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by
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Introduction

The organizers of this Symposium asked us to explore the legal and social constructions of sexual orientation. Symposium Editor Sarah Colby asked one panel, consisting of Matt Coles, Shannon Minter, Ruthann Robson, and me, to discuss "the means and ends of the civil rights struggle." The particular means and ends I want to address in this Article concern the enlistment of the categories of "sex" and "gender identity" in arguments about rights claims based on sexual orientation. If sexual orientation is defined by sexual object choice, and if the categories of sex and gender and the relation between them are not contested, are equal rights claims based on sexual orientation implicitly premised on the continuation of the state-administered binary-sex-classification system? If so, what are the consequences, not just for lesbians and gay men, but for bisexuals, transgendered, and transsexual people?

I want to suggest that arguments for gay, lesbian, and bisexual civil rights must challenge not only the state's prerogative to discriminate on the basis of sex, but also the legal construction of the relationship between sex, gender identity, and gender expression that inheres in the definition of sexual orientation. Ending state-sponsored discrimination on the basis of sexual orientation is unquestionably an important goal—but so also is ending the juridical power of the state to enforce any particular definition of sex, gender identity, and sexual orientation. In a 1979 article, Mary Dunlap made these connections explicitly, arguing that there is a "commonality" between women, homosexuals, mothers of

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illegitimate children, and sexually reassigned persons "who have suffered from the power of the law to prescribe sex identity, and, correlatively, to enforce sex roles in all areas of life."[1] She concluded, "If the individual's authority to define sex identity were to replace the authority of law to impose sex identity, many of the most difficult problems currently associated with the power of government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved."[2]

While gay, lesbian, and bisexual rights advocates pursue the entirely worthy goal of putting an end to particular kinds of state-sponsored discrimination against sexual minorities, the more radical project of replacing the state's authority to define sex and gender, articulated so clearly by Dunlap, has sometimes been obscured.[3] Moreover, as I will argue in this paper, if the rights claims of lesbian and gay people rely on the deployment of arguments, either implicit or explicit, that reinforce hegemonic United States gender norms—including the notion that there is a predictable, normative relationship between visible genitals, gender identity, and gender expression—any ensuing victory might turn out to be something of a pyrrhic one, not only for transgendered and gender-variant people but also for those lesbian, bisexual, and gay individuals who are not transgendered or gender-variant.

My larger project is to engage in a radical revision of the politics of identity, of rights talk, and of the rights claims of sexual minorities in order to develop an account of them that reinscribes neither the "identity fundamentalisms" so prevalent among the new social movements, including the U.S. gay and lesbian rights movement, nor the deconstructive "identity iconoclasms" so rampant in the academy and in queer theory in particular. Queer theorists have rightly shown that identity-based political claims ultimately fail to undermine the very categories—homosexuality and heterosexuality, in this case—upon which such subjection is based. Lisa Bower, for example, calls this identity-based civil rights project the "politics of official recognition" and characterizes it as an attempt to "fit the 'queer other' within some space

1. Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1147 (1979).

2. *Id.* at 1147-48.

3. John D'Emilio identifies the emergence of identity politics in the 1970s, which became "the organizing framework for oppression and . . . the basis for collective mobilization," as partly responsible for the foundering of the more radical aspects of the gay liberation movement in the U.S., a movement which originally sought to challenge the very categories upon which gay oppression was based. The rise of the Gay Activist Alliance and the concomitant demise of the Gay Liberation Front exemplifies this shift. JOHN D'EMILIO, MAKING TROUBLE 245 (1992).

already acknowledged by the liberal nation-state."[4] In opposition to such reformist "we're just like you" goals, queer theorists have focused their attention on identity's contingency, fluidity, and constructedness, and suggested that it is in the destabilization of identity categories that effective political practice is to be found. Accompanying this dismissal of identity-based politics has been the abandonment of the state as "the site of privileged political action."[5] Instead, "cultural contestations" have become the locus of effective political intervention.[6]

I want to argue, however, that the promulgation of these oppositions between identity fundamentalism and identity iconoclasm, between state-centered political action and interventions in the "cultural" sphere, has sometimes had the unfortunate effect of eliding the very material violences that people suffer from the discursive construction of the identity categories that many queer theorists are so eager to dismantle.[7]

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4. Lisa Bower, *Queer Problems/Straight Solutions*, *in* PLAYING WITH FIRE 267, 268-69 (Shane Phelan ed., 1997). Wendy Brown also has a cogent critique of rights discourse. *See* WENDY BROWN, STATE OF INJURY 133-34 (1995).

5. For example, Lauren Berlant and Michael Warner point out that "[q]ueer theory has flourished in the disciplines where expert service to the state has been least familiar and where theory has consequently meant unsettlement rather than systemization." Laura Berlant & Michael Warner, *What Does Queer Theory Teach Us About X?*, 110 PUBLICATION MOD. LANGUAGES ASS'N 343, 348 (1995).

6. Discussions of the kind of cultural interventions that pose a challenge to the very categories of gender and sex often encompass such subjects as the queering of public spaces and undermining gender through drag performativity. But even Judith Butler has disavowed the kind of voluntaristic notions of agency upon which these types of cultural interventions are predicated:

> Matters have been made even worse, if not more remote, by the questions raised by the notion of gender performativity introduced in *Gender Trouble*. For if I were to argue that genders are performative, that could mean that I thought that one woke in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night. Such a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start and fails to realize that its existence is already decided *by* gender. Certainly, such a theory would restore a figure of a choosing subject—humanist—at the center of a project whose emphasis on construction seems to be quite opposed to such a notion.

JUDITH BUTLER, BODIES THAT MATTER x, xi (1993). Instead, Butler suggests that we see gender as "constitutive constraint." *Id.*

It may have been this over-enthusiastic reading of gender performativiy that has led some queer theorists to construe transsexuals' desires for hormone therapy or surgery as naive.

For another discussion of the tension between structure and agency, see Anthony Appiah, *Tolerable Falsehoods: Agency and the Interests of Theory*, *in* CONSEQUENCES OF THEORY 63, 74 (Jonathan Arac & Barbara Johnson eds., 1991).

7. Kimberlé Crenshaw has suggested that defending the identity categories upon which oppression is based is an important part of the strategies of subordinated groups: "At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it."

The contingency of identity does not make it less "real" to the subjects who experience it and who organize their lives around it, whether those subjects' identifications are male, female, masculine, feminine, lesbian, gay, bisexual, transsexual, transgendered, and/or non-transgendered. In this Article, I stress the necessity of political action directed toward the state. I also demonstrate why identity-based political claims cannot be jettisoned *before* the state's prerogative to legislate the system of sex and gender classifications has been taken away. In fact, I argue that it is possible to articulate the two projects—the short-term project of freeing queer identities and practices from state-sponsored discrimination and the long-term project of ending the state's power to classify—together.

