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## ARTICLES

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### INDIVIDUAL SOVEREIGNTY, FREER SEX, AND DIMINISHED PRIVACY: HOW AN INFORMED AND REALISTIC MODERN SEXUAL MORALITY PROVIDES SALVATION FROM UNJUSTIFIED SHAME

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## I. INTRODUCTION

Privacy is the tool by which we control others' perception of ourselves.<sup>1</sup> Not surprisingly, many of the facts about ourselves, which we desire to hide or keep private, are facts that, if generally known, would cause us to experience shame.<sup>2</sup> For example, the shame associated

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<sup>1</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 34–35 (2007).

<sup>2</sup> See Rory Bahadur, *Electronic Discovery Informational Privacy and Utopian Civil Justice*, 79 MISS. L.J. 317, 351 n.161 (2009) (“Judge Posner, on his blog, has stated that people want to conceal facts that are ‘embarrassing or discreditable.’ He argues that people want to hide the embarrassing information about themselves that go against cultural taboos.”); see also Bryan H. Choi, *A Prospect Theory of Privacy*, 51 IDAHO L. REV. 623, 623 (2015) (“Privacy law is unique in that it continues to be steered foremost by moral intuition. What qualifies as a ‘violation’ of privacy is predicated largely on the moral reprehensibility of the act in question”); Lisa M. Austin, *Privacy Shame and the Anxieties of Identity* (Jan. 1, 2012) (unpublished manuscript), <http://ssrn.com/abstract=2061748> (“Shame often hovers near privacy. We can ask whether information is private by asking whether its disclosure would ‘humiliate’ and we can show damages by pointing to the ‘humiliation and distress’ that follow from disclosure.”); Richard Posner, *Posner on Privacy*, BECKNER-POSNER BLOG (May 8, 2005), <http://www.becker-posner-blog.com/2005/05/posner-on-privacy.html>.

with sexuality is deeply ingrained in our culture.<sup>3</sup> Courts, even in an era of decreasing notions of privacy, have routinely held that these most intimate facts are indeed private.<sup>4</sup>

In a 2012 law review article, I suggested the need for privacy, as we know it, would decline significantly for two reasons.<sup>5</sup> The first reason is that in the digital age, newsworthiness is a boundless privilege.<sup>6</sup> The second, which this Article explores, is the Millennial Generation, which understands that some of the very things we are traditionally

<sup>3</sup> Jeffrey M. Bryan, *Sexual Morality: An Analysis of Dominance Feminism, Christian Theology and the First Amendment*, 84 U. DET. MERCY L. REV. 655, 687–88 (2007).

To Augustine, however, the fall deeply changed the relationships that humans have with each other and with God such that what was once harmonious is now in conflict: spiritual, heavenly desires vs. physical, worldly desires. Glaring evidence of this showed through the creation story and into his own life, illustrated and confirmed by attempts to control his own sexual desires. Sexual desire defied his control, and, as a result, became something to distrust and something of which he was ashamed: Justly is shame very specially connected with this lust; justly, too, these members themselves, being moved and restrained not at our will, but by a certain independent autocracy, so to speak, are called 'shameful.' Their condition was different before sin. For as it is written, '[t]hey were naked and were not ashamed'—not that their nakedness was unknown to them, but because nakedness was not yet shameful, because not yet did lust move those members without the will's consent; not yet did the flesh by its disobedience testify against the disobedience of man. An Augustinian theology of sexual morality concludes by incorporating the involuntary nature of human sexuality into the true original sin—subverting God's will with humankind's own: [Augustine] went on to insist that such shame was 'more than just; it was 'utterly appropriate.' As soon as they had made their own wills independent of the will of God, parts of Adam and Eve became resistant to their own conscious will. Their bodies were touched with a disturbing new sense of the alien, in the form of sexual sensations that escaped their control.

*Id.*; see also Jane Caputi, *Re-Creating Patriarchy: Connecting Religion and Pornography*, 1 WAKE FOREST J.L. & POL'Y 293, 313 (2011).

For the Abrahamic religions, all ills can be traced to Eve, whose 'transgression against the command of Allah' not only marked women as morally weaker than man, 'but . . . also responsible for bringing *pislik* (dirtiness) into existence . . . creaturely functions of defecation, urination . . . sweating . . . menstruation.' In this paradigm, mind or spirit is vehemently separated from body, and shame and disgust are attached not only to sexuality, but to the very condition of being human (from the Latin *humus*, meaning earth or dirt).

*Id.*

<sup>4</sup> See Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1109 (2002).

[J]udges and juries appear to face no great conceptual difficulty identifying those aspects of life that are sufficiently intimate or personal to qualify as nobody else's business. Matters relating to sexuality, love, physical and mental health, family relationships, intense religious and political convictions, and personal finances are among the topics regarded as private.

*Id.*

<sup>5</sup> See Bahadur, *supra* note 2, at 317–18.

<sup>6</sup> *Id.* at 339–41.

most ashamed of and seek to keep private, such as sexuality, are actually essential components of our humanity.<sup>7</sup> As a result, the Millennial Generation's need for privacy has declined because members of the generation have recognized the artifice of society's moral formulations regarding sex.

Part II of this Article examines and describes the traditional American sexual morality. America's normative moral and legal structure largely reflects a denial of human sexuality. This denial is based on guilt and shame associated with behavior, which does not conform to the Judeo-Christian constructs upon which we traditionally base our morality.<sup>8</sup>

Part III demonstrates that this sexual morality is contrived and empirically baseless. The fundamental purpose of this morality is to perpetuate discrimination and to suppress female sexuality because it threatens patriarchal societal structures.

Part IV suggests that contemporary sexuality reflects an awareness of the empirical vacuousness of the traditional moral construct regarding sexuality. This awareness, in part itself fueled by reduced privacy in an era of digital information, is simultaneously the catalyst for and the result of an increased acceptance of the reality of human sexuality. This acceptance removes the shames associated with sexual activity that were traditionally considered immoral. In turn, the eradication of the shame associated with sexuality reduces the need for privacy.

As this Article unfolds, it is important to clarify that no normative judgments are being made about any religious text or religion; rather, the Article suggests that interpretations of various religious texts were used to perpetuate a sexual morality that is both unrealistic and inhumane.

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<sup>7</sup> See *id.* at 343–49.

<sup>8</sup> Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 226 n.169 (2000) (explaining that "a traditional influence and structure of meaning, the Judeo-Christian religion remains the most powerful and continues to provide the social context for sexuality for most Americans").

## II. TRADITIONAL SEXUAL MORALITY

A significant part of our normative morality is entirely related to sexual intercourse.<sup>9</sup> In the 2004 election exit polling, more Americans listed “moral values” as the issue that concerned them more than any other,<sup>10</sup> even though

[t]he country was still recovering from the most deadly foreign attack it had ever sustained and fighting a war that had already claimed over a thousand lives and cost over one hundred billion dollars; the economy was faltering; the national debt skyrocketing; public education in disarray; Social Security heading toward collapse and health care in a widely acknowledged state of crisis.<sup>11</sup>

Despite the entirety of dire predicaments existing at the time, the most important issue for the American voters in choosing a leader related to the candidate’s attitudes about sexual intercourse or the candidate’s normative sexual morality.<sup>12</sup> Edward Rubin suggests the current and conspicuous importance of moral values, or morality, in the political sphere represents a desperate effort to resist a major shift in normative morality—fueled by an age of enlightenment—from one based on higher purposes to one based on self-fulfillment.<sup>13</sup>

The “Morality of Higher Purposes” existed from the Middle Ages through the Age of Enlightenment.<sup>14</sup> It is inherently a morality derived from Christian principles with well-established norms.<sup>15</sup> The most fundamental of these principles was perhaps the notion that the sole purpose of one’s actions in this life is to determine that person’s place of residence after death.<sup>16</sup> This, of course, refers to the long-standing Christian dichotomy of salvation versus damnation after death. Central to this morality is the belief that anything you desire is inconsistent with avoiding a really hot afterlife.<sup>17</sup> Pursuant to the association of desire with evil, the only non-sinful sex was sex for the purpose of procreation.<sup>18</sup> Any other sexual activity was sinful and

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<sup>9</sup> See Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 2–3 (2005).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2–3.

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10–11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 11.

therefore immoral.<sup>19</sup> Legal and social viewpoints regarding sexuality in the United States find their genesis in this same morality of higher purposes.<sup>20</sup>

For example, the anti-abortion campaigns rely on this morality in the sense that abortion is viewed as “a specific reversal of sexual intercourse’s only valid purpose.”<sup>21</sup> Similarly, viewpoints holding that the abstinence doctrine is the only proper sexual education reflect the beliefs that sex is only moral when the goal is reproduction and that high school students are too young to prepare for raising children.<sup>22</sup> This morality is also the basis for opposition to RU-486® and Plan B One-Step®, which are viewed as medical abortions under Judeo-Christian moral constructs.<sup>23</sup>

The ultimate effect of this still-existing, medieval-era, Judeo-Christian-based morality on American law is the heavy, persistent regulation of sex.<sup>24</sup> According to Martha Chamallas,

[w]hen the traditional view is expressed in the law, the critical fact tends to be the status of the participants, rather than the purpose or nature of the sexual encounter. Legal regulation in the traditional mode regards non-marital sexual activity, whether consensual or not, as properly subject to legal sanction.<sup>25</sup>

Tautologically, the regulation of adult consensual sexual activity further buttresses the immorality of conduct not conforming to the moral majority’s viewpoint because “[t]he traditionalist also tends to perceive the law as an important mechanism for expressing moral values and maintaining a morally decent society. Under the traditional mode of

<sup>19</sup> *Id.*

<sup>20</sup> Timothy W. Reinig, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 *BUFF. L. REV.* 859, 872–73 (1990).

[T]here is nothing in the English-American social structure which has had more influence upon present patterns of sexual behavior than the religious backgrounds of that culture. It would require long research and a complete volume to work out the origins of the present-day religious codes which apply to sex, of the present-day sex mores, of the coded sex laws, and to trace the subtle ways in which these have influenced the behavior of individuals . . . . Ancient religious codes are still the prime source of the attitudes, the ideals, and the rationalizations by which most individuals pattern their sexual lives.

*Id.*

<sup>21</sup> Rubin, *supra* note 9, at 23.

<sup>22</sup> *Id.* at 24.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 *S. CAL. L. REV.* 777, 781–82 (1987).

<sup>25</sup> *Id.* at 781.

regulation, the law functions actively to enforce the moral code, and immoral activity is likely to be unlawful.”<sup>26</sup>

The traditionalist viewpoint based on Judeo-Christian tradition, as explained above, is reflected in both the criminal and civil legal systems.<sup>27</sup> In the criminal system, for example, fornication, adultery, and sodomy were illegal even when consensual, and robust and restrictive obscenity laws further suggested that sex outside of marriage was immoral.<sup>28</sup> In the civil system, the traditional morality also disincentivized morally nonconforming behavior as follows:

1. The denial of contraceptives to unmarried persons;<sup>29</sup>
2. The stigmatization and victimization of non-marital children because of their parents’ choice to engage in non-marital sex;<sup>30</sup>
3. The labeling of unmarried parents and homosexuals as immoral and unfit for education and jobs; and<sup>31</sup>
4. The potential for adultery to result in increased post-divorce support obligations and/or loss of support and, even more incredulously, the belief that denying her custody of her children could punish a wife’s adultery.<sup>32</sup>

Traditional morality and the associated legal doctrines perpetuate a patriarchal society reflecting these normative judgments, which, at their root, hold women sexually and socio-economically subordinate to men.<sup>33</sup> As previously mentioned, this is especially significant because

<sup>26</sup> *Id.* at 781–82.

<sup>27</sup> *Id.* at 784–85.

<sup>28</sup> *Id.*; see also Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN’S L.J. 1, 25 n.134 (2000).

<sup>29</sup> Chamallas, *supra* note 24, at 785.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 787–89.

The subordination of wives meant that the only legitimate environment for sex was destined to be controlled by men. Although men as well as women could feel trapped by a traditional marriage, women typically had more to lose from divorce than men. Women were less likely to remarry and were far more vulnerable to poverty if they had no support from a man.

