

# Article

## Covering

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## I. INTRODUCTION

Assimilation is the magic in the American Dream. Just as in our actual dreams, magic permits us to transform into better, more beautiful creatures, so too in the American Dream, assimilation permits us to become not only Americans, but the kind of Americans we seek to be. Justice Scalia recently expressed this pro-assimilation sentiment when he joined a Supreme Court majority to strike down an affirmative action program. Calling for the end of race-consciousness by public actors, Scalia said: “In the eyes of government, we are just one race here. It is American.”<sup>1</sup> Packed into this statement is the idea that we should set aside the racial identifications that divide us—black, white, Asian, Latino—and embrace the Americanness that unites us all.

This vision of assimilation is profoundly seductive and is, at some level, not just American but human. Surrendering our individuality is what permits us to enter communities larger than the narrow stations of our individual lives. Especially when the traits that divide us are, like race, morally arbitrary, this surrender seems like something to be prized. Indeed, assimilation is not only often beneficial, but sometimes necessary. To speak a language, to wear clothes, to have manners—all are acts of assimilation.

This assimilationist dream has its grip on the law. The American legal antidiscrimination paradigm has been dominated by the cases of race, and, to a lesser extent, sex. The solicitude directed toward racial minorities and women has been justified in part by the fact that they are marked by “immutable” and “visible” characteristics—that is, that such groups cannot assimilate into mainstream society because they are marked as different. The law must step in because these groups are physiologically incapable of blending into the mainstream. In contrast, major strands of American antidiscrimination law direct much less concern toward groups that can assimilate. Such groups, after all, can engage in self-help by assimilating into mainstream society. In law, as in broader culture, assimilation is celebrated as the cure to many social ills. One would have to be antisocial to argue against it.

So it is with great trepidation but greater conviction that I come to do so. For the past few years, I have been working on issues relating to sexual minorities.<sup>2</sup> That work has persuaded me that gays (by which I mean both

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1. *Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

2. See, e.g., Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 *YALE L.J.* 485 (1998) [hereinafter Yoshino, *Assimilationist Bias*]; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353 (2000); Kenji Yoshino, *Suspect Symbols: The Literary Argument for*

lesbians and gay men) can proffer a new perspective on the relationship between assimilation and discrimination. I believe that the gay context demonstrates in a particularly trenchant manner that assimilation can be an *effect* of discrimination as well as an *evasion* of it. My goal here is to develop this idea in the context of orientation, and then to demonstrate the applicability of this insight to the race- and sex-based contexts.

I believe gays may have theorized some dimensions of the relationship between assimilation and discrimination differently from either racial minorities or women. This is because gays are generally able to assimilate in more ways than either racial minorities or women. In fact or in the imagination of others, gays can assimilate in three ways: conversion, passing, and covering. Conversion means the underlying identity is altered. Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.

Of these three forms of assimilation, covering will probably be least familiar. The term and concept come from sociologist Erving Goffman's groundbreaking work on stigma.<sup>3</sup> Goffman observed that even "persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large."<sup>4</sup> Thus a lesbian might be comfortable being gay and saying she is gay, but might nonetheless modulate her identity to permit others to ignore her orientation. She might, for example, (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism.

As Goffman realized, these modes of assimilation are not always easily distinguishable from one another. For example, Goffman recognized that the same action could be either passing or covering depending on the knowledge of the audience before whom it was performed.<sup>5</sup> A woman who refrains from holding hands with her same-sex partner may thus pass with respect to those who do not know her orientation but cover with respect to those who do. This does not mean that the modalities of assimilation are indistinguishable. Rather, it means that one must know not only the performance of the actor, but also the literacy of the audience, to make that

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*Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) [hereinafter Yoshino, *Suspect Symbols*].

3. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102-04 (1963).

4. *Id.* at 102.

5. *Id.* at 50-51.

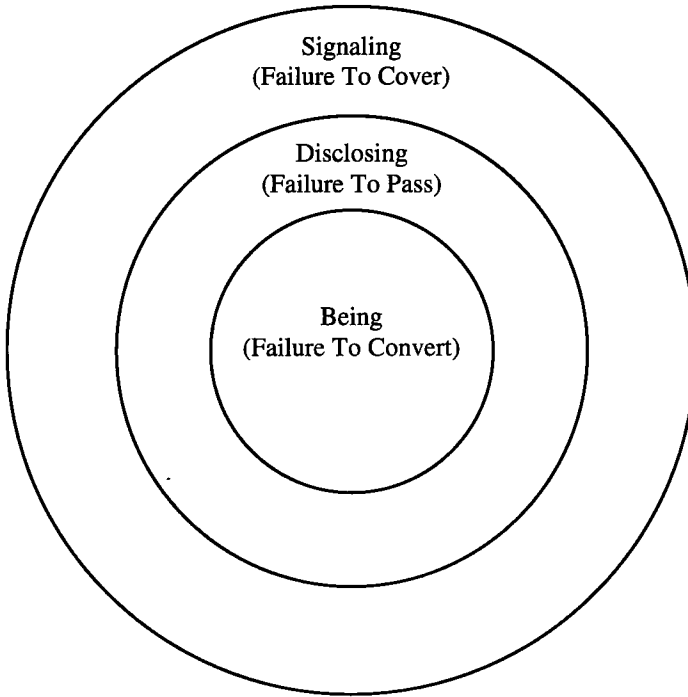
distinction. The relational aspect of presentations of the self is a preoccupation of this Article, as it was of Goffman's work.<sup>6</sup> I recur repeatedly to the concept that assimilation is not a simple performance on the part of an agent, but rather a dialectic between an agent and her audiences.

While I have not seen it explicitly theorized, I believe that much of contemporary antidiscrimination discourse operates on a model—which I call the classical model—that incorporates the three assimilationist demands of conversion, passing, and covering. The classical model can be distinguished from others through two assumptions. First, the classical model assumes that the demands operate independently of each other—that is, that one can cover without passing and that one can pass without converting. Second, the classical model assumes that the demands are rigidly ordered in terms of their severity, with conversion always being a more burdensome demand than passing, and passing always being a more burdensome demand than covering. This model of identity can be conceived as a set of concentric circles rippling outward from a core, with having a certain status (failure to convert) at the center, disclosing that status (failure to pass) in the first circle around the core, and signaling that status (failure to cover) in the second circle. The model can be represented as follows:

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6. See, e.g., ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961) (describing how individuals in mental institutions and other “total institutions” perform their identities for actual and internalized supervisors); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) (describing how individuals seek to provide observers with desired impressions through the use of “fronts”).

FIGURE 1.



I later revise this model by noting that some activities denominated as covering are often deeply constitutive of identity. Yet it is heuristically useful to develop the classical model before challenging it in this way.

The classical model of identity is also a model of discrimination. If individuals have multiple ways of modulating their identities, discrimination against them will take multiple forms, including the demands to convert, to pass, and to cover. The form of assimilation required of an identity will often be correlated to the strength of the animus against it. When discriminatory animus against an identity is particularly strong, it may require conversion. When that animus is weaker, it may permit individuals to retain the targeted trait, but require them to pass.<sup>7</sup>

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7. I wish to emphasize that these demands for assimilation do not exhaust the forms discrimination can take. When a gay employee is discharged for her homosexuality, she is not being subjected to the demand to convert, but the demand to leave. Of course, exclusions based on homosexuality may place prospective pressure on other employees to assimilate through conversion or passing. Nevertheless, the exclusion cannot be reduced to the demand to convert, as it is quite possible that no assimilation on the part of the terminated employee will lead to her reinstatement. Thus, my analysis is not proffered as a comprehensive taxonomy of discrimination. Rather, it is a much more specific study of discrimination that takes the form of coerced assimilation.

When the animus is weaker still, it may permit individuals to retain and disclose their trait, but require them to cover it.

In Part II, I develop the classical model of discrimination in the context of sexual orientation. I retell the history of the gay rights movement as a history of the increasingly attenuated assimilationist demands placed on gays by mainstream society, in both nonlegal and legal contexts. I show that as the gay rights movement has become stronger, the assimilationist demands made on gays have become weaker, shifting in emphasis from conversion, to passing, to covering.

A quick way of demonstrating that shift is to consider the gay-related issues that have figured in the mainstream press over the last decades. In the early 1970s, the press widely discussed the American Psychiatric Association's (APA's) deletion of homosexuality from its taxonomy of mental disorders.<sup>8</sup> The controversy over this deletion was a debate about conversion, that is, about whether gays were mentally diseased individuals who needed to change their orientations. In the early 1990s, the press debated the practice of outing<sup>9</sup>—the revelation of an individual's homosexuality against her will—and the military's "don't ask, don't tell" policy.<sup>10</sup> These topics pertained not to conversion, but to passing, that is, to

8. See, e.g., Victor Cohn, *Doctors Rule Homosexuals Not Abnormal*, WASH. POST, Dec. 16, 1973, at A1 (describing the APA's removal of homosexuality per se from the category of mental illnesses); *Doctors Urged Not To Call Homosexuality Illness*, N.Y. TIMES, May 10, 1973, § 1, at 20 (describing a proposal by a high-ranking official of the APA to stop categorizing homosexuality as an illness); Robert E. Gould, *What We Don't Know About Homosexuality*, N.Y. TIMES, Feb. 24, 1974, § 6 (Magazine), at 13 (describing the APA's depathologization of homosexuality); Peter Kihss, *8 Psychiatrists Are Seeking New Vote on Homosexuality as Mental Illness*, N.Y. TIMES, May 26, 1974, § 1, at 39 (describing an attempt by eight psychiatrists to revisit the APA's decision to depathologize homosexuality); Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at A1 (describing the APA's depathologization of homosexuality); see also RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 138 (1981) (describing the broad media response to the APA's decision).

9. See, e.g., Rita Giordano, *Gays Bitter in Division over Outing*, NEWSDAY, Aug. 9, 1991, at 17 (describing the outing debate in the wake of an article outing a prominent Department of Defense official); Renee Graham, *The Prince of Outing*, BOSTON GLOBE, July 13, 1993, at 25 (profiling Michelangelo Signorile, the originator of outing); Sally Jacobs, *"Outing" Seen as Political Tool*, BOSTON GLOBE, Apr. 3, 1993, at 1 (describing the increasing popularity of outing tactics, such as a history professor's offer of \$10,000 to anyone who successfully outed "a four-star officer serving in the military, a justice on the U.S. Supreme Court, or an American cardinal"); Beth Ann Krier, *Whose Sex Secret Is It?*, L.A. TIMES, Mar. 22, 1990, at E1 (describing the debate about outing among gay activists); David Tuller, *Uproar over Gays Booting Others Out of the Closet*, S.F. CHRON., Mar. 12, 1990, at A9 (describing rumors about the orientation of prominent government and business officials that have prompted journalists to wrestle with the outing issue); see also LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 219-30 (1993) (reprinting other articles from the mainstream press that exemplify the furor created by outing).

10. See, e.g., Maia Davis, *Both Sides Dislike New Gay Policy*, L.A. TIMES, July 20, 1993, at B1 (canvassing liberal and conservative criticisms of the "don't ask, don't tell" policy); David A. Kaplan with Daniel Glick, *"Into the Hands of Bigots,"* NEWSWEEK, Nov. 29, 1993, at 43 (considering how "don't ask, don't tell" is affected by court rulings striking down the regulations that preceded the statute); Martin Kasindorf, *Gay Policy a Puzzler*, NEWSDAY, July 22, 1993, at

whether a gay individual could or should self-identify as straight. Finally, at the turn of the millennium, the press has been devoting much of its gay-related coverage to same-sex marriage.<sup>11</sup> The right of gays to marry is a question of covering, as it pertains not to the ability of gays to be gay or to self-identify as gay, but to their ability to signal that identity beyond the simple act of self-identification. (As I demonstrate below, marriage can also paradoxically be seen as an act of covering, by those who take it to be a form of domesticating gays into straight norms.)<sup>12</sup>

Again, the demand to cover may be the least intuitive. A recent example may clarify how gays are increasingly encountering covering demands. In 1990, a lesbian lawyer named Robin Shahar was fired from her job at the Georgia Attorney General's Office.<sup>13</sup> Her employer emphasized that he had not fired Shahar for being a homosexual or for saying she was a homosexual, but for flaunting her homosexuality by engaging in a same-sex commitment ceremony.<sup>14</sup> Thus Shahar was terminated not for failing to convert or to pass, but for failing to cover. As time progresses, I posit that more and more discrimination against gays will take the form of covering demands, rather than taking the historical forms of categorical exclusion or "don't ask, don't tell."

Part II describes this shift in much greater detail in the hope of accomplishing four goals. First, I seek to provide a new way of thinking about gay rights. To my knowledge, no account of gay history has described it as a series of increasingly attenuated demands for assimilation. By providing this account, I aspire to develop a new taxonomy of the forms anti-gay animus can take, not only historically, but in our contemporary

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23 (describing congressional hearings on "don't ask, don't tell" that entertained "very hypothetical hypotheticals" such as one in which an army platoon shouts in unison during its 6:30 a.m. formation: "Good morning, lieutenant—we're all gay!"); Hanna Rosin, *The Ban Plays On*, NEW REPUBLIC, May 2, 1994, at 11 (describing how the "don't ask, don't tell" policy has not made life easier for gay servicemembers and has in some ways made it worse); Eric Schmitt, *Gay Troops Say Clinton's Policy Is Often Misused*, N.Y. TIMES, May 9, 1994, at A1 (describing reports of "overaggressive enforcement" of the "don't ask, don't tell" policy); see also JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 104 (1997) (describing the irony that "don't ask, don't tell" has apparently led to a dramatic increase in public discourse about homosexuality).

11. See, e.g., Yasmin Anwar, *Will States Say "I Do" to Gay Marriage?*, USA TODAY, Mar. 6, 2000, at 3A (describing the rising debate over legalization of same-sex marriage across the nation); Pam Belluck, *Nebraskans To Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, Oct. 21, 2000, at A9 (describing a proposed amendment to the Nebraska state constitution that would not only ban gay marriage but also invalidate same-sex domestic partnerships and civil unions); Elizabeth Mehren, *A Historic Day in Vermont as Civil Unions Become Legal*, L.A. TIMES, July 1, 2000, at A1 (describing gay couples entering into civil unions in Vermont on the day on which such unions became legally available); Michael Powell, *Riled Up in Old Vermont*, WASH. POST, Oct. 17, 2000, at C1 (describing the backlash against same-sex union legislation in Vermont).

12. See *infra* notes 426-428 and accompanying text.

13. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

14. *Id.* at 1104-05.



moment. I believe that many individuals intuit a difference among current attempts at reparative therapy (the demand to convert), “don’t ask, don’t tell” (the demand to pass), and opposition to same-sex marriage (the demand to cover). I wish to provide some analytic distinctions to rationalize that intuition.

My second reason for spending some time describing this shift is to show its messiness and contingency. Synoptic accounts like the preceding vignettes from the media may give the impression that one assimilationist demand has neatly replaced another in an inexorable teleology in which gays are moving ever closer to full equality. I emphasize my disagreement with that view. No historical moment has existed in which one demand has categorically supplanted another, as suggested by the coexistence of all three demands today. I thus am not arguing that we have definitively moved into a covering phase of anti-gay discrimination in which conversion and passing are no longer at issue. To the contrary, I believe that one of the challenging aspects of being gay today lies in the very multiplicity of the assimilationist demands that gays encounter. Moreover, the attenuation of assimilationist demands made on gays in the past few decades does not mean this shift is inexorable. The ascendance of the demand to convert in medical circles in the years after Freud’s death is but one of many examples of how fragile progress in this area has been. The qualified progress narrative I tell here is not presented as an iron law of history.

My third goal in this Part is to describe some relationships between law and society with regard to conversion, passing, and covering. I have divided the discussion of each demand into its cultural and legal manifestations.<sup>15</sup> In doing so, I consider how the law both converges with and diverges from a broader culture of gay assimilation. In some crude sense, every cultural demand for gay conversion, passing, or covering finds voice in the law. Through translation into legal argot, however, the demands are also transformed. The ways culture gets refracted when articulated as law are not easy to describe systematically, and I have erred here on the side of being a witness rather than a theorist. Yet I pay particular attention to the dimension of time—to how legal discourse sometimes harks back to older cultural discourses and at other times reifies nascent ones.