The "figures" of the transsexual and the transgender have played a central role in queer theorists' readings of the destabilizing effects of cultural constestations of gender categories. Yet, as Ki Namaste points out:

> In recent years, the field known as queer theory has witnessed a veritable explosion of essays, presentations, and books on the subjects of drag, gender, performance, and transsexuality. Yet these works have shown very little concern for those who identify and live as drag queens, transsexuals, and/or transgenders. . . . [Why] is it that transgendered people are the chosen objects of the field of queer theory, and why does the presentation of these issues ignore the daily realities of transgendered people?[8]

Even queer theorists who do examine the state's role in producing "proper" liberal subjects use the problems that transgender people face in dealing with the state only to demonstrate the margins, boundaries, and limits of a politics of identity, while failing to attend to the immediate, material violence engendered by the situation. For example, Bower's critique of state-directed identity politics is accompanied by a reading of Karen Ulane's sex-based discrimination lawsuit against Eastern Airlines (Ulane was fired after undergoing sex-change surgery). Bower uses that case to celebrate the deconstructive possibilities of "articulating a non-identity" in the following passage, "*Granted* both Ulane and Hardwick 'lost' their cases, but the legal decisions can be interpreted to suggest the instability of sex and sexual identities and the capacity of ambiguous

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Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1299 (1991).

8. Ki Namaste, *'Tragic Misreadings': Queer Theory's Erasure of Transgender Subjectivity*, *in* QUEER STUDIES 183-84 (Brett Beemyn & Mickey Eliason eds., 1996). For examples of the kinds of work Namaste critiques, see JUDITH BUTLER, GENDER TROUBLE (1990) and BODIES THAT MATTER (1993); MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY (1992); Carole-Anne Tyler, *Boys Will Be Girls: The Politics of Gay Drag*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 32 (Diana Fuss ed., 1991).

identities to create constestation in the legal field."[9] Yet Ms. Ulane would probably not describe herself as a "non-identity." In her Title VII complaint, she described herself simply as a woman. Moreover, she would probably not have put quotation marks around the word "lost" when describing the outcome of her case. Similarly, when Dee Farmer, a pre-operative male-to-female transsexual prisoner who was beaten and raped when placed in a federal penitentiary's male general population, found out that she had lost her Eighth Amendment-based case, her initial reaction was probably not that "at least" her challenge constituted a blow to the hegemonic system of gender classification.[10] Finally, in Missouri, a transsexual woman named Sharon Boyd lost joint custody of her sons and had her visiting rights severely restricted because, in part, the court did not have "substantial evidence" that the "father's" sex reassignment surgery would have no effect on the children's "moral development."[11] "Losses" like these affect not only the individual litigants involved but also the thousands of other transgendered people who will never file lawsuits, but who will continue to be discriminated against as a result of these decisions. While interrogating the incoherence embedded in the state's attempt to regulate the relationship between genitalia, gender identity, and gender expression, it is also vital that we not lose track of the material consequences of such regulation. As Robert Cover has written, "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[12]

Transsexuals, transgendered, and gender-variant people are thus besieged on both sides. On the one hand, they are attacked by lesbian and gay rights advocates who perceive their "gender-crossing" practices and identities as too inauthentic,[13] dismissing them as either too politically unfeasible a constituency for mainstream gay rights groups[14] or too

9. Bower, *supra* note 4, at 274, 285 (emphasis added).

10. *See* Farmer v. Brennan, 511 U.S. 825 (1994).

11. J.L.S. v. D.K.S., 943 S.W.2d 766 (Mo. Ct. App. 1997).

12. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

13. A view put forward in JANICE RAYMOND, THE TRANSSEXUAL EMPIRE (1980). See Sandy Stone's powerful rejoinder to Raymond's argument that transsexual women are "deviant males" in Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, *in* BODYGUARDS 280, 295-99 (Julia Epstein & Kristina Straub eds., 1991).

14. For example, Barney Frank considered transsexuals, transgendered and gender-variant individuals too politically unfeasible to be included in the groups that would be covered under the proposed Employment Non-Discrimination Act. *See* Frank's remarks in *More on Federal Sexual Orientation Bias Bill*, FAIR EMP. PRAC. NEWSL. 83 (July 10, 1997). The Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. § 4 (1997) requires that "[a] covered entity shall not, with respect to the employment or an employment opportunity of an individual—(1) subject the individual to a different standard or different treatment, or otherwise discriminate against the individual, on the basis of sexual orientation; or (2) discriminate against the individual based on the sexual orientation of a person with whom the individual is believed

undermining of the supposedly stable relationship between biological sex and gender identity that much of current gay and lesbian rights strategy rests upon. (Hence the exclusion of transgendered and transsexual people from the politics of official recognition that seek legislative and judicial remedies for what gay and lesbian rights advocates perceive as identity-based discrimination.[15]) They are simultaneously belittled by queer theorists' readings of transgender subjectivity, which pose transgendered people and their rights claims as interesting only insofar as their subjectivity works to deconstruct categories, rather than as identity-bearing subjects like "everyone else" who (also like "everyone else") might wish to enjoy freedom from state-sponsored violence and discrimination. Rather than challenging the categories themselves, advocates of the rights of sexual minorities ought to have a long-term strategy of challenging the state's prerogative to define those categories. Let civil society—or what queer theorists call "culture"—be the sphere in which identities are believed in, deconstructed, nurtured, undermined, performed, and lived.[16] In the short term, however, rights advocates ought to fight for legislation to protect all sexual minorities, including transgendered and transsexual people.[17]

The rest of this Article demonstrates why gay and lesbian rights advocates should expand their project to include transgendered and gender-variant people, practices, and identities. Much of this discussion centers on the arguments that are made for and against same-sex marriage. In the next section of the Article, I discuss the sex-based strategy of gay and lesbian rights advocates seeking legal recognition of same-sex marriage and some of the assumptions about sex that accompany that strategy. Then in Part III, I examine the "same-sex

to associate or to have associated." The Act defines "sexual orientation" as "homosexuality, bisexuality, or heterosexuality, whether such orientation is real or perceived." *Id.*

15. Though of course what is often taken to be identity-based discrimination—the firing of lesbians and gay men, for example—might often be, in fact, discrimination based on the individual's gender presentation. Very butch women or effeminate men, heterosexual or homosexual, can be subject to discrimination for their violation of hegemonic gender norms.

16. For a debate about the reproduction of cultural identifications not based on essentialist notions, see Walter Benn Michaels, *Race into Culture* and *The No-Drop Rule*, *in* IDENTITIES 32, 401 (Kwame Anthiony Appiah & Henry Louis Gates eds., 1995) and the response by Avery Gordan and Christopher Newfield, *White Philosophy*, *in* IDENTITIES, *supra,* at 380.