Moreover, the traditional view of sex coexisted peacefully with the double standard of sexual morality. Under the double standard, men were expected to be sexually active before marriage and on occasion to engage in casual extra-marital sex. Women were ordinarily denied such freedom and were subjected to harsh social penalties if they exerted sexual independence. One

“[t]he law of sex . . . can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct.”<sup>34</sup> Hence, “[s]exuality was male-centered, culturally established, and labeled as science. If women’s sexual satisfaction stemmed from the clitoris—and thus could be achieved independently—then the subordinate and dependent role of women intrinsic to the contemporary understandings of both family and sexuality would be challenged.”<sup>35</sup>

For example, this rationale directly explains the fact that in Texas, the use of sex toys can lead to a year in jail and a \$4,000 fine.<sup>36</sup> Similar statutes exist in Georgia, Mississippi, Alabama, Louisiana, Kansas, and Colorado, although some were subsequently challenged on constitutional grounds.<sup>37</sup>

Additionally, the law of sex, based on the traditional moral code, was also used to perpetuate racism until the Supreme Court’s ruling in *Loving v. Virginia*.<sup>38</sup> Remarkably, in upholding the ban on interracial marriage, the state trial judge pronounced,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>39</sup>

Interracial marriages, inasmuch as they were offensive to God, were therefore also “immoral, offensive to social mores, [and] against the rules of nature.”<sup>40</sup>

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serious threat a woman could face in a society that embraced this double standard was to be labeled “immoral” and ineligible for the respectable roles of wife and mother.

*Id.*

<sup>34</sup> *Id.* at 777.

<sup>35</sup> Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 *YALE J.L. & FEMINISM* 1, 19 (2004).

<sup>36</sup> *Id.* at 2 (discussing, *inter alia*, TEX. PENAL CODE ANN. §43.21, which defines as obscene “a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs”).

<sup>37</sup> *Id.* at 2 n.2.

<sup>38</sup> Joshua A. Slone, *Comment: Whose Morality is it Anyway?: Recognizing the Tension Between Morality Laws and the Establishment Clause*, 13 *Geo. J.L. & Pub. Pol’y* 49, 72 (2015).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Homosexuality was also declared properly criminal in *Bowers v. Hardwick*<sup>41</sup> because it was an activity the Supreme Court concluded did not conform to the traditional Judeo-Christian morality; and as such, it was immoral.<sup>42</sup> In dictum, the *Bowers* court “reinscribes arcane myths about homosexuals and homosexuality,” which are derived from “religious and biblical interpretations of sexuality.”<sup>43</sup>

Judeo-Christian norms are the bases of our sexual morality, and these norms are reflected in the law regulating consensual adult sexual activity.<sup>44</sup> Reinforced by the law, these norms perpetuate an environment where nonconformance to the standards results in feelings of shame. Part III demonstrates that there simply is no empirical basis for this morality and that complying with this morality perpetuated a history of discrimination, cruelty, and female suppression. As a result, these norms should not be the basis of our sexual morality.<sup>45</sup> Finally, Part IV suggests that the privacy decline is related to modern society’s recognition of the empirical vacuousness of our morality.<sup>46</sup>

### III. TRADITIONAL SEXUAL MORALITY AS AN INSTRUMENT OF RACISM AND FEMALE OPPRESSION

Finding its origins in Augustinian ideology, the traditional Judeo-Christian sexual morality serves as an instrument to justify female oppression, racism, and radical constraints on society. Subsection A discusses the Augustinian origins of Judeo-Christian sexual morality. In turn, Subsections B and C discuss the female oppression this moral perspective justifies and its effects on society. Subsection D explains that while this Judeo-Christian morality promotes sexism, it also promotes race-based oppression. Finally, and perhaps most alarming, the final Subsection explores the similarities between normative Judeo-Christian sexuality and psychopathic sexuality.

<sup>41</sup> 478 U.S. 186 (1986).

<sup>42</sup> See Slone, *supra* note 38, at 61 (explaining that the Court in *Bowers v. Hardwick* “specifically identified and applied” Judeo-Christian morals as a sufficient rational basis for upholding the state’s prohibition of sodomy); see also *id.* at 63 (explaining that “morality interests are often religiously motivated and seek to govern morality for morality’s sake”).

<sup>43</sup> See Kris McDaniel-Miccio, *Tzadek Tirdof—Justice, Justice You Shall Pursue: Romer, Lawrence, & Windsor: A Critique of Justice Scalia’s Dissenting Opinions*, 21 CARDOZO J.L. & GENDER 317, 329 (2015).

<sup>44</sup> *Id.*

<sup>45</sup> See *infra* notes 47–147 and accompanying text.

<sup>46</sup> See *infra* notes 148–268 and accompanying text.

A. *The Augustinian Origins of Judeo-Christian Sexual Morality*

The sexual prohibitions associated with our sexual morality are directly attributable to the teachings of St. Augustine.<sup>47</sup> The basic premise of Western sexual morality is that “sex within itself is evil and sinful.”<sup>48</sup> Essentially, St. Augustine blamed Eve from The Book of Genesis for nearly all of humanity’s woes.<sup>49</sup> He believed the forbidden fruit was sex.<sup>50</sup> St. Augustine thought that because sex was sin, it was punished by pain, and he further equated the pain of child bearing with punishment for the sin of sex.<sup>51</sup> Augustine thought that humans should ask forgiveness for even thinking about sex and that abstinence was the norm.<sup>52</sup> “Augustine’s teachings [therefore] gave theological structure to feelings of guilt and shame in a biological drive.”<sup>53</sup>

The Church at the time knew that Augustine’s teachings were incorrect, but it adopted them anyway because his teachings “served the political, economic and religious interests of religious establishment. In particular, they served to maintain the interests of a male-dominated religion.”<sup>54</sup>

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<sup>47</sup> CHARLES PHILLIPS, ANOTHER LOOK AT SEX: THE BIBLICAL PERSPECTIVE 41–44 (1994).

The Church’s attitude about sex goes back hundreds of years to one great theologian, St. Augustine . . . In his book on Western sexual morality, C. W. Lloyd says: “Augustine’s writings have probably exerted more influence in the West on love and sexual practice than those of any other man. The clearest expression of the innate evil in sexual passion, even within marriage, is set forth.”

*Id.*

<sup>48</sup> *Id.* at 42–43.

<sup>49</sup> *Id.* at 42.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

St. Augustine believed that Adam and Eve’s problem in the Garden was because of sex. He believed that the account of the sin of Adam and Eve against God in Genesis 3 uses symbolic language, that the “forbidden fruit” actually represented sex. He thought Eve conceived and bore children in pain (Genesis 3:16) because sex is sinful, and any kind of sexual activity brings pain. According to St. Augustine, human beings should ask God’s forgiveness for even thinking about sex and should abstain whenever possible. In fact, Augustine said, “Men and women who want to be righteous in God’s sight should live in celibacy; i.e., without sexual contact.” His adherents believed their leaders should live in church monasteries and convents without even conversing with the opposite sex.

*Id.*

<sup>53</sup> *Id.* at 43.

<sup>54</sup> Ronny West, *The Ancient Roots of Our Judeo-Christian Sexual Prohibitions*, CYBERCOLLEGE, <http://www.cybercollege.com/history.htm> (last visited Mar. 9, 2016).

Augustine thought that gender hierarchy, or rather the “superiority of male and subordination of female,” was part of the original creation.<sup>55</sup> Though he thought sexual intercourse was part and parcel of original creation, he believed the original plan was for sex to occur completely free of lust, and as a result, Eve would have remained “virginal” even after sexual intercourse.<sup>56</sup>

According to Augustine, the divine plan was thwarted, however, because Eve gave into temptation.<sup>57</sup> Augustine based this position on his belief that women, “ha[ving] less rationality, [were] closer to the flesh than the spirit and so [Eve] was easily deceived by the serpent.”<sup>58</sup> The biting of the apple is widely regarded as a metaphor for Eve satisfying her sexual desire or lust with one other than Adam.<sup>59</sup> Thus, Augustine blamed all of humanity’s suffering on a woman seeking to satisfy her sexual desires.<sup>60</sup> Realize that Augustine also thought that hierarchical social structure, including slavery, was necessary as a direct result of Eve’s decision to have sex with someone whom she chose.<sup>61</sup>

Augustine did recognize that a woman’s resurrection could occur and that men likely would not dominate over them in heaven.<sup>62</sup> However, he believed this could only be true because during the resurrection, “women will rise as women just as men will rise as men, but in such a way that their sexual parts related to procreation will be

<sup>55</sup> ROSEMARY RADFORD RUETHER, *WOMEN IN CREATION, FALL AND REDEMPTION: THE CLASSICAL PARADIGM 1*, <http://est.earlham.edu/sites/default/files/1Quaker.pdf>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2.

<sup>59</sup> See Justin Glenn, *Pandora and Eve: Sex as the Root of All Evil*, 71 *CLASSICAL WORLD* 179, 180–81 (1977).

<sup>60</sup> See RUETHER, *supra* note 55, at 2.

<sup>61</sup> *Id.* at 3–4.

For Augustine, only women are under subordination in the original creation. This subordination is inherent in their female roles of helpmeets to men. There was no subordination of some men to others in the original creation, but the fall and sinful self-will brought about social disorder. Thus various forms of domination are necessary to prevent lawlessness in society, such as slavery, the domination of peasants by landlords and coercion of rebels by the state. Heretics and dissidents also need to be coerced by the Christian state and forced to submit to the rulings of the church. Thus Augustine justified hierarchical and coercive social systems to compensate for the lawlessness brought about by sin.

*Id.*

<sup>62</sup> *Id.* at 4.

changed”.<sup>63</sup> As Augustine put it, they would be “fitted to glory rather than to shame.”<sup>64</sup>

It is this Augustinian view of women and sexuality that formed the pattern that was “accepted as normative by subsequent Western Christian theologians.”<sup>65</sup> St. Thomas Aquinas, by adopting the teachings of Aristotle, also perpetuated the subversion of women, as he thought their sole purpose was to assist men in procreation.<sup>66</sup>

According to Aristotle’s biology, the male seed provides the form and active power in procreation, while the female only provides the “matter” that is formed.<sup>67</sup> “Normatively, every male seed should produce another male.”<sup>68</sup> Women are generated by an accident or defect in this process in the sense that female matter is incompletely formed by the male seed and therefore a defective human or female results.<sup>69</sup> Women thus are inherently incomplete or lacking in full humanness.<sup>70</sup> For Aquinas, following Aristotle, the woman was by nature weaker in physical strength, in will power, and in intellect.<sup>71</sup>

Perhaps the most disturbingly profound result of this ideology is the normative belief “that women are incapable of exercising sovereignty over [themselves].”<sup>72</sup> Also, this set of beliefs adopted by Aquinas from Aristotle, and involving a preordained hierarchy of humans in the order of creation, justifies and even condones slavery.<sup>73</sup>

Aquinas believed that Eve’s decision to sin led to the further subjugation of all women and increased the male dominance over them that was originally present in the Creation.<sup>74</sup> Ultimately, even the re-

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.* at 5.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

The social hierarchy in which the male rules and the female is ruled by the male is biologically necessary, and parallels the relation of the active mind and passive matter. Aristotle sees a parallel hierarchy in the relations of masters and slaves, and free Greeks over “Orientals,” similar to the relation of humans over animals and ultimately of humans over material creation.

*Id.*

<sup>74</sup> *Id.* at 6.

formists John Calvin and Martin Luther were unquestioning in the divine certainty that the woman's rightful place was male controlled and dominated and that women should never have positions of authority or power.<sup>75</sup> Not surprisingly then, morals legislation, or legislation enacted on the basis of Judeo-Christian morality, has a long-standing history of supporting discrimination.<sup>76</sup> Perhaps more surprising, however, the Aristotelian superiority of males over females is still recognized in the role differentiation today as embodied by the modern church.<sup>77</sup>

### B. *The Judeo-Christian Justification of Female Oppression*

Judeo-Christian morality has a long history of promoting sexism. At the Seneca Falls Women's Rights Convention of 1848, which was instrumental in affording women the right of suffrage, opponents used the Bible to show women's inferiority to men.<sup>78</sup> For example, Justin Fulton, a prominent reverend of the time, said:

Who demand the ballot for woman? They are not the lovers of God, nor are they believers in Christ, as a class. There may be exceptions, but the majority prefer an infidel's cheer to the favor of God and the love of the Christian community. It is because of this tendency that the majority of those who contend for the ballot for woman cut loose from the legislation of Heaven, from the enjoyments of home, and drift to infidelity and ruin.<sup>79</sup>

Additionally, the very same Judeo-Christian moral tradition that is the source of our traditional normative morality is based on the Bible, a book which contains copious language clearly assuming that females should be subservient to men and sexually repressed.<sup>80</sup> In the Book of Deuteronomy, for example, if a man marries a woman and it turns out

<sup>75</sup> *Id.* at 8.

<sup>76</sup> Jeffery Kershaw, *Notes Towards an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 559 (2005).

<sup>77</sup> RUEETHER, *supra* note 55, at 5 ("This means only males can be priests since only males can image Christ. Women are not only barred from priestly ordination juridically. By nature, women cannot validly receive this sacrament since their defective humanness cannot image Christ, exemplify excellence or exercise sovereignty.").

<sup>78</sup> See Zaid Jilani, *How Religious 'Liberty' Has Been Used to Justify Racism, Sexism and Slavery Throughout History*, ALTERNET, <http://www.alternet.org/belief/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history> (last visited Mar. 10, 2016).