My fourth and final goal is to use this history to enter an important qualification to the classical model of identity. The classical model assumes that the assimilationist demands (1) are always independent, such that one can cover without passing and pass without converting; and (2) are rigidly ordered in terms of severity, with conversion being the most severe, then

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15. I do not, of course, mean by this that law is not part of culture. For these purposes, “culture” denotes the broader set of extralegal social discourses in which legal norms are embedded.

passing, then covering. If we adopt this model, gay history can be told as an unqualified progress narrative, as the demands for assimilation have shifted in emphasis from conversion to passing to covering.

Any real engagement with gay history, however, shows that in some instances, the shift from conversion to passing or covering can be experienced by gays as no shift at all. One such shift is the military's movement from its 1981 policy, which excluded gays on the basis of their homosexual status, to its 1993 "don't ask, don't tell" policy (still in effect), which excludes gays on the basis of homosexual self-identification<sup>16</sup> or homosexual conduct. The 1981 policy was a conversion policy, as it required gays to convert to heterosexuality to serve. The "don't ask, don't tell" policy is popularly understood as a passing policy (as its moniker would suggest) and is defended by the military as a covering policy. This shift thus appears to represent progress for gays—no longer will they be excluded for their status, but only for their self-identification or conduct. Yet this shift has not improved the material or dignitary conditions of gays in the military, as homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status. Indeed, exclusions under the new policy have skyrocketed,<sup>17</sup> suggesting that the shift is the reverse of a progress narrative for gays.

Qualifying the progress narrative should lead us to qualify the classical model that frames it. The instance of sodomy subverts both assumptions underlying the classical model. It shows that assimilationist demands are not always independent, in that a demand to cover can be tantamount to a demand to convert. Relatedly, it also demonstrates that we cannot assume that acts of covering are always less severe than acts of conversion. I am therefore led to propose a modification of the classical model that I call the weak performative model. The weak performative model, which draws on

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16. I realize that the military contends that it does not exclude homosexuals for self-identification alone. Yet for reasons that I articulate more clearly below, I believe that "don't ask, don't tell" effectively does precisely this. See *infra* notes 331-332 and accompanying text.

17. See OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (1998), <http://www.defenselink.mil/pubs/rpt040798.html> (noting that "[a]lthough the trend from the early 1980s to the early 1990s reflected gradually decreasing numbers and rates of discharges, culminating in a historic low in Fiscal Year 1994, both the number and rate of discharges for homosexual conduct have increased each year since that time"); see also Eric Schmitt, *Close Quarters: How Is This Strategy Working? Don't Ask*, N.Y. TIMES, Dec. 19, 1999, § 4, at 4 (noting that the number of servicemembers discharged for homosexuality in 1998 was double the number dismissed in 1993, when the policy was developed). *But cf.* SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 15 (2001), [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/256.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf) (noting that reported instances of asking and telling were down in the year between February 16, 2000, and February 15, 2001, for the first time since implementation of the policy).

the work of Judith Butler, suggests that statuses can be partially constituted by acts. This model suggests that acts denominated as acts of covering might simultaneously be denominated as acts of conversion.

My hope is that Part II provides a free-standing contribution to an understanding of gay rights. As I seek to show in Part III, however, the lessons of this new assimilationist paradigm extend far beyond the context of orientation. Distinguishing among conversion, passing, and covering allows us to speak more precisely about how gays are like and unlike racial minorities and women.<sup>18</sup> In particular, the paradigm suggests that the claims of all three groups converge around covering.

I begin Part III by describing the distinctions that civil rights discourse often draws between gays on the one hand and racial minorities and women on the other. Two posited distinctions are that gays can convert and pass, while racial minorities and women cannot. To a significant extent, the antidiscrimination jurisprudence arising under the equal protection guarantees of the Federal Constitution and Title VII of the Civil Rights Act of 1964 has accepted these distinctions, maintaining that racial minorities and women are more deserving of legal protection in part because they cannot convert or pass. Such jurisprudence embodies an assimilationist bias. It maintains that groups that can assimilate are less worthy of protection than groups that cannot. It further suggests that the only acceptable defense to a demand for assimilation is the inability to accede to it. In doing so, the jurisprudence reflects and reinforces a schism between gays on the one hand and racial minorities and women on the other.

I seek to demonstrate that even if we accept these distinctions for the sake of argument, gays can still find common cause with racial minorities and women. Conversion and passing do not exhaust the forms of assimilation. There is also covering. And while racial minorities and women may be differently situated from gays along the axes of conversion and passing, all three groups are similarly situated along the axis of covering.

Like gays, racial minorities and women cover, and are asked to cover, all the time. The African-American woman who stops wearing cornrows to succeed at work may be covering.<sup>19</sup> The native Hawaiian broadcaster who mutes his accent to retain his broadcasting job may be covering.<sup>20</sup> The

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18. Religious minorities form another group whose claims are deeply relevant in thinking about questions of assimilation. I do not consider them in this Article for the reasons described below. *Infra* notes 889-896 and accompanying text.

19. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); see also Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

20. See *Kahakua v. Friday*, No. 88-1668, 1989 WL 61762 (9th Cir. June 2, 1989); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (discussing accent-based discrimination).

Latino venireperson who denies knowledge of Spanish to remain on a jury may be covering.<sup>21</sup> Women also cover. The woman who seeks to downplay her status as a mother or her pregnancy for fear of being penalized as an inauthentic worker may be covering. The female scholar who eschews feminist topics may be covering. The woman who strives to be as aggressive or tearless as the stereotypical man may be covering.<sup>22</sup> In all these instances, the individual is not attempting to change or hide her identity. Nonetheless, she is assimilating by making a disfavored trait easy for others to disattend.

Framing analogies among the covering strategies of these different groups merits some qualification. As an initial matter, these groups are obviously not distinct. When I state that women cover, I am focusing on how they cover *as women*—I do not foreclose the possibility that they will also cover along other dimensions. Understanding the intersectionality of identity is crucial to comprehending the difficulty of declaring that an individual is covering. For example, if a lesbian wears her hair long and down, is she covering her status as a gay person, refusing to cover as a woman, or exercising a grooming preference that has nothing to do with either axis of identity? If this question seems unanswerable, it is because—like most intersectional analysis—it honors the complexity of the underlying practice. In most of what follows, I disaggregate different axes of identity for the sake of introducing the concept of covering in an accessible manner. I wish clearly to acknowledge, however, that I regard this heuristic overschematization as a necessary evil. I hope further work will be more attentive to how assimilation occurs at the intersections of multiple identities.

Another important qualification, which I have been able more fully to capture in my analysis, is that covering does not manifest itself in identical ways across all contexts. I believe that women are differently situated from both gays and racial minorities in that they are asked more insistently by the dominant group (i.e. men) to “reverse cover” as well as to cover. By this, I mean that women are asked to emphasize their womanhood as well as to deemphasize it. In the landmark case of *Price Waterhouse v. Hopkins*,<sup>23</sup> Ann Hopkins was asked to be assertive enough to make partner, but also asked to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>24</sup> This was the “intolerable and impermissible catch 22”<sup>25</sup> that drove the Supreme Court to hold in Hopkins’s favor. While gays and racial minorities certainly

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21. See *Hernandez v. New York*, 500 U.S. 352 (1991).

22. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

23. 490 U.S. 228.

24. *Id.* at 235.

25. *Id.* at 251.

experience pressure to reverse cover, I believe they encounter this demand less systematically than women.

This difference, however, should not obscure how covering affects not only gays, but also racial minorities and women. Indeed, I argue that the contemporary forms of discrimination to which racial minorities and women are most vulnerable often take the guise of enforced covering. A member of a racial minority cannot be sanctioned for failing to convert or to pass without having a Title VII employment discrimination claim. But he can be sanctioned for failing to cover—for wearing cornrows,<sup>26</sup> for lapsing into Spanish,<sup>27</sup> or for speaking with an accent.<sup>28</sup> Similarly, a woman generally cannot be burdened for failing to convert or to pass. Yet it is still true that for constitutional purposes, state actors can burden pregnancy without triggering a sex discrimination analysis.<sup>29</sup>

This commonality suggests that racial minorities and women have much to gain from a theory of discrimination that focuses on the harms of coerced assimilation. Members of these groups are not as impervious to the assimilationist bias in the current antidiscrimination paradigm as their inability to convert or to pass might suggest. If the only defense against an assimilationist demand is that one cannot accede to it, racial minorities and women are left completely unprotected against covering demands, as anyone is assumed to be able to cover. My model thus shows a ground on which racial minorities, women, and gays can make common cause. That common ground will become more evident as anti-gay claims shift in emphasis away from conversion and passing and toward covering.

The gay context can also demonstrate the seriousness of the harm the covering demand inflicts. In that context, I demonstrate that under a performative conception of gay identity, certain acts denominated as covering, such as abstention from same-sex sodomy, might be constitutive of gay identity. I argue for this reason that one should not dismiss enforced covering as a trivial burden. That insight is applicable to racial minorities and women as well. I maintain that some forms of race-based covering (such as muting linguistic difference) or sex-based covering (such as muting a pregnancy) might also be constitutive of identity in this way.

In Part IV, I set forth three critiques of my model. The first critique suggests that gays do not deserve the primacy I have accorded them. One objection in this vein addresses my claim that gays have greater insight into some dimensions of the relationship between assimilation and discrimination because they can assimilate in more ways than racial

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26. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

27. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

28. *Kahakua v. Friday*, No. 88-1668, 1989 WL 61762 (9th Cir. June 2, 1989).

29. *Geduldig v. Aiello*, 417 U.S. 484 (1974); see also *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272 n.3 (1993) (noting the "continuing vitality of *Geduldig*").

minorities or women. The objection points out that one should not lightly assume that racial minorities and women are not capable of conversion or passing. It would be particularly ironic to claim that passing is a special attribute of gays, as passing was first identified as a phenomenon in the racial context. My response concedes all of this, but nonetheless emphasizes the greater relative frequency with which gays are asked to convert or to pass.

Of course, even if one acceded to this point, there would still be other candidates on which to found my model. Prime among these are religious minorities, who have routinely been asked to convert, to pass, and to cover. Moreover, religious minorities have secured constitutional and Title VII antidiscrimination protections despite the fact that they are capable of assimilating in these ways, making them a superficially more prepossessing site on which to build a model of assimilation as discrimination. I nonetheless argue that orientation may provide a better basis for developing this model because religion has been both marginalized and domesticated in the broader discourse of equality jurisprudence.

The second critique contends that my analysis ignores how assimilation can be both beneficial and necessary. My response—which I hope is implicit in much of my analysis—is that I am not arguing that all assimilation is *per se* bad. Rather, I am arguing against the countervailing assumption—powerful in both law and culture—that all assimilation is *per se* good. That response, of course, simply begs the question of how I seek to determine which forms of assimilation are malign. Elucidating my answer to that question permits me to articulate the very different standards I would apply in legal and nonlegal contexts. I am relatively conservative in the forms of coerced assimilation I believe should be remedied by the law. In contrast, I am much more willing to espouse a broader anti-assimilationist ethos in nonlegal contexts.

The final critique maintains that my model risks essentializing identities and engaging in the very stereotyping that the antidiscrimination paradigm is meant to retire. I find this critique the most formidable, as it is easy to envision a covering paradigm in which individuals would be accused of covering if they did not conform to stereotypes about their group. Thus a “masculine-identified” woman who experiences herself as “just being herself” might be told that she was not only covering but suffering from false consciousness. My model thus seems to encourage its adherents to think of groups according to the stereotypical behaviors in which they engage.

While this criticism is weighty, I argue that it can be overcome. I contend that it is possible to observe correlations between certain behaviors and certain identities—such as language and ethnic identity, pregnancy and being a woman, sodomy and being gay—without falling into stereotyping. I

maintain that the erroneous conflation of such observations with stereotypes is a rhetorical strategy of those who would adhere to a formalistic regime of race-blindness, sex-blindness, and orientation-blindness. As seductive as those blindness regimes may appear to be, I contend that they actually have extremely pernicious implications for the equality claims of racial minorities, women, and sexual minorities. I therefore seek to articulate a regime in which antidiscrimination discourse would recognize correlations between behaviors and statuses without falling into either the essentialism of stereotyping or the formalism of blindness.

## II. CONCEPT

The rainbow can stand as an emblem for the gay rights movement not only in the diversity of its hues but in the speed of its imagined arc. As Dudley Clendinen and Adam Nagourney observe, "it seems likely that the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation."<sup>30</sup> One way to track its velocity is to listen to the laughter that has attended it. In 1986, Justice White's opinion in *Bowers v. Hardwick*<sup>31</sup> described the claim that the constitutional right to privacy protected homosexual sodomy as "facetious,"<sup>32</sup> a characterization that would enrage the gay community for years to follow.<sup>33</sup> Yet accounts of the Stonewall riots in 1969, commonly thought to mark the birth of the gay rights movement,<sup>34</sup> suggest that not so long before *Bowers*, some individuals in that very community could not take their rights seriously. Edmund White writes that as unrest escalated at the Stonewall Inn, one gay person's cry of "Gay Power" was met with laughter—half-nervous, half-exuberant—among the gays assembled there.<sup>35</sup> It is tempting to tell the history of the gay rights movement as a history of laughter—alternately anxious or derisive, mirthful

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30. DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 13 (1999).

31. 478 U.S. 186 (1986).

32. *Id.* at 194.

33. See, e.g., *Crime in the Bedroom*, N.Y. TIMES, July 2, 1986, at A30 (noting that the Court "crudely" used the word "facetious" in its opinion); Arthur S. Leonard, *Letting the Cops Back into Michael Hardwick's Bedroom*, N.Y. NATIVE, July 14, 1986, at 11 (criticizing aspects of the opinion as "insulting" and noting the use of the word "facetious"); see also EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 6 (1990) (describing the negative reaction to the Court's use of the word "facetious").

34. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-70*, at 1-2 (2d ed. 1998). D'Emilio's work challenges this conventional wisdom by unearthing evidence for a preexisting homophile movement. See *id. passim*.

35. EDMUND WHITE, *The Political Vocabulary of Homosexuality*, in *THE BURNING LIBRARY* 69, 69 (David Bergman ed., 1994).

or sardonic—as who is laughing, and with what emotion, has changed very much, very quickly.

I resist that temptation, except as a point of departure for underscoring how the startlingly metamorphic nature of the gay rights movement makes it a particularly vivid context for examining the sociology of assimilation. I employ that context to retell the history of the gay rights movement in a more analytic fashion, as a history of successively attenuated demands for assimilation. I chart the progress of the gay rights movement as a shift in emphasis from the demand that gays convert, to the demand that gays pass, to the demand that gays cover.

Retelling gay history in this manner might suggest it is an inexorable progress narrative. Yet a more probing appraisal of that history invites skepticism about how much a shift from conversion to passing or covering has translated into actual progress in the material and dignitary status of gays. Throughout my account, I emphasize how some shifts from gay conversion regimes to gay passing or gay covering regimes did not represent such progress. In concluding the discussion of orientation, I show how this evidence compels a modification of the model of identity that assumes that conversion is always more severe than passing or covering.

#### A. *Gay Conversion*

J.K.: Do you think your parents feel guilty now about committing you, and about the shock treatment?

Anon.: A person who has become a close friend of theirs is a psychologist, and he asked them, “Why did you ever commit him for that?” My mother answered, “We just didn’t know.” Now she says they shouldn’t have done it. I realize that they did what they thought was right at the time. They felt responsible, the typical attitude of intelligent parents. If they weren’t so intelligent I think it wouldn’t have happened. They didn’t know that shock treatment was so bad. My mother said, “We didn’t know what we were doing. The doctors convinced us to do it. We never would have done it if we knew the result.”

J.K.: What was it like in the institution that time? Were there other Gay people there?

Anon.: I think so, but then you really never knew. Everyone was undergoing the same kind of shock treatment, both males and females.

They give you sodium pentothal beforehand, but I do remember being taken to one particular shock treatment. You’re in



your pajamas, and you just lie down on a table. Then you don't remember any more because they give you a shock. The shock itself erases anything you were experiencing before, any memory of it. I had seventeen shock treatments—I did have awareness enough to ask one of the nurses how many times I had had it, and she said, "I'll look it up." She said seventeen.

J.K.: When you come out of the shock treatment, what is it like?

Anon.: I remember being shaved with an electric razor and thinking, "Isn't that strange? I can't move." I thought, "Why is he shaving me, and where am I, and why can't I do it myself, and why can't I stand up, and why can't I move my arms?" Then I probably lost consciousness again. You're not aware of much.