17. Recently, legislation which would include "gender identity" in anti-discrimination laws has been proposed, and in a few cases passed. These bills attempt to protect transsexual and transgendered, or gender-variant, individuals. An Iowa City ordinance, passed in October 1995, defines gender identity as "[a] person's various individual attributes, actual or perceived, in behavior, practice or appearance, as they are understood to be masculine and/or feminine." IOWA CITY, IOWA, CITY CODE tit. 2, § 2-2-1 (1995). Similarly, a San Francisco ordinance, passed in December 1994, defines gender identity as "a person's various individual attributes as they are understood to be masculine and/or feminine." SAN FRANCISCO, CAL., POLICE CODE art. 33, § 3303 (1994).

marriages" that are already legal—ones that involve transsexuals—and discuss how opponents of same-sex marriage do not make the distinction between gay/lesbian rights and transgender rights that many gay and lesbian rights advocates do. In Part IV, I show how the strategy of attempting to separate gender normativity from heteronormativity does not work for the entire constituency of sexual minorities—especially if one does not define that constituency with the abstract concept of homosexuality or sexual orientation—and, moreover, has serious consequences for non-transgendered people as well.

I. Describing Sexual Orientation Discrimination as Sex Discrimation

Some have argued that discrimination on the basis of sexual orientation might be better described as a type of sex discrimination,[18] especially since neither the federal circuits nor the Supreme Court have found that sexual orientation constitutes a suspect or quasi-suspect class, and so have not required that laws discriminating on the basis of sexual orientation be subject to a higher level of judicial scrutiny. This equal protection dead-end has led some advocates of gay and lesbian rights to portray some types of discrimination on the basis of sexual orientation as discrimination on the basis of sexual object choice, which constitutes a type of sex discrimination.[19] Basing the rights claims of lesbians and gay men on a same-sex-object-choice definition of homosexuality appears to be a solid tactical move, since rights claims need to be articulated in terms that are intelligible to the judiciary. What could be more intelligible than sexual object choice, since that choice is supposedly premised on the biological sex of one's partner, rather than on the sexual

18. *See, e.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); Cass Sunstein, *Homosexuality and the Constitution*, METAPHILOSOPHY, Oct. 1994. For a critique of Sunstein's argument for same-sex marriage, see MORRIS B. KAPLAN, SEXUAL JUSTICE 225-26 (1997).

In fact, one of the arguments made against the Equal Rights Amendment was that the ERA would bring about homosexual marriages. *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 128-29 (1986).

19. Recently, Judge Eugene Nickerson found the Department of Defense's "Don't Ask, Don't Tell" policy unconstitutional, and part of his reasoning was based on the observation that homosexuality is not defined by engaging in the practice of "sodomy," as the Department of Defense suggests, since heterosexuals also engage in sodomy, defined as oral or anal intercourse. Instead, he suggests, "[w]hat differentiates the class of homosexuals from that of heterosexuals is the gender of the person's sexual partner." Able v. United States, 968 F. Supp. 850, 864 (E.D.N.Y. 1997).

practices that the opponents of gay and lesbian rights relish describing?[20] Certainly, sex is a category that seems reassuringly stable, fixed, and knowable—unlike homosexuality itself, which opponents of lesbian and gay rights, including the Christian right, depict as a behavior rather than an identity.

The sexual-orientation-discrimination-as-sex-discrimination strategy is articulated very clearly in *Baehr v. Miike*, the Hawaii same-sex marriage case.[21] The challengers of the ban on same-sex marriage in *Baehr* have based their most successful claim thus far on an article of Hawaii's Constitution prohibiting state-sanctioned discrimination in the exercise of a person's civil rights on the basis of sex.[22] Although the state of Hawaii attempted to argue that the plaintiffs had no right to "enter into state-licensed homosexual marriages" because as homosexuals they "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude,"[23] the majority opinion of Hawaii's Supreme Court noted that "'[h]omosexual' and 'same-sex' marriages are not synonymous"[24] and "it is immaterial whether the plaintiffs . . . are homosexuals."[25] According to the majority's reasoning, it is the sex, not

20. A typical example of such rhetoric, in this case produced to argue in favor of Colorado's anti-gay Amendment 2, is as follows: "What's fair about an affluent group gaining minority privileges simply for what they do in bed?" Colorado for Family Values pamphlet, cited in Donna Minkowitz, *The Christian Right's Anti-Gay Campaign*, 53 CHRISTIANITY AND CRISIS 99, 102 (1993).

21. For example, the plaintiffs in the Hawaii same-sex marriage case argue that the most direct impact of the Hawaii marriage statute is that "the limitation imposed by the statute is exclusively sex-based (all that is asked by the Director is the sex of the applicants), notwithstanding that this also has the effect of prohibiting marriages into which some people seek to enter because of their sexual orientation." Plaintiff-Appellees' Answering Brief at 18, Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

22. "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." HAW. CONST. art. I, § 5F. The Hawaii Supreme Court has so far found in favor of the plaintiffs. Finding sex a suspect category under the terms of the Hawaiian constitution, the court ruled that, unless the state of Hawaii can demonstrate that the marriage statute in question is justified by a compelling state interest, it is unconstitutional. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

23. *Baehr*, 852 P.2d at 51, 52.

24. *Id.* at 52, n.11. The opinion continues: "[B]y the same token, a 'heterosexual' same-sex marriage is, in theory, not oxymoronic. A 'homosexual' person is defined as '[o]ne sexually attracted to another of the same sex.' Taber's Cyclopedic Medical Dictionary 839 (16th ed. 1989). 'Homosexuality' is 'sexual desire or behavior directed toward a person or person's of one's own sex.' Webster's Encyclopedic Unabridged Dictionary of the English Language 680 (1989). . . . Parties to a 'union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Id.*

25. *Id.* at 58 n.17.

the sexual orientation, of the marriage license applicants that is at issue, and, absent a compelling state interest, refusing marriages licenses to applicants of the same sex is unconstitutional under the Hawaiian constitution. Such a sex-based approach ends the reliance of gay and lesbian rights advocates on the difficult suspect class argument, which involves trying to prove that homosexuality constitutes an immutable characteristic and thus a fixed identity in itself, rather than merely a behavior or set of practices.[26] Instead, the more discrete, already quasi-suspect, and presumably fixed category of sex becomes the operative identity in this civil rights claim. Hence, it is not the homosexuality of the plaintiffs that is at issue but, rather, the sex of their partners. Figured this way, many, though not all,[27] homosexual rights claims boil down to sex. Mark Fajer observes:

> Unlike the suspect class argument, a gender-based equal protection argument avoids the immutability controversy. While immutability is not a litmus test for heightened scrutiny, courts and commentators discussing classifications based on sexual orientation generally seem to rely heavily on it. Many who support heightened scrutiny argue that sexual orientation is immutable; some who reject heightened scrutiny argue it is not. Because mutability is a difficult issue, gay advocates are better off avoiding it if possible. To the extent the gender-based argument rests on immutability, it is the immutability of gender, not of orientation.[28]

Certainly, the "common sense" knowledge of sex produces a narrative in which biological sex is immutable, is limited to two categories, and is determined by the body—and in which gender, although socially constructed, is produced in a predictable relation to sex. This model posits that the sex assigned to the infant at birth by a doctor's visual check of the genitalia will accurately predict the child's gender identity or, otherwise stated, the child's sense of being male or female. As Suzanne Kessler and Wendy McKenna have noted, "Gender attribution is, for the most part, genital attribution."[29] In turn, this model assumes that the child's gender identity will cause the child to begin to organize "his" or "her" behavior to conform to either masculine or feminine patterns of presentation. This developmental milestone is variously described as social sex role, gender behavior, or gender

26. *See* Paisley Currah, *Searching for Immutability: Homosexuality, Race, and Rights Discourse*, *in* A SIMPLE MATTER OF JUSTICE (Angelia R. Wilson ed., 1994).