<sup>79</sup> *Id.* (citation omitted).

<sup>80</sup> B.A. Robinson, *The Status of Women in the Hebrew Scriptures (Old Testament)*, RELIGIOUS TOLERANCE, [http://www.religioustolerance.org/ofe\\_bibl.htm](http://www.religioustolerance.org/ofe_bibl.htm) (last updated Sept. 7, 2012).

on her wedding night she was not a virgin, “she shall be brought to the door of her father’s house and there the men of her town shall stone her to death. She has done an outrageous thing in Israel by being promiscuous while still in her father’s house.”<sup>81</sup>

Other Abrahamic religions, or religions which embrace the Old Testament, are interpreted to condone the subjugation and repression of female sexuality.<sup>82</sup> For example, *Princess: A True Story of Life Behind the Veil in Saudi Arabia*, contains descriptions of how unmarried Saudi women have to travel to Western countries to satisfy their natural sexual desires and then have surgeries to reconstruct their hymens in order to not be vilified for being sexually active.<sup>83</sup> However, at the same time, it is acceptable for Saudi men to have sex with girls as young as eight years old.<sup>84</sup>

This use of religion to justify male suppression of women is not confined to conservative Islam or post-independence America; rather, it is ingrained in the history of Western Europe as well.<sup>85</sup> The broad-reaching tentacles of this suppression similarly created a long-lasting mark on societal structures and personal relationships.

### C. *The Effect of Normative Judeo-Christian Sexual Suppression on Society*

Normative Judeo-Christian sexual morality resulted in widespread and systematic oppression of women by encouraging female persecution for infidelity and serving as the basis of adultery laws that cemented sexual oppression in a legal forum.<sup>86</sup> Perhaps, no example of Judeo-Christian female suppression is clearer than the Witch Hunts. Similarly, the results of this suppression are also reflected in adultery laws, which justify male dominance over women and dictate, still to this

<sup>81</sup> *Deuteronomy* 22:21.

<sup>82</sup> Nelia Beth Scovill, *The Liberation of Women in Religious Sources*, RELIGIOUS CONSULTATION, <http://www.religiousconsultation.org/liberation.htm> (last visited Mar. 10, 2016).

<sup>83</sup> See JEAN SASSON, *PRINCESS: A TRUE STORY OF LIFE BEHIND THE VEIL IN SAUDI ARABIA* 196 (2004).

<sup>84</sup> *Id.* at 78.

<sup>85</sup> Max Fisher, *The Real Roots of Sexism in the Middle East (It’s Not Islam, Race, or ‘Hate’)*, ATLANTIC (Apr. 25, 2012), <http://www.theatlantic.com/international/archive/2012/04/the-real-roots-of-sexism-in-the-middle-east-its-not-islam-race-or-hate/256362/>.

<sup>86</sup> See Thalif Deen, *Adultery Laws Unfairly Target Women, U.N. Says*, INTER PRESS SERV. (Oct. 24, 2012), <http://www.ipsnews.net/2012/10/adultery-laws-unfairly-target-women-u-n-says/>.

day, the proper confines of marriage, sexuality, and social hierarchies.<sup>87</sup>

### 1. The Witch Hunts

The Witch Hunts refer to a period of approximately 300 years, between 1450 and 1750 in Europe, when as many as nine million people, 80–90% of whom were women, were killed because they were identified as, or someone else believed they identified as, witches.<sup>88</sup> The Witch Hunts were described as an “eruption of Orthodox Christianity’s vilification of women.”<sup>89</sup> More precisely, Charles Zika theorizes that the Witch Hunts were an attempt to demonize the reality of female sexuality and female independence.<sup>90</sup> In an attempt to control this sexuality and to dominate women, marriage was asserted as a normative social result.<sup>91</sup> “Marriage, by virtue of the obedience demanded of women, was put forward as a remedy for this unbridled lust. Women were to be married so as to be mastered.”<sup>92</sup>

The uncontrolled, unmarried woman as a witch and someone to be feared is not an extinct historical relic; rather, this construct still informs politics today. For example, in his 1992 attack on an Equal Rights Amendment bill in Iowa, Pat Robertson said, “[T]he feminist agenda is not about equal rights for women. It is about a socialist, anti-family political movement that encourages women to leave their hus-

<sup>87</sup> See *id.*

<sup>88</sup> See HELEN ELLERBE, *The Witch Hunts: The End of Magic and Miracles*, in *THE DARK SIDE OF CHRISTIAN HISTORY* 116 (2013); see also KAYLA THERESA NATRELLA, *WITCHCRAFT AND WOMEN: A HISTORIOGRAPHY OF WITCHCRAFT AS GENDER HISTORY* 1, <https://www.binghamton.edu/history/resources/journal-of-history/k-natrella.pdf>.

<sup>89</sup> ELLERBE, *supra* note 88, at 114.

<sup>90</sup> Charles Zika, *Fears of Flying: Representations of Witchcraft and Sexuality in Early Sixteenth-Century Germany*, in 4 *New Perspectives on Witchcraft, Magic, and Demonology, Gender and Witchcraft* 384 (Brian P. Levack ed., 2001).

After a period of moral and sexual permissiveness in the mid-fifteenth century, preachers, moralists and town councils brought women’s sexuality and women’s bodies under their scrutiny and surveillance. Prostitution, procuring, concubinage, adultery, dancing, dress and ornament were all attacked. All were signs of disorder, and the root of the disorder was female lust. This lust was nothing short of demonic and had to be bridled.

*Id.*; see also ELLERBE, *supra* note 88, at 117 (explaining that the *Malleus Maleficarum*, or the manual put out by the church for understanding how to persecute witchcraft, describes how witches “collect[ed] male [sex] organs in great numbers”).

<sup>91</sup> Zika, *supra* note 90, at 384.

<sup>92</sup> *Id.*

bands, kill their children, practice witchcraft, destroy capitalism and become lesbians.”<sup>93</sup>

The equation of female sexuality with moral destruction and disorder finds its roots in Judeo-Christian misogynistic premises and Aristotelian physiology.<sup>94</sup> As a result, the following assessment of female sexuality developed:

Women’s wombs were described as hungry animals, which needed to be constantly satisfied by sexual intercourse and reproduction, otherwise they would wander through the body overpowering all the senses and faculties and subjecting the woman to hysteria. In other words, women’s natures were regarded as fixed through their bodies, and the internal functions of those bodies governed their overwhelming sex drives. Men needed to be constantly reminded of this reality. They had to be taught the ambiguity of women’s bodies, to be taken beyond the surface so that their senses did not bind them and they could exorcise the seductions of desire.<sup>95</sup>

The dangers of female sexuality and the need for a morality, which cabined, controlled, and justified the subjugation of women, are reinforced by common Christian portrayals of great men and their seducers, such as Samson and Delilah or David and Bathsheba.<sup>96</sup> However, often unrecognized in this portrayal of the evils of female sexuality is that female sexuality was associated with natural female characteristics, which were threatening to the patriarchy. In sixteenth-century Germany, for example, the witch’s sexuality was closely linked to “female independence, self-control and autonomy” and, in short, being a master-less female.<sup>97</sup>

Perhaps this might explain the common association of the “crone” with the witch.<sup>98</sup> “As the embodiment of mature feminine power, the wise old woman threatens a structure which acknowledges only force and domination as avenues of power.”<sup>99</sup> To this end, many of the women targeted as witches were postmenopausal women, widows, or women who rejected marriage.<sup>100</sup> These women represented the

<sup>93</sup> *Witch Hunts*, SUPPRESSEDHISTORIES.ORG, <http://www.suppressedhistories.net/catalog/witchhunts.html> (last visited Apr. 8, 2016).

<sup>94</sup> Zika, *supra* note 90, at 394.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 398.

<sup>98</sup> ELLERBE, *supra* note 88, at 128 (“The most common victims of witchcraft accusations were those women who resembled the image of the Crone.”).

<sup>99</sup> *Id.*

<sup>100</sup> NATRELLA, *supra* note 88, at 11.

antithesis of patriarchy and domination by men. In fact, Reginald Scot, writing in 1584, stated, “[I]t is indifferent to say in the English tongue, ‘she is a witch’ or ‘she is a wise woman.’”<sup>101</sup>

Judeo-Christianity was again instrumental in creating the image of the independent female as worthy of hatred because the ideal Judeo-Christian image of women was the Virgin Mary, and the witch is the exact opposite of that image.<sup>102</sup>

Whereas Mary became a mother without having sex, the witch has sex but . . . does not bear children [and because] motherhood was the primary, if not sole, purpose of a woman’s life and succeeding in that purpose correlated with a woman’s status, then the witch, as an anti-mother would be the most contemptible of women.<sup>103</sup>

The Witch Hunts also illustrate a most disturbing aspect of creating a normative morality based on Judeo-Christianity; that is, the convenience to those who have power in society of a morality, which can be drastically altered due to the inherent flexibility of doctrinal interpretation.

Before the Witch Hunts, the Church preached for centuries that belief in witchcraft was heresy and denied the existence of witches or magic.<sup>104</sup> In fact, in 906, the *Canon Escopi* mandated that the belief in witchcraft was heresy.<sup>105</sup> Yet, by 1320, partially in an effort to control female sexuality and maintain the patriarchy,<sup>106</sup> the very same Church began the persecution of witches and eventually came up with the *Malleus Maleficarum*, which is a treatise on how to persecute them.<sup>107</sup>

<sup>101</sup> ELLERBE, *supra* note 88, at 131; *see also* NATRELLA, *supra* note 88, at 398 (describing a painting of witches and suggesting that the women in the picture are not the typical female nurturer and preparer of food but rather women who seem in control of themselves).

<sup>102</sup> NATRELLA, *supra* note 88, at 12.

<sup>103</sup> *Id.*

<sup>104</sup> ELLERBE, *supra* note 88, at 121–22.

<sup>105</sup> *Id.*

<sup>106</sup> *See supra* Section III (explaining the basis of the Witch Hunts).

<sup>107</sup> *See* ELLERBE, *supra* note 88, at 114–17, 121.

Pope John XXII formalized the persecution of witchcraft in 1320 when he authorized the Inquisition to prosecute sorcery. Thereafter papal bulls and declarations grew increasingly vehement in their condemnation of witchcraft and of all those who “made a pact with hell.” In 1484 Pope Innocent VIII issued the bull *Summis desiderantes* authorizing two inquisitors, Kramer and Sprenger, to systematize the persecution of witches. Two years later their manual, *Malleus Maleficarum*, was published with 14 editions following between 1487–1520 and at least 16 editions between 1574–1669. A papal bull in 1488 called upon the nations of Europe to rescue the Church of Christ which was “imperiled by the arts of Satan.” The papacy and the Inquisition had

## 2. Adultery Laws

Adultery laws also have their bases in barbarian Judeo-Christian norms, which include the belief that women are the sexual property of men.<sup>108</sup> “Fathers, husbands, and kinship groups had property interests in women and women’s services, and they availed themselves of self-help or civil remedies to compensate for adulterous liaisons.”<sup>109</sup> Originally, before the spread of Christianity, adultery was viewed as a private but not a moral wrong.<sup>110</sup> The offended husband would avenge the invasion of his property rights by killing the offender or a member of the offender’s family.<sup>111</sup>

Eventually, under the influence of Christianity, adultery became a sin and was associated with the moral deficiency of the female.<sup>112</sup> As a result of the continued influence of Christianity, the American-colonial Puritans combined religious and legal norms, and adultery became a moral wrong and a capital offense.<sup>113</sup> Similar to the Witch Hunts, the purpose of modern adultery statutes is to preserve a morality where the only appropriate expression of sexuality is within marriage,<sup>114</sup> and the genesis of marriage is an institution, which cabins and

successfully transformed the witch from a phenomenon whose existence the Church had previously rigorously denied into a phenomenon that was deemed very real, very frightening, the antithesis of Christianity, and absolutely deserving of persecution. It was now heresy *not* to believe in the existence of witches.

*Id.*

<sup>108</sup> Mischler, *supra* note 28, at 20.

While early prohibitions of adultery were “concerned with power, not with religion,” as Christianity spread, sexual conduct took on a moral dimension. In the eighth and ninth centuries, “adultery became a sin as well as a wrong against the husband.” During the Norman reforms of the twelfth century, the criminal law became more developed with the state “co-optation of private vengeance” for most crimes. Adultery, however, was not viewed as a crime against the state, but rather as an ecclesiastical offense. Because church remedies were insufficient, Norman law, explicitly or implicitly, allowed an offended husband to act on his own behalf despite the church’s jurisdiction. “The state, having failed to provide an adequate remedy, did not punish the cuckold’s vengeance, and thus institutionalized it through permission.”

*Id.* at 21–22.

<sup>109</sup> *Id.* at 22.

<sup>110</sup> *Id.* at 20.

<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.* at 21 (citation omitted).

