminals by virtue of their assumed propensity to engage in acts of sodomy. While the number of actual cases filed in recent years is extremely low,³²⁶ the impact of the law lies in its coercive effect in repressing same-sex sexual activity and gay or lesbian self-identification.³²⁷ Here, activists have also argued that section 377 is used with alarming regularity to harass, threaten, and silence gay organizing.³²⁸

322. See IGLHRC Action Alert: *India, Demand the Immediate Release of HIV/AIDS Prevention Workers Detained Under Sodomy and Obscenity Laws* at http://www.iglhrc.org/world/s-asia/India2001Jul_2.html (July 25, 2001).

323. *Id.* See also Aditya Bondyopadhyay, *State-Supported Suppression and Persecution of Sexual Minorities in India*, Statement before the United Nations Comm’n on Human Rights (April 8, 2002) (on file with author).

324. IGLHRC Action Alert, *supra* note 322.

325. Sherry Joseph, *The Law and Homosexuality in India*, International Conference on Preventing Violence, Caring for Survivors: Role of Health Professionals and Services in Violence, at <http://www.hsph.harvard.edu/Organizations/healthnet/Sasia/suchana/0909/rh374.html> (Nov. 28-30, 1998) (“de jure, [Section 377] is an attempt to criminalize sodomy while de facto it is an attempt to criminalize and stigmatise homosexuality.”).

326. See Dhir, *supra* note 10, at 5 (noting 30 total cases between 1860 and 1992, the majority of which dealt with non-consensual intercourse and assaults on minors); see also Working Group on Lesbian and Gay Rights, Mumbai, *Background Paper: Strategies to Advance Lesbian and Gay Rights*, at 4-5, available at <http://www.altindia.net/altsex/background%20paper.html> (November 7-9, 1997).

327. See Bondyopadhyay, *supra* note 323 (“In India, Section 377 of the Penal Code hangs like a Damocles’ sword over the heads of all sexual minorities.”).

328. In Mumbai in 1990, police began a series of arrests of men gathering in a public park for no reason other than they “looked” “like homosexuals.” Dhir, *supra* note 10. The same happened in another park in Lucknow, where a spokesman explained that “police will not allow male couples into the park if they know they are gays,” a spokesman explained. “Policemen will ask them if they are gay. If they hold hands or are demonstrative about their affection, we’ll suspect them of being gay.” Rex Wockner, *Indian Gays Banned From Park*, www.wockner-news.com at #245 (Jan. 4, 1999). In India, as in many countries, the involvement of the police has led to a corrupt, and often dangerous collusion. The police will enter public gathering places for men to seek sex with other men, and then rape or extort sex from those arrested. See Bondyopadhyay, *supra* note 323.

In addition, in India, a panoply of other laws have been used to prevent the development of gay organizing or HIV education—namely, Section 268 of the Indian Penal Code, which provides that any conduct that occurs in a public place that constitutes an injury, annoyance, or danger to the public is a punishable offense; and Section 292, which refers to obscenity, and which has been used by customs officials to prevent distribution of gay and lesbian magazines. See Dhir, *supra* note 10, at 6; Mihir Desai, *Civil Laws Affecting Gays and Lesbians*, at <http://alt.india.net/altsex/toc.html>.

As recent cases illustrate, sodomy laws in India take on extraordinarily public dimensions, demonstrating that Section 377 is still used by police to imprison *both* MSM and gay-identified movements. Such criminalization prevents self-identified gays and lesbians from “coming out of the closet” and from forming a centralized community.³²⁹ Irrespective of whether MSM individuals self-identify as gay or bisexual, or even heterosexual, Indian law enforcement officials label MSM—simply by virtue of their location in a public place, or by their willingness to show affection for members of the same sex—as foundational evidence of a gay or homosexual identity. Here, the law’s vague language leads to its expansive interpretation: rather than simply outlawing sodomy, such laws can be used to outlaw all forms of public affection between men altogether.³³⁰

Indeed, the law has also been used to criminalize lesbian relationships. In 1987, an individual named Tarulata/Tarun Kumar underwent a female-to-male sex change operation, and married a woman named Lila two years later. Lila’s father filed a petition in Gujarat High Court, demanding that the marriage be annulled because it was a lesbian relationship, arguing, “Tarun Kumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children.” The case called for criminal penalties under Section 377, and is apparently still pending in Gujarat High Court.³³¹