27. There are some very significant exceptions, including discrimination in employment related to gender presentation, expression, or role. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

28. Fajer, *supra* note 18, at 648-49 (footnotes omitted).

29. SUZANNE KESSLER & WENDY MCKENNA, GENDER: AN ETHNO-METHODOLOGICAL APPROACH 11 (1978).

expression.[30] Although a few psychologists are beginning to challenge this model,[31] most do not.[32] In the larger social field in which civil rights arguments are made, this model dominates, operating not merely as a description of childhood development but as a normative standard of correctness, representing how things ought to be arranged.

Before homosexuality was removed from the American Psychiatric Association's list of mental disorders in 1973, in the U.S. this model of sexuality posited a fourth developmental achievement—heterosexuality. The entire process, then, went like this: Infants designated as male become aware of themselves as boys, learn to act masculine, and develop a heterosexual sexual orientation; infants designated by doctors as female at birth learn to label themselves as girls during early childhood, later present feminine behavior, and eventually develop a sexual attraction toward the opposite sex.

Opponents of the rights of lesbian and gay people still hold dear the model that construes heterosexuality as the normative endpoint of mature human sexuality. Conversely, advocates of gay and lesbian rights affirm that heterosexuality, bisexuality, and homosexuality are equally healthy avenues of development. In an article entitled, *How to Bring Your Kids Up Gay*, Eve Sedgwick points out that the elimination of the diagnosis of homosexuality from the American Psychiatric Association's Diagnostic and Statistical Manual in 1973 was followed a few years later with the introduction of a new pathology, "Gender Identity Disorder of Childhood," which pathologizes effeminate boys and overly-masculine girls.[33] Thus, as Sedgwick notes, homosexuality, defined in terms of

30. For a review of the psychological literature on gender identity, see Deborah E.S. Frable, *Gender, Racial, Ethnic, Sexual, and Class Identities*, 48 ANN. REV. PSYCH. 139 (1997). As Anne Bolin suggests, transsexuals skew the entire determinist schematic: "As a social identity, transsexualism posits the analytic independence of the four gender markers—sex, gender identity, gender role or social identity (including behaviors and appearance) and sexual orientation—that are embedded in the Western gender schema as taken-for-granted premises and regarded in a number of scientific discourses as 'naturally' linked." Anne Bolin, *Transcending and Transgendering*, *in* THIRD SEX, THIRD GENDER 447, 459 (Gilbert Herdt ed., 1996).

31. Most notably SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY (1993).

32. *See* Shannon Minter, Diagnosis and Treatment of Gender Identity Disorder in Children (February 1997) (unpublished manuscript, on file with author).

33. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, *in* FEAR OF A QUEER PLANET 69-71 (Michael Warner ed., 1993) [hereinafter FEAR OF A QUEER PLANET]. In fact, although the American Psychiatric Association agreed to remove homosexuality from its list of mental disorders in 1973, the next complete edition of their *Diagnostic and Statistical Manual* (*DSM III*) was not published until 1980—the first edition to include the "Gender Identity Disorder" diagnosis. *Id.*

As Shannon Minter has pointed out, the psychiatric diagnosis of Gender Identity Disorder has provided needed cover to psychologists and psychiatrists to treat pre-homosexual, or pre-transsexual children; indeed, he notes, "the great majority of children treated for GID grow up

same-sex object choice, is uncoupled from the new pathology, which posits that healthy boys and girls exhibit a "core gender identity" consonant with their biological sex.[34] Of course, as Sedgwick observes, "[o]ne serious problem with this way of distinguishing between gender and sexuality is that, while denaturalizing sexual object-choice, it radically *re*naturalizes gender."[35]

The problem with "renaturalizing gender" is that the category of biological sex is fraught with indeterminacy.[36] Apart from visible genitals, other physiological components of gender include hormones, chromosomes, and internal reproductive organs. As Anne Bolin notes, "the more scientific and complex the determinants of biological sex become, the less they can be relied on to indicate gender."[37] A strategy that is based on sex and essentialist notions of gender, then, is ultimately unmoored—not only for transgendered people, but for non-transgendered people as well. Rather than assuming that the immutability of sex is unchallenged such that gender identity and gender expression exists in an unmediated and predictable relation to one's physiology, the agenda-setting rights advocates of sexual minorities would do well to attend to the works of Mary Ann Case, Katherine Franke, and Francisco Valdes, which demonstrate some of the consequences of the legal applications of these categories.[38]

II. Legal Same-Sex Marriages

Because individual state marriage statutes and the case law interpreting them ultimately refer to sex and not gender identity, the fight for same-sex marriage that currently preoccupies the mainstream gay and lesbian rights movement constitutes a demand that states marry individuals of, "literally," the same sex. As will be discussed below, because states define sex and its relation to gender differently, this

to be lesbian, gay, or bisexual." Minter, *supra* note 32. *See also* Katherine K. Wilson, *Gender as Illness: Issues of Psychiatric Classification*, (unpublished manuscript, on file with author); National Gay and Lesbian Task Force Statement on Gender Identity Disorder and Transgender People (Dec. 11, 1996) (unpublished manuscript, on file with author).

34. *See* Sedgwick, *supra* note 33, at 73.

35. *Id.*

36. *See* ANNA FAUSTO-STERLING, MYTHS OF GENDER (2d ed. 1992).