<sup>113</sup> *Id.* at 22–23 (citations omitted).

<sup>114</sup> *Id.* at 24 (citation omitted) (explaining that “[t]he laws against fornication and adultery are primarily aimed at preserving a moral order in which marriage is the only appropriate relationship for sexual expression”).

controls female sexuality and independence so as to perpetuate patriarchy.<sup>115</sup>

In fact, many contemporary Christian texts continue to perpetuate this patriarchy. In *Created to be His Help Meet*, a non-denominational book distributed by the Church, Debi Pearl suggests that the blueprint for a happy marriage is for women to understand that their role is to be subservient and obedient to their husbands.<sup>116</sup> She also suggests that women who are sexually active outside of a marital relationship are violating fundamental principles of Christianity because chastity is the essence of what it means to be female.<sup>117</sup> In fact, Pearl suggests that according to Christianity, the following terms describe the nature and role of women: chaste, sober, modest, shamefacedness, meek, quiet spirit, in subjection, obedient, kind, virtuous, discreet, keeper at home, gracious, good, and prudent.<sup>118</sup> While Pearl espouses what is perhaps an extreme example of Judeo-Christian subjugation of women, the refusal of certain churches to ordain women as priests, even today, reflects a Judeo-Christian normative hierarchy where men are superior to women.<sup>119</sup>

Other Judeo-Christian scholars perpetuate the false normativity of marriage as the only appropriate forum for sexual expression. For example, Ben Young and Dr. Samuel Adams, in their book *Devotions for Dating Couples*, advise the following: “Saving sex for marriage keeps you from feeling scattered and helps protect you from shame, guilt, anxiety and disintegration. The truth is, the more you continue to value your body and the significance of sexuality by waiting, the more secure, peaceful, and whole you will feel.”<sup>120</sup> Furthermore, according to the authors, “Sex outside of marriage is not God’s ideal for you because it takes something wonderful out of its context.”<sup>121</sup> One undeniable conclusion of the Judeo-Christian scholars is that sexuality is only appro-

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<sup>115</sup> See *supra* Part II.

<sup>116</sup> DEBI PEARL, *CREATED TO BE HIS HELP MEET* 54 (2004) (“Wives, submit yourselves unto your husbands, as unto the Lord.”) (emphasis omitted) (quoting *Ephesians* 5:22–24)); *id.* (“But I will have you know, that the head of every man is Christ; and the head of the woman is the man . . . .”) (emphasis omitted) (quoting *1 Corinthians* 11:3)).

<sup>117</sup> See PEARL, *supra* note 116, at 199.

<sup>118</sup> See *id.* at 198.

<sup>119</sup> STEPHEN SYKES ET AL., *THE STUDY OF ANGLICANISM* 331 (1988) (“The ordination of women to the priesthood is integrally related to a larger contemporary discussion of the ideological character of masculine language and imagery about God and corresponding social arrangements.”).

<sup>120</sup> BEN YOUNG & SAMUEL ADAMS, *DEVOTIONS FOR DATING COUPLES* 163 (2001).

<sup>121</sup> *Id.* at 166.

priate and acceptable within the institution of marriage.<sup>122</sup> As previously demonstrated, this notion is akin to saying that sexuality is only appropriate in an institution originally developed to control and subjugate women.

#### D. *The Judeo-Christian Justification of Race Based Oppression*

Normative Judeo-Christian morality has also traditionally been used to justify other forms of oppression in addition to female sexual oppression. In fact, normative Judeo-Christian morality historically served as a justification for systematic race-based oppression as well.<sup>123</sup> This justification served as not only the basis of historical slavery, but also contemporary Christian racism.<sup>124</sup>

In 1852, Josiah Priest published *Bible Defense of Slavery: And Origin, Fortunes, and History of the Negro Race*, claiming “the institution of slavery received the sanction of the Almighty in the Patriarchal age; that it was incorporated into the only national constitution which ever emanated from God, that its legality was recognized, and its relative duties relegated by our Saviour, when upon earth.”<sup>125</sup> Priest also uses other scriptures to support slavery, namely the following:

If God appointed the race of Ham judicially to slavery, and it were a heinous sin to enslave one, or all the race, how then is the appointment of God to go into effect? . . . God does never sanction sin, nor call for the commission of moral evil to forward any of his purposes; wherefore we come to the conclusion, that it is not sinful to enslave the negro race, providing it is done in a tender, fatherly and thoughtful manner.<sup>126</sup>

Prominent Baptist minister Richard Furman wrote to the Governor of South Carolina, using the Bible to support slavery and arguing, “[T]he right of holding slaves is clearly established in the Holy Scriptures.” He also specifically cited the “Israelites [being] directed to purchase their bond-men and bond-maids of the Heathen nations; except they were of the Canaanites, for these were to be destroyed. And it is declared that the persons purchased were to be their ‘bond-men forever;’ and an ‘inheritance for them and their children.’”<sup>127</sup>

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<sup>122</sup> *Id.* at xii.

<sup>123</sup> See Jilani, *supra* note 78 (quoting JOSHUA PRIEST, *BIBLE DEFENSE OF SLAVERY: AND ORIGIN, FORTUNES, AND HISTORY OF THE NEGRO RACE* (1852)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (explaining the letter that Richard Furman wrote to the Governor of South Carolina).

Not only is this consistent with Aristotelian justifications of slavery,<sup>128</sup> the Tenth Commandment itself implicitly supports slavery.<sup>129</sup> A commonly accepted translation of this commandment is, “Thou shalt not covet thy neighbor’s house, thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbor’s.”<sup>130</sup> The plain implication is that a person may own a maidservant and a manservant in exactly the same manner that he can own an ox or an ass.

Recent scholarship also explores the biblical basis of racism.<sup>131</sup> Obviously there is also language in the Bible which can be interpreted as not supporting racism,<sup>132</sup> but the point is that there is support for both viewpoints, and no one side can ever prove that their interpretation is correct.<sup>133</sup>

Not surprisingly, then, a 2010 study from the Society for Personality and Social Psychology concluded that, among white, American Christians, the “intergroup dynamics established by religious identification along with conventional life values appeared to drive religious racism.”<sup>134</sup> In fact, the study went so far as to conclude that even the humanitarian and inclusive interpretation of religious teachings does nothing to decrease religion-based racism and that racial tolerance was highest among people who identified as agnostic.<sup>135</sup>

<sup>128</sup> See *Deuteronomy* 22:13–21.

<sup>129</sup> *Exodus* 20:1–17.

<sup>130</sup> *Id.*

<sup>131</sup> George H. Taylor, *Race, Religion, and Law: The Tension between Spirit and its Institutionalization*, 6 MD. L.J. RACE, RELIGION, GENDER & CLASS 51, 52–53 (2006).

White racists make claims that their racist religious beliefs do derive from the Bible. Biblical predicates for racist claims by White Christians include the condemnation by Noah of his son Ham’s progeny, due to Ham’s misconduct. The book of Genesis quotes Noah saying of Ham’s son, Canaan: “Cursed be Canaan; a slave of slaves shall he be to his brothers.” The New Testament in turn differentiates between the life of the law and the life of faith. The life of the law is required because of human sin, and under the life of the law, writes Paul, slaves should be obedient to their masters. Slavery as a practice is not condemned.

*Id.*

<sup>132</sup> *Id.* at 53 (“Paul will go on to say elsewhere: ‘[I]n Christ Jesus you are all sons of God, through faith . . . There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.’”).

<sup>133</sup> *Id.* (“But just as much as this language can provide support for those fighting the battle against racism, it can also be invoked by those who differentiate between the life of law in this world—which tolerates racism—and life in Christ, which lies beyond.”).

<sup>134</sup> Deborah L. Hall et al., *Why Don’t We Practice What We Preach? A Meta-Analytic Review of Religious Racism*, PERSONALITY & SOC. PSYCHOL. REV. 135, 135 (2010).

<sup>135</sup> *Id.* at 126.

Derek Bell, a critical race scholar, suggested recently what is perhaps the most common and logical inference in response to the above information. Bell suggested:

I have focused on the economic, political, and cultural dimensions of racism, suggesting its permanence because of the social stability it provides in a system that contains great disparities in income and wealth. . . . But I want to raise . . . the possibility of a deeper foundation growing out of an undeniable fact. Most racists are also Christians.<sup>136</sup>

E. *The Criminally Insane Nature of Judeo-Christian Sexuality*

Even more alarming still than perpetuating discrimination, as discussed above, is the notion that normative Judeo-Christian sexuality closely parallels the sexuality of the criminally insane. Hans Eysenck's study demonstrates that the sexual views of 186 highly criminal male psychopaths mirror what is widely considered normative according to Judeo-Christian sexual morality. For example, male criminal psychopaths:

1. Consciously avoided sexual thoughts;
2. Thought about sex rarely;
3. Did not think about sex every day;
4. Felt sex was not all that important;
5. Were apathetic about sex;
6. Were unexcited by the thought of illicit relationships;
7. Regarded the purpose of sex as reproductive rather than pleasure;
8. Drew sharp lines between what was wrong or right in terms of sexual conduct;
9. Preferred sexual intercourse carried out under bedclothes and in the dark;
10. Declined to watch a couple making love;
11. Opposed the free publication of pornography;
12. Would protect their children from all contact with sex;

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<sup>136</sup> Taylor, *supra* note 131, at 51.

13. Thought women should never be sexually aggressive and that only men should be dominant; and

14. Regarded virginity as a girl's most valuable possession.<sup>137</sup> The commonalities between Judeo-Christian sexual normativity and criminal psychopaths is consistent with findings indicating a strong, direct relationship between sexual repression and violence, and it is also consistent with recent revelations about pedophilia in the Catholic Church.<sup>138</sup>

People with a sex-repressive morality were relatively more aggressive, insensitive, more inclined to physical abuse of children and subordinates, to killing and torturing enemies, and to other criminal behavior, while people with moral beliefs permitting sexual freedom, on the other hand, were generally more friendly and kind-hearted, showed more affection to their children, and were less inclined to criminality.<sup>139</sup>

In 2014, the *Daily Mail* quoted Pope Francis as saying that one in every fifty Catholic priests was a pedophile.<sup>140</sup> The United Nations previously reported that the Vatican systematically adopted policies allowing priests to molest thousands of children by failing to report the abuse and instead transferring priests to other dioceses to prevent their exposure.<sup>141</sup> Yet, amazingly, this institution remains stable with membership worldwide.<sup>142</sup> People still tithe their incomes to the Church, and they continue to understate harm caused by this institution, and society in general, from thousands of years of perversion and denial of humanity's sexual nature.<sup>143</sup> This denial and continued devo-

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<sup>137</sup> CHRIS R. BERGSTRAND & JENNIFER BLEVINS SINISKI, *SWINGING IN AMERICA: LOVE, SEX, AND MARRIAGE IN THE 21ST CENTURY* 132 (2009).

<sup>138</sup> *Id.* at 133.

<sup>139</sup> *Id.*

<sup>140</sup> Hannah Roberts, *One in 50 Priests is a Pedophile: Pope Francis says Child Abuse Is 'Leprosy' Infecting the Catholic Church*, DAILY MAIL (July 13, 2014, 10:54 AM), <http://www.dailymail.co.uk/news/article-2690575/Pope-Francis-admits-two-cent-Roman-Catholic-priests-paedophiles-interview-Italian-newspaper.html>.

<sup>141</sup> *Id.*

<sup>142</sup> CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE, *GLOBAL CATHOLICISM: TRENDS AND FORECASTS* 1 (2015), <http://cara.georgetown.edu/staff/webpages/Global%20Catholicism%20Release.pdf>.

<sup>143</sup> See THOMAS P. DOYLE ET AL., *SEX PRIESTS AND SECRET CODES: THE CATHOLIC CHURCH'S 2000-YEAR PAPER TRAIL OF SEXUAL ABUSE* 4 (2006) (explaining that the church had documented knowledge of consistent failure of clerics to observe chastity vows and child abuse from as early as the fourth century).

tion to the artificial morality espoused by this institution may be due to the phenomenon known as religious duress.<sup>144</sup>

Religious duress, or the inability to question religious authority, can be a powerful thing. It can be so powerful in fact that it would motivate Mark Chopko, General Counsel to the United States Bishops, to attempt to “shield the Catholic Church from too much judicial interference as a result of the clergy abuse cases.”<sup>145</sup> Chopko did so, he said, “because he would hate to see the Church remade ‘in dangerous ways,’” even after the exposure of pedophilia in the Catholic Church.<sup>146</sup> It is possible you are experiencing religious duress if you are currently experiencing involuntary guilt and panic from the mere reading of this academic piece and this guilt and panic prevents you from being able to objectively consider the arguments herein.