I do remember after my own shock treatment listening to other people having shock treatment. I don't think that should be allowed. I was in the next ward. You hear that horrible scream. There's one loud scream—"Ahhhhh!!!"—very loud, each time they give you a shock, as the lungs are being evacuated. You hear what sounds like hundreds of people having shock treatment. They always did it in the morning, it went on all morning, three hours of those loud, single screams, one person at a time.

I do remember being very affectionate in the hospital during the time I had shock treatment. I thought I knew everyone. I would hug anyone.

J.K.: That seems to be the opposite of what was intended.

Anon.: Right, it was like making out with everyone, it didn't make any difference, male or female. I was going around feeling very close to everyone. They didn't respond with any affection. But I would do it anyway.<sup>36</sup>

What does it mean to convert? Generally defined as a "[c]hange in character [or] nature,"<sup>37</sup> conversion encompasses mundane, value-neutral, and reversible transactions such as changes of measure or currency. Yet as the above account of electroshock therapy suggests, this general definition may fail to capture what conversion denotes for human identities. In such cases, I believe conversion often has a more specific meaning inflected by the instance of religious conversion—" [t]he turning of sinners to God; a spiritual change from sinfulness, ungodliness, or worldliness to love of God

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36. JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 203-04 (1976).

37. 3 *THE OXFORD ENGLISH DICTIONARY* 870 (2d ed. 1989).

and pursuit of holiness.”<sup>38</sup> Conversion in this formulation is not a mundane event, but a sacred one; not a value-neutral event, but one that transforms the damned into the saved; and not a reversible event, but in theory a unique occurrence.

Under such an account, human conversion differs profoundly from either passing or covering. Passing and covering are both perceived to be compromise formations in which the underlying identity is ostensibly preserved, modified only for popular consumption. In contrast, conversion is thought to be a more complete embrace or surrender. It is believed to change not only the expression of an identity, but the underlying substance of it.<sup>39</sup>

In this discussion, I describe the history of attempts to convert homosexuality into heterosexuality in the nonlegal field of mental health, as well as in the legal field. In both contexts, I document the same trend. I observe that before Stonewall, homosexuality was believed in many quarters to be a literal disease—a bona fide psychiatric mental disorder. This conceptualization powerfully justified conversion: To figure homosexuality as a disease was to figure conversion as an unimpeachable medical cure.<sup>40</sup> Since Stonewall, that conceptualization has gradually lost its hold. This is not to say, however, that the disease rhetoric surrounding homosexuality disappeared. Even as the concept of homosexuality as a literal disease (i.e., a mental disorder) waned, a concept of homosexuality as a figurative disease (i.e., a disfavored social condition that was contagious) remained. This contagion metaphor for homosexuality still continues explicitly and implicitly to license many subtler forms of conversion today.

I use this shift from literal to metaphoric conceptualizations to show the stickiness of norms about homosexuality. The intractability of the disease model sounds a cautionary note about the actual progress made by the gay rights movement. This note should echo across the entire Article. Again and again, I demonstrate the stubbornness of human animus by observing how, when challenged, it finds new rhetorical forms.

### 1. *Cultural Contexts*

In documenting the nonlegal demand that homosexuals convert, I do not seek to be comprehensive. The cultural demand to convert occupies too many locations in, for example, art, education, entertainment, medicine,

38. 3 *id.* at 871.

39. I call this distinction between expression and substance into question below. See *infra* notes 318-324 and accompanying text.

40. As one conversion therapist would note, “No one would think of saying ‘Let’s be lenient about cancer.’” ABRAM KARDINER, *SEX AND MORALITY* 163 (1955).

religion, and social life to permit such a universal account. Instead, I focus on medicine because of the ascension of the medical establishment as a primary superintendent of sexuality beginning in the nineteenth century.<sup>41</sup> Medical conversion treatments for homosexuality in the United States have been well documented, particularly by the tireless Jonathan Ned Katz.<sup>42</sup> Some of these “cures” were surgical: hysterectomy,<sup>43</sup> ovariectomy,<sup>44</sup> clitoridectomy,<sup>45</sup> castration,<sup>46</sup> vasectomy,<sup>47</sup> pudic nerve surgery,<sup>48</sup> and lobotomy.<sup>49</sup> Other treatments were substance-based: hormone treatment,<sup>50</sup>

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41. See KATZ, *supra* note 36, at 129-30. Katz asserts that “European discussion of homosexuality as a medical phenomenon dates to the early 1800s,” maintaining that before that time homosexuality was regulated by churches or legislative bodies. *Id.* at 130. He attributes the medicalization of homosexuality in this time period to “the rise to power of a class of petit bourgeois medical professionals, a group of individual medical entrepreneurs, whose stock in trade [was] their alleged ‘expert’ understanding of homosexuality.” *Id.* As Katz himself has subsequently acknowledged, the use of the term “homosexuality” here might be somewhat inattentive to the historically specific nature of the term. See JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 8 (1995) (“At the moment I was writing [*Gay American History*], no one I knew was worrying much about the distorting effect of hypothesizing an eternal homosexual essence.”). This is because homosexual identity as it is known today is thought (by those who believe Foucault) to date from the late nineteenth century. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 43 (Robert Hurley trans., 1978) (1976). Yet this is not to gainsay that the medical profession regulated same-sex desire since the early nineteenth century. Foucault himself ascribes great agency to the profession in the creation of homosexual identity. See *id.* (describing the late-nineteenth-century creation of homosexuality as a “psychological, psychiatric, medical category”).

42. See KATZ, *supra* note 36, at 129-207 (collecting materials on gay conversion under the heading of “Treatment”).

43. See *id.* at 129 (noting the existence of this practice).

44. See *id.* at 135, 136-37 (reprinting in part F.E. Daniel, *Castration of Sexual Perverts*, 9 *TEX. MED. J.* at 255-71 (1893) (discussing a large-scale experiment in a Pennsylvania hospital that removed the ovaries of women diagnosed with sexual “disturbance”)); see also ROBERT KRONMEYER, *OVERCOMING HOMOSEXUALITY* 81 (1980) (noting the existence of this practice).

45. See KATZ, *supra* note 36, at 129 (noting the existence of this practice).

46. See *id.* at 140, 140-43 (reprinting in part E.S. Talbot & Havelock Ellis, *A Case of Developmental Degenerative Insanity, with Sexual Inversion, Melancholia, Following Removal of Testicles, Attempted Murder and Suicide*, 42 *J. MENTAL SCI.* at 341-44 (1896) (describing the case history of a homosexual who was castrated)); *Results of Castration in Sexual Abnormalities*, 33 *UROLOGIC & CUTANEOUS REV.* 351, 351 (1929) (reporting on a study of male and female castration “carried out in the attempt to relieve some sexual abnormality” and recommending the operation “in cases of persistent exhibitionism, rape and homosexuality”); see also KRONMEYER, *supra* note 44, at 81 (noting the existence of this practice).

47. See KATZ, *supra* note 36, at 143, 143-44 (reprinting in part HARRY CLAY SHARP, *THE STERILIZATION OF DEGENERATES* 1-2, 6 (Nat’l Christian League for Promotion of Purity, 1908) (describing vasectomies as preferable to castration in dealing with “degenerates,” a class encompassing “sexual perverts”)); see also KRONMEYER, *supra* note 44, at 81 (noting the existence of this practice).

48. See KATZ, *supra* note 36, at 145, 145-46 (reprinting in part *The Gentleman Degenerate. A Homosexualist’s Self-Description and Self-Applied Title. Pudic Nerve Section Fails Therapeutically*, 25 *ALIENIST & NEUROLOGIST* at 68-70 (1904) (describing the failure of pudic nerve surgery to cure a man’s same-sex desire)).

49. See *id.* at 175, 175-81 (reprinting in part Joseph Friedlander & Ralph S. Banay, *Psychosis Following Lobotomy in a Case of Sexual Psychopathology; Report of a Case*, 59 *ARCHIVES NEUROLOGY & PSYCHIATRY* at 303-11, 315, 321 (1948) (describing the lobotomization of a homosexual who became demented as a result of surgery)); *id.* at 191, 191-93 (reprinting in part Moses Zlotlow & Albert E. Paganini, *Autoerotic and Homoerotic Manifestations in Hospitalized*

pharmacologic shock treatment,<sup>51</sup> and treatment with sexual stimulants and sexual depressants.<sup>52</sup> Finally, some treatments attempted to deal with the patient's psyche instead of, or in addition to, her body. Such treatments included aversion therapy,<sup>53</sup> desensitization (the attempted reduction of aversion to heterosexuality),<sup>54</sup> electroshock treatment,<sup>55</sup> group therapy,<sup>56</sup> hypnosis,<sup>57</sup> and psychoanalysis.<sup>58</sup>

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*Male Postlobotomy Patients*, 33 PSYCHIATRIC Q. at 492-97 (1959) (describing how lobotomies conducted on 100 hospitalized patients who were "management problems," a term arguably encompassing patients manifesting same-sex desire, had little effect on their behavior)); *see also* KRONEMEYER, *supra* note 44, at 87 ("In the 1950s and 1960s, lobotomies . . . were administered promiscuously in the treatment of homosexuals.").

50. *See* KATZ, *supra* note 36, at 167, 167-69 (reprinting in part Saul Rosenzweig & R.G. Hoskins, *A Note on the Ineffectualness of Sex-Hormone Medication in a Case of Pronounced Homosexuality*, 3 PSYCHOSOMATIC MED. at 87-89 (1941) (describing the failure of treatment of a homosexual with hormones such as estrogen and testosterone)); SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 109-27 (1996) (describing the use of testosterone and estrogen in the treatment of homosexuality).

51. *See* KATZ, *supra* note 36, at 165, 165-67 (reprinting in part Newdigate M. Owensby, *Homosexuality and Lesbianism Treated with Metrazol*, 92 J. NERVOUS & MENTAL DISEASE at 65-66 (1940) (describing the effectiveness of treatment with Metrazol, a chemical stimulant that induces convulsive shocks in its subjects)).

52. *See id.* at 129 (noting the existence of this practice).

53. *See id.* at 198, 198-99 (reprinting in part Joseph R. Cautela, *Covert Sensitization*, 20 PSYCHOL. REP. at 464-65 (1967) (describing the preliminary success of aversion therapy on two male subjects)); *id.* at 199, 199-201 (reprinting in part Ivan T. Rutner, *A Double-Barrel Approach to Modification of Homosexual Behavior*, 26 PSYCHOL. REP. at 356-58 (1970) (describing the short-term success but long-term failure of aversion therapy on a "practicing homosexual" woman)); Nathaniel McConaghy, Michael S. Armstrong & Alex Blaszczyński, *Controlled Comparison of Aversive Therapy and Covert Sensitization in Compulsive Homosexuality*, 19 BEHAV. RES. & THERAPY 425 (1981) (describing aversive therapy conducted on twenty subjects using electric shocks in combination with slides of male nudes to reduce compulsive homosexual urges).

54. *See* KATZ, *supra* note 36, at 199, 199-201 (reprinting in part Rutner, *supra* note 53 (describing desensitization used in tandem with aversion therapy)).

55. *See id.* at 164, 164-65 (reprinting in part Louis William Max, *Breaking Up a Homosexual Fixation by the Condition Reaction Technique: A Case Study*, 32 PSYCHOL. BULL. at 734 (1935) (describing the success of electric shock therapy administered at "intensities considerably higher than those usually employed on human subjects")); *id.* at 170, 170-73 (reprinting in part Samuel Liebman, *Homosexuality, Transvestism, and Psychosis: Study of a Case Treated with Electroshock*, 99 J. NERVOUS & MENTAL DISEASE at 945-57 (1944) (describing the partial success of electroshock therapy on a male homosexual)); McConaghy et al., *supra* note 53 (describing electroshock therapy combined with an aversive conditioning technique); George N. Thompson, *Electroshock and Other Therapeutic Considerations in Sexual Psychopathy*, 109 J. NERVOUS & MENTAL DISEASE 531, 531 (1949) (describing electroshock therapy to prompt sexual reorientation).

56. *See* MARTIN DUBERMAN, *CURES* 93-115, 118-24 (1991) (describing group therapy from a first-person perspective); KATZ, *supra* note 36, at 183, 183-84 (reprinting in part Ernest Harms, *Homo-Anonymous*, 14 DISEASES NERVOUS SYS. at 318-19 (1953) (describing the successful application of group therapy techniques established by Alcoholics Anonymous to four homosexual men)); *id.* at 186, 186-87 (reprinting in part Samuel B. Hadden, *Attitudes Toward and Approaches to the Problem of Homosexuality*, 6 PA. MED. J. at 1195-98 (1957) (describing the success of group therapy in treating homosexuality)); *id.* at 190, 190-91 (reprinting in part Alexander B. Smith & Alexander Bassin, *Group Therapy with Homosexuals*, 5 J. SOC. THERAPY at 227, 231-32 (1959) (describing the success of group therapy)).

57. *See* KATZ, *supra* note 36, at 144, 144-45 (reprinting in part John Duncan Quackenbos, *Hypnotic Suggestion in the Treatment of Sexual Perversions and Moral Anaesthesia: A Personal*

My focus is still narrower than general medical treatments for homosexuality, as I concentrate specifically on psychoanalytic conversion treatments. I do so because part of my goal is to demonstrate the longevity of conversion treatment. As Timothy Murphy has observed, “virtually every sexual orientation therapy ever formulated has typically passed into history along with its originators,” but “[p]sychoanalysis has proved one exception to this rule of obsolescence.”<sup>59</sup> This is slightly misleading, as some forms of nonpsychoanalytic treatment appear to have persisted.<sup>60</sup> Yet it is true that it is relatively easy to dismiss some forms of conversion treatment—such as lobotomies—as belonging to the past.<sup>61</sup> Even mental health professionals who currently advocate psychoanalytic therapy for homosexuals deride such physical interventions as “quackeries.”<sup>62</sup> In contrast, conversion therapy has been practiced continuously through the present.<sup>63</sup> In using the term “conversion therapy,” then, I do not mean the broader practice of conversion treatments, but the narrower practice of psychoanalytic techniques.<sup>64</sup>

The history of conversion therapy can be divided into three periods—the Freudian period, in which conversion therapy was not yet systematically

*Experience*, 108 TRANSACTIONS N.H. MED. SOC'Y at 69, 72, 75, 78-80 (1899) (describing the successful conversion of a male homosexual through hypnosis); *id.* at 194, 194-96 (reprinting in part Michael M. Miller, *Hypnotic-Aversion Treatment of Homosexuality*, 55 J. NAT'L MED. ASS'N at 411-13, 415 (1963) (describing the successful treatments of four homosexual/bisexual men and one lesbian through hypnotic suggestion that created associations between disgust and same-sex feelings)). Katz observes that hypnosis was advocated in America as a cure for sexual perversion as early as 1893 by Dr. Henry Hulst. *Id.* at 144. E.M. Forster's novel *Maurice*, not published until 1971 but written in 1913-1914, contains a scene in which hypnosis is used in an attempt to cure homosexuality. E.M. FORSTER, MAURICE 209-13 (1971).

58. See KATZ, *supra* note 36, at 148, 148-51 (reprinting A.A. Brill, *The Conception of Homosexuality*, 61 JAMA 335, 335-40 (1913) (describing how a psychoanalytic attempt to cure homosexuality only cured the neurosis that accompanied it)); *id.* at 159, 159 (reprinting in part Wilhelm Stekel, *Is Homosexuality Curable?*, 17 PSYCHOANALYTIC REV. at 443, 447-48 (1930) (describing the possibility of a successful cure through psychoanalysis if the patient can be convinced to stay in treatment)); RICHARD C. ROBERTIELLO, VOYAGE FROM LESBOS 252-53 (1959) (describing the conversion of a lesbian into a heterosexual through psychoanalysis).

59. TIMOTHY F. MURPHY, GAY SCIENCE: THE ETHICS OF SEXUAL ORIENTATION RESEARCH 82-83 (1997).

60. See, e.g., Stephen C. Halpert, *If It Ain't Broke, Don't Fix It*, 5 INT'L J. SEXUALITY & GENDER STUD. 19, 21 (2000) (describing the continued use of aversion therapies involving electric shock or nausea-inducing drugs).

61. See KATZ, *supra* note 36, at 129 (observing that lobotomies were practiced in the United States until 1951).

62. CHARLES W. SOCARIDES, HOMOSEXUALITY: A FREEDOM TOO FAR 103 (1995) (describing lobotomies and aversion therapies as “quackeries” in a work advocating psychotherapeutic conversion of homosexuals); see also KRONMEYER, *supra* note 44, at 87-88 (dismissing electric shock therapy and lobotomy, but advocating psychoanalytic conversion).