Because of Section 377’s continued force in preventing both the public and private expressions of homosexuality, activists in India have launched a campaign for its repeal that concentrates specifically on the law’s colonial origins. This move first began after prison personnel in Delhi refused to provide condoms to inmates, reasoning that condom distribution would encourage male-to-male sexual behavior, thereby leading to violations of section 377.³³² In many ways, the prison officials’ argument surrounding Section 377 reflects much of the earlier jurisprudence favored by expansionist readings of *Hardwick*. Again, like *Padula*’s recognition of “state laws that criminalize the behavior that defines the class,” Section 377 labeled gays and lesbians, as well as MSM, as accomplices or criminals.

In response, a human rights group filed a petition challenging the constitutional validity of Section 377, and to enjoin jail authorities from sequestering those prisoners who were HIV positive or identified with homosexual sexual activity. The legal challenge posed to Section 377 is

329. Neelesh Misra, *Indian Lesbians Demand Decriminalisation of Homosexuality*, ASSOCIATED PRESS, Aug. 10, 2000. There are also other laws, specifically the Dramatic Performances Act and the Indecent Representation of Women Act, which contain similarly pernicious potential to stifle gay and lesbian self expression. For a detailed summary of the laws of India affecting gay men, lesbians, bisexuals, and other sexual minorities, see Desai, *supra* note 328.

330. See Katherine Bell, *Gay Sex Prosecuted Worldwide*, PLANETOUT NEWS, Dec. 13, 2000.

331. *Background Paper*, *supra* note 326.

332. Dhir, *supra* note 10 at 6.

extremely different than the one used in *Hardwick* in several key aspects, each of which separately underscores the limitations of the substitutive model, and demonstrates how emerging, non-Western gay movements often confront different challenges—and opportunities—because of the government’s tendency to view homosexuality as a “foreign,” “Western” disease.

By focusing squarely on men who have sex with men in their constitutional challenge, rather than gay-identified men, the brief filed against Section 377 aptly demonstrates why eliminating sodomy laws will build a more inclusive community by removing a key obstacle to gay self-identification: criminalization of sodomy. In other words, activists recognized that consideration of MSM issues underscores the enormous need for protection of conduct and privacy-based protections.³³³

Yet rather than focusing on identity as a central platform, the attempt to repeal Section 377 has focused on building a *continuum* of rights strategies that has both included and transcended the substitutive model. As Shivenanda Khan has emphasized, a gay rights movement must begin at the place where individuals are at in terms of their self-identity, not where the movement would like them to be.³³⁴ By avoiding the representation of plaintiffs who identify as “gay” in the substitutive sense, gay human rights activists in India were able to avoid some of the accusations of Westernization and foreign influence that often plague gay rights strategies in other contexts, like Zimbabwe.

Under this trajectory, in India, privacy protections appear to be sought as a *precondition* to other rights based on sexual orientation. This strategy builds upon the substantial jurisprudence in Indian law that mirrors the American conception of privacy, intersecting privacy with two other elements: personal expression and sexual autonomy under the right to “life and liberty” under Article 21 of the Indian constitution.³³⁵ In India, the Supreme Court has interpreted this right to include “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life . . . and also expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”³³⁶ Significantly, in India, the right to privacy includes a *right to identity*, as a bedrock Indian case on the right to privacy makes clear: “*any plausible definition of the right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body’s inviolability and integrity and intimacy of personal identity, including marital privacy.*”³³⁷

333. *Id.*

334. Khan, *supra* note 291, at 14.

335. For example, in India, the right to privacy, like the United States, is a judge-made instrument. See Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INTL. L. 35, 48 (2001).

336. *Id.* at 50 (citing *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 68 AIR SC 746, 747 (1981)).

337. *Id.* at 53 (citing *Sareetha v. T. Venkata Subbaiah*, 70 AIR AP 356 (1983)) (emphasis added).