37. Bolin, *supra* note 30, at 453.

38. For a discussion of much of the contradictory caselaw on sex and gender identity, including cases involving transsexuals, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). For a detailed examination of the "conflation" between sex, gender, and sexual orientation, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). See also Case, *supra* note 27, at 46-49, for a discussion of Title VII and effeminate men.

ambiguity often poses problems for transsexuals—whether they be heterosexual or homosexual, pre-operative, post-operative, or non-operative. If individuals of the same "sex" were allowed to marry, transsexuals would no longer be at a disadvantage. Transsexuals who had previously wished to marry someone of the opposite gender, but were denied because of the vagaries of the laws of the particular state that issued their birth certificate, would then be eligible to marry the object of their desire. This would be construed as a same-"sex" marriage.[39] Although the legalization of marriages involving transsexuals would certainly be a positive outcome, some of the arguments invoked in favor of the legal recognition of same-sex marriage paradoxically have negative consequences for transgendered and gender-variant people, both children and adults. Specifically, the mainstream gay and lesbian rights' community's same-sex marriage strategy relies on arguments that reproduce both the hegemony of gender conformity and the notion that there is a stable relationship between biological sex, gender identity and gender expression.

As the "freedom to marry" challenge engineered by mainstream lesbian and gay rights advocates gains momentum, it is important to recognize that "same-sex" marriage is already legal, or, more precisely, that many states have been unable to successfully regulate marriages between those whose sexual identity, gender identity, or even sexual orientation confounds the predictable relationship assumed by state law to exist between sex, gender identity, and sexual orientation. For example, when Lori Buckwalter, a male-to-female transsexual who had been taking hormones for about a year, announced that she was going to marry her female lover before officially requesting a certificate indicating her sex had been changed, she was also announcing the first public marriage of a "homosexual" couple in Oregon.[40] This officially sanctioned homosexual marriage resulted from the disjunction between her gender identity and the law's assignment of her gender. In Ms. Buckwalter's eyes, as a woman who marries the object of her desire, another woman, the marriage is a homosexual one. At the moment of the marriage, however, the legal categories of the state define Ms. Buckwalter as a male, therefore the marriage—while a same-gender one—is nevertheless sanctioned by the state as an opposite-sex marriage. When Ms.

39. Despite the legal, conceptual, and political nexus between the fight for legal recognition of lesbian and gay same-sex marriages and transsexual marriages (some of which are same-sex, some of which are same-gender, some of which are homosexual, and some of which are heterosexual), there is a paucity of academic work on the connection, except for Mary Coomb's excellent article, *Transgenderism and Sexual Orientation: More than a Marriage of Covenience* (1997) (unpublished manuscript, on file with author).

40. *See Man Planning Sex Change Will Marry Woman*, BULL. (Bend, Or.), Dec. 15, 1996, at B8.

Buckwalter formally has her gender identity changed, however, and the state officially recognizes her as a woman, she will already be married to another woman—thus resulting in a legal same-sex marriage. Ms. Buckwalter is able to take advantage of the incoherence of the state's marriage laws—that designate marriage as a union between a man and a woman and attribute gender based on visible-genital-sexual characteristics—and marry her lover, a woman, before her sex reassignment surgery. Of course, since her gender identity, and that of her partner, is female, she already had a same-gender marriage before undergoing sex reassignment surgery.

These marriage plans reveal the contradictions inherent in legislating the supposedly natural, organic, and immutable correspondence between the anatomical sex given at birth and gender identity, *and* the universality and normativity of opposite-sex desire. Her plan to marry before undergoing surgery confounds the state's attempt to define the relations between gender identity, anatomical sex, sexual orientation, and sexuality. In Oregon, marriage is entered into by "a male" and "a female."[41] Oregon's laws on the official designation of gender mark surgery as the moment that sex reassignment is completed. (The medical establishment's emphasis on the completion of sex reassignment surgery as the moment of transition from one sex to another poses particular problems for female-to-male transsexuals, since the high cost of the "bottom" surgery is often prohibitive.)

Oregon's case law on defining sex, however, is not the final word on that subject since, for the purpose of marriage, the power to define sex is left to the states—a power the recently passed Defense of Marriage Act does not undermine.[42] As the late transgender-legal-rights advocate Dee McKellar pointed out, some contradictions arise in comparing statutes and case law across states:

> In Ohio, which will not correct a birth certificate, a post-op TS can marry someone with similar genitals. In Oregon, a pre-op TS can marry someone with complementary genitals. In Texas, a non-op with court-ordered gender correction can marry a person with similar

41. OR. REV. STAT. § 106.010 (1995) ("Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.").

42. The Defense of Marriage Act declares that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other States." 28 U.S.C. § 1738c. The Defense of Marriage Act did not, however, attempt to define sex.

genitals by showing a driver's license, or can show a passport and marry someone with complementary genitals.[43]

Generally, the most important instrument for the purposes of marriage is one's birth certificate. Currently, only fifteen states allow post-operative transsexuals to change their birth certificates. Individual states have different statutes and caselaw on amending of birth certificates, resulting in the patchwork situations described above. Some states, such as Arizona, have statutes which allow for the issuance of new birth certificates, while others, such as Colorado, have statutes which allow for the amendment of original birth certificates.[44] Conversely, other states, such as Tennessee, have statutes explicitly prohibiting the retroactive changing of birth certificates[45] or, as in the case of Oregon and Ohio, have caselaw prohibiting the legal recognition of sex changes.[46] Since the state of Ohio will not allow the legal designation of sex to come into congruence with an individual's gender identity after sex reassignment surgery, it is perfectly possible for either a pre-operative or a post-operative transsexual woman from Ohio to marry another woman there.[47] Conversely, it is not possible for a post-operative transsexual woman to marry a man in that state. And in Oregon, because that state refuses to recognize Lori Buckwalter's female gender identity, Ms. Buckwalter is able to marry her woman lover before she undergoes sex reassignment surgery.

43. Electronic mail from Dee McKellar (May 3, 1997) (on file with author). *See also* NATIONAL CENTER FOR LESBIAN RIGHTS, A TRANSGENDERED PARENT'S LEGAL GUIDE TO CHILD CUSTODY (on file with author).

44. NATIONAL CENTER FOR LESBIAN RIGHTS, *supra* note 43 (manuscript at 44, 47, on file with author).

45. TENN. CODE. ANN. § 68-3-203 (1997). ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.").

46. *See* K. v. Health Div., 552 P.2d 840 (1976). An Ohio court, ruling on "whether a post-operative male-to-female transsexual is permitted under Ohio law to marry a male," found that "[t]here was no evidence that [Elaine Ladrach] at birth had any physical characteristics other than those of a male and he was thus correctly designated 'Boy' on his birth certificate. There was also no laboratory documentation that the applicant had other than male chromosomes." *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio 1987) (citing the English case Corbett v. Corbett, 2 W.L.R. 1306, 1323 (P. 1970), holding that the assignment of gender at birth becomes the person's "true sex," which sex reassignment surgery cannot change).

47. *See* Patrick O'Donnell, *He Plans to Become a Woman Shortly After Marriage*, HOUS. CHRON., Oct. 6, 1986, at 7 (describing Ohio native Denise Smith's plan to marry her fiancée Debi Easterday and then begin a male-to-female sex change procedure). In *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio 1987), an Ohio court upheld the refusal of a marriage license to a post-operative male-to-female transsexual and a man.