The argument here is not that the Bible—or any religion or religious text—is bad. Rather, the argument is only that they have been traditionally used, and continue to be used, by the moral majority to promote discrimination and oppression by allowing “different” to be equated with immoral.<sup>147</sup>

<sup>144</sup> *Id.* at 229 (explaining that at some deeply-ingrained level religion, conforming and obeying the teachers of religion were necessary to being “saved”). So important is being saved to Judeo-Christian tradition that fear of not being saved can create “a moral pressure on people to behave in such a way as to placate rather than displease the deity; they perform actions that they might not otherwise perform, or omit actions that they would.” *Id.* at 230. In the Catholic faith, it was totally incomprehensible that a priest could do evil, and many families believed that they would only be saved if they remained loyal to the church and the priests. *Id.* at 229–30.

<sup>145</sup> Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 *CARDOZO L. REV.* 225, 244 (2007).

<sup>146</sup> *Id.*

What could be more dangerous than the Church’s continuing history of covering up the sexual abuse of children? It has not ended. In 2007, Cardinal Francis George of the Chicago Archdiocese is desperately trying to explain away the fact he failed to report Father Daniel McCormack to the authorities, and, therefore, a boy was recently abused. When McCormack pled guilty to sexual assault, the Archdiocese issued a statement that McCormack’s crimes were not really that bad—after all, he had pled guilty to sexual assault, not rape.

*Id.*

<sup>147</sup> See Timothy W. Reinig, *Sin, Stigma and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 *BUFF. L. REV.* 859, 882 (1990).

Likewise, appeals to the Bible for standards of morality are faulty. It is irrational to insist that the Bible is the final arbiter of morality simply because it is claimed that the Bible is the ultimate moral authority, either because of its alleged divine origins or its time-honored status in Western culture. Without an independent and objective criteria against which to measure the morality of the Bible’s position on a given issue, the arguments simply become tauto-

#### IV. CONTEMPORARY SEXUAL MORALITY AND DECREASING PRIVACY

The following sections of this Article suggest that the portability of electronically stored information (“ESI”) and Internet access exposed the falsity and baselessness of the traditional morality. Therefore, people now feel less shame for sexuality outside the parameters of this patently false and empirically vacuous morality because they understand that this sexuality is an essential part of being human. As a result of the reduced shame associated with this sexuality, people are not inclined to hide it as much or to keep it private. Ultimately, the sphere of activity we desire to keep private to prevent us from shame has decreased significantly.

##### A. *The Internet Age Reveals the Contemporary Ideology Concerning Sexual Morality*

Much was recently written about the so-called privacy paradox.<sup>148</sup> In fact, in 2006, Susan Barnes contended that many young people reveal information about themselves via social networking sites because they do not understand how public the data really is.<sup>149</sup> She argued that young people wanted to keep information private, but underestimated the publicity afforded to social media posts.<sup>150</sup>

However, more recent opinions and reports seem to suggest that digital natives and people who use social networks are very aware of the public nature of the information they post.<sup>151</sup> In fact, the reason so

logical. This type of reasoning may be appropriate for an act of blind faith, but it is a type of reasoning which no one should be compelled to make short of external, independent and objective criteria by which to determine whether or not the Bible’s position on a topic is, in fact, a moral one.

*Id.*

<sup>148</sup> See, e.g., Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, FIRST MONDAY (Aug. 15, 2006), <http://firstmonday.org/ojs/index.php/fm/article/view/Article/1394/1312%23not>.

<sup>149</sup> *Id.* (“Young people do not seem to be aware of the uses of their personal information.”).

<sup>150</sup> *Id.* (“Students wanted to keep information private, but did not seem to realize that Facebook is a public space.”).

<sup>151</sup> April M. Short, *Chomsky Says Young People Don’t Care About Surveillance—Is He Right?*, ALTERNET.ORG (Jun. 25, 2013), <http://www.alternet.org/civil-liberties/do-nsa-leaks-shock-younger-generation> (comparing the outrage Millennials felt when they learned via Edward Snowden that the government was spying on its own citizens with the acceptance of social media and the sharing of information by opining, “[i]n the case of social media and other online platforms, the sale of personal information is not as appalling because everyone who uses those sites has the ability to know what they’ve signed up for—it’s written in the security agreement”).

many people share what is typically viewed as private information online is a contemporary understanding that the loss of privacy is a necessary risk of the technology age.<sup>152</sup> As a result of this reality, many people have developed a thicker skin.<sup>153</sup> For example, Lisa M. Austin describes a nineteen-year-old blogger's response to someone's ex-boyfriend posting a sex tape online in the following way:

If that girl's video got published, if she did it in the first place, she should be thick skinned enough to brush it off . . . . I understand that it's really humiliating and everything. But if something like that happened to me, I hope I'd just say, well, that was a terrible thing for a guy to do, to put it online. But I did it and that's me. So I am a sexual person and I shouldn't have to hide my sexuality. I did it for my boyfriend just like you would probably do this for your boyfriend, [it's] just that yours isn't published. But to me, it's all the same. It's either documented online for other people to see or it's not, but either way you're still doing it.<sup>154</sup>

However, more than the existence of thicker skins is at work here, and it likely has to do with the realization that real humanity is more distant from Judeo-Christian moral norms than previously believed.<sup>155</sup>

### 1. The Tinder Phenomenon

Perhaps the statistics regarding the use of Tinder™ provide the clearest example of the change in sexual norms. Tinder™, an online dating app, matches couples based on physical attraction.<sup>156</sup> The app guides users to each other if they meet particular criteria, such as age range, gender, location, and mutual friendships.<sup>157</sup> From there, if you like someone, then

great; if you don't, they'll never know. If you're both interested, then Tinder's messaging function offers a virtual private location in which to chat and get to know each other better. It's very much like being introduced to the hot friend of a friend in a bar, but it removes the clumsy,

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<sup>152</sup> *Id.*

<sup>153</sup> Emily Nussbaum, *Say Everything*, N.Y. MAG. (Feb. 12, 2007), <http://nymag.com/news/features/27341/index4.html>.

<sup>154</sup> Lisa M. Austin, *Privacy, Shame and the Anxieties of Identity* 6–7 (Jan. 1, 2012) (unpublished manuscript), <http://papers.ssrn.com/abstract=2061748>.

<sup>155</sup> See Short, *supra* note 151 (“In some ways the younger generation is jaded because their foray into adulthood has been tainted by scandal, lies, and disappointment at the hands of the system at large.”).

<sup>156</sup> Marie Brewis, *What is Tinder? How Does Tinder Work; Tinder FAQ. Find Love This Valentine's Day with Tinder*, PC ADVISOR (Feb. 15, 2013), <http://www.pcadvisor.co.uk/feature/internet/what-is-tinder-faq-3515013/>.

<sup>157</sup> *Id.*

drunken matchmaker and the want-to-curl-up-and-die cringe worthiness from the equation.<sup>158</sup>

The app is just as simple to use as the concept on which it was based. Once the app is downloaded, users can log in via Facebook® and then enter the criteria about the type of people they would like to meet.<sup>159</sup> From there, once

Tinder finds people who match those criteria, [then] it places cards on your screen that show a large photo of the person; tap this to see a short description they've written. Below the picture is a heart icon and a cross—tap the heart if you like them and the cross if you don't, or simply swipe off screen the card to dismiss it and move on to the next. If you like someone who also likes you Tinder will tell you that a match has been made and opens up a simple messaging function.<sup>160</sup>

The usage statistics on the app are mind blowing. “[T]he app receives over a billion left and right swipes and creates 12 million matches every day.”<sup>161</sup> Additionally, 42% of people using the app are already in relationships.<sup>162</sup> The growth in the number of people using the app is also rapid.<sup>163</sup> Tinder™ was launched in October 2013.<sup>164</sup> By January 2014, it already had in excess of ten million users, and by December 2014, it was downloaded in excess of forty million times and registered a billion swipes per day.<sup>165</sup> By mid-2014, Tinder™ exper-

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Ellen Rule, *Tinder Release Some Mind-blowing Usership Statistics*, ACCLAIM MAG., <http://www.acclaimmag.com/lifestyle/tinder-releases-mind-blowing-usership-statistics/> (last visited Dec. 24, 2015).

<sup>162</sup> Molly McHugh, *42 Percent of Tinder Users Aren't Even Single*, WIRED (May 7, 2015, 2:05 PM), <http://www.wired.com/2015/05/tinder-users-not-single/>.

<sup>163</sup> See Steven Bertoni, *Dating App Hinge Scores \$12 Million in Shasta Led Round*, FORBES (Dec. 11, 2014, 9:00 AM), <http://www.forbes.com/sites/stevenbertoni/2014/12/11/dating-app-hinge-scores-12-million-in-shasta-led-round/#371cfaafaa0c> (explaining that Tinder grew by 600% in 2014).

<sup>164</sup> Morgan Brown, *What Ignited Tinder's Explosive Growth?*, GROWTHHACKERS, <https://growthhackers.com/growth-studies/what-ignited-tinders-explosive-growth> (last visited Dec. 24, 2015).

<sup>165</sup> *Id.*

enced 850 million swipes per day.<sup>166</sup> Also, 40% of Tinder™ users are women.<sup>167</sup>

These statistics are not surprising in light of a March 2014 *Rolling Stone* article, “Tales From the Millennials’ Sexual Revolution.”<sup>168</sup> The author claims in the article that Millennials are rethinking the parameters of traditional sex and marriage and possess significantly different views on “intimacy, commitment and hooking up,” than previous generations.<sup>169</sup> Most Millennials describe themselves as not viewing monogamy as an ideal.<sup>170</sup>

Combine this perspective with a realization that the stigma of female casual sex is unwarranted, and we can see the dawn of a new morality regarding sexuality. The *Rolling Stone* article suggests that casual sex, without emotion or much communication, is an acceptable norm for both Millennial men and women.<sup>171</sup> The article interviews a twenty-year-old Syracuse University junior and suggests that her response and favorable view of casual, noncommittal sex is the new normal.<sup>172</sup>

Her views, and the similar views of other Millennials like her, have been described as a Tinder-influenced dating apocalypse.<sup>173</sup> Further, one scientist at Indiana University’s Kinsey Institute for Research in Sex, Gender, and Reproduction explains that the new hook-up, casual-sex culture is perhaps one of only two major changes in heterosexual

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<sup>166</sup> Leena Rao, *With Moments, Tinder Decides Photos Shouldn’t Always Last Forever*, TECHCRUNCH (June 5, 2014), <http://techcrunch.com/2014/06/05/with-moments-tinder-too-decides-photos-shouldnt-always-last-forever/>.

<sup>167</sup> Daniel Mueller, *Report: Tinder Users are Mostly Men, 30 Percent are Married*, SUN TIMES NAT’L (May 7, 2015, 4:30 PM), <http://national.suntimes.com/national-world-news/national-business/7/72/1076907/tinder-mostly-men-not-single/>.

<sup>168</sup> Alex Morris, *Tales From the Millennials’ Sexual Revolution*, ROLLING STONE (Mar. 31, 2014), <http://www.rollingstone.com/feature/millennial-sexual-revolution-relationships-marriage>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (“My friends and I are like sexual vultures. We just go out and hunt for the guy that we’re going to get with.”).

<sup>173</sup> Nancy Jo Sales, *Tinder and the Dawn of the “Dating Apocalypse”*, VANITY FAIR (Aug. 6, 2015, 10:30 AM), <http://www.vanityfair.com/culture/2015/08/tinder-hook-up-culture-end-of-dating>.

dating to occur in the last four million years.<sup>174</sup> In fact, sexual interaction and selection of partners is now as casual as online shopping.<sup>175</sup>

The traditional Judeo-Christian influenced response to this maintains that the hook-up culture is harmful to women who are traditionally thought of as preferring long-term, committed relationships.<sup>176</sup> However, in her article *Boys on the Side*, Hannah Rosin, author of *The End of Men*, suggests that “[t]he hookup culture is too bound up with everything that’s fabulous about being a young woman in 2012—the freedom, the confidence, the knowledge that you can always depend on yourself.”<sup>177</sup> Recent studies also demonstrate that, contrary to Judeo-Christian suggestion, women enjoy casual sex as much as men do.<sup>178</sup> This is especially true in the absence of the traditional stigma concerning casual sex.<sup>179</sup>

Furthermore, the reality of the stigma associated with female sexuality is yet another relic of a patriarchal society where women are de-

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

The comparison to online shopping seems an apt one. Dating apps are the free-market economy come to sex. The innovation of Tinder was the swipe—the flick of a finger on a picture, no more elaborate profiles necessary and no more fear of rejection; users only know whether they’ve been approved, never when they’ve been discarded. OkCupid soon adopted the function. Hinge, which allows for more information about a match’s circle of friends through Facebook, and Happn, which enables G.P.S. tracking to show whether matches have recently “crossed paths,” use it too. It’s telling that swiping has been jocularly incorporated into advertisements for various products, a nod to the notion that, online, the act of choosing consumer brands and sex partners has become interchangeable.