This interpretation of personal identity mirrors a similar preoccupation in gay rights circles in India with the right to determine both the interior and exterior aspects of a person's sexuality; in other words, to evaluate the relevance and importance of "coming out." But this difference also carries important lessons for gay rights strategies elsewhere. In other words, a strategy that focuses primarily on the right to privacy *before* identity-based protections allows an individual the autonomy to determine his or her sexual identity and preferences, instead of forcing them to adopt a particular identity in order to access constitutional protection. In other words, by demanding the right to privacy, Indian activists are actually demanding the right to *deliberate*—and determine—the interior and exterior aspects of their sexual identity, for themselves, and not as a prerequisite for a particular legal entitlement.

According to activists, this choice to focus on privacy, rather than identity, was strategically motivated by cultural concerns about the changing social meaning of homosexuality in India. Apparently, advocates feared that a visible, identity-based approach would alienate those who were uncomfortable with gay civil rights and the general public visibility afforded to the nascent movement. As the Campaign for Lesbian Rights in India explained:

... [T]he appeal to privacy rather than homosexual rights in their petition was a tactical move suggested by senior members of the Supreme Court, among whom the [human rights group] had campaigned. This strategy was supposed to ensure that the petition itself was not rejected, as it would have been had it harped on homosexuality being legitimized in the public and private sphere. Since the Supreme Court had already settled the right to privacy . . . that judgment served as a useful precedent for the purpose of the petition. After the petition was accepted, then the issue of homosexuality and rights could be raised in the final arguments.³³⁸

By choosing MSM, rather than "gay" or "homosexual" plaintiffs, Indian gay activists implicitly recognized that a privacy-based strategy towards constitutional protection is much more inclusive than a anti-discrimination model because it does not require a certain self-identification or expression to access its protections, nor does it require a formal recognition of the public aspects of gay personhood.³³⁹

Interestingly, at the same time that Indian activists appeared to favor a non-identitarian approach to overturning Section 377, and a localized construction

338. See *Lesbian Emergence*, *supra* note 121, at 49. The privacy case cited is in reference to another bedrock case in India that delineated the right to privacy (ironically, with ample use of case law from the United States). See Nussbaum, *supra* note 335, at 52-53.

339. It is important to note, however, that the concept of privacy rights is often contested by many feminists in India, who point out that state intervention into the supposedly "private" aspects of the home is often needed to protect women from domestic violence, incest, and marital rape. See *Lesbian Emergence*, *supra* note 121, at 49; and Martha Nussbaum, *Is Privacy Bad for Women*, BOSTON REVIEW (April 2000) at <http://bostonreview.mit.edu/BR25.2/nussbaum.html> (analyzing Indian and American constitutional treatments of privacy).

of identity, they have also resisted taking a culturally relativistic approach to human rights.³⁴⁰ The plaintiffs, for example, argued that Section 377 violates the Indian Constitution's right to fundamental rights of life and liberty, and the right to privacy enshrined in the Universal Declaration of Human Rights. This difficult balance of resisting relativism while favoring a more culturally appropriate treatment of homosexuality carries important lessons for any society that seeks to build a more multicultural platform of gay rights, because it suggests that it is indeed possible to balance cultural sensitivity with universal models of equality and non-discrimination.

Yet, despite the brief's clear emphasis on privacy instead of identity, it does reflect a tacit recognition of the growing importance of gay personhood in Indian civil rights. Quite unlike *Hardwick*, which failed to distinguish between sodomy and identity, the plaintiffs also argued in their brief that the law violates Article 14's equal protection clause since it discriminates against persons based on their sexual orientation.³⁴¹ In this manner the brief paid equal attention to sodomy laws' attacks on both conduct *and* identity. In other words, even if a "gay identity" did not necessarily exist among the MSM plaintiffs, the brief argued that they were still entitled to protection on the basis of privacy *as well as* their sexual orientation.

Finally, the brief also—quite unusually—resists looking to the West for guidance, a factor which further demonstrates the diminished utility of the substitutive model. By identifying the "Western" underpinnings of gay and lesbian criminality (indeed, the law was an export from British colonialism), gay and lesbian activists accomplished a marvelous reversal. Indeed, a substantial portion of the constitutional arguments offered for reversal concentrate on the law's foreign character,³⁴² pointing out that the law was outdated and "archaic," given its repeal in Britain. Here, the Indian gay movement utilized anti-Western rhetoric of Hindu cultural purists to expose a crucial irony: Section 377 was not enacted by Indians, but by the British during colonialism.