63. See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1303-11 (1999).

64. See generally KENNETH LEWES, THE PSYCHOANALYTIC THEORY OF MALE HOMOSEXUALITY (1988) (describing the history of such psychoanalytic techniques).

established (roughly 1870-1938);<sup>65</sup> the “Gilded Age” of conversion therapy,<sup>66</sup> in which such therapy became entrenched (roughly 1938-1969);<sup>67</sup> and the post-Stonewall period, in which it was attacked (roughly 1969 to the present). As I indicate in my discussion, this periodization is not absolute—many prominent voices assailed conversion therapy during the gilded age,<sup>68</sup> and many defend conversion therapy today.<sup>69</sup> Nonetheless, I believe the periodization illuminates more than it obscures.

a. *The Freudian Period (1870-1938)*

Both proponents<sup>70</sup> and opponents<sup>71</sup> of conversion therapy invoke the work of Freud as a conceptual fountainhead. As this might suggest, what exactly Freud had to say about conversion therapy is a matter of much dispute. The intensity of the dispute probably owes much to a political interest in having the father of psychoanalysis bless one’s cause. But the dispute itself is grounded in substance. With regard to the causes and mutability of homosexuality, Freud’s work is descriptively complex.<sup>72</sup> With regard to the validity of homosexuality, Freud’s work is prescriptively ambiguous.<sup>73</sup>

A fundamental descriptive question relating to homosexuality is whether it arises from nature or nurture. Freud’s answer to this question is superficially clear—he believed that all human beings (not just homosexuals) had an innate bisexual disposition.<sup>74</sup> The term “bisexuality,” however, had a much broader valence for Freud than it possesses for most contemporary readers. For Freud, bisexuality at least at times referred to the

65. I take 1870, Foucault’s date for the invention of the modern homosexual, as my starting date. See 1 FOUCAULT, *supra* note 41, at 43. This is because I believe that conversion, as used here, implies the existence of both modern homosexual and heterosexual identities. I take 1938, the death of Freud, as my end date.

66. I take the term from Jack Drescher, *I’m Your Handyman: A History of Reparative Therapies*, 36 J. HOMOSEXUALITY 19, 25-26 (1998).

67. I take the death of Freud as my starting date and the Stonewall riots as my end date.

68. See *infra* notes 126-130 and accompanying text.

69. See *infra* notes 144-145, 149 and accompanying text.

70. See, e.g., KRONMEYER, *supra* note 44; JOSEPH NICOLosi, REPARATIVE THERAPY OF MALE HOMOSEXUALITY (1991); SOCARIDES, *supra* note 62.

71. See, e.g., LEVAY, *supra* note 50; MURPHY, *supra* note 59.

72. See *infra* notes 74-84 and accompanying text.

73. See *infra* notes 85-88 and accompanying text.

74. See, e.g., SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930), reprinted in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 57, 105 n.3 (James Strachey ed. & trans., 1961) [hereinafter STANDARD EDITION] [hereinafter FREUD, CIVILIZATION AND ITS DISCONTENTS] (“Man is an animal organism with . . . an unmistakably bisexual disposition.”); SIGMUND FREUD, THE PSYCHOGENESIS OF A CASE OF HOMOSEXUALITY IN A WOMAN (1920), reprinted in 18 STANDARD EDITION, *supra*, at 145, 158 (1955) [hereinafter FREUD, HOMOSEXUALITY IN A WOMAN] (“In all of us, throughout life, the libido normally oscillates between male and female objects . . . .”); *id.* at 157 (noting “the universal bisexuality of human beings”).

belief that human beings contained elements of both maleness and femaleness within them.<sup>75</sup> This is not to say that Freud believed all human beings were genitally hermaphroditic, but rather that he believed that “[i]n every normal male or female individual, traces are found of the apparatus of the opposite sex.”<sup>76</sup> Under this particular formulation, bisexuality described how individuals *contained* both men and women (a conceptualization I call sex-based bisexuality) rather than how they *desired* both men and women (the contemporary conceptualization of the term “bisexuality,” which I here call orientation-based bisexuality).

Yet in Freud’s view, sex-based bisexuality logically entailed orientation-based bisexuality. If “every human being display[ed] both male and female instinctual impulses,” and one of those instincts was sexual, then for Freud it followed that “each individual [sought] to satisfy both male and female wishes in his sexual life.”<sup>77</sup> Put differently, if the psyche had both male and female aspects, the psyche must contain desire for both men and women—assuming, of course, that these male and female aspects were themselves heterosexual. Ironically, then, this belief in universal orientation-based *bisexuality* derived from an unarticulated belief in the universal *heterosexuality* of the male and female aspects of the psyche. Through such machinations, Freud arrived at the conclusion that “every human being [was an orientation-based] bisexual” and that the “libido [was] distributed either in a manifest or latent fashion, over objects of both sexes.”<sup>78</sup>

Freud’s belief in the universal biological predisposition toward bisexuality—I now leave the term unmodified where, as here, I mean orientation-based bisexuality—impelled him toward a belief in culturally derived homosexuality. To say that all individuals have a natural bisexual disposition fails to explain why most of them do not overtly live out that potentiality, rendering homosexuality (as well as heterosexuality) in need of explanation.<sup>79</sup> Freud generated a number of such explanations, which need not detain the reader here.<sup>80</sup> The important point is that Freud believed that both homosexuality and heterosexuality were culturally determined.

75. SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905), *reprinted in 7 STANDARD EDITION, supra note 74*, at 123, 141 (1953) [hereinafter FREUD, THREE ESSAYS]; *see also* SIGMUND FREUD, “A CHILD IS BEING BEATEN”: A CONTRIBUTION TO THE STUDY OF THE ORIGIN OF SEXUAL PERVERSION (1919), *reprinted in 17 STANDARD EDITION, supra note 74*, at 175, 202 (1955).

76. *See* FREUD, THREE ESSAYS, *supra note 75*, at 141.

77. *See* FREUD, CIVILIZATION AND ITS DISCONTENTS, *supra note 74*, at 105-06 n.3.

78. SIGMUND FREUD, ANALYSIS TERMINABLE AND INTERMINABLE (1937), *reprinted in 23 STANDARD EDITION, supra note 74*, at 209, 244 (1964).

79. FREUD, THREE ESSAYS, *supra note 75*, at 145-46 n.1.

80. Scholars have distinguished four Freudian theories about the etiology of (male) homosexuality. Under the first, the male child identifies with and desires his mother in classic Oedipal fashion, but also has a particularly strong identification with his penis. These two identifications transitively produce the belief that his mother must have a penis, a belief whose

The belief that homosexuality arises from a cultural source has often engendered optimism about the viability of conversion.<sup>81</sup> Yet Freud expressed no such optimism. As he stated in *The Psychogenesis of a Case of Homosexuality in a Woman*: “In general, to undertake to convert a fully developed homosexual into a heterosexual does not offer much more prospect of success than the reverse, except that for good practical reasons the latter is never attempted.”<sup>82</sup> He reiterated this belief in his famous 1935 letter to an American mother, who had written to him asking if he could treat her son. Freud wrote:

By asking me if I can help [your son], you mean, I suppose, if I can abolish homosexuality and make normal heterosexuality take its place. The answer is, in a general way, we cannot promise to achieve it. In a certain number of cases we succeed in developing the blighted germs of heterosexual tendencies which are present in every homosexual, in the majority of cases it is no more possible. It

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falsification greatly traumatizes the boy. Post-trauma, the boy begins to associate women with castration and turns to other men to escape this fate. See SIGMUND FREUD, ANALYSIS OF A PHOBIA IN A FIVE-YEAR-OLD BOY (1909), *reprinted in* 10 STANDARD EDITION, *supra* note 74, at 1, 109 (1955); SIGMUND FREUD, LEONARDO DA VINCI AND A MEMORY OF HIS CHILDHOOD (1910), *reprinted in* 11 STANDARD EDITION, *supra* note 74, at 57, 95-96 (1957) [hereinafter FREUD, LEONARDO DA VINCI]; *see also* BAYER, *supra* note 8, at 23-24 (describing the first theory); LEWES, *supra* note 64, at 36-38 (same). Under the second, the male child again desires his mother, but discovers that the mother is unattainable. He is driven by that thwarted desire into an identification with the mother, loving other men as his mother loved him. In doing so, he imaginatively consummates the frustrated relationship between himself and his mother by casting himself in both roles. See SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (1921), *reprinted in* 18 STANDARD EDITION, *supra* note 74, at 65, 108-09 (1955); FREUD, LEONARDO DA VINCI, *supra*, at 99-100; FREUD, THREE ESSAYS, *supra* note 75, at 145 n.1; *see also* BAYER, *supra* note 8, at 24 (describing the second theory); LEWES, *supra* note 64, at 38-39 (same). Kenneth Lewes describes this theory as a “favorite” of Freud’s, noting its recurrence in the works cited immediately above. LEWES, *supra* note 64, at 38. Under the third, the male child reverses the Oedipal conflict, identifying with the mother rather than the father and choosing to become the object choice of the father. This theory differs from the others in that the male child is not the sexual aggressor, but takes a passive sexual stance relative to other males. See SIGMUND FREUD, FROM THE HISTORY OF AN INFANTILE NEUROSIS (1918), *reprinted in* 17 STANDARD EDITION, *supra* note 74, at 1, 101 (1955); *see also* BAYER, *supra* note 8, at 24 (describing the third theory); LEWES, *supra* note 64, at 39-41 (same). In the fourth, the male child is led by his desire for the mother into a murderous jealousy of his siblings and, presumably, of his father. Through mechanisms that are not entirely clear, the repression of these murderous feelings transforms them into homosexual love. See SIGMUND FREUD, SOME NEUROTIC MECHANISMS IN JEALOUSY, PARANOIA AND HOMOSEXUALITY (1922), *reprinted in* 18 STANDARD EDITION, *supra* note 74, at 221, 231-32 (1955); *see also* BAYER, *supra* note 8, at 25 (describing the fourth theory); LEWES, *supra* note 64, at 42-43 (same).

It bears mention that Freud’s theories of homosexual etiology, like much of his work, are marked by a systematic inattention to women. See JULIET MITCHELL, PSYCHOANALYSIS AND FEMINISM 303-55 (1974) (describing feminist opposition to Freud on the ground of his misogyny).

81. See EDWARD STEIN, THE Mismeasure of Desire 263-64 (1999) (describing the widely held fallacy that constructionism is necessarily related to voluntarism).

82. FREUD, HOMOSEXUALITY IN A WOMAN, *supra* note 74, at 151.



is a question of the quality and the age of the individual. The result of treatment cannot be predicted.<sup>83</sup>

Thus while Freud did not categorically deny that analysts could convert homosexuals, he expressed serious misgivings about their ability to do so. Moreover, these qualms did not arise from a belief that biology rendered homosexuality immutable, as Freud assumed that human beings were biologically bisexual. (This assumption surfaces in his statement that “the blighted germs of heterosexual tendencies . . . are present in *every* homosexual.”)<sup>84</sup> Freud clearly rejected the premise that what was culturally made could always be analytically unmade.

Freud also questioned the ethics of conversion therapy on normative grounds. In his 1935 letter to the American mother, he contended that “[h]omosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness . . . .”<sup>85</sup> Freud also opined elsewhere that homosexuality ought not to be treated as a disease, stating point blank that “[h]omosexual persons are not sick.”<sup>86</sup>

Yet just as Freud never relinquished the descriptive claim that homosexuals could sometimes convert, he never abjured the prescriptive claim that homosexuality was a form of erotic immaturity. While cited as an instance of his tolerance for homosexuality, his 1935 letter also describes homosexuality as “produced by a certain arrest of sexual development.”<sup>87</sup> Moreover, Freud elsewhere articulated the belief that homosexuality should not be expressed in homosexual acts, but rather sublimated and directed to more “social” ends.<sup>88</sup>

Despite their complexity and ambiguity, Freud’s views reverberated throughout the time in which he thought and wrote. In describing the first generation of Freudian analysts, Kenneth Lewes notes the remarkable absence of “innovative or important additions to the theory of homosexuality.”<sup>89</sup> The theorists of this period basically sought to corroborate, consolidate, and verify Freud’s theories. They generally agreed (1) that homosexuality was a manifestation of universal bisexuality;<sup>90</sup>

83. Letter from Sigmund Freud to Anonymous Mother (Apr. 9, 1935), in *A Letter from Freud*, 107 AM. J. PSYCHIATRY 786, 787 (1951).

84. *Id.* (emphasis added).

85. *Id.*

86. LEWES, *supra* note 64, at 32 (quoting Sigmund Freud, *Brief*, DIE ZEIT (Vienna), Oct. 27, 1903).

87. Letter from Sigmund Freud to Anonymous Mother, *supra* note 83, at 787.

88. See Drescher, *supra* note 66, at 22.

89. LEWES, *supra* note 64, at 48.

90. See, e.g., OTTO FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSES* (1945) (reaffirming Freud’s emphasis on universal constitutional bisexuality); see also LEWES, *supra* note 64, at 64 (describing the belief among mental health professionals of Freud’s time in universal bisexuality).

(2) that psychoanalytic conversion was generally inefficacious,<sup>91</sup> and (3) that it was unclear whether homosexuality was pathological.<sup>92</sup>

b. *The Gilded Age of Conversion Therapy (1938-1969)*

After Freud's death in 1938, a radically different model took shape.<sup>93</sup> Insofar as homosexuality was concerned, psychoanalysis "moved from the humane and cosmopolitan system of investigation it had been with Freud and his circle to a rigid and impervious set of values and judgments."<sup>94</sup> The new generation of therapists—including Edmund Bergler, Irving Bieber, Albert Ellis, Abram Kardiner, Sandor Rado, and Charles Socarides<sup>95</sup>—systematically contested each of Freud's premises about therapeutic conversion.

First, Rado blasted Freud's theory of universal bisexuality. In a lecture delivered the year after Freud's death, Rado argued that the theory of sex-based bisexuality had been discredited.<sup>96</sup> While Rado conceded that every human zygote had the capacity to develop into a male or female, he marshaled scientific data to demonstrate that this bipotentiality was short-lived.<sup>97</sup> Rado stated that although some species—such as oysters—were "truly hermaphroditic, i.e., bisexual in the only legitimate sense of this term," human beings were not.<sup>98</sup> He therefore concluded that human beings could not be bisexual in their orientations.<sup>99</sup> This conclusion does not automatically follow from the premise, as Freud's theory of sex-based

91. See, e.g., SÁNDOR FERENCZI, *The Nosology of Male Homosexuality*, in *SEX IN PSYCHOANALYSIS* (Ernest Jones trans., Gorham Press 1916) (1914) (expressing skepticism about the ability to "cure" homosexuality); see also LEWES, *supra* note 64, at 66 (describing the belief among mental health professionals of Freud's time in the inefficacy of treatment).

92. See, e.g., Brill, *supra* note 58 (expressing doubt about whether homosexuality was pathological); Otto Rank, *Perversion und Neurose*, 8 *INTERNATIONALE ZEITSCHRIFT FÜR PSYCHOANALYSE* 397 (1922) (same); see also LEWES, *supra* note 64, at 65 (describing doubt among mental health professionals of Freud's time about the pathological nature of homosexuality).

93. See LEWES, *supra* note 64, at 16.

94. *Id.*

95. See, e.g., EDMUND BERGLER, *COUNTERFEIT-SEX: HOMOSEXUALITY, IMPOTENCE, FRIGIDITY* (2d ed. 1958); IRVING BIEBER, HARVEY J. DAIN, PAUL R. DINCE, MARVIN G. PRELLICH, HENRY G. GRAND, RALPH H. GUNDLACH, MALVINA W. KREMER, ALFRED H. RIFKIN, CORNELIA B. WILBUR & TOBY B. BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 44-117 (1962); ALBERT ELLIS, *HOMOSEXUALITY: ITS CAUSES AND CURE* (1965); KARDINER, *supra* note 40; LIONEL OVESEY, *HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY* (1969); SANDOR RADO, *ADAPTATIONAL PSYCHODYNAMICS: MOTIVATION AND CONTROL* (1969); CHARLES W. SOCARIDES, *HOMOSEXUALITY: PSYCHOANALYTIC THERAPY* (1978) [hereinafter SOCARIDES, *PSYCHOANALYTIC THERAPY*]; CHARLES W. SOCARIDES, *THE OVERT HOMOSEXUAL* (1968).