III. Gender Normativity, Heteronormativity, and the Reproduction of Culture(s)

The ontological chaos revealed in Oregon's laws on marriage, sex, and gender identity is made even clearer by the response of those opposing Ms. Buckwalter's marriage. Upon hearing about her marriage plans, Lon Mabon, the leader of Oregon Citizens Alliance, announced he would immediately begin organizing a voter referendum that would define marriage as a strictly heterosexual institution and gender as something determined at conception. "It stops this playing around with Mother Nature," Mabon said.[48] The Christian right's attempt to defend traditional notions about the relation between genitals and gender identity by possibly resorting to a state-wide referendum exposes the futility of such an essentialist gesture—which Mabon admits when he decides to put the relation between gender identity and anatomy up to a vote. Not only does Lon Mabon want to enshrine forever the relation between gender identity and anatomy, he also wishes to define the moment when that relationship is secured as the moment of conception, which would make it impossible for transsexuals to change their gender identity legally to match sex reassignment therapy or surgery.

While the Christian right attempts to defend traditional Western notions about the correct relation between anatomy and gender identity by seeking recourse in a majoritarian vote, Ms. Buckwalter and her supporters enunciate their rights claims in the language of classical Millian liberalism: "It allows me to be who I am" and "others' judgment of you shouldn't stop you," she argues.[49] In defense of both her transition and Ms. Buckwalter and her partner's wish to be the first homosexual couple in Oregon to be officially married, Ms. Buckwalter invokes a coherent and imminently rational constellation of conventions that resonates strongly with U.S. political vernacular—the language of liberal, individualist rights. She and her family deny her community the right to legislate her gender identity.

Of course, gender transitivity is not the only problem that the Oregon Citizen's Alliance sees in this pre-op transsexual marriage.

48. *Man Planning Sex Change Will Marry Woman*, *supra* note 40, at B8.

Other spokespeople for organizations associated with the Christian right also make explicit connections between same-sex and transsexual marriages. For example, Andrea Sheldon, of the Traditional Values Coalition, responded to a comment about same-sex marriages by suggesting,

> "I don't believe it stops there . . . . I think the American people really need to understand what is going on. This is an attempt to legitimize their lifestyle. Their behavior-based lifestyle. You want to grant marriages to transgendered people. What does that mean—Jim marries Suzy one day, leaves her, gets a sex-change, marries Jim—it's very, very confusing."

Interview aired on *CNN Today* (CNN television broadcast, Dec. 4, 1996).

49. *Man Planning Sex Change Will Marry Woman*, *supra* note 40, at B8.

Mabon and other opponents of same-sex marriage claim that the state must never officially sanction same-sex marriage for the simple reason that these unions would strike a death blow to the core values of Western culture. The problem, quite simply, is that culture, or at least what is best about "our" culture, would not be reproduced if the state were to recognize same-sex marriages. For example, a member of Congress supporting the Defense of Marriage Act argued:

> We live in a free country . . . precisely because we have standards, because our society has successfully socialized most Americans in the values of love, charity, and tolerance; and the institution on which we depend to socialize these values is the institution of marriage. Those who oppose [DOMA] are either seeking no standards or a standard vastly different from that sanctioned by millennia of tradition, the teachings of all the monotheistic religions, and in particular, the teachings of Judeo-Christian religion on which our culture is based.[50]

Indeed, reproducing culture figures as a recurring motif in these discussions against "gay marriage." Opponents of same-sex marriage do understand that gender, or, more precisely, gender identity, is not literally reproduced through the body, but through cultural mechanisms. It is because the link between assigned biological sex and gender identity and expression is not secured by "nature" that they so vociferously favor securing that link by law—despite the discursive and physical violence that such state intervention entails.

How exactly is it that same-sex marriage would fail to reproduce the "greatness" of American culture? According to the arguments put forward by the opponents of same-sex marriage, it is by failing to raise children with a firm sense of the "correct" gender identity—one that conforms to the gender assigned to them on the basis of their genitalia—that same-sex marriages would fail to reproduce what is good about (hegemonic) American culture. Thus, one of the arguments put forward by opponents of same-sex marriage in Hawaii addresses the gender identity of the children raised in same-sex households. For example, the minority members of the State of Hawaii's Commission on Sexual Orientation and the Law (arguing against same-sex marriage) cite testimony asserting that:

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50. 141 CONG. REC. H1346 (daily ed. July 23, 1996) (statement of Rep. Talent).

Queer theorists use the term heteronormativity to describe ideologies that posit heterosexuality as exclusive and central to the reproduction of culture. MICHAEL WARNER, *Introduction* to FEAR OF A QUEER PLANET, *supra* note 33, at vii, xxi. The point about queer theory's interrogations of heteronormativity, of course, is that it is not heterosexual identities and practices themselves that must be undermined; rather, the point is to critique the normative status ascribed to heterosexual identities, institutions, and practices, to get rid of the "ought to" that simultaneously legitimizes heterosexuality and thus necessarily casts homosexual identities and practices as other, as abnormal, as deviant. Of course, such a project undermines the very categories themselves, over time.

> One of the most fundamental functions of parenting is to evoke, develop, and reinforce gender identity and then proceed to shepherd the developing child in such a way as to bring his psychological side into harmony with his biological side, and thereby develop a solid sense of maleness or femaleness.[51]

And,

> [A] child should be brought up with a mother and a father, in order to develop appropriate gender-defined self identity.[52]

And, finally,

> We must fight back against the social movements which are destructive to our ways of life . . . . This means, above all, preventing the passage of laws which ignore the differences between a male and a female, and which undermine the security and stability of the family and the nation.[53]

In these debates, it is assumed that the institution of heterosexual marriage functions to reproduce traditional gender roles, arrangements, and identities. To prove this claim, opponents of same-sex marriage cite evidence that purports to show that children raised in same-sex households have difficulties developing a gender identity consonant with their assigned gender.[54] It is important to note that in these discussions of children—in same-sex marriage as well as in adoption and custody case law—it is not merely the potential of the children raised in such households to become homosexual that is explicitly under discussion; in addition, the development of the children's gender identity is also problematized, often more explicitly. But, as Shannon Minter has pointed out, gender identity problems in youth are invariably yoked to the specter of homosexuality, or "pre-homosexual conditions."[55]

Certainly, the ideologues of the Christian right work hard to associate gender identity disorder with homosexuality. For example, Robert Knight, of the Family Research Council, argues:

> [C]hildren really do need a mother and a father. A little boy needs to have a father to learn what it is to be a man and to have his growing masculinity affirmed, and he needs to have a mother for that mother love, and to watch both parents interact and see how men should treat women, women should treat men, how they both treat each other as

51. REPORT OF THE COMM'N ON SEXUAL ORIENTATION AND THE LAW, 18th Leg., Ch. 5, Pt. I, at 16 (Haw. 1995) (statement of Dr. Harold M. Voth).