This unique strategy has led to a remarkable coalition between progressive human rights activists, public health activists and gay and lesbian activists who opt to challenge *both* the enforcement of identity-based categories and the sodomy laws that exist in India. Its localizing of a strategy for gay rights, coupled with a reexamination of its foundational precepts, reflects an important reassessment of the global utility of the identity-based, substitutive model. Instead of the government serving as a defender of Indian cultural purity and heterosexual tradition, gay and lesbian activists demonstrated that the central

340. See Dhir, *supra* note 10, at 6.

341. The plaintiffs also argued that the term "carnal intercourse" is void for vagueness; and that forced sodomy is incomparable with consensual sexual acts between men. *Id.*

342. Dhir, *supra* note 10, at 6.

tool wielded by the Indian government—section 377— is nothing more than leftover baggage from colonialism. Like those who blamed the West for exporting gay identity, gay and lesbian activists similarly blamed the West for its exported criminalization of such behavior. In sum, the remarkable duality that this movement demonstrates—challenging the enforcement of substitutive categories of sexual identity, while challenging the criminalization of sodomy—exemplifies a profound possibility for powerful civil rights models.

VI. REFRAMING SEXUAL AUTONOMY

As the Indian experience suggests, current debates over gay rights involve much more than the simple legal question of whether or not individuals deserve protections based on the category of sexual orientation. Instead, in this changing era of globalization and cosmopolitanism, the questions posed by such debates (both legal and nonlegal) are much more complex because they also raise questions about culture, tradition, and the response of law. Here, law has played a central role by serving as a tool for activists to demand constitutional inclusion *and* as a target that engenders further activism. Yet, the response of Indian activists suggests that it is possible to present the world with a dynamic, pluralistic view of law, culture and sexuality that transcends the limitations of an identity-based model.

As I have argued, the current choice between strategies of protection for sexual minorities—one focusing on privacy, another focusing on nondiscrimination on the basis of sexual orientation—are distressingly simplistic and underinclusive of the different permutations between identity and conduct that exist with respect to human sexuality, both in the United States, as well as abroad. As I have argued, a person's subjectivity, or sense of self, may differ from the outward sexual identity which he/she may adopt. This dissonance between external identity, internal subjectivity, and conduct—when combined with the role culture plays in constructing each—throws the American framework of identity politics into question.³⁴³ What is needed, then, is a new legal framework for thinking about global gay rights that takes these potential, cultural differences into account.

One way to overcome the dissonance—cultural, legal, subjective—between one's conduct and one's social and sexual identity is to turn to another framework that encompasses both the expressive and private aspects of sexuality and sexual identity: sexual autonomy, or sexual self-determination. In this section, I argue that a focus on sexual autonomy is preferable to one based on identity for three primary reasons. First, a model based on sexual autonomy is a *deliberative* one, thereby encompassing potential dissonance

343. See Peter Jackson and Gerard Sullivan, in *LADY BOYS, TOM BOYS, RENT BOYS*, *supra* note 1, at 19.

between subjectivity and external representation. Second, a sexual autonomy model focuses more squarely on the protection of sexual *conduct*, so that it includes protection for individuals who may engage in same-sex sexual conduct but who view themselves as heterosexual. Third, protections based on sexual autonomy are *expressive*, in that they protect the freedoms of individuals to express their public gender or sexual identities, and publicly voice the need for such protections. Finally, because the right to sexual autonomy encompasses aspects of *both* identity-based and privacy protections, it provides a much more thorough conceptual and legal framework for protection than existing models, which normally focus on either framework to the exclusion of other possibilities.

The contemporary definition of sexual autonomy, as scholars such as Stephen Schulhofer has emphasized, centers on the freedom to seek sexual fulfillment and freedom from sexual coercion.³⁴⁴ It is the product of a complex interaction of conditions, requiring both mental competency, an awareness of one's options, and sufficient information to choose between various possibilities, i.e. whether or not to become sexually intimate with another person.³⁴⁵ Schulhofer also defines sexual autonomy in terms of (1) an *internal* dimension, involving the moral and intellectual capacity to choose without impermissible pressures and limitations; (2) an *external* dimension involving a freedom from impermissible pressures and constraints; and (3) a *physical* dimension, comprising the bodily integrity of a person.³⁴⁶