96. 1 SANDOR RADO, *A Critical Examination of the Concept of Bisexuality*, in *PSYCHOANALYSIS OF BEHAVIOR: THE COLLECTED PAPERS OF SANDOR RADO* 139 (1956).

97. See 1 *id.* at 143-44.

98. 1 *id.* at 144.

99. See 1 *id.* at 146-48.

bisexuality is not the only possible ground for orientation-based bisexuality. To close that logical gap, Rado argued that the innate human sexual drive must be heterosexual by emphasizing that (male) orgasm was simultaneously the most pleasurable and the most procreative sexual act.<sup>100</sup>

If homosexuality was not innate, where did it originate? In other work, Rado provided a clear answer: parental psychopathology. Rado believed that “the familiar campaign of deterrence that parents wage to prohibit the sexual activity of the child” could create a psychological anxiety that overwhelmed the heterosexual drive.<sup>101</sup> Such a campaign caused “the female to view the male organ as a destructive weapon,” leading lesbian partners to be “reassured by the absence in both of them of the male organ.”<sup>102</sup> Similarly, such a campaign caused “the male to see in the mutilated female organ a reminder of inescapable punishment.”<sup>103</sup> Other conversion therapists would elaborate different variations on this theme. Bieber systematized the popular model that male homosexuality arose from close-binding mothers<sup>104</sup> and distant fathers.<sup>105</sup> Socarides subscribed to this theory<sup>106</sup> and supplemented it with the theory that female homosexuality arose from an individual’s perception of a malevolent mother and rejecting father.<sup>107</sup> Kardiner accepted that parents had an influence on the development of homosexuality, but also believed that other social factors, such as abrupt social changes, could lead to a “flight from masculinity” that could terminate in homosexuality.<sup>108</sup>

The therapists also diverged from Freud’s second premise—that conversion therapy was generally inefficacious. The most systematic study of conversion therapy for male homosexuals was conducted by the New York Society of Medical Psychoanalysts in the 1950s.<sup>109</sup> The study, published in 1962 under the primary authorship of Bieber, concluded that “[a]lthough this change may be more easily accomplished by some than by others, in our judgment a heterosexual shift is a possibility for all

100. See 1 *id.* at 145-46.

101. RADO, *supra* note 95, at 212.

102. *Id.*

103. *Id.*

104. See BIEBER ET AL., *supra* note 95, at 79-81 (observing that mothers “promoted homosexuality” by falling into a pattern described as “close-binding-intimate”).

105. See *id.* at 114 (observing that “the pathologic seeking of need fulfillment from men has a clear point of origin in fathers who were detached”).

106. See CHARLES W. SOCARIDES, *HOMOSEXUALITY* 183-84 (1978) (observing that “[t]he absence of the father or the presence of a weak father combined with a domineering, harsh, and phallic mother favor the development of [male] homosexuality” (emphasis omitted)).

107. See *id.* at 188 (observing that lesbianism derives from the subject’s “dread of . . . a malevolent mother” and a conviction that the father “rejects and hates her”).

108. See KARDINER, *supra* note 40, at 160-92 (describing the etiology of homosexuality as a “flight from masculinity”).

109. See BAYER, *supra* note 8, at 29-30.

homosexuals who are strongly motivated to change.”<sup>110</sup> As critical commentary has observed, this conclusion was not strongly supported by the results reported by the study<sup>111</sup>—of the seventy-two exclusive homosexuals in the study, 19% converted to heterosexuality, 19% converted to bisexuality, and 57% remained unchanged.<sup>112</sup> Nonetheless, the Bieber study remains “to this day probably the most often cited on the possibility of sexual reorientation.”<sup>113</sup>

Bieber and many of his colleagues predicated their optimism about conversion on a belief that the causes of homosexuality were psychological.<sup>114</sup> Other therapists, however, remained confident in their ability to convert their patients without subscribing to the theory that orientation had no biological basis. Thus, the Masters and Johnson Institute, which offered conversion therapy programs on a wide scale until it closed in 1994, operated on the premise that conversion of one’s orientation was possible regardless of its cause.<sup>115</sup> The Institute researchers correctly observed that “‘even if the proportion of genetic or biochemical influences contributing to homosexuality for any individual is equal to or greater than postnatal influences, there is no reason to believe that this fact would specifically deny the possibility of altering the individual’s sexual preferences.’”<sup>116</sup> In inveighing against the conventional wisdom that biological features were immutable, these practitioners made the obverse of Freud’s claim. Just as Freud claimed that cultural traits could be immutable, these therapists stated that biological traits could be mutable.

Finally, the conversion therapists simply assumed that homosexuality was a psychopathology. Rado categorically declared it a “deficient adaptation.”<sup>117</sup> Ellis observed that “fixed homosexuals in our society are almost invariably neurotic or psychotic; . . . therefore, no so-called *normal* group of homosexuals is to be found anywhere.”<sup>118</sup> Bieber similarly stated that homosexuality was a “pathologic biosocial, psychosexual adaptation consequent to pervasive fears surrounding the expression of heterosexual impulses.”<sup>119</sup> Indeed, Bieber explicitly bracketed the normative question in his study, stating that “[a]ll psychoanalytic theories assume that adult

110. BIEBER ET AL., *supra* note 95, at 319.

111. See BAYER, *supra* note 8, at 33.

112. See BIEBER ET AL., *supra* note 95, at 276.

113. MURPHY, *supra* note 59, at 82.

114. See, e.g., BIEBER ET AL., *supra* note 95, at 19-20; RADO, *supra* note 95, at 210-18; SOCARIDES, *PSYCHOANALYTIC THERAPY*, *supra* note 95, at 4-5.

115. See MURPHY, *supra* note 59, at 81 (citing Mark F. Schwartz & William H. Masters, *The Masters and Johnson Treatment Program for Dissatisfied Homosexual Men*, 141 AM. J. PSYCHIATRY 173, 173 (1984)).

116. *Id.* (quoting Schwartz & Masters, *supra* note 115, at 173).

117. RADO, *supra* note 95, at 213.

118. ALBERT ELLIS, *REASON AND EMOTION IN PSYCHOTHERAPY* 242 (1962).

119. BIEBER ET AL., *supra* note 95, at 220.

homosexuality is psychopathologic.”<sup>120</sup> Bieber’s contention was supported by the APA’s 1952 listing of homosexuality as a psychopathology in the first edition of its nosology, the *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)*.<sup>121</sup>

The work of these therapists inaugurated a period of aggressive conversion of homosexuals. In the period from the 1940s to the 1960s, “many gay men and women voluntarily sought psychoanalytic treatment for their same-sex feelings.”<sup>122</sup> In his memoir entitled *Cures*, gay historian Martin Duberman recounts his voluntary treatment under three different conversion therapists during this period.<sup>123</sup> Duberman describes how he so deeply internalized “the dominant psychiatric view that homosexuals were a homogeneous group, bound together by dysfunction and neurosis,” that he thought of “‘conversion’ as [his] only hope for a happy life.”<sup>124</sup> Even the nascent gay rights organizations of the time made concessions to the zeitgeist. The *Mattachine Review*, which formally espoused the incrementalist credo of “evolution not revolution,” accepted contributions from therapists who advocated conversion during this time.<sup>125</sup>

This account suggests the need to qualify any progress narrative that posits that assimilationist demands on gays have grown uniformly more attenuated over time. Demands for conversion became stronger, rather than weaker, after the death of Freud. This underscores the fact that the advance gays have made since the middle of this century has not been a product of an inexorable law of history, but rather a contingent historical development.

Even during the gilded age of conversion therapy, however, pro-gay scholars raised dissenting voices against the psychiatric orthodoxy. The Kinsey studies of human sexuality in the male<sup>126</sup> and female<sup>127</sup> indicated that homosexuality was much more widespread than had previously been imagined. In doing so, they tacitly questioned the idea that homosexuality was abnormal.<sup>128</sup> Psychologist Evelyn Hooker published a series of articles in the 1950s that challenged the conception that homosexuality was a pathology more directly, demonstrating that personality experts could not

120. *Id.* at 18 (emphasis omitted).

121. COMM. ON NOMENCLATURE & STATISTICS OF THE AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1st ed. 1952) (listing “homosexuality” as an instance of “pathologic behavior”).

122. Drescher, *supra* note 66, at 26.

123. See DUBERMAN, *supra* note 56, at 32-36 (first therapy); *id.* at 44-46 (second therapy); *id.* at 93-115 (third therapy).

124. *Id.* at 31.

125. SOCARIDES, *supra* note 62, at 47.

126. ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

127. ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

128. See D’EMILIO, *supra* note 34, at 37.

distinguish between heterosexuals and homosexuals.<sup>129</sup> Most radically, Thomas Szasz argued in a series of essays beginning in the 1950s that the very concept of pathology was a culturally contingent one that masked the psychiatric establishment's will to power.<sup>130</sup> While these works did not have immediately transformative effects,<sup>131</sup> they may have laid a foundation for post-Stonewall challenges to conversion therapy.

c. *The Post-Stonewall Period (1969 to the Present)*

Immediately after Stonewall, anti-conversion activism coalesced around the *DSM* designation of homosexuality as a psychopathology. Taking the convocation of the APA's annual conference in San Francisco in 1970 as their occasion, gay activists began to agitate for the deletion of homosexuality from the manual.<sup>132</sup> They had the growing sense that, as lesbian activist Del Martin framed it, "psychiatry was the most dangerous enemy of homosexuals in contemporary society."<sup>133</sup> The efforts of these activists, along with their allies within the psychiatric establishment, led to the deletion of homosexuality from the *DSM-II* on December 15, 1973.<sup>134</sup>

Significantly, the challenge to the *DSM* classification directly engaged the question of validity. Activists did not argue for the biological immutability of homosexuality, but frontally assailed the characterization of homosexuality as an invalid social identity.<sup>135</sup> While this may have been due to the state of biological science at the time, it nonetheless gives the dissidence of this period an air of precocity. Later activism would increasingly emphasize the biological etiology or immutability of homosexuality,<sup>136</sup> an emphasis that would arguably leave in place the

129. See, e.g., Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18 (1957); Evelyn Hooker, *Male Homosexuality in the Rorschach*, 22 J. PROJECTIVE TECH. 33 (1958).

130. See, e.g., THOMAS SZASZ, *IDEOLOGY AND INSANITY: ESSAYS ON THE PSYCHIATRIC DEHUMANIZATION OF MAN* (1970); THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961); see also BAYER, *supra* note 8, at 54-55 (describing Szasz's contribution).

131. Lewes observes that the influence of the Kinsey studies with respect to the pathologization of homosexuality was much less significant than might have been expected from the perceived importance of the studies. LEWES, *supra* note 64, at 122. Similarly, D'Emilio observes that Hooker's papers, taken together, "made hardly a dent in the structure of oppression, but activists exploited them as much as possible with an eye toward impressing professionals who received the magazines and instilling hope among gay readers." D'EMILIO, *supra* note 34, at 113.

132. See BAYER, *supra* note 8, at 102.

133. *Id.* at 106.

134. See *id.* at 138; see also COMM. ON NOMENCLATURE & STATISTICS OF THE AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, at vi (2d ed. 8th prt. 1975) [hereinafter *DSM-II*] (noting this change in the seventh printing of the *DSM-II*).

135. See BAYER, *supra* note 8, at 116-21.

136. See, e.g., SIMON LEVAY, *THE SEXUAL BRAIN* 123 (1993); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089

assumption that immutability was the only ground for defending homosexuality.<sup>137</sup>

Nonetheless, the deletion of homosexuality *per se* as a disease from the *DSM-II* did not mean that sexual orientation vanished from the manual. The preface to the seventh printing of the *DSM-II* stated that the printing had replaced “Homosexuality *per se*” with “Sexual Orientation Disturbance.”<sup>138</sup> The new category included individuals “who are either disturbed by, in conflict with, or wish to change their sexual orientation.”<sup>139</sup> The *DSM-III*, first published in 1980, refined that diagnosis under the moniker of “Ego-dystonic Homosexuality.”<sup>140</sup> That category gave cover to professionals who sought to continue to practice conversion therapy.<sup>141</sup> It was not until the *DSM-IV*, first published in 1994, that homosexuality formally disappeared from the manual.<sup>142</sup> This does not mean that other language from the *DSM-IV* could not be used to pathologize homosexuality—there is historical evidence suggesting that the still extant category of “Gender Identity Disorder” has been used in precisely this way.<sup>143</sup>

Some professionals still engage in conversion therapy today. The primary mental health organization espousing conversion therapy is the National Association for Research and Treatment of Homosexuality (NARTH). Founded in 1992, NARTH describes itself as a “Non-Profit Psychoanalytic, Educational Organization Dedicated to Research, Therapy and Prevention of Homosexuality.”<sup>144</sup> The existence of such organizations suggests a broader practice of conversion therapy by individual therapists;

(1991); Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu & Angela M.L. Pattatucci, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 *SCIENCE* 321 (1993).

137. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994) (challenging the immutability defense of homosexuality).

138. *DSM-II*, *supra* note 134, at vi.

139. *Id.* at 44.

140. TASK FORCE ON NOMENCLATURE & STATISTICS, AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 281 (3d ed. 1980).

141. See Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 *J. CONSULTING & CLINICAL PSYCHOL.* 221, 221 (1994) (describing therapists who “defend sexual reorientation therapy as a matter of free choice for the unhappy client, claiming that their treatments do not imply a negative judgment on homosexuality *per se*”).

142. See TASK FORCE ON DSM-IV, AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 493-538 (4th ed. 1994).

143. See 1 LAWRENCE D. MASS, *HOMOSEXUALITY AND SEXUALITY: DIALOGUES OF THE SEXUAL REVOLUTION* 213 (1990).

144. Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 *B.U. PUB. INT. L.J.* 219, 219 (1999) (internal quotation marks omitted).

indeed, some commentators believe that such therapy is currently enjoying a comeback.<sup>145</sup>

The evidence suggests, however, that the mental health profession has generally marginalized the practice.<sup>146</sup> None of the major mental health associations—including the American Medical Association, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers—currently endorses conversion therapy.<sup>147</sup> Accounts of the conversion therapists themselves also corroborate the increasingly beleaguered status of such practices. In 1993, conversion therapist Joseph Nicolosi stated that “[m]any psychotherapists privately view homosexuality as a treatable developmental disorder. . . . [N]early all of them are afraid to speak out in academic or professional circles.”<sup>148</sup>

In part because of this trend in the mental health profession, the most high-profile contemporary purveyors of conversion therapy tend to be religious organizations. These include fundamentalist Christian groups such as Homosexuals Anonymous, Metanoia Ministries, Love in Action, Exodus International, and EXIT of Melodyland.<sup>149</sup> Such organizations have not been without their own difficulties, as ex-gays sometimes inconveniently reemerge as ex-ex-gays.<sup>150</sup> Prominent examples include the founders of the ex-gay ministry Exodus International, who ultimately repudiated their own program as “ineffective,” and the founder of the ex-gay ministry Quest (a precursor of Homosexuals Anonymous) who was expelled by his organization for sexual misconduct with men under his care.<sup>151</sup> Nonetheless,

145. See Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 149 (John Gonsiorek & James D. Weinrich eds., 1991).

146. Drescher, *supra* note 66, at 39.

147. See Am. Med. Ass’n, House of Delegates Resolution 506: Policy Statement on Sexual Orientation Reparative (Conversion) Therapy (Apr. 26, 2000), <http://www.ama-assn.org/meetings/public/annual00/reports/refcome/506.rtf> (American Medical Association position statement); Bd. of Trs. of the Am. Psychiatric Ass’n, COPP Position Statement on Therapies Focused on Attempts To Change Sexual Orientation (Reparative or Conversion Therapies) (May 2000), [http://www.psych.org/pract\\_of\\_psych/copptherapyaddendum83100.cfm](http://www.psych.org/pract_of_psych/copptherapyaddendum83100.cfm) (APA position statement); Am. Psychological Ass’n Council of Representatives, Resolution on Appropriate Therapeutic Responses to Sexual Orientation (Aug. 14, 1997), <http://www.apa.org/pi/lgbcc/policy/statements.html#10> (American Psychological Association position statement); Nat’l Comm. on Lesbian, Gay & Bisexual Issues, Nat’l Ass’n of Soc. Workers, Position Statement: “Reparative” and “Conversion” Therapies for Lesbians and Gay Men (Jan. 21, 2000), <http://www.naswdc.org/nasw/Diversity/lgbt/reparative.htm> (National Association of Social Workers position statement); see also Halpert, *supra* note 60, at 22 n.2 (listing organizations opposing conversion therapy).