“It’s instant gratification,” says Jason, 26, a Brooklyn photographer, “and a validation of your own attractiveness by just, like, swiping your thumb on an app. You see some pretty girl and you swipe and it’s, like, oh, she thinks you’re attractive too, so it’s really addicting, and you just find yourself mindlessly doing it.” “Sex has become so easy,” says John, 26, a marketing executive in New York. “I can go on my phone right now and no doubt I can find someone I can have sex with this evening, probably before midnight.”

*Id.*

<sup>176</sup> See Julia Becker, *Hookup Culture is Good for Women, and Other Feminist Myths*, CHRISTIANITY TODAY (Sept. 24, 2012), <http://www.christianitytoday.com/women/2012/september/hookup-culture-is-good-for-women-and-other-feminist-myths.html?start=2>.

<sup>177</sup> Hanna Rosin, *Boys On the Side*, ATLANTIC, <http://www.theatlantic.com/magazine/archive/2012/09/boys-on-the-side/309062/> (last visited Dec. 24, 2015).

<sup>178</sup> Terri D. Conley et al., *Women, Men, and the Bedroom: Methodological and Conceptual Insights that Narrow, Reframe, and Eliminate Gender Differences in Sexuality*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 296, 298 (2011).

<sup>179</sup> *Id.*

pendent on men for economic income.<sup>180</sup> It is also more than a coincidence, then, that the Judeo-Christian morality of higher purposes and its associated sexual repression developed in environments where there was a high economic dependence of females on males.<sup>181</sup>

As recently reiterated by the Ashley Madison® hack, the traditional facts relating to sexual activity beyond marital boundaries were the ones that typically made people most ashamed, and as a result, they were regarded as ones that should be the most private.<sup>182</sup>

## 2. The Ashley Madison Hack

Ashley Madison® is a website operated by a Toronto-based corporation.<sup>183</sup> The website's motto, "Life is Short Have an Affair,"® encourages married men and women to anonymously and discreetly connect with, and have affairs with, people other than the ones to whom they are married.<sup>184</sup>

In July 2015, a self-proclaimed cyber-hacktivist group called The Impact Team announced that they criminally hacked into the Ashley Madison® database and threatened to release identifying information about the people who signed up for affairs.<sup>185</sup> The purpose of this

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<sup>180</sup> Michael E. Price, Nicholas Pound & Isabel M. Scott, *Female Economic Dependence on the Morality of Promiscuity*, 43 ARCHIVES OF SEXUAL BEHAV. 1296, 1298 (2014).

[I]n environments in which female economic dependence on a male mate is higher, both a woman and her mate have a greater interest in maximizing paternity certainty. Because promiscuity undermines paternity certainty, both men and women should be more opposed to promiscuity by both sexes in environments where there is greater female economic dependence on a male mate.

*Id.*

<sup>181</sup> See *id.*

<sup>182</sup> See Glenn Greenwald, *The Puritanical Glee Over the Ashley Madison Hack*, INTERCEPT (Aug. 20, 2015, 11:41 AM), <https://theintercept.com/2015/08/20/puritanical-glee-ashley-madison-hack/>.

<sup>183</sup> Joel Eastwood, *Ashley Madison CEO Steps Down in Wake of Breach*, TORONTO STAR (Aug. 28, 2015), <http://www.thestar.com/business/2015/08/28/ashley-madison-ceo-steps-down-in-wake-of-breach.html>.

<sup>184</sup> See Meredith Masony, *Life Is Short. Have An Affair*, HUFFINGTON POST (July 21, 2015), [http://www.huffingtonpost.com/meredith-masonry/life-is-short-have-an-aff\\_1\\_b\\_7833874.html](http://www.huffingtonpost.com/meredith-masonry/life-is-short-have-an-aff_1_b_7833874.html).

<sup>185</sup> Christopher Budd, *Impact Team to Ashley Madison—Shut Down or Else!*, TREND MICRO (July 20, 2015), <http://blog.trendmicro.com/impact-team-to-ashley-madison-shut-down-or-else/>.

threat, they said, was to punish Ashley Madison® for false advertising.<sup>186</sup>

The company maintained a full delete feature, which they claimed scrubbed all the information on a person's online profile.<sup>187</sup> Additionally, they charged approximately \$19 for this feature; but The Impact Team claimed that information was left on the server, which could identify members who paid for full delete.<sup>188</sup> The Impact Team threatened to post this data to the dark web if Ashley Madison® did not shut down the website.<sup>189</sup>

In August 2015, the hackers did exactly what they threatened to do and posted personal information, such as e-mail addresses and account details, from thirty-two million of the site's members.<sup>190</sup>

At the time of the hack, the site serviced almost thirty-nine million members worldwide.<sup>191</sup> Members could search the profiles of other like-minded members for free, but in order to contact other members, the site required them to purchase "credits" via a credit card.<sup>192</sup>

The conservative media condemned the site's members and predicted that society would be swift, unforgiving, and almost unanimous in branding these people as dishonest, sexually deviant, and immoral.<sup>193</sup> As a result, they predicted the website might go bankrupt.<sup>194</sup>

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<sup>186</sup> See Melanie Hart, *Hack Hall of Shame—July 2015*, GFI (Aug. 3, 2015), <http://www.gfi.com/blog/hack-hall-of-shame-july-2015/> (claiming the "attack came about after Avid Life Media lied about the complete deletion of user accounts—something the company was charging users for").

<sup>187</sup> Kim Zetter, *Hackers Finally Post Stolen Ashley Madison Data*, WIRED (Aug. 18, 2015), <http://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley-madison-data/>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Robert Hackett, *What to Know About the Ashley Madison Hack*, FORTUNE (Aug. 26, 2015), <http://fortune.com/2015/08/26/ashley-madison-hack/>.

<sup>191</sup> Chris Isidore & David Goldman, *Ashley Madison Hackers Post Millions of Customer Names*, CNN (Aug. 19, 2015), <http://money.cnn.com/2015/08/18/technology/ashley-madison-data-dump/>.

<sup>192</sup> *Id.*

<sup>193</sup> Greenwald, *supra* note 182.

<sup>194</sup> Russell Brandom, *If the Hack Doesn't Kill Ashley Madison, These Lawsuits Could*, VERGE (Aug. 20, 2015), <http://www.theverge.com/2015/8/20/9183093/ashley-madison-hack-lawsuit-class-action-sue>.

However, even after the hackers released the information, the site's membership continued to grow.<sup>195</sup> Two weeks after the release of the data, female members alone sent almost thirty-four million messages on the site.<sup>196</sup> Additionally, almost 90,000 new females joined the site following the data release.<sup>197</sup> One month later, at the time of this writing in October 2015, the site's membership expanded to 41.5 million members.<sup>198</sup> The media then, in response to the Ashley Madison® statistics, suggested that monogamy as a normative relationship goal—which is a tenet of our Judeo-Christian morality—was dead.<sup>199</sup>

B. *ESI, The Internet, and the Evolution of Contemporary Sexual Morality*

The actual reality is that the Ashley Madison® hack revealed nothing new about human behavior. The only unprecedented thing was the scope of the revelation. Therapists and counselors knew for years that monogamy and Judeo-Christian sexuality were not the norm.<sup>200</sup> In fact, adultery is a completely cross-cultural, worldwide phenomenon.<sup>201</sup> Ethnographic studies documenting the global prevalence of extramarital relationships indicate that humans are quite likely genetically predisposed to the behavior and engage in the practice even where it is punishable by death.<sup>202</sup>

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<sup>195</sup> *Ashley Madison: 87,596 Women Signed Up Last Week*, NBC NEWS (Sept. 1, 2015), <http://www.nbcnews.com/tech/tech-news/ashley-madison-87-596-women-signed-last-week-n418791>.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> ASHLEY MADISON, <https://www.ashleymadison.com/> (last visited Dec. 24, 2015) (stating that the site expanded membership to almost forty-four million as of March 13, 2015).

<sup>199</sup> See Meredith Masony, *Does the Ashley Madison Hack Spell the End for Monogamous Marriage*, HUFFINGTON POST (Aug. 24, 2015), [http://www.huffingtonpost.com/meredith-masony/shame-shame-i-know-your-n\\_b\\_8025112.html](http://www.huffingtonpost.com/meredith-masony/shame-shame-i-know-your-n_b_8025112.html) (explaining how a number of people from a small town were exposed in the hack).

<sup>200</sup> See *infra* notes 203–15 and accompanying text.

<sup>201</sup> Mischler, *supra* note 28, at 94 nn.86–87 and accompanying text.

<sup>202</sup> *Id.*

### 1. Contemporary Sexual Morality Was Always the Norm; We Just Never Realized It Before the Internet and ESI

In 2010, Tammy Nelson published an article in *The Psychotherapy Networker*, which questioned the premise of monogamy as normative.<sup>203</sup> Nelson first demonstrates that even in marital relationships, monogamy was never the norm.<sup>204</sup> In fact, 55% of married women and 65% of married men report being unfaithful.<sup>205</sup> Up to 50% of married women “have at least one lover after they’re married and before the age of 40.”<sup>206</sup>

Nelson suggests that centuries ago, when the morality of higher purposes evolved and was considered the norm, one partner in the marriage would be dead within five to ten years of marriage.<sup>207</sup> This made monogamy easier, in comparison to today, as people now typically remain married for forty or fifty years.<sup>208</sup> Nelson further explains that “[t]here’s no precedent in any culture for staying married and passionate about the same person for that amount of time.”<sup>209</sup> “We aren’t trained or advised about how to remain monogamous and happy with a single sexual partner for half a century, probably because we’ve never had to be.”<sup>210</sup> Today’s couples are aware of this reality and are openly reviewing their commitments to monogamy.<sup>211</sup>

Before ESI, however, this reality was not widely available for public consideration.<sup>212</sup> In fact, this information was typically kept confidential between counselors and clients, or within marriages and discrete family networks when an affair was discovered.<sup>213</sup>

Because of ESI and its ease of distribution, the reality of human sexuality and normative morality is now patent on an unprecedented

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<sup>203</sup> Tammy Nelson, *The New Monogamy: How Far Should We Go?*, PSYCHOTHERAPY NETWORKER (July 7, 2010), [http://www.alternet.org/story/147468/facing\\_reality\\_the\\_%22new\\_monogamy%22\\_is\\_keeping\\_relationships\\_together](http://www.alternet.org/story/147468/facing_reality_the_%22new_monogamy%22_is_keeping_relationships_together).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Bahadur, *supra* note 2, at 351.

<sup>213</sup> *See id.*

scale for the first time.<sup>214</sup> Further, it is causing us to rethink the truth of what we were told for centuries by religious leaders and others with monopolistic media access.<sup>215</sup>

It is no longer possible to pretend, or actually be convinced, that affairs and multiple sex partners represent non-normative behavior or a minority position, which, because it was outside the established and well-publicized Judeo-Christian moral boundaries, reflected immorality and therefore was properly associated with shame. Because of the Internet and ESI, almost every person can be a source of news, and information is similarly no longer controlled by politicians, corporate entities, or religious organizations, who, before the Internet, had monopolistic control of media output.<sup>216</sup>

## 2. ESI and its Effect on Sexual Morality

As a result of this unprecedented access to realistic information about human sexuality, Millennials have become the “don’t judge generation on sexual morality.”<sup>217</sup> This directly contrasts older people whose sexual morality is rooted in religion.<sup>218</sup> Most Millennials think “people should have individual freedom to make decisions” in this regard and that the correct choice about sexual activity depends on the situation.<sup>219</sup> They have shifted away from the one-size-fits-all “black and white moral pronouncements” regarding sexual activity, which are typical of the Judeo-Christian morality of higher purpose.

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<sup>214</sup> *Id.* at 350–53 (explaining how a flexible morality has developed as a result of the widespread availability on the internet of information, which was previously private, and which demonstrates the artifice of Judeo-Christian sexual norms).

<sup>215</sup> *Id.* at 351–52.

<sup>216</sup> *Id.* at 339–40.

Before ESI, in 1977, at the time of the Restatement’s comment, news was information provided by a discrete set of media corporations. Today however, with the advent of the computer and internet communications, the term “those who publish and broadcast the news” refers to anyone with a personal computer and internet access. For example, reports of the February 25, 2009 crash and pictures of the wreckage of a Turkish Airliner on approach to an airport in Amsterdam were first published not by one of the mainstream media corporations but by the online social networking site, Twitter. Other examples abound of online social networking sites disseminating information or news traditionally disseminated by large news corporations.