While Schulhofer examines sexual autonomy through the lens of sexual intimacy, it is clear that his observations can be easily extended to the realm of sexual identity. Quite usefully, he defines sexual autonomy in terms of an "active" facet—namely, the right to determine the kind of life one wishes to live, and the kind of activities one may wish to pursue—and in terms of a "right of refusal"—involving the right to refuse to undertake certain activities with others.³⁴⁷ And Schulhofer also points out how social conditions—cultural influences, education, the realistic availability of alternative options, and a culture that supports personal introspection—can have an enormous impact on ensuring a person's autonomous decisions.³⁴⁸

I add two ingredients to this definition of sexual autonomy: "deliberation" and "expression." The "deliberative" aspect of sexual autonomy extends the right to privacy to include both personal deliberation about subjective identity,

344. See Katherine K. Baker, *Unwanted Supply, Unwanted Demand*, 3 GREEN BAG 103 (1999) (reviewing STEVEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998)).

345. SCHULHOFER, *supra* note 344, at 111.

346. See *id.*; and Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 J. L. & PHIL. 35, 70-71 (1992).

347. SCHULHOFER, *supra* note 344, at 99.

348. *Id.* at 106.

and the “expressive” quality extends sexual autonomy to include the outward expression of that identity.

The idea of deliberative sexual autonomy is not without precedent, as the Indian experience suggests. Consider what the Supreme Court in the United States has also said about privacy, a right that it often links to rights for expressive association and intimate association in constitutional law. As defined by Justice Blackmun in *Planned Parenthood v. Casey*, the right of privacy includes “the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government.”³⁴⁹ The joint opinion in *Casey* also states, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³⁵⁰ Indeed, Professor James Fleming has argued that this explication of privacy, by its terms, reflects a concern for personal deliberation about subjective identity and the outward expression of that identity.³⁵¹

The same can also be said for Stevens’ dissent in *Bowers v. Hardwick*, which mentions the “individual’s right to make certain unusually important decisions that will affect his own, or his family’s destiny,” and “the abiding interest in individual liberty, that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.”³⁵² So too, Justice Blackmun, who characterizes (as Fleming points out) the “freedom of intimate association” to include the “decisional and spatial aspects of the right to privacy.”³⁵³ In Fleming’s view, rights that involve bodily integrity, decisional autonomy, and integrity involving “persons’ destiny, identity, or way of life,” constitute basic liberties that are significant preconditions for deliberative autonomy.³⁵⁴

While Professor Fleming’s arguments are couched in the rubric of privacy, they can be reframed profitably to emphasize the sexual aspects of autonomy undergirding both *Casey* and *Hardwick*’s dissents. As these cases suggest, these liberties (regarding destiny, identity, and way of life) become even more important when we consider the boundaries of the contested intersections between sexual identity and sexual activity. Just as bodily integrity comprises a certain type of personal sovereignty that is inviolate, a framework for deliberative sexual autonomy permits individuals to make their own decisions about how or whether or not they choose to adopt—or express—a particular type of sexual identity. This kind of “sexual self-determination” draws a boundary that allows persons to undertake their own process of deliberation to

349. 505 U.S. 833, 927 (1992) (Blackmun, concurring in part, dissenting in part).

350. *Id.* at 851.

351. James E. Fleming, *Securing Deliberative Autonomy*, 45 STANFORD L. REV. 1, 12 (1995).

352. *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J. dissenting).

353. *Id.* at 202, 204 (Blackmun, J. dissenting).

354. Fleming, *supra* note 351, at 12.

ultimately decide how they may choose to represent him or herself.³⁵⁵ Since sexual autonomy includes the right to make one's decisions about bodily integrity and sexual self-satisfaction, it also necessarily includes a decision about identity: how to represent oneself.

These decisions about representation give rise to a further refinement of sexual autonomy: *expression*. Under this framework, the right to sexual autonomy should be understood as providing legal protection to permit individuals to identify with a particular gender identity or sexual orientation if desired, or none at all. As the Ninth Circuit recognized in *Hernandez-Montiel*, a male homosexual who may choose to dress as a woman in order to express his sexual orientation is just as deserving of equal protection under the basis of sexual orientation as any other person.³⁵⁶ Here, the Ninth Circuit implicitly adopted a deliberative sexual autonomy model by recognizing that Geovanni's volitional choice of sexual self-expression (dressing as a woman) did not necessarily detract from the discrimination that he faced on the basis of his sexual orientation. Instead, *both* his female sexual identity and his sexual orientation were deemed inherent, fundamental characteristics of his personality.³⁵⁷ By casting Geovanni's choice to dress as a female as a protected, outward, and expressive aspect of Geovanni's sexual orientation, the court recognized that sexual identity goes beyond sexual conduct and extends to the realm of gender identity. In other words, under this framework, both the private and public aspects of one's sexual or gender identity would be protected as a legitimate choice of sexual self-determination.