148. Joseph Nicolosi, *Let’s Be Straight: A Cure Is Possible*, INSIGHT ON NEWS, Dec. 6, 1993, at 22, 22.

149. Haldeman, *supra* note 141, at 224; see also Cruz, *supra* note 63, at 1309 (listing other religiously focused conversion groups).

150. See MURPHY, *supra* note 59, at 85.

151. Haldeman, *supra* note 141, at 224.



these organizations are relatively insulated from the depathologization of homosexuality, as they are less reliant on a literal disease model to justify their conversion practices.

This is not to say that accounts of homosexuality as a disease have vanished. Even as the concept of homosexuality as a literal disease appears to have been generally retired, the concept of homosexuality as a metaphorical disease endures. Thus a 1996 article describes a study as demonstrating that homosexual teachers can transmit their homosexuality to their students.<sup>152</sup> The article makes no reference to homosexuality as a literal mental disorder, but observes that the study substantiates “the contagion model of homosexuality—that homosexuality is taught by or caught by sexual interaction with homosexual practitioners.”<sup>153</sup> It is worth dwelling on the endurance of this contagion model as an instance of how ideas can survive in metaphorical forms even after they have been rejected in their literal ones.

The trope of homosexuality as metaphorical disease has extremely venerable roots, at least insofar as one accepts a nexus between homosexuality and sodomy.<sup>154</sup> Yet that figuration has had a particularly vivid florescence in the wake of the AIDS epidemic. One claim that AIDS has had to the uncanny is its seeming vindication of a metaphor—it has supplemented the figurative disease of homosexuality with a literal syndrome. In doing so, AIDS has created the conditions in which the rhetoric of homosexuality as a contagion could flourish.<sup>155</sup> In a colloquy that occurred at a crisis point in the epidemic, Richard Poirier observed that AIDS offered “an opportunity to propagate the belief . . . that homosexuality is itself a disease and a threat to human survival.”<sup>156</sup> In the same forum, Allan Brandt elaborated on the irony of this rhetorical renaissance: “After a generation of work to have homosexuality removed

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152. Paul Cameron & Kirk Cameron, *Do Homosexual Teachers Pose a Risk to Pupils?*, 130 J. PSYCHOL. 603, 611-13 (1996).

153. *Id.* at 603.

154. In his recent history of homophobia, Byrne Fone catalogues how sodomy was described as, *inter alia*, “pestilential” in Old Testament times, a “pollut[ion]” of the flesh by Peter Damian in the eleventh century, and a “contagious disease” by Albertus Magnus in the thirteenth. BYRNE FONE, *HOMOPHOBIA* 186 (2000).

155. The terrible braid of discourse that entwines AIDS as a disease with homosexuality as a disease has been just as damaging to the apprehension of AIDS as it has been to the apprehension of homosexuality. The intrication of these two discourses led AIDS to be understood as a gay plague, as evident in its original appellation “GRID,” or “gay-related immune deficiency.” See RANDY SHILTS, *AND THE BAND PLAYED ON* 121 (1987). This perception led lesbians as well as gay men to be the targets of AIDS-phobia, despite the fact that, to accede for a moment to the demographic terms in which these debates are still too often conducted, lesbians tend to be at lower risk for the syndrome than either heterosexuals or gay men. See TERRY CASTLE, *THE APPARITIONAL LESBIAN: FEMALE HOMOSEXUALITY AND MODERN CULTURE* 12 (1993). If homosexuality has been a figurative disease that all gays actually have, AIDS has been an actual disease that all gays figuratively have.

156. Richard Poirier, *AIDS and Traditions of Homophobia*, 55 SOC. RES. 461, 463-64 (1988).

as a disease from the psychiatric diagnostic manuals, it ha[s] suddenly reappeared as an infectious, terminal disease.”<sup>157</sup>

The metaphorical “contagion model” of homosexuality doubtless owes much to the literal “mental illness” model. Yet the metaphorical model also significantly differs from the literal one in figuring homosexuality as contagious. The most popular literal figurations of homosexuality as a mental illness did not assume that homosexuality was contagious in the sense that one homosexual could infect an individual who would otherwise be heterosexual. To the contrary, to the extent that therapists such as Rado, Bieber, or Socarides believed that parental psychopathology caused homosexuality, it was presumptive *heterosexuals* who spread homosexuality.<sup>158</sup> Even Kardinier, who did not subscribe as categorically to this parental psychopathology model, stated that homosexuality was “not contagious” and did “not pass from person to person.”<sup>159</sup>

I believe the relative longevity of the metaphorical contagion model in anti-gay rhetoric rests in part on this distinction. The metaphorical contagion model captures a fundamental fear about homosexuality better than the literal disease model. Whether framed as contagion, as recruitment,<sup>160</sup> as seduction,<sup>161</sup> or as role-modeling,<sup>162</sup> the fundamental fear about homosexuality is the apocalyptic “fear of a queer planet,”<sup>163</sup> the fear that homosexuality can spread without being spread thin.

Because it so closely tracks popular fears, the contagion model has proved an extremely effective anti-gay rhetorical device. The utility of this conception of homosexuality is that it figures homosexuals as *themselves* engaging in a kind of conversion therapy, converting wavering individuals into gays. Contagion, after all, is itself a form of forced conversion that requires imitation against one’s will: If *A* infects *B* with a disease, then *B* must, in the absence of care or cure, tread *A*’s path. Casting homosexuality as such an act of aggression makes conversion measures on the part of anti-gay constituencies seem defensive or prophylactic. In doing so, it occludes

157. Allan M. Brandt, *AIDS and Metaphor: Toward the Social Meaning of Epidemic Disease*, 55 SOC. RES. 413, 429 (1988); see also Michael Lynch, *Living with Kaposi’s*, BODY POLITIC, Nov. 1982, at 31, 31 (observing the irony that the AIDS crisis caused gays to relinquish the hard-won power of self-definition to “[t]he very authority [they] wrested it from in a struggle that occupied [them] for more than a hundred years: the medical profession”).

158. See *supra* notes 101-107 and accompanying text.

159. KARDINER, *supra* note 40, at 189.

160. See, e.g., *Elections: Miami Gay Rights*, *Chicago Mayor*, N.J. GOVERNOR, WASH. POST, June 7, 1977, at A2 (describing an advertisement placed in a Miami paper by anti-gay-rights crusader Anita Bryant that warned that “[t]he other side of the homosexual coin is a hair-raising pattern of recruitments and outright seductions and molestation”).

161. See, e.g., *id.*

162. See, e.g., Cameron & Cameron, *supra* note 152, at 612.

163. I take the phrase from Michael Warner. FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993).

the aggression inherent in anti-gay conversion, much as a Department renamed Defense occludes its warmaking capacity.

The shift from literal to metaphorical conceptions of homosexuality as a disease suggests the stickiness of ideas—how the older literal “disease” left a metaphorical afterimage. As Susan Sontag has famously described, illnesses are accompanied by powerful metaphors that can assume a life of their own.<sup>164</sup> This certainly appears to be true of the literal “disease” of homosexuality, which has lingered as metaphor long after its demise as disorder. I now turn to demonstrating that this metaphor also persists in the law.

## 2. *Legal Contexts*

In law, as in medicine, the most physically invasive attempts at conversion are largely a thing of the past. This is no accident, as the most aggressive legal attempts at conversion often relied upon the medical profession. Bill Eskridge has documented that in the years leading up to World War II, state legislatures enacted a series of laws targeting sex offenders, a category that at the time included homosexuals.<sup>165</sup> These laws imposed penalties on sex offenders tantamount to attempts at conversion, including indefinite incarceration until “rehabilitation,” or even castration.<sup>166</sup> Eskridge contends that authorities enforced these laws with relative vigor in the years immediately after the war, sentencing some homosexual offenders “to hospitals or special prison wards, where they were subjected to experimental medical treatments, sometimes castration, but more typically electrical and pharmacological shock treatments and lobotomies.”<sup>167</sup> The courts upheld these laws against constitutional challenges and sometimes took an even more active role.<sup>168</sup> Eskridge observes that “[b]etween 1933 and 1947, California Judge Frank Collier

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164. SUSAN SONTAG, *ILLNESS AS METAPHOR* (1977), *reprinted in* *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 1 (1990). Sontag states that she seeks “to describe, not what it is really like to emigrate to the kingdom of the ill and live there, but the punitive or sentimental fantasies concocted about that situation: not real geography, but stereotypes of national character.” *Id.* at 3. She then elaborates on her aim to distinguish between “physical illness itself” and “the uses of illness as a figure or metaphor,” for the purposes of seeking a “liberation from [those metaphors].” *Id.* at 3-4. I reenact that distinction here as one that sounds in ordinary language. Yet I find it worth asking, particularly given my later discussion of Judith Butler’s work, *see infra* notes 530-569, how stable that distinction can be. Is there indeed any reality of illness that one could describe as denuded of metaphoric association? Sontag’s inaugural descriptions of “real” illness in metaphorical terms, such as “kingdom” or “geography,” suggest not. SONTAG, *supra*, at 3.

165. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 41-43 (1999).

166. *See id.* at 42.

167. *Id.* at 82.

168. *See id.* at 42.

allowed forty-seven sex offenders, most homosexual, to be relieved of long prison sentences by agreeing to castration, which the judge thought ‘completely cured their unnatural sex desires.’”<sup>169</sup>

The legal profession’s dependence on the medical profession for the most physically invasive forms of conversion meant that the latter’s retirement of these practices made them unavailable to the former. At the same time, in areas where law was not as directly dependent on medicine, legal actors continued to pathologize homosexuality long after medical actors ceased to do so. The Immigration and Naturalization Service (INS) held homosexuality to be a mental disease for seventeen years after the APA repudiated that exact stance. The INS had occasion to take such a position because the Immigration and Nationality Act of 1952 required the INS to exclude individuals “afflicted with psychopathic personality.”<sup>170</sup> Until 1990, the INS interpreted “psychopath” to include “homosexual.”<sup>171</sup>

This interpretation was supported by the Supreme Court’s 1967 decision in *Boutilier v. INS*.<sup>172</sup> When Clive Michael Boutilier applied for citizenship in 1963, he divulged a history of same-sex sexual conduct.<sup>173</sup> Based on this admission and an affidavit submitted in 1964 at the government’s request, the INS not only rejected Boutilier’s application, but also ordered that he be deported as a “psychopathic personality.”<sup>174</sup> Boutilier brought a due process challenge to the INS exclusion, claiming that the term “psychopathic personality” was unconstitutionally vague.<sup>175</sup> While Boutilier’s case reached the Court six years before the formal depathologization of the APA, his suit incorporated testimony from his psychiatrists stating that Boutilier was not a psychopathic personality despite his homosexual activity.<sup>176</sup> After canvassing this testimony, the Court acknowledged that “psychopathic personality” might be “a medically ambiguous term.”<sup>177</sup> Yet it then held that such medical ambiguities were irrelevant, stating that “the test here is what the Congress intended, not what differing psychiatrists may think.”<sup>178</sup> Applying that test, the Court found that the legislative history clearly indicated that Congress had intended the term “psychopathic personality” to encompass

169. *Id.* (quoting SUBCOMM. ON SEX CRIMES, CAL. ASSEMBLY INTERIM COMM. ON JUDICIAL SYS. & JUDICIAL PROCESS, PRELIMINARY REPORT 214-15 (1950)).

170. *Id.* at 70 (citing Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (repealed 1990)).

171. *See id.* at 133-34.

172. 387 U.S. 118 (1967).

173. *Id.* at 119.

174. *Id.* at 118-20.

175. *Id.* at 120.

176. *Id.*

177. *Id.* at 124.

178. *Id.*

homosexuality.<sup>179</sup> It therefore permitted the INS to exclude individuals on the ground that homosexuality was a pathology until Congress stated otherwise.<sup>180</sup> The relationship that existed between psychopathology and homosexuality in 1952 (the year in which both the Immigration and Nationality Act and the *DSM-I* were promulgated) was cryogenically preserved against the encroachments of medical progress.

The INS assiduously deployed the license the Court had given it. After the deletion of homosexuality from the *DSM-II* in 1973, the president of the APA urged the INS to use its discretion to refrain from excluding homosexual aliens.<sup>181</sup> The INS responded that *Boutilier* and the statute precluded such a change in policy.<sup>182</sup> Beginning in 1979, the Public Health Service, understandably more sensitive to medical developments, refused to issue the certificate that was statutorily required for INS exclusions.<sup>183</sup> Yet the INS nonetheless continued to exclude homosexuals until the statute was altered in 1990.<sup>184</sup>

The INS's treatment of homosexuality as pathology can be characterized as an instance of what I call "legal lag"—a dynamic in which the legal conceptions of phenomena straggle behind developments in other fields. I realize that characterizing the INS's practice as belated may appear tendentious. A critic might inquire why the law must track extralegal developments, rather than being permitted to arrive at its own determinations about homosexuality. This query permits me to articulate my objection to the INS's interpretive practices more precisely. The interpretive problem is not that the INS sought to exclude homosexuals, but that it sought to exclude them as "psychopathic personalities." In applying that particular phrase to homosexuals, the INS invoked the prestige of medical discourse to validate its stance. In my view, that invocation obligated the INS to deploy that term according to its use in medicine at that time. The failure to do so misled the public about the extent to which the medical establishment supported the INS's position. It also made it harder for the medical establishment to communicate its new positions to that public. I thus agree with Lawrence Lessig's interpretation of this case, in which he argues that the INS lost the ability to exclude gays as sexual psychopaths at the moment the medical establishment conclusively rejected that claim.<sup>185</sup> In 1973, the INS's finding that homosexuality was a

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179. *Id.*

180. *See id.* at 120, 124.

181. ESKRIDGE, *supra* note 165, at 133.

182. *Id.*

183. *Id.*

184. *Id.* at 133-34.

185. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 417-19 (1995).

psychopathology began to resemble the Indiana legislature's attempt in 1879 to find that the value of pi was 3.2.<sup>186</sup>

Judges in the immigration realm appear to have finally repudiated the concept that homosexuality is a disease in need of cure. In *Pitcherskaia v. INS*,<sup>187</sup> the Ninth Circuit in 1997 considered a Russian lesbian's application for asylum in the United States. In the early 1980s, Alla Pitcherskaia was repeatedly arrested and detained in Russia for her gay rights activism.<sup>188</sup> In the mid-1980s, the militia forcibly sent Pitcherskaia's ex-girlfriend to a psychiatric institution, where she was subjected to a variety of conversion therapies, including electroshock treatment.<sup>189</sup> While visiting this woman, Pitcherskaia was detained and questioned by the militia.<sup>190</sup> After this interview, the militia informed Pitcherskaia that they suspected her of being a lesbian, and that she had to undergo treatment at a clinic every six months.<sup>191</sup> Pitcherskaia attended eight of these sessions, during which the psychiatrist prescribed sedative drugs and, on one occasion, sought to hypnotize her.<sup>192</sup>

According to federal law, the Attorney General may grant asylum to an alien who seeks not to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>193</sup> Nonetheless, Pitcherskaia's initial application for asylum was denied by an immigration judge for failure to demonstrate persecution.<sup>194</sup> The Board of Immigration Appeals (BIA) then rejected her appeal of that denial in part on the ground that the conversion therapy was rehabilitative rather than punitive in intent.<sup>195</sup> The BIA observed that "the militia and psychiatric institutions intended to 'cure' her, not to punish her, and thus their actions did not constitute 'persecution' within the meaning of the Act."<sup>196</sup>

The Ninth Circuit reversed the BIA's determination, categorically rejecting its rationale. The court observed that the motive of the persecutor was irrelevant to determinations of persecution, as "[t]he fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct

186. See PETR BECKMANN, A HISTORY OF PI 173 (2d ed. 1971).

187. 118 F.3d 641 (9th Cir. 1997).

188. *Id.* at 644.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. 8 U.S.C. § 1101(a)(42)(A) (1994).

194. *Pitcherskaia*, 118 F.3d at 645.

195. *Id.*

196. *Id.*

from the statutory definition of persecution.”<sup>197</sup> It concluded that “[h]uman rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”<sup>198</sup> In so stating, the Ninth Circuit forcefully characterized conversion therapy as a form of persecution and torture.