52. *Id.* at 14.

53. *Id.* at 16-17.

54. For example, the defendant in *Baehr* presented testimony asserting that "same-sex relationships do not provide the same type of learning model or experience for children as does male-female parenting, because there is an overabundance of information about one gender and little information about the other gender." Baehr v. Miike, No. 91-1394 (Dec. 3, 1996) (findings of fact and conclusions of law).

55. Minter, *supra* note 32.

husbands and wives, mothers and fathers, and their relationship with their children.[56]

For Knight, inculcating heterosexuality goes part and parcel with establishing a gender identity that conforms to gender norms—learning masculinity, for example, is also learning heterosexuality. So gender normativity—the belief that gender ought to be organized according to traditional and firmly established gender identities, practices, and arrangements—assumes heteronormativity.

Since the crux of the argument against same-sex marriage lies in the linkages of heteronormativity with gender normativity and dysphoric gender identity with homosexuality, gay and lesbian advocates for same-sex marriage have responded by reasserting the distinctions between the above concepts. They cite evidence to prove, first, that children raised by same-sex couples or by single lesbians or gay men are not more likely to become gay or lesbian than children raised in opposite-sex households, and, second, that the gender identity of children raised in such households is no "less normal" than that of children raised in opposite-sex households.[57] However, basing arguments for same-sex marriage (and custody and adoption by same-sex couples) on data that suggest that children raised in lesbian and gay households are no "less normal" than children raised in heterosexual households—in terms of their gender identity and sexual orientation—means that the heteronormative aspects of the institution of marriage are challenged by resorting to an argument that suggests that the production of gay, lesbian, bisexual, or transgendered children in a same-sex household would be a bad thing. Such an argument ultimately does little to seriously undermine either the hetero norms or the gender norms implicit (and explicit) in homophobic and transphobic arguments about the reproduction of American greatness.

The separation of sexual orientation from gender variance, transgenderism, and transsexualism reinforces the idea that gender identity has a stable and predictable relation to the gender assigned at birth on inspection of the visible genitals, which ought not to be changed. We can see now that this disjunction between sexual orientation and

56. *Straight Talk from the Family Research Council: Same-Sex Marriage?* (National Empowerment Television broadcast, Apr. 10, 1996).

57. For example, in a custody case involving a lesbian mother, Lambda Legal Defense and Education Fund argued, "The presence of a lesbian or gay parent or a same-sex couple in the home has no adverse effect on the moral or sexual development of children." Second Amended Brief of Amicus Curiae The Lambda Legal Defense and Education Fund in Support of Appellant at 19, Ward v. Ward, No. 95-4184, 1996 Fla. App. LEXIS 9130 (Fla. Dist. Ct. App. Aug. 30, 1996). This is not a difficult argument to make because the claim that same-sex couples will be more likely to raise children with a "weak" gender identity or who grow up to be gay or lesbian has not been borne out by the research. *See, e.g.*, C. PATTERSON, *Lesbian and Gay Parents and Their Children*, *in* THE LIVES OF LESBIANS, GAYS, AND BISEXUALS 274 (Rich Savin-Williams & Kenneth Cohen eds., 1996).

gender nonconformity is premised on the idea that gays and lesbians are defined by same-sex desire, which in turn is premised on the notion that sex and gender identity are static, fixed and intransitive. In the case of gays and lesbians, then, one is the same as one's object of desire. But what exactly is it that is the same? Visible genitals? Internal reproductive organs? Chromosomes? Hormones? Gender identity? And what if one of the above variables is not the same as that of one's lover?

No doubt basing rights claims on a definition of sexual orientation as constituted by same-sex object choice has the advantage of analytical clarity. But that analytical clarity loses its usefulness when it is forced to apply to particular histories, practices, cultures, and social formations—in short, to the lived experiences of sexual minorities. As the work produced in queer history has pointed out, particular historical configurations around sex, gender identity expression, and sexuality cannot be contained by an invocation of ahistorical categories that do not take the variability of forms of gender expression into account. For example, in his study of gay life in New York in the first half of this century, George Chauncey points out:

> [I]n important respects the hetero-homosexual binarism, the sexual regime now hegemonic in American culture, is a stunningly recent creation. Particularly in working-class culture, homosexual behavior per se became the primary basis for the labeling and self-identification of men as 'queer' only around the middle of the twentieth century; before then, most men were so labeled only if they displayed a much broader inversion of their ascribed gender status by assuming the sexual and other cultural roles ascribed to women.[58]

There are—and have been—many queer communities and cultures that do engage in practices that undermine traditional gender norms, that do constitute a kind of queerness that is not at all described by the notion of same-sex desire. When the mainstream gay and lesbian rights community's strategies for equality leave intact the state's authority to regulate the relation between genitals and gender identity, the result is a narrow victory—one that keeps the analytical category of sexual orientation pure at the expense of those whose anatomy, gender identity, and gender expression are not linked the way the hegemonic culture would wish.

58. GEORGE CHAUNCEY, GAY NEW YORK 13 (1994). Davis and Kennedy's history of lesbian communities in Buffalo from the mid-1930s to the early 1960s has also unearthed a more complicated relation to gender identity and gender expression exhibited in some of the lesbian communities they studied. *See* ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY (1993).

While "homosexuality" in particular and sexual orientation in general, defined abstractly as constituted by sexual object choice, has been an important conceptual tool in furthering the rights claims of gay men and lesbians in the heyday of the new social movements and the ascendancy of identity politics, perhaps it is time to reconsider how extensively it ought to be invoked to further the civil rights strategies of the divergent sets of identities, practices, and orientations designated by the term "sexual minority." Since the very concept of homosexuality is complicit in reinscribing the hegemonic sex/gender system, it does little to further the interests of those sexual minorities who *are* gender-variant and/or transsexual. Clearly, the fight for same-sex marriage is an important one—for lesbians, for bisexuals, for gay men, and for those transsexuals (straight and gay) who are now unable to get married. However, the more radical project, and one that could run alongside the reformist one, is to argue against the state's right to classify in the first place. Kimberlé Crenshaw has reminded us that *Plessy v. Ferguson* was not merely an identity-based challenge to the doctrine of separate but equal. She notes:

> At issue were multiple dimensions of domination, including categorization, the sign of race, and the subordination of those so labeled. There were at least two targets for *Plessy* to challenge: the construction of identity ("What is a Black?"), and the system of subordination based on that identity ("Can Blacks and whites sit together on a train?"). *Plessy* actually made both arguments, one against the coherence of race as a category, the other against the subordination of those deemed to be Black.[59]

This clash of constituencies, between mainstream lesbian and gay rights advocates and the gender community, is not as clear-cut as many assume. One constituency, queer and transgendered youth, blurs this distinction.[60] While gay and lesbian rights advocates fight for equal rights, children and adolescents exhibiting gender-variant behavior can be pathologized, treated, and in some cases institutionalized for gender identity disorder to cure them of their pre-homosexual *or* pre-transsexual conditions. One of the leading proponents of the treatment of Gender Identity Disorder in Childhood, George Rekers, made this connection quite clearly at a recent conservative conference on homosexuality:

> Rekers said lesbians tend to be tomboys in childhood, identify too closely with their fathers, prefer to play with "masculine" toys and demonstrate a "distinct dislike for doll play and various other female activities." Male homosexuals, Rekers said, "report the opposite pattern," preferring the company of girls and wanting to wear lipstick

59. Crenshaw, *supra* note 7, at 1297-98.

60. *See* Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269 (1996).