This view of deliberative sexual autonomy yields several real-world advantages. To begin, as this article has suggested, current pressures in gay civil rights—to come out, to speak out—often simplify, and hence reduce, the value of public deliberation about the intersection of sexual autonomy and sexual orientation generally. By linking gay civil rights to sexual orientation alone, the substitutive model diminishes the value that a deliberative autonomy model offers. However, because a deliberative autonomy model focuses on personal choice, this model honors not only the complexity of sexual orientation, but it confers value on the act of deliberation itself. Unlike the substitutive model, which draws lines between gay/straight and out/closeted, a deliberative autonomy rationale honors people's choices on personal identity while still engaging them in the debate over gay rights.

Moreover, in practical terms, thinking in terms of sexual autonomy, rather than sexual identity, forces the gay civil rights community to take a much more actively inclusive approach to groups who are normally left out of the

355. See Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. OF INTL. & COMP. L. 343, 352 (2000).

356. See *Hernandez-Montiel vs. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000).

357. *Id.* at 1093.

traditional substitutive paradigm. Using sexual autonomy as a conceptual framework avoids the problems of exclusion of men who have sex with men in India, for example, who are often left outside of categories of protection based on “sexual orientation,” because these men tend to view themselves as heterosexual. Under the substitutive paradigm, as I have discussed, such individuals are cast as “closeted” or “unliberated” for their failure to name themselves as gay, lesbian, or bisexual. However, under a sexual autonomy paradigm, such individuals can adopt whatever identity they may choose. The emphasis is on the ability to *choose* identity, rather than on the requirement to do so. Since no particular “sexual orientation” or “naming” is required for inclusion, the sexual autonomy framework includes the additive model discussed in Part V.

In addition, the deliberative autonomy framework takes the right of privacy a further step by allowing an individual a kind of “inviolable space” in which to make decisions about how to identify oneself sexually. It also contrasts with the right to equality espoused by gay rights activists in that it does not require a particular “sexual orientation” (or perception thereof) in order to qualify for legal entitlement from discrimination. Instead, a deliberative sexual autonomy framework provides a much more expansive view of protection, encompassing both the internal and external aspects of a person. This framework also happily coexists with identity-based models; as the Indian case against Section 377 suggests, it is entirely possible to have a nondiscrimination clause based on sexual orientation *and* to construe the right to privacy to include the deliberative and expressive aspects of a person’s sexual identity.

In sum, the presence of an autonomy-based model reduces the need to rely on identity-based protections because it avoids some of the problems faced by an overreliance on identity, and provides an alternative strategy of legislative or constitutional protection.³⁵⁸

As we have seen, some identity-based models can be appropriate vehicles of constitutional protection for some individuals who readily adopt the category

358. Even though the right of sexual autonomy is extraordinarily important, Schulhofer valuably observes that sexual autonomy is a “missing entitlement;” meaning that sexual autonomy does not rank among the list of fundamental entitlements granted by law—entitlements to life, liberty and to labor. Indeed, he explains that because laws governing rape have been so preoccupied with the presence of force and coercion (in other words, the presence of physically violent misconduct), that judges and legislators have missed a much more important right: the right of a woman to control access to her own body. Schulhofer argues:

Sexual autonomy should not exist so precariously, as a mere by-product of the law’s restrictions on the use of force. It is an independent interest, in one of the most important interests for any free person. A decent regime for safeguarding fundamental rights should place sexual autonomy at the center of attention and protect it directly, for its own sake, just as we protect physical safety, property, labor, and informational privacy, the core interests of every human being.