Yet this strong language does not mean that legal actors have uniformly repudiated all forms of conversion. The administrative proceedings in *Pitcherskaia* themselves suggest this point. In the BIA’s opinion, the forcible detention, hypnosis, and drug treatment of a homosexual did not constitute persecution because these practices were intended as a “cure.”<sup>199</sup> It is difficult to imagine that the BIA would so hold unless it at some level agreed that conversion therapy was colorably curative. To see this, consider whether the BIA would have given the same weight to the intent of a militia that sought to convert a political dissident through the same means to cure his “diseased” political beliefs.

Given these remaining traces of the literal disease model, it should be unsurprising that the figurative contagion model enjoys a robust legal life. Perhaps the most explicit legal articulation of the contagion model was made by then-Justice Rehnquist in his 1978 commentary on the case of *Ratchford v. Gay Lib.*<sup>200</sup> At issue in *Ratchford* was the University of Missouri’s denial of recognition to a gay rights group on the ground that such recognition would “tend to expand homosexual behavior,” and thereby increase violations of the state’s sodomy law.<sup>201</sup> The gay rights group challenged the policy as a violation of its First Amendment right of association.<sup>202</sup> In ruling for the university, the district court relied on testimony from reparative therapists such as Socarides.<sup>203</sup> The testimony contained traces of both literal and figurative disease models, implying that homosexuality was an illness and stating that formal recognition of the group would “perpetuate” or “expand” homosexual behavior.<sup>204</sup>

A divided panel of the Eighth Circuit reversed.<sup>205</sup> The university appealed to the Supreme Court, which denied review. In dissenting from that denial, Justice Rehnquist, joined by Justice Blackmun, wrote:

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197. *Id.* at 648.

198. *Id.*

199. *Id.* at 645.

200. *Ratchford v. Gay Lib.*, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting from denial of certiorari).

201. *Gay Lib v. Univ. of Mo.*, 416 F. Supp. 1350, 1358 (W.D. Mo. 1976), *rev’d*, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom.* *Ratchford v. Gay Lib.*, 434 U.S. 1080 (1978).

202. *Id.* at 1363.

203. *Id.* at 1368-70.

204. *Id.* at 1368-69.

205. *Gay Lib.*, 558 F.2d 848.

The University's view of respondents' activities and respondents' own view of them are diametrically opposed. From the point of view of the latter, the question is little different from whether university recognition of a college Democratic club in fairness also requires recognition of a college Republican club. From the point of view of the University, however, the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.<sup>206</sup>

The comparison of homosexuality to a contagious disease seems in some sense a natural outgrowth of the expert testimony that homosexuality was an illness that would spread through human contact. At the same time, the statement, rendered five years after the *DSM* deletion, startles in its baldness, and would be quoted by other Justices at the turn of the millennium as an instance of antiquated thinking.<sup>207</sup>

Yet close analysis of the distinction between *political* orientation and *sexual* orientation on which Rehnquist sought to rely shows that the disease metaphor served to make the needed distinction. For if homosexual association was to be barred, it could not be on the ground that it was unpopular, as an unpopular political group would be, if anything, more protected because of its unpopularity.<sup>208</sup> Similarly, homosexual association could not be barred simply on the basis that association would spread homosexuality, for political association would also spread support for a political affiliation. What distinguished homosexual orientation from political orientation was that the former was like a disease. This meant that its unpopularity was not the ideological unpopularity of a political group in the eyes of a potentially irrational political majority, but the *clinical* unpopularity of a diseased group in the eyes of an utterly rational universal humanity. It further meant that the contagiousness of homosexuality was

206. *Raichford*, 434 U.S. at 1084 (Rehnquist, J., dissenting from denial of certiorari).

207. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 700 n.30 (2000) (Stevens, J., dissenting).

208. Thus, for example, in *Gibson v. Florida Legislative Investigation Commission*, 372 U.S. 539 (1963), the Court upheld the right of the NAACP to refuse to disclose a list of its members to the Florida legislature. The Court said:

While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.

*Id.* at 556-57. Richard Delgado and David Yun, among others, have criticized such reasoning "associated with the ACLU and those who take a relatively purist position with respect to the First Amendment, . . . that hate speech, pornography, and similar forms of expression ought to be protected precisely because they are unpopular." Richard Delgado & David Yun, "*The Speech We Hate*": *First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281, 1285 (1995).



not the ideological contagiousness of an idea that persuaded individuals through their minds, but rather the clinical contagiousness of a disease that forcibly infected their bodies.

The presence of the contagion model of homosexuality in the law can also be seen in those opposing anti-gay legal measures. In 1978, then-presidential hopeful Ronald Reagan opposed a California proposition that would have barred gays from teaching in public schools.<sup>209</sup> As if responding to the *Ratchford* denial, Reagan stated: “Whatever else it is, homosexuality is not a contagious disease like measles. Prevailing scientific opinion is that an individual’s sexuality is determined at a very early age and that a child’s teachers do not really influence this.”<sup>210</sup> Similarly, in 1982, a district court supported its finding that “homosexuality is not a ‘disease’” with medical testimony that “homosexuality was not ‘contagious’ or infectious.”<sup>211</sup>

Even where legal language is devoid of the rhetoric of contagion, it may be structured according to the logic of contagion. Then the task of pro-gay scholars is to make the metaphor visible. Nancy Knauer has observed that “the contagion model of homosexuality continue[s] to frame the views of not just anti-gay activists, but also those of lawmakers, prosecutors, and judges.”<sup>212</sup> She observes this logic across a wide variety of contexts in which the contagion language is not superficially present, including obscenity statutes, sodomy statutes, and educational guidelines.<sup>213</sup> Similarly, Judith Butler analyzes the military’s “don’t ask, don’t tell” policy as embodying a fear of what she calls the “contagious power of the magical word” of homosexual self-identification.<sup>214</sup> In Butler’s view, the statement “I am a homosexual” is perceived to trigger conversions in others by, as it were, infecting them “through the ear.”<sup>215</sup>

To unpack the nature of this contagion logic, I conclude by considering “no promo homo” legislation, that is, laws that prohibit the promotion of homosexuality.<sup>216</sup> In some sense, all anti-gay state action—including sodomy statutes, bans on same-sex marriage, or restrictions on custody—might be characterized as falling under the “no promo homo” rubric. Yet the term particularly denotes laws that prohibit state-employed educators

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209. Melinda Beck, Martin Kasindorf & Michael Reese, *The New Issues: Gay Teachers*, NEWSWEEK, Oct. 2, 1978, at 56.

210. Catherine A. Lugg, *The Religious Right and Public Education: The Paranoid Politics of Homophobia*, 12 EDUC. POL’Y 267, 269 (1998).

211. *Baker v. Wade*, 553 F. Supp. 1121, 1129, 1129-30 n.15 (N.D. Tex. 1982) (citing medical testimony of Dr. Judd Marmor).

212. Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 454 (2000).

213. *Id.*

214. BUTLER, *supra* note 10, at 113.

215. *Id.* at 116.

216. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000).

dealing with adolescents or children from exposing them to homosexuality.<sup>217</sup> Thus the paradigmatic “no promo homo” laws are laws—generally state statutes—that prohibit the promotion of homosexuality in public educational institutions.<sup>218</sup> These statutes can bar any mention of homosexuality, prohibit pro-gay teachings, or require anti-gay teachings.<sup>219</sup>

The purpose of the laws is ostensibly to prevent impressionable youths from being converted into homosexuals. As noted earlier, this casts the laws as defending against an act of aggression on the part of homosexuals

217. See Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 587 (1999).

218. A number of states and the District of Columbia still have “no promo homo” laws on their books. See ALA. CODE § 16-40A-2(c)(8) (1995) (requiring sex education course materials to emphasize “in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state”); ARIZ. REV. STAT. ANN. § 15-716(c)(1) to (3) (West 2000) (prohibiting any course of study that (1) “promotes a homosexual life-style,” (2) “portrays homosexuality as a positive alternative life-style,” or (3) “[s]uggests that some methods of sex are safe methods of homosexual sex”); CONN. GEN. STAT. ANN. § 46a-81r (West 1998) (stating that state antidiscrimination statutes cannot be construed to mean Connecticut (1) “condones” homosexuality, (2) authorizes its promotion in educational institutions, (3) authorizes “numerical goals or quotas” with respect to homosexuality, (4) recognizes same-sex marriages, or (5) “establish[es] sexual orientation as a specific and separate cultural classification in society”); D.C. CODE ANN. § 1-2520(3) (1999) (allowing “any educational institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization” to deny funds, services, and recognition to those “engaged in[] promoting, encouraging, or condoning” homosexuality); LA. REV. STAT. ANN. § 17:281(A)(3) (West 2001) (prohibiting “sexually explicit materials depicting male or female homosexual activity”); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (West 2000) (defining “sexual orientation” for purposes of the chapter, but stating that “[t]his chapter is intended to ensure specific defined rights, and not to endorse or extend to any form of sexual behavior”); MINN. STAT. ANN. § 363.021 (West Supp. 2001) (stating that “[n]othing in this chapter shall be construed to” (1) mean that Minnesota condones homosexuality, (2) authorize the promotion of homosexuality in educational institutions, (3) authorize “numerical goals and quotas, or other types of affirmative actions programs” with respect to homosexuality, or (4) recognize same-sex marriages); N.H. REV. STAT. ANN. § 21:49 (2001) (defining “sexual orientation,” but stating that it is “intended to describe the status of persons” and not to legalize criminally prohibited conduct, to impose duties on religious organizations, or to “confer legislative approval of such status”); N.C. GEN. STAT. § 115C-81(e1)(3) (1999) (requiring (1) that education about AIDS include statements that a monogamous, heterosexual relationship is “the best lifelong means of avoiding diseases transmitted by sexual contact” and (2) that any instruction about diseases, such as AIDS, where “homosexual acts are a significant means of transmission . . . include the current legal status of those acts”); R.I. GEN. LAWS § 11-24-2.1(a)(7) (2000) (defining “sexual orientation,” but stating that it does not (1) legalize conduct prohibited by criminal law, (2) impose duties on religious organizations, or (3) “confer legislative approval of any status”); S.C. CODE ANN. § 59-32-30(A)(5) (Law. Co-op. 1976) (prohibiting health education programs from discussing “alternate sexual lifestyles from heterosexual relationships” except in the context of sexually transmitted disease instruction); TEX. HEALTH & SAFETY CODE ANN. § 85.007 (Vernon 1992) (requiring education programs for those eighteen and younger to state “that homosexual conduct is not an acceptable lifestyle and is a criminal offense”).

219. See Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1641-42 (1995).

themselves.<sup>220</sup> This characterization obscures the fact that the laws themselves may be viewed as a form of pressure toward conversion. For if the idea is that these waverers could go either way, the laws must be read as an attempt to convert waverers into heterosexuals.

The logic of contagion also suggests how these laws can coexist with laws—sometimes in the same jurisdiction—that protect adult homosexuals.<sup>221</sup> It is not uncommon for individuals to express the view that already formed homosexuals deserve public sympathy and protection, but that they should not be permitted to spread their condition to others. As one commentator has stated: “Surely decency demands that those who find themselves homosexual be treated with dignity and respect. But surely, too, reason suggests that one guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop.”<sup>222</sup> Disease is one way to make sense of this stance. It is commonplace to say that someone who has actually succumbed to a particular disease deserves all of our sympathy, but to say that she should not be permitted to infect others with her condition.

In law, as in broader culture, the literal disease rhetoric surrounding homosexuality has gradually been beaten back. This shift represents progress, but not as much progress as it may seem to embody at first glance. For in law, as in culture, a metaphorical disease rhetoric supplants the literal disease rhetoric as the ground for conversion. This suggests the stickiness of animus against gays, as one kind of conversion is replaced by a weaker form. I now turn to passing, suggesting that passing is also a location onto which the discredited pressure to convert has been displaced.

## B. *Gay Passing*

Joining a college friend at a gay bar later that evening, I spoke glowingly about my first day. I showed off my new sweat shirt and tote bag, complete with company logo. Out of loyalty to my new client, I vowed to abandon my electric shaver for the twin-bladed, pivot-headed razors I would now be charged with selling to Middle America. It never entered my mind, as I shared all this with my friend, that there was any reason to doubt my employer’s good intentions. Surrounded by other gay men in suits and ties, it didn’t occur to me, not even for a moment, that my initiation into the

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220. See Knauer, *supra* note 212, at 493-94.

221. Compare, e.g., CONN. GEN. STAT. ANN. § 10-15c (West Supp. 2001) (prohibiting discrimination on the basis of orientation by public schools), with CONN. GEN. STAT. ANN. § 46a-81r (West 1998) (stating that nothing in the state antidiscrimination protections “shall be deemed or construed . . . to authorize the promotion of homosexuality or bisexuality in educational institutions”).

222. E.L. Pattullo, *Straight Talk About Gays*, COMMENTARY, Dec. 1992, at 21, 22.

working world had been hostile or demeaning. On the contrary, Monday struck me as a typical day at the office. My first day of work felt like countless other experiences I had been through over the years: beginning the school year, moving to a new town, entering a roomful of strangers.

Years later I see the situation differently. I now recognize the countless ways I was told—formally and informally, in word and in deed—that I was unwelcome in this organization. Like the company's other lesbian and gay employees, I sensed the moral judgment implicit in social invitations for "you and a girlfriend," in the occasional joke about who was or wasn't a queer, and in the seductive advertisements, depicting heterosexual romance and love, that I would be helping to create. I filled out personnel forms that recognized only one kind of domestic relationship and that promised health insurance and other benefits to the families of those checking the "married" box. I learned the rules about dating: "Homosexuals flings" and heterosexual "intrafucking" were forbidden, even as it was taken for granted that I would desire the latter. I discovered that there were other people like me in the company, *single* people who gathered on Fridays in the hope of solving that particular problem. Finally, I had been told that "fagginess" was undesirable in any form: in nicknames, in product advertising, and in people.

My response, as the weeks passed, was to adopt what I now call a "counterfeiting" strategy. I went to the company's singles night and spoke vaguely about past girlfriends. I was conspicuous about my friendships with women. I told (or at least laughed at) the right jokes and didn't say too much about my interest in theater. On a friend's suggestion, I read the sports section of the *New York Times* and at least twice dragged myself to Yankee Stadium. For a time, I even hid a small notepad in my desk on which I scribbled key biographical information about "Heather," a quite imaginary young woman with brains, looks, and the good sense to have dated me in college. Heather had unfortunately moved to Maine.

Like my lesbian and gay coworkers, I learned to "manage" my identity at work. I paid close attention to my presentation of self, to the people with whom I was seen, to nuances of appearance and gesture, and to the information about my personal life that circulated through the hallways. I became skillful in assembling the necessary props and supporting players. A few months after I began work, [a coworker named] Don began to complain of a mysterious ailment with an array of puzzling symptoms. When someone commented, "He's a faggot, so it's probably AIDS," I bit my tongue. Don ultimately died, but in the weeks that followed I was

careful not to show too much concern for him, not even to ask what had killed him. In short, I claimed an identity as a heterosexual man, the identity that was expected and rewarded in my organization.<sup>223</sup>

“To pass” can mean “to judge,” as in “to pass on” a particular issue.<sup>224</sup> Yet when used in the context of human identity, “to pass” means to *be* judged, or, more precisely, to be misjudged, “to be held or accepted as a member of a . . . group other than one’s own.”<sup>225</sup> The concept of passing assumes that the passer fails to convert the underlying identity, secretly retaining it even as she presents a separate face to the outside world. As such, the demand to pass is understood to be milder than the demand to convert.

Nonetheless, as the vignette above demonstrates, passing is work. Passing is not simply the failure to articulate the words “I am gay.” To pass is to control the “nuances of appearance and gesture”<sup>226</sup> and to assemble “the necessary props and supporting players.”<sup>227</sup> Passing is acting straight by feigning an interest in sports, by creating a fictitious girlfriend, by laughing at the right jokes.<sup>228</sup> It is repressing traits or behaviors that might code as gay, such as an interest in theater, an expression of concern for a dying colleague, or resistance to a homophobic comment.<sup>229</sup> Thus, while this account of passing may seem less punishing than the preceding account of conversion, it demonstrates that passing, too, exacts its costs.