> and dresses. Rekers characterized both behaviors as "gender disturbances" that can be corrected through 18 to 22 months of weekly therapy during childhood and adolescence.[61]

Returning to the reproduction of sex, sexual orientation, and gender transitivity, there is a bit of a free rider problem going on here. Gender-variant behavior, homosexuality, and transgenderism—while clearly *not* reproduced primarily in the family as the Christian right and other opponents of same-sex marriage assume—does have to get reproduced somewhere. Launching arguments that reinforce gender norms into that discursive space of the media, broadly construed—which is the actual battleground for the rights claims of gender minorities—plays into the ongoing conservative assaults on minority gender transitive traditions. Instead, we ought to give sustenance to gender-variant traditions to preserve them and ensure their reproduction, instead of playing into the larger ideological erasure of them. We need to contest rather than support ideologies that assert that queer, gay, lesbian, bisexual, questioning, and transgendered kids are pathological, and that ultimately reinforce heteronormative notions.[62] Putting too much time and energy into making arguments that are implicitly premised on the dominant gender norms (and their relationship to anatomy) merely because they are intelligible in the terms of the state's legal categories might mean that we ignore the larger project of transforming just what is intelligible.

Suggesting that sexual orientation and gender non-conformity are entirely separate issues skirts the problem, however. The right wing, much of the "general public," and many members of the judiciary *do* see a link between sexual orientation and gender non-conformity. Moreover, lesbians and gay men, even gender-conforming lesbians and gay men, do suffer material consequences from that link, most notably in cases involving child custody, as the following examples demonstrate.

In Illinois, a court restricted a lesbian mother's visitation with her son, finding that the child has a "gender identity problem" and that "there is no strong evidence . . . that the [lesbian mother] will be more discreet in terms of her exposition of her gay lifestyle in the child's presence, and notwithstanding the child's gender identification problem,

61. Carolyn Lochhead, *Conservatives Brand Homosexuality a 'Tragic Affliction,'* S.F. CHRON., Jun. 20, 1997, at A4. Rekers advocates the use of aversion therapy in this treatment.

62. In arguing against legal discrimination against homosexuals, Stephen Macedo suggests that it may be a good idea to transmit heteronormative ideology to children: "It is not completely unreasonable to regard heterosexuality as preferable to homosexuality. There may even be a 'wavering child' to whom this information is important." Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 292 (1995).

which she learned in 1987, [she] took the child to a gay-lesbian parade."[63]

In Louisiana, a lesbian mother lost joint custody because of concerns about gender identity. The court cited the trial testimony of a psychologist at length:

> Q. Dr. L'Herisson, I will ask you to assume that you have a situation with a two year old son whose parents recently separated and is residing with his mother. And further assuming his mother is occupying a bedroom with another woman behind a closed door, would that situation create any problems in your professional opinion that might be harmful to the welfare of that two year old child?
>
> A. A two year old child is at a stage of development where they are forming a gender identity and learning sex appropriate roles for their own sex, whatever, masculine and female rolls [*sic*]. It's preferable that they have good roll [*sic*] models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.[64]

The court concluded that, "where the sexual preference is known and openly admitted, where there have been open, indiscreet displays of affection beyond mere friendship and where the child is of an age where gender identity is being formed, the joint custody arrangement should award greater custodial time to the father."[65]

In New Jersey, an appellate court permitted a second-parent adoption by the same-sex partner of the natural mother, noting with approval that "[e]ach child has a bedroom beautifully decorated in appropriate childhood motifs with M. having a feminine design and Z. a

63. Post-decree ruling, quoted in *Pleasant v. Pleasant*, 628 N.E.2d 633, 639 (Ill. App. Ct. 1990). This order was reversed by the appellate court, which found that "there is no evidence that Jimmie has a gender identity problem." *Id.* at 641. However the higher court's ruling did not dispute the logic behind the earlier ruling—that the existence of a "gender identity problem" would indicate that the mother's lesbian lifestyle had a detrimental effect on the child. Instead, the higher court disputed the finding that the child in question had such a "problem." *Id.*

64. Lundin v. Lundin, 563 So. 2d 1273, 1275 (La. Ct. App. 1990).

In another case in Louisiana, an appellate court affirmed a trial court's decision to take away primary custody from a lesbian mother because, in part, of the assumption that the formation of the boys' gender identity would be affected by the witnessing of open displays of "sexually charged" affection between two women. "Robin . . . argues that . . . the displays of affection between herself and Karri do not exceed the bounds of friendship, and that formation of the boys' gender identity will not be affected . . . . Robin asserts that she should not be denied custody because of her admitted homosexuality. We cannot agree." Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995).

65. *Lundin*, 563 So. 2d at 1277.

masculine design" and that "[b]oth parents want the children to have good self-esteem and a good sense of gender identity."[66]

Finally, there is the case of Mary Ward, a lesbian who lost custody of her child to an ex-husband who had been convicted of murdering a previous wife. The trial judge did not rule that Mary Ward's sexual orientation per se meant she would lose custody, but rather considered the effects on the child of living in a lesbian household. One of the "facts" that figured largely in the trial court's decision against Mary Ward was that her 11-year-old girl was forgoing age-appropriate behavior such as wearing women's perfume, and "preferred instead to wear men's cologne."[67] There may not have been *any* causal relationship between Mary Ward's same-sex desire and her daughter's supposed gender non-conformity. But the appropriate response of gay and lesbian rights advocates to such a determination is not to reassert a distinction between sexual orientation and gender non-conformity, but to challenge the very notion that there is something wrong with "girls" who act like "boys," with children assigned at birth as female who identify as boys, or with children who want to change their sex. In challenging the sex-based classifications so embedded in so much discrimination against gays, lesbians, bisexuals, queer, and transgendered people, it is vital that we get to the root of the problem and challenge the very premises of the classification system itself.

66. *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 537 (N.J. Super. Ct. App. Div. 1995).

67. Ward v. Ward, No. 95-4184, 1996 Fla. App. LEXIS 9130, at *4 (Fla. Dist. Ct. App. Aug. 30, 1996).