Id. at 100-02. Again, while Schulhofer’s observations are contextualized within the sphere of examining rape laws in the United States, I believe that they can be valuably extended towards other areas of potential coercion, particularly towards the realm of sexual identity itself.

of “gay” or “lesbian.” Yet such models often require individuals to “name” themselves or “come out” as an implicit prerequisite. However, a sexual autonomy framework allows for protection on the basis of *both* privacy and identity. It requires only that individuals have the right to determine their own preferences, orientations, and identities. And, as the Indian experience has shown, a sexual autonomy framework, quite unlike the current overreliance on a substitutive equation between identity and conduct, avoids the accusation that it is a Western export because it builds on preexisting localized jurisprudence and civil rights movements for its efficacy.

Finally, a sexual autonomy model is most clearly akin to the original goals and objectives of the gay liberation movement. Following the Stonewall Incident in 1969, gay liberation was conceptualized as a multi-intersectional movement that connected threads of various struggles.³⁵⁹ In pointing out that gender and sex roles oppress *everyone*, not just gay people, gay liberationists originally sought “not only recognition of homosexuality as a legitimate identity for a minority population but also to ‘free the homosexual in everyone.’”³⁶⁰ A sexual autonomy model does just that: it equalizes one’s sexual and identity preferences by focusing on the *act of choosing*, rather than *the gender or identity chosen*, as a focal point of protection. Instead of gay rights affecting a small, discernible minority population, a sexual autonomy model seeks to transform social attitudes to gender and sexuality—the original goals of the gay liberationist movement.³⁶¹ Destroying categories of homosexuality and heterosexuality should be a central, focal, point of discussion,³⁶² in stark contrast to the current overreliance on “sexual orientation” as a vehicle for constitutional protection.

Using a sexual autonomy model invigorates these basic foundations of gay liberation. Even though line-drawing between gay and straight may be politically strategic, as the United States’ experience has sometimes shown, it obscures a more important goal: respecting people’s autonomy to embrace a more fluid conception of sexuality and sexual orientation.³⁶³ In other words,

359. See ANNAMARIE JAGOSE, *supra* note 97, at 34-35.

360. *Id.* at 40.

361. In stark contrast to the value and attention placed on the current image of the “masculine” gay male, gay liberationists of the 1970s actively sought to build connections between feminism and gay liberation by focusing on effeminacy as a rallying point for revolution. *Id.* at 39.

362. As put by Judy Grahn, “if anyone were allowed to fall in love with *anyone*, the word ‘homosexual’ would not be needed.” *Id.* at 42.

363. For this reason, I again draw attention to the mandate issued by IGLHRC, which observes the importance of sexual self-determination:

Our constituency therefore includes people who are lesbian, gay, bisexual, transgendered and anyone living with HIV or AIDS. A US based non-profit, non-governmental organization (NGO), IGLHRC responds to such human rights violations around the world through documentation, advocacy, coalition building, public education, and technical assistance. *Our overarching commitment is to defend the rights of people worldwide to define their own sexualities and gender identities.*

See www.iglhrc.org/about/index.html (last visited May 18, 2002) (emphasis added).

the destruction of categories, a critical focus of the original gay rights movement—seems to have been actively (and paradoxically) overlooked by current models of gay rights, who often claim protection based on contingent (and largely fictional) categories of identity. As I have argued, such categories rarely challenge existing categories and also exclude many individuals who are equally deserving of protection. In contrast, a sexual autonomy framework includes individuals who need and deserve such protections by allowing them the freedom to choose how to express themselves, and then by protecting them from discrimination on this basis.

VII. CONCLUDING THOUGHTS

This is a time of great irony in gay rights. At no other time has global gay rights been so successful and so deeply contested. The recent emergence of gay or lesbian-identified individuals across the globe have created complex ruptures in existing social fabrics, calling into question the universality of legal constructs involving sexuality and culture.