*Id.*

<sup>217</sup> Cathy Lynn Grossman, *Millennials are the ‘Don’t Judge Generation’ on Sexual Morality: Survey*, RELIGION NEWS SERV. (Mar. 27, 2015), <http://www.religionnews.com/2015/03/27/millennials-dont-judge-generation-sexual-morality-survey/>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

To summarize the change in morality:

The prohibitions that figured so prominently in former times seem to have lost their hold on most members of society. Of course, those earlier prohibitions were often disobeyed, particularly by men, and more generally by anyone who could get away with it. What is notable about modern times, however, is not simply that disobedience has become more frequent, but that the prohibitions themselves seem to be rapidly disintegrating. Sex is no longer regarded as a sin, but rather as a natural and inherently enjoyable part of life; in fact, being sexually active is now regarded as something of a social and personal obligation.

Further,

The prior morality of higher purposes has not simply declined, leaving a moral void; rather, it has been replaced by a new morality, and the more permissive attitudes toward sexual behavior are among its most distinctive features. This morality can be described as a morality of self-fulfillment. Its central idea is that each person should be able to lead a life that makes use of that person's distinctive abilities and satisfies his or her particular aspirations and desires.<sup>220</sup>

In fact, Millennials are also moving away from religion itself.<sup>221</sup> According to a *Pew Research Study*, Millennials declare themselves as unaffiliated with a religion twice as much as Baby Boomers and three times as much as those born between 1928 and 1945.<sup>222</sup> Thirty-five percent of Millennials are religiously unaffiliated, and that lack of religious affiliation continues to see significant growth.<sup>223</sup>

One Millennial blogger recently stated that his generation's apathy and revealing online presence are directly related to its perception that they inherited a world of supreme hypocrisy and crisis.<sup>224</sup> The blogger explains this position, writing that "one President nearly got impeached for a superficial sex scandal and then another later broke international laws to preemptively start a war without UN support and

<sup>220</sup> Rubin, *supra* note 9, at 13, 14–15; see also Herald, *supra* note 35, at 40 ("A lack of concern about women's health issues has fueled a history and tradition that is oblivious to the realities of women's sexual selves.").

<sup>221</sup> Grossman, *supra* note 217.

<sup>222</sup> Michael Lipka, *Millennials Increasingly are Driving Growth of 'Nones'*, PEW RES. CTR. (May 12, 2015), <http://www.pewresearch.org/fact-tank/2015/05/12/millennials-increasingly-are-driving-growth-of-nones/>.

<sup>223</sup> *Id.*

<sup>224</sup> Cameron Russell, *Your Generation of Hypocrisy Begat My Apathetic (!?) One*, TECHPRESIDENT (Mar. 23, 2009), <http://techpresident.com/blog-entry/your-generation-hypocrisy-begat-my-apathectic-one>.

was re-elected to serve [two] full terms without so much as a breath of legal retribution."<sup>225</sup>

This sentiment of hypocrisy should not be surprising because we now live in an era where ESI means very little privacy. The formerly private lives of elected officials and public figures are now routinely made public via the Internet, and it is no longer possible to mask the reality of their humanity by an unrealistic and fabricated moral persona and meaningless narratives about conformance to the contrived moral mainstream.<sup>226</sup> The Internet, and the availability and transfer-

<sup>225</sup> *Id.*

Imagine for a moment being one of us. Taught in school that all people are created equal, that all countries are sovereign, that freedom, democracy, and capitalism are embraced by all people and nations because they are ultimate ideals that allow us to prosper and live as we choose in the pursuit of happiness. Old enough to read the New York Times online and blog on Huffington Post, we see a very different world. Equality? Not for the poor, not for LGBT. Capitalism? It appears to have been a house of cards recklessly constructed by greed for the benefit of a few. Sovereignty? Not for resource-poor or oil-rich countries. Ideals? Not for the media or our political and business leaders.

*Id.*

<sup>226</sup> See, e.g., Marshall Connolly, *PASTORPOCALYPSE—At Least 400 Church Leaders to Resign Sunday after Ashley Madison Accounts Revealed*, CATH. ONLINE (Aug. 28, 2015), <http://www.catholic.org/news/national/story.php?id=63263> (explaining that at least 400 religious leaders will be forced to resign after the Ashley Madison hack); see also Bahadur, *supra* note 2, at 349–53 (giving examples of the role of ESI in fueling a shift in normative human morality noticed as far back as 2009).

Today, highly esteemed public figures and institutions traditionally thought to represent the virtue of morality are caught in ‘morally-condemnable’ situations. For example:

- The Roman Catholic Church has fallen into disrepute because of the widespread allegations of sexual abuse by clergy.
- The most pious evangelical leaders have been caught up in scandals involving prostitution, sex, drugs and other things considered by society as immoral.
- The attorney general of New York, Elliot Spitzer, so long espoused as a paragon of virtue, was felled by a prostitution scandal.
- Senator Condit was exposed as having an affair with an intern despite being married.
- Senator Larry Craig, a grandfather, pled guilty to disorderly conduct after being arrested for soliciting homosexual sex in a public bathroom.
- The Episcopal Church U.S.A. consecrated an openly homosexual bishop.
- Celebrity actors and entertainers stage their comebacks based on drunk antics, DUI’s, and stints in rehabilitation programs.
- Olympic gold medalist, Michael Phelps, was pictured using a bong, purportedly to smoke marijuana, at a party.

Comparing the political careers of Bill Clinton and Barack Obama provides an excellent illustration of society’s rapidly changing attitudes toward morality and as a result privacy[.] In 1992, presidential candidate Bill Clinton “thought marijuana use could be enough of a liability [that he was] compelled to say he had not inhaled.” Sixteen years later, President Obama, on

bility of information, no longer allows influential individuals to monopolize the moral message.

A prime example of this is Dan Loeb, who is a billionaire hedge fund investor and a huge contributor to the GOP.<sup>227</sup> He is also a vocal detractor of Hillary Clinton's presidential campaign.<sup>228</sup> Earlier this year, Loeb criticized Hillary Clinton as a presidential candidate by saying she was married to a "liar and a cheat."<sup>229</sup> He further described her as a "put-upon spouse trapped in a loveless marriage with a cheating husband who thinks she's a lesbian."<sup>230</sup> All of this was, presumably, to demonstrate that her involvement in a marriage where infidelity was acknowledged and forgiven rendering her unfit to lead the traditional moral majority and leaving her a weak person.<sup>231</sup> As it turns out, Mr. Loeb is a normal, healthy human being who also maintained an Ashley Madison® account.<sup>232</sup> Mr. Loeb is not a morally bankrupt individual,

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the other hand, gained widespread acceptance from the youth by talking openly about his extensive previous drug use as a candidate, and is the first candidate to admit to the use of cocaine.

*Id.* at 351–53; see also Sam Biddle, *Billionaire Republican Who Mocked Hillary Clinton's Marriage Had an Ashley Madison Account*, GAWKER (Aug. 27, 2015), <http://gawker.com/billionaire-republican-who-mocked-hillary-clintons-marr-1726725925> (indicating that Dan Loeb, a billionaire contributor to Mitt Romney's Campaign and huge contributor to the GOP who earlier in 2005 publicly mocked Hilary Clinton for being married to a "liar and a cheat," had an Ashley Madison account). Loeb further described Hillary Clinton as a "put-upon spouse trapped in a loveless marriage with a cheating husband who thinks she's a lesbian." *Id.*

<sup>227</sup> See Biddle, *supra* note 226.

<sup>228</sup> *Id.* (explaining that Dan Loeb "gifted \$1,000,000 to the right-wing American Unity PAC and a quarter million to the Ending Spending Action Fund just last fall, along with tens of thousands of dollars straight to the Republican Party").

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* He even went so far as to post a mock Dear Abby letter about Clinton on his Facebook page. *Id.*

Dear Abby,

My husband is a liar and a cheat. He has cheated on me from the beginning, and when I confront him, he denies everything. What's worse, everyone knows that he cheats on me. It is so humiliating. Also, since he lost his job 14 years ago, he hasn't even look[ed] for a new one. All he does all day is smoke cigars, cruise around and shoot the bull with his buddies, while I have to work to pay the bills. Since our daughter went away to college he doesn't even pretend to like me, and even hints that I may be a lesbian. What should I do?  
Signed Clueless.

Dear Clueless,

Grow up and dump him. Good grief woman! You don't need him anymore! You're running for President of the United States. Act like one.

*Id.*

<sup>232</sup> *Id.*

but a real human being. According to Alfred Kinsey, “the prevalence of what was considered deviant sexual behavior was so widespread that it in fact was the norm, and what was considered normal was really a fictional picture humanity painted of itself to avoid social embarrassment.”<sup>233</sup>

### C. *The New Sexual Morality and the Decreasing Need for Privacy*

Friedrich Nietzsche long ago suggested the result of contemporary humanity’s acceptance of traditional Judeo-Christian morality’s empirical baselessness alone should result in decreased feelings of shame.<sup>234</sup> When this realization is coupled with the ESI-fueled, rampant exposure of actual and realistic human behavior, many of the things that traditionally caused shame because they were considered immoral and deviant will instead become acceptable as normative human behavior. Therefore, because privacy is related to shame, more people should need less privacy.

#### 1. A Decreasing Need for Privacy as a Result of Sexual Moral Realism

A 2014 Pew Research Study supports this declining need for privacy.<sup>235</sup> The study quoted Hal Varian, the Chief Economist for Google®, as saying, “There is no putting the Genie back in the bottle . . . . Everyone will expect to be tracked and monitored, since the advantages, in terms of convenience, safety, and services, will be so great . . . continuous monitoring will be the norm.”<sup>236</sup> The same study also predicts that increasing use of facial recognition software will create a result that will make wanting to remain private seem antisocial and abnormal.<sup>237</sup> The Pew study also confirms something about a pre-

<sup>233</sup> Bahadur, *supra* note 2, at 351.

<sup>234</sup> The German philosopher Friedrich Nietzsche also states, “[W]e should be justified in deducing, with no little probability, that from the unstoppable decline in faith in the Christian God there is, even now, a considerable decline in the consciousness of human debt[.]” FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 62 (Carol Diethe trans., revised student ed. 2007) (1887).

<sup>235</sup> Lee Rainie & Janna Anderson, *Above-and-Beyond Responses: Part 1*, PEW RES. CTR. (Dec. 18, 2014), <http://www.pewinternet.org/2014/12/18/above-and-beyond-responses-part-1-2/> [hereinafter Rainie & Anderson, *Above-and-Beyond*].

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* Judith Donath, a fellow at Harvard University’s Berkman Center for Internet & Society, responded:

A big inflection point will be face-recognition. Today, when we meet a new person, we are likely to do a search on their name, often finding out some surprising hobby or other details, perhaps a lengthy blog history, plus the

vious hypothesis—that as the economic benefits of an online presence increase, the desire for privacy will decrease.<sup>238</sup>

Likewise, the study suggests that Americans care more about convenience than they do about privacy.<sup>239</sup> Additionally, as more conveniences are gained by an online presence, people will gladly relinquish their privacy.<sup>240</sup> Furthermore, there appears to be a resigned acceptance that privacy is going to be impossible within ten years.<sup>241</sup> In addi-

expected professional information. But, the people we see on the street, in the subway, across the restaurant—they remain strangers, enigmatic. Face recognition will change this. We will be able to put a name to a face—and all the data attached to that name. For the citizen of that future world, it will seem strange and unsettling to think that in the past people walked, sat, and ate amidst crowds of unknowable strangers. It will seem dangerous—one of the first apps that will make use of this technology will alert us to registered sex offenders and paroled felons in our midst—and dull. (Today if someone catches your attention, you muse a bit about him or her, and then move on. There is no connection. Tomorrow, you can delve into whatever personal traces they have online.) This will cause a big shift in how we think of privacy and the norms around making information about ourselves public. Today, if someone chooses to have a very low online profile, this has little effect on how we think of him or her face-to-face. But, in this future, that will start to seem anti-social and a little creepy. There will be much more pressure to have such a data presence—and to carefully cultivate it.

*Id.*

<sup>238</sup> See *id.*; Bahadur, *supra* note 2, at 368 (“The legal reality of coming decades will be based on the realization that since access to information in a world of declining privacy is symmetrical, there will be no need for control of information as is currently the norm.”).

<sup>239</sup> Rainie & Anderson, *Above-and-Beyond*, *supra* note 235.

<sup>240</sup> See *id.*

Paul Saffo, managing director at Discern Analytics and consulting associate professor at Stanford University, wrote, “The opposition to privacy erosion is broad and diffuse, while the proponents of privacy-eroding systems are narrow and focused. Further, while Americans claim to care about privacy, they care even more about convenience. Americans have happily sacrificed their privacy over the last several decades, and will continue to do so, even as they complain. Privacy has already shifted from being a right to a good that is purchased. Privacy-as-good will continue to advance and become the 2025 norm.”

*Id.*

<sup>241</sup> Lee Rainie & Janna Anderson, *Elaborations: More Expert Responses*, PEW RES. CTR. (Dec. 18, 2014), <http://www.pewinternet.org/2014/12/18/elaborations-more-expert-responses-4/>.