As I have argued, global gay rights movements may eventually do serious harm to themselves if they continue to exclude alternative constructions of the relationship between identity and conduct among sexual minorities, and to propagate a single, substitutive, formulation of the two. For example, one of the most critical accounts of cultural difference among South Asian same-sex sexualities opens with a quote from Gabriel Garcia Marquez, which observes:

It is only natural that they insist on measuring us with the yardstick that they use for themselves, forgetting that the ravages of time are not the same for all, and that the quest of our own identity is just as arduous and bloody as it was for them. The interpretation of our reality through patterns not our own serves to make us ever more unknown, ever less free, ever more solitary.³⁶⁴

As the selection of this quote implicitly suggests, the current model of gay civil rights is problematic not only because it relies on an overly constrictive form of identity, but also because it alienates the very people such rights are supposed to protect. As a result, what some see as gay liberation, others see as a colonizing conflict of identity; where the complexities of desire and experience are forcibly mapped onto a shifting and ultimately unpredictable terrain. As one author in *The Economist* ruefully concluded several years ago, “[I]n effect, what McDonald’s has done for food and Disney has done for entertainment, the global emergence of ordinary gayness is doing for sexual culture.”³⁶⁵

364. See SHIVANANDA KHAN, *supra* note 178, at 31 (quoting Gabriel Garcia Marquez).

365. *It's Normal to be Queer*, *THE ECONOMIST*, Jan. 6, 1996, at 84.

For the substitutive model of gay rights contains a paradox: its overly limiting view of the relationship between identity and conduct excludes alternative configurations from its purview. Recall that the substitutive equation between identity and conduct is markedly inappropriate for transgendered individuals, who often find their gender identity to be *transformative* of their sexual identity. And this invisibility is replicated in other situations—for example, some men who engage in same-sex sexual conduct see themselves as heterosexual, and thus cannot fit into the prescribed mold so easily. Instead of the presumed substitutive relationship between identity and conduct, these individuals demonstrate that their same-sex sexual conduct may be *additive* to, and separate from, their sexual identities.

These different social meanings mean that it has become increasingly difficult (and often inappropriate) to generalize about how certain countries, or certain contexts, may treat homosexuality. Yet, many gay rights activists persist in utilizing the substitutive model as the only “proper” relationship between identity and conduct, thereby reinterpreting the world in their own image and on their own terms.³⁶⁶ There remains a tendency to view same-sex sexual activity that does not fit this mold as “underdeveloped,” and to recommend that lesbians and gay men in developing nations “catch up” with the rest of the Western world.³⁶⁷ As a result, the current discourse surrounding the globalization of gay rights tends to assume that an American-style model of gay identity is a “universal human condition, impeded only by shame and social stigma elsewhere in the world.”³⁶⁸

As I have argued, nothing could be further from the truth. But under the substitutive paradigm prefigured throughout law, such alternative sexualities—like those we have seen in Thailand, Zambia, India, and Mexico—are often excluded from the traditional platforms of gay civil rights. For laws that premise their protections on “sexual orientation” require self-identification of a gay, lesbian, or bisexual identity, but they also risk alienating others who vastly deserve protection. As commentator Frank Browning has observed, “A system of gay-identity politics may well sweep the world, like so much of Western commercial culture, but it may also prove as repressive and imperial as the old bigotries already in place.”³⁶⁹ In this sense, ideas of “gay liberation” serve “not as emancipatory slogans” but impose external categories onto widely divergent peoples,³⁷⁰ thus obscuring the inherent value of fluidity and deliberation in sexual identity.

366. See SEABROOK, *supra* note 277, at 1-2 (“it is very easy for the West, with its dominance of the cultural as well as the economic arena, to re-interpret the world in its own image and on its own terms.”).

367. See *Lesbian Emergence*, *supra* note 121, at 64, quoting ALAN SINFIELD, *GAY AND AFTER* 68 (1998).

368. BROWNING, *supra* note 4, at 25.

369. BROWNING, *supra* note 4, at 28.

370. SEABROOK, *supra* note 277, at 1-2.

Instead of excluding these other frameworks from protection, it is time to construe the substitutive model more broadly, and accept the multiple co-existence of different subjectivities and identities. The only way to accomplish this goal is to focus on sexual autonomy, and its expressive and deliberative aspects—as an alternative vehicle for protection. By doing so, we can ultimately recognize that there are multiple models of gay liberation and identity that take very different forms than the substitutive model favored by existing legal protections.

Consequently, reassessing the utility of the substitutive paradigm carries important lessons for gay rights activists in *any* locality. And ultimately, by studying how different frameworks are excluded, we can create a more sophisticated, inclusive approach that integrates protections for sexual minorities with preexisting social meanings. By utilizing a vision of deliberative sexual autonomy while seeking civil rights protections based on *both* privacy and identity, we can honor the complex process of identity formation while still recognizing the need for equality on the basis of sexual orientation.