Leah Lievrouw, a professor of information studies at the University of California-Los Angeles, wrote, “A way forward for proactive, trusted privacy rights does not seem promising. Especially in the last few years, my sense is that many people, perhaps even heavy Internet users, in particular, have begun to affect an attitude of dismissive cynicism about privacy and surveillance to justify their disengagement with privacy and autonomy issues: ‘They know everything you do anyway,’ where ‘they’ includes anyone or anything from Google to TSA to ISP’s to insurance companies, educational institutions, copyright owners, law enforcement, government, credit agencies, and so forth.”

tion to the probable impossibility of privacy in the near future, the Millennial move from a morality of higher purposes to a morality of self-fulfillment renders the need for privacy almost obsolete.<sup>242</sup>

Society is moving from a morality of higher purposes to a morality of self-fulfillment lacking any stigma associated with consensual, adult sexual relationships.<sup>243</sup> This new morality is very different from the traditional mainstream morality or the Judeo-Christian-based morality of higher purposes.<sup>244</sup> This is not a vacuous morality based on convenience; rather, it might actually be the very morality that our founding fathers envisioned.<sup>245</sup>

## 2. The Constitutionality of the New Sexual Morality and the Resulting Massive Decrease in Privacy

The morality of self-fulfillment is not only an essential element of the Constitution, but it is in fact an indispensable one.<sup>246</sup> Kris McDaniel-Miccio argues the founding fathers deliberately included Age of Enlightenment moral principles, which were based on individual liberty and equality, in the Constitution.<sup>247</sup> These moral principles were derived from a period where the devolution of “arcane institutions—including the monarchy, the feudal system, and the primacy of the Roman Catholic Church,” was occurring.<sup>248</sup>

During this time, massive political change resulted in the revolutions of France, England, and the United States.<sup>249</sup>

At the center of the social and political upheavals of the seventeenth and eighteenth centuries was the notion of the dignity and worth of the person because humans are not only sentient but rational beings capable of reason or rational thought. The ability to think, to reason, to interrogate

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*Id.*

<sup>242</sup> Rubin, *supra* note 9, at 9–18.

<sup>243</sup> *See id.* at 17–18.

<sup>244</sup> *Id.* at 17.

The morality of higher purposes treated sexual desire as part of people’s fallen, sinful nature, and treated the satisfaction of that desire as moral only when performed for the higher purpose of perpetuating human life. According to the morality of self-fulfillment, however, satisfying sexual desire is an intrinsic good, and one essential component of complete, productive, and fulfilled existence.

*Id.*

<sup>245</sup> *See* McDaniel-Miccio, *supra* note 43, at 323.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

ideas, was—in and of itself—worthy of approbation and protection. Thus, *freedom* of thought, expression, association, and religious belief were indelible concepts of the Enlightenment and of the creation of America as a nation-state.<sup>250</sup>

As a result, the governmental structure of the United States, which can be found in the Constitution, is actually founded on a deliberate balance between two principles: (1) the retention of individuality within the notion of a state; and (2) that “the authority to govern is not a result of conquest, divine right[,] or initiated by a religious hierarchy.”<sup>251</sup> The central tenets of American governance structure are therefore equality and liberty,<sup>252</sup> and these in turn are premised on a morality based on equality and individual dignity.<sup>253</sup>

In contrast to Judeo-Christian morality, each person is equal before the law, community, and state.<sup>254</sup> Because of this, no person should be subject to governance or laws based on “an accident of birth, inherited title or wealth or divine right.”<sup>255</sup> The essence of American morality and justice is “the dignity and worth of all individuals, manifest in the Fourteenth Amendment guarantee of liberty and equality. Thus, religion and ideology are baggage that should be left at the courthouse door.”<sup>256</sup>

This normative shift in sexual morality is even reflected in Supreme Court jurisprudence. For example, in *Lawrence v. Texas*,<sup>257</sup> which overruled *Bowers*, the Court said,

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral* is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.<sup>258</sup>

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<sup>250</sup> *Id.* (emphasis added).

<sup>251</sup> *Id.* at 324.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 344.

<sup>257</sup> 539 U.S. 558 (2003).

<sup>258</sup> *Id.* at 577 (emphasis added); see Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447 (2005–06).

If we contrast this with the jurisprudential calculus of *Bowers*, which is based entirely on interpretations of Judeo-Christian sexual morality, the massive jurisprudential shift away from a morality of higher purposes to a morality of self-fulfillment becomes abundantly clear.<sup>259</sup> This jurisprudential shift away from using religious beliefs as part of the legal structure results in a jurisprudence more in sync with the true morality of the American Constitution.<sup>260</sup>

With this new morality, which Rubin describes as the morality of self-fulfillment based on the individual dignity,<sup>261</sup> comes a decrease in shame associated with the things for which we previously felt shame. If shame is connected to privacy, then the resulting decrease in shame equates to decline in the need for privacy.

One commentator went so far as to suggest that the constitutional right to privacy actually reinforces the shame associated with any sexual behavior outside the scope of what the moral majority considers acceptable.<sup>262</sup> She argues that, if *Lawrence* can be interpreted as a repu-

<sup>259</sup> McDaniel-Miccio, *supra* note 43, at 329–30.

*Bowers* is much more troubling than reported by either the press or legal scholars because the Court reinscribes arcane myths about homosexuals and homosexuality. These myths are in part constructed by religious and biblical interpretations of sexuality. Devoid of any critical analysis of the cultural iterations of sexual expression, the Court not only espoused but also premised the grant or denial of fundamental rights upon cultural mythology constructed by biblical tome. Burger opined that the immorality of homosexuality was firmly “rooted in the Judeo-Christian moral and ethical standards,” found in the Bible. I would suspect that Justice Burger was referencing the oft-cited passages from the *Book of Leviticus* in the *Torah* that invoke conceptions of sanctification. For Burger, this is evidence of a legitimate bar on homosexuality that is not only a tradition within Christianity but Judaism as well. I trust that Justice Burger as well as his colleagues on the bench in 1986 were neither theologians nor historians; and certainly they had no facility with *Torah*, the source of the alleged bar. Burger merely grafted this rather odious myth onto law by drawing from what he perceived as common culture.

*Id.* (citations omitted).

<sup>260</sup> *See id.* at 343 (describing the religious-based opinions of Scalia as “discard[ing] the foundational morality of the Constitution”).

<sup>261</sup> *See* Rubin, *supra* note 9, at 13–15.

<sup>262</sup> Bedi, *supra* note 258, at 450–51.

Not surprisingly, no one ever says to the straight married couple about to engage in procreative, non-kinky sex, “what you do in your bedroom is your business!” This often-used mantra, under the right to privacy, applies only to those acts we disapprove of, but must begrudgingly tolerate in private. Certainly, murder and assault cannot take place in private. Rather, privacy is used to protect those non-harmful activities that the majority simply finds morally wrong or offensive. In this way, deviations or leeway from this standard require appeal to privacy. The right to privacy, then, is necessary to protect only minority sexual practices that take place in private—i.e., behind closed doors.

diation of morals legislation, then we may be approaching the era where the right to privacy is no longer as necessary as the constitutional jurisprudence currently reflects and where nonconformity with Judeo-Christian moral constructs and their legislative products is no longer associated with shame.<sup>263</sup> Ultimately, then, they would no longer need to be hidden or protected by a doctrine of privacy.<sup>264</sup>

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By invoking the right to privacy to protect certain behavior, however, we have *ipso facto* deemed it abnormal. It is true that . . . the state cannot stop me from having sex with a man. Nevertheless, by the very fact that I must appeal to this right to protect my [gay] “life-style,” that I must take cover under privacy, the state has implicitly rendered my “life-style” abnormal and shameful. As demonstrated above, this is Sandel’s very critique of the right to privacy.

*Id.*

<sup>263</sup> *Id.* at 454–55.

<sup>264</sup> *Id.* at 454.

If mere morality is insufficient, then the state has no good reason to prohibit certain sexual practices or even to limit the institution of civil marriage to heterosexual couples. For instance, the following rationales for state legislation are illegitimate under this re-conceptualized rational review: the virtuous path of monogamy; God deems gay sex, and even certain kinds of heterosexual sex, a sin; oral sex between men is disgusting; marriage is a holy bond between only a man and a woman. If moral disgust is seen as insufficient to pass rational review, we have no need for the problematic right to privacy. In fact, freedom is enhanced by the rejection of both privacy and morals legislation. At the very least, a ban on morals legislation secures the liberty we previously and problematically protected via a right to privacy. Deeming mere morality an illegitimate reason under rational review not only secures our freedom. It also avoids problematic appeals to substantive due process and tolerance. First, the textual argument against the right to privacy is immediately avoided. By repudiating legislation that curtails consensual sexual behavior on the ground that such legislation does not serve a legitimate purpose, we simply avoid any appeal to substantive due process. We, therefore, do not need to search the Constitution for this enigmatic right to privacy, and the problematic pedigree of *Lochner* in grounding rights in substantive due process is circumvented.

Second, and more importantly, the problem of tolerance inherent in the right to privacy is altogether not present under this re-conceptualized rational review. But rather than moving toward acceptance and articulating another standard of valuable sexual relations, as Sandel would have us do, the ban on morals legislation refuses to endorse *any standard*. A simpler, less problematic solution is to simply reject the right to privacy and adopt this new understanding of rational review. Thus, all kinds of activities are permitted for the very same reason, namely that the state has no legitimate reason to prohibit any of them. Consequently, my gay sex life, her polygamous one-night stands, and their monogamous straight relationship are all protected for the same reason. Under this reformed version of rational review, purged of the right to privacy, legislation prohibiting straight sex and legislation prohibiting sodomy are both unconstitutional. Gay sex, straight sex, and polygamous sex are all justified by the same principle. There is no disparity in status and we have avoided the pitfalls of both toleration and acceptance.

*Id.*

Extrapolating the jurisprudential shift, especially after *Obergefell v. Hodges*,<sup>265</sup> it is not far-fetched to envision the Supreme Court declaring all morals legislation, sans an independent, actual, and significant empirical public health basis, invalid. For example, polygamy laws may need to be re-examined in the near future because polygamous relationships entered into between consenting adults appear to pose no threat to public health, but instead are unlawful simply because they do not comport with mainstream morality.<sup>266</sup> In 1890, the Supreme Court justified the illegality of polygamous unions as follows, “polygamy is . . . contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world.”<sup>267</sup> In that same year, the Court “justified the suppression of polygamy with reference to Christian values and ‘the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation.’”<sup>268</sup>

#### V. CONCLUSION

Traditional American morality is based on unrealistic, Judeo-Christian constructs, which perpetuate the subjugation of women and other forms of discrimination. The normative nature of this morality was reinforced because, before the Internet and ESI, those institutions and individuals (e.g., public officials seeking elected office and churches aimed at perpetuating religious oppression) who benefitted from its perpetuation traditionally had monopolistic control of the media. Therefore, this morality was largely accepted as normal human behavior, and anyone who did not conform or deviated from it experienced shame internally or externally if his or her deviations were made public. The Internet and ESI have destroyed this media monopoly, and anyone with access to a computer can now be considered a media outlet. The unprecedented availability and distribution of realistic information related to actual human behavior has shattered the

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<sup>265</sup> 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

<sup>266</sup> Slone, *supra* note 38, at 63–64.

Whether consenting adults enter into polygamous relationships hardly implicates public safety or health. [And] it is unlikely that polygamous marriages would result in imminent lawlessness or the destruction of civilization as we know it. Additionally, polygamy poses no significant threat to public health. Thus, the motivation for these bans seems to be based on moral concerns rather than public health or safety risks.

*Id.*

<sup>267</sup> Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 330 n.82 (2004).

<sup>268</sup> *Id.*

reality of the previously prevalent, singular, sterilized, and manicured presentation of human behavior and morality.

More and more Millennials and subsequent generations are realizing that the shame they thought to be associated with desires and complex sexuality previously labeled deviant and immoral are actually normal facets of being human. As the absurdity of the shame dissipates in this Internet-dominated age, more people are comfortable publicizing this aspect of their lives. Thus, not only does the need for privacy decrease, but there also may actually be liberated public celebration on the Internet of realities previously considered private for fear of retribution.

Our jurisprudence also reflects this rapid decline in the influence of Judeo-Christian constructs as an appropriate basis of our morality. At the end of the day, I am left feeling that morality as it relates to sexuality is a combination of Sheryl Crow and John Stuart Mill on liberty.<sup>269</sup> If it makes you happy, it can't be that bad, as long as it does not cause hurt to another.<sup>270</sup>

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<sup>269</sup> See SHERYL CROW, *IF IT MAKES YOU HAPPY* (A&M Records 1996); JOHN STUART MILL, *ON LIBERTY* 7 (London, Longman, Roberts & Green Co. 1869) ("A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.").

<sup>270</sup> See Sheryl Crow, *supra* note 269; JOHN STUART MILL, *supra* note 269.