In keeping with the contrast and continuity between those two accounts, I continue my qualified progress narrative in both cultural and legal contexts. As conversion norms have become weaker, passing norms have gradually taken their place. In numerous sectors of society, gays have achieved nominal acceptance of their status so long as they do not self-identify. This progress narrative, however, requires two qualifications. First, when the passing norm has been contested in its turn, it has proved intransigent, as evidenced by the hale existence it enjoys today. Second, the shift from conversion to passing may not be as dramatic as it may initially seem. Anti-gay actors may use the commonalities between conversion and passing to achieve the same ends through a passing regime that they sought under a conversion regime.

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223. JAMES D. WOODS WITH JAY H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA*, at xiii-xv (1993).

224. 11 *THE OXFORD ENGLISH DICTIONARY*, *supra* note 37, at 295.

225. *Id.* at 294.

226. WOODS WITH LUCAS, *supra* note 223, at xv.

227. *Id.*

228. *Id.* at xiv.

229. *Id.* at xiv-xv.

### 1. *Cultural Contexts*

For much of this nation's history, the passing norm was not even available for contestation. While the demand to convert was in place, it would have been foolhardy for gays to contest the demand to pass, as coming out would only have exposed the individual to the more stringent demand to convert. The painful irony of early gay activism is that its most prominent actors were pseudonymous or anonymous. Hungarian writer Karoly Benkert coined the word "homosexual" in 1869 writing as "Dr. M."<sup>230</sup> Activist Edward Sagarin penned the first American tract for gay equality in 1951<sup>231</sup> as Donald Webster Cory, a pseudonym that may have been an oblique reference to André Gide's pro-homosexual *Corydon*.<sup>232</sup> The names of the pre-Stonewall gay rights organizations were similarly obscure. The Mattachine Society, founded in 1950, was modeled on a group of medieval French bachelors of the same name.<sup>233</sup> The Society identified itself as "'a group of persons (not necessarily variants), interested in doing research, education and conducting social action for the benefit of the variant minority and, in turn, for the benefit of society as a whole.'"<sup>234</sup> Its publication, *One*, referred to a Thomas Carlyle quotation— "A mystic bond of brotherhood makes all men one."<sup>235</sup> The Daughters of Bilitis, a lesbian organization founded in 1955, took its name from *Songs of Bilitis*, a collection of prose poems by Pierre Louys.<sup>236</sup>

Straights similarly shrouded homosexuality in a stigmatizing silence that drew on a long tradition of treating homosexuality as unspeakable. To take but one of many examples, the sodomy statutes regulating same-sex sexual conduct, which until 1961 were on the books in every state,<sup>237</sup> often referred to the proscribed activity no more specifically than as a "crime against nature."<sup>238</sup> Silence in this era did not signify tolerance for homosexuality, but was rather a means of sexual regulation. The nexus

230. See 1 THE ENCYCLOPEDIA OF HOMOSEXUALITY 659-60 (Wayne R. Dynes ed., 1990); GROSS, *supra* note 9, at 8.

231. DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH (1951).

232. GROSS, *supra* note 9, at 15.

233. See Henry Hay, *The Feast of Fools: The Homosexual and History . . . An Invitation to Further Study*, in RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 92, 112 (Will Roscoe ed., 1996) (describing the origins of the Mattachine Society's name); see also GROSS, *supra* note 9, at 13 (same).

234. ESKRIDGE, *supra* note 165, at 93 (quoting MATTACHINE SOC'Y, THE MATTACHINE SOCIETY TODAY 1 (1954)).

235. 1 ONE 1 (1953) (quoting Thomas Carlyle).

236. See 1 LADDER 2-3 (1956) (describing the source of the name Daughters of Bilitis).

237. See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (citing sodomy statutes).

238. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1411 (West 2001); IDAHO CODE § 18-6605 (Michie 1997); MISS. CODE ANN. § 97-29-59 (1972); N.C. GEN. STAT. § 14-177 (1999); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 2001).

between silence and disgust has long been captured in the preteritive formulations of the homosexual possibility<sup>239</sup>—sodomy was the “sin which should neither be named nor committed,”<sup>240</sup> or the “detestable, and abominable sin, amongst Christians not to be named,”<sup>241</sup> or the “sin so odious that the fame of it / Will fright the damned in the darksome pit.”<sup>242</sup>

It is true that straights in the pre-Stonewall years would sometimes loft gays into visibility by ferreting homosexuals out of their closets. Perhaps the most famous of these witch hunts were those conducted in the Navy in the 1920s,<sup>243</sup> and in the federal civil service in the late 1940s to 1950s.<sup>244</sup> Such witch hunts, however, were not sustained, in part because they inevitably revealed more than the hunters cared to know, outing individuals they did not wish to classify as gay.<sup>245</sup> More to the point, even as they broke the code of gay silence, the witch hunts only served to strengthen it. The pressure on gays to pass became stronger when mainstream society disrespected the closet door. In an age of conversion, the closet door opened only from the outside.

As conventionally told, all of this changed with the Stonewall riots in 1969. When the police raided the Stonewall Inn, gay patrons of the bar refused to go quietly.<sup>246</sup> Barricading themselves in the bar, they alternately hurled out beer bottles and slogans like “Gay Power.”<sup>247</sup> The riots did not last the week, and the mainstream press accorded them no great significance.<sup>248</sup> Yet the riots imaginatively inaugurated the gay rights movement. As Cindy Patton describes it, “Stonewall divides a timeless time of oppression from the entry into the Time of History. *Before 1969*:

239. See SEDGWICK, *supra* note 33, at 202. The following three quotations can all be found in Sedgwick. See *id.*

240. Letter from Pope Honorius III to the Archbishop of Lund (Feb. 4, 1227), in JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 380 (1980).

241. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 58 (photo. reprint 1979) (London, E. & R. Brooke 1644).

242. 2 GULLAUME DE SALUSTE SIEUR DU BARTAS, *THE DIVINE WEEKS AND WORKS OF GULLAUME DE SALUSTE SIEUR DU BARTAS* (Josuah Sylvester trans., Susan Snyder ed., 1979).

243. See George Chauncey, *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 294 (Martin Bauml Duberman, Martha Vicinus & George Chauncey, Jr. eds., 1990).

244. ESKRIDGE, *supra* note 165, at 67-74.

245. George Chauncey explains:

The investigation became controversial when it verged on suggesting that the homosocial world of the navy and the relationships between sailors and their Christian brothers in the Newport ministry were permeated by homosexual desire. . . . [T]o some extent even the navy itself repudiated the Newport inquiry because they found such a suggestion intolerable.

Chauncey, *supra* note 243, at 317.

246. CLENDINEN & NAGOURNEY, *supra* note 30, at 22; D'EMILIO, *supra* note 34, at 231-32.

247. CLENDINEN & NAGOURNEY, *supra* note 30, at 22; D'EMILIO, *supra* note 34, at 232.

248. CLENDINEN & NAGOURNEY, *supra* note 30, at 22-23.

we could only chafe and give up our fullest possibilities. *After 1969*: we could say who we are and in the unifying power of our speech, fight back.”<sup>249</sup>

What made Stonewall loom so large was that it dramatized a systematic resistance to the passing demand. The bar itself could be seen as a symbolic closet, over which gays had finally wrested control. In denying the police access to this space, gays emphasized the closet’s protective rather than its confining dimensions.<sup>250</sup> Yet in publicizing that space, gays paved the way for other anti-passing events by making themselves visible in unprecedented ways. The riots called forth a new set of gay activist organizations, including the Gay Liberation Front, Radicalesbians, and the Third World Gay Revolution.<sup>251</sup> These groups unabashedly identified themselves as “gay”: “There was no talk among these new activists of disguising their mission with ambiguous titles—no homophile, no Mattachine, no Bilitis.”<sup>252</sup> These groups brought a militant visibility to gay rights politics. “Proclaiming the necessity of ‘coming out of the closet’ as the first essential step toward freedom,” these groups “acted on their beliefs by being as visible as they could in every sphere of life.”<sup>253</sup> They “conducted sit-ins in the offices of newspapers and magazines that purveyed demeaning images of homosexuals; they marched in the street to protest police harassment; they disrupted the conventions of psychiatrists who proclaimed them to be sick; they occupied campus buildings to win concessions from university administrators.”<sup>254</sup> On the one-year anniversary of Stonewall, these activists organized the first gay pride march in New York, which drew out between five and fifteen thousand marchers.<sup>255</sup> This march was by far the city’s biggest gay demonstration, and, unlike Stonewall itself, made the front page of the *New York Times*.<sup>256</sup>

The 1973 *DSM* deletion also marked a watershed in the fight against passing norms. The deletion demonstrates how conversion norms and passing norms are intricately intertwined with each other. On the one hand, passing norms had to be sufficiently eroded to enable the political mobilization that would permit the contestation of the medical establishment’s conversion

249. Cindy Patton, *Foreword* to *LAVENDER CULTURE*, at ix, xiv (Karla Jay & Allen Young eds., N.Y. Univ. Press 1994) (1978).

250. See Yoshino, *Suspect Symbols*, *supra* note 2, at 1796-802 (describing the “confining” and “protective” aspects of the closet).

251. John D’Emilio, *Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement After Fifty Years*, in *THE POLITICS OF GAY RIGHTS* 31, 35 (Craig A. Rimmerman, Kenneth Wald & Clyde Wilcox eds., 2000).

252. CLENDINEN & NAGOURNEY, *supra* note 30, at 31.

253. D’Emilio, *supra* note 251, at 35.

254. *Id.*

255. CHARLES KAISER, *THE GAY METROPOLIS, 1940-1996*, at 216 (1997).

256. See Lacey Fosburgh, *Thousands of Homosexuals Hold a Protest Rally in Central Park*, *N.Y. TIMES*, June 29, 1970, at A1; see also KAISER, *supra* note 255, at 216 (describing the demonstration).



norms. On the other hand, the formal retirement of this conversion norm created the analytic license further to contest passing norms. As Roy Cain has noted, “When homosexuality was considered pathological, secretiveness about one’s homosexuality was widely viewed as normal and desirable; openness, conversely, was seen as an expression of personal and social pathology and as a political liability to gays in general.”<sup>257</sup> Yet “when homosexuality was normalized, openness about one’s homosexual preferences came to be viewed as desirable, while secretiveness came to be seen as problematic.”<sup>258</sup> If homosexuality was not a sickness, it became hard to justify why homosexuals should have to keep silent about their condition.<sup>259</sup>

Many of the post-Stonewall developments that contested the passing norm were more diffuse than the Stonewall riots or the *DSM* deletion, including the recuperation of gay history, the flowering of gay publications, and the coming out of public and private figures. Beginning with Jonathan Ned Katz’s *Gay American History* in 1977, professional and amateur historians sought to make homosexuality visible in the past as well as in the present.<sup>260</sup> These efforts were embodied not only in scholarly and popular books, but also in the grass-roots gay history projects that sprang up in various American cities in the late 1970s—perhaps most notably New York City’s Lesbian Herstory Archives.<sup>261</sup> Some of these efforts have been criticized for assuming a transhistorical homosexuality without regard to the starkly different ways in which different eras have figured same-sex desire.<sup>262</sup> While there is much to this criticism, it seems natural that the initial work on homosexual history would be, along this dimension, paradoxically ahistorical. This work was itself done in a context—a context in which homosexual identity was being consolidated for political recognition. If the contemporary cry for gay rights was “We are

257. Roy Cain, *Disclosure and Secrecy Among Gay Men in the United States and Canada: A Shift in Views*, 2 J. HIST. SEXUALITY 25, 25-26 (1991), quoted in GROSS, *supra* note 9, at 167.

258. *Id.*

259. One question that arises is why the erosion of conversion norms, clearly a necessary condition for the erosion of passing norms, was not also a sufficient one. As Cain’s quotation suggests, if homosexuality is not normatively wrong, then not only conversion, but also passing, is difficult to justify analytically. One would thus expect that when homosexuality was depathologized, gays would no longer be forced to assimilate in any way. Of course, this was not the case, as anti-gay animus has moved less logically than sociologically. While chastened by the discrediting of conversion discourse, anti-gay animus did not disappear. Instead, it expressed itself in a correlatively less severe form.

260. See, e.g., BOSWELL, *supra* note 240; D’EMILIO, *supra* note 34; LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* (1981); KATZ, *supra* note 36.

261. See George Chauncey, Jr., Martin Bauml Duberman & Martha Vicinus, *Introduction to HIDDEN FROM HISTORY*, *supra* note 243, at 1, 1-2.

262. *Id.* at 5.

everywhere,”<sup>263</sup> the historicizing cry might be described as “We are always,” an ethos with perhaps inevitably essentializing tendencies.

Other grass-roots publications spoke to the contemporary situation of gays. Rodger Streitmatter takes the proliferation of gay-themed publications during the 1970s as an indication that disparate strands of gay rights had finally coalesced into a movement.<sup>264</sup> These publications included the following: *GAY, Come Out!*, *Gay Times*, and *Gay Flames*, in New York City; *Gay Sunshine* and the *San Francisco Gay Free Press* in San Francisco; *Lavender Vision* in Boston; *Gay Liberator* in Detroit; and *Killer Dyke* in Chicago.<sup>265</sup> Again, these publications made explicit reference to homosexuality in their titles, in contrast to earlier homophile publications such as *One* or *The Ladder*. This new emphasis on visibility was also at the substantive core of these journals. Thus the first issue of *Come Out!* sounded a clarion call to its readers:

Come out for freedom! Come out now! Power to the people! Gay power to gay people! Come out of the closet before the door is nailed shut! *Come Out!* has COME OUT to fight for the freedom of the homosexual; to give voice to the rapidly growing militancy within our community; to provide a public forum for the discussion and clarification of methods and actions necessary to end our oppression.<sup>266</sup>

These publications not only exhorted their readers toward visibility but also performatively enacted that visibility, demonstrating the existence of a gay community of writers and readers. While none of these publications was national in scope, they opened up discursive spaces populated by an imagined community of readers. Particularly in a pre-Internet age, these publications were doubtlessly a significant medium through which closeted individuals caught their first glimpse of life on the outside.

One function served by both scholarly and popular publications was the naming of names. Englishman A.L. Rowse’s *Homosexuals in History* might stand as the best-known academic book of this genre, sketching famous “gay” historical figures from Richard the Lionhearted to Oscar Wilde.<sup>267</sup> Popular publications similarly provided a running tally of contemporary gay names: *Gay Sunshine* reported that “1976 saw the public coming out of a number of writers and other public figures: culture analyst Charles

263. Karla Jay, *Introduction to LAVENDER CULTURE*, *supra* note 249, at xxix, xxix.

264. RODGER STREITMATTER, UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA 116 (1995).

265. *Id.* at 117.

266. *Come Out!*, COME OUT!, Nov. 14, 1969, at 1, *quoted in* STREITMATTER, *supra* note 264, at 123.

267. See A.L. ROWSE, HOMOSEXUALS IN HISTORY: A STUDY OF AMBIVALENCE IN SOCIETY, LITERATURE AND THE ARTS (1977).

Reich, . . . footballer Dave Kopay, painter Paul Cadmus, . . . Olympic skating champion John Curry, [and] poets Adrienne Rich and Walter Rinder.”<sup>268</sup> The post-Stonewall decades also saw the emergence of numerous volumes of “coming out” narratives, which gave eloquent first-person testimony to the power of self-identification. Thus, Adrienne Rich wrote in her foreword to *The Coming Out Stories*:

I keep thinking about power. The intuitive flash of power that “coming-out” can give: I have an indestructible memory of walking along a particular block in New York City, the hour after I had acknowledged to myself that I loved a woman, feeling invincible. For the first time in my life I experienced sexuality as clarifying my mind instead of hazing it over; that passion, once named, flung a long, imperative beam of light into my future. I knew my life was decisively and forever different; and that change felt to me like power. “Coming-out” over and over to others—to old friends, in the classroom, in print, at a poetry reading in the study hall of the girls’ school I had long ago attended—each time, both fear and the renewal of that sense of power. And I ask myself, what is the fear about? that I can no longer “pass”? that I will see expressions alter, walls go up between my students and me, my old friends and me, some audience and me—that I will be dismissed, discredited, seen as monster?—or is it the fear of that old/new power, perhaps even some genetic imprinting of what was done to us of old, when we acted on our power?

I don’t know. But I think “coming-out”—that first permission we give ourselves to name our love for women as love, to say, *I am a lesbian*, but also the successive “comings-out” to the world . . . is connected with power, connects us with power, and until we believe that we have the right not merely to our love but to our power, we will continue to do harm among ourselves, fearing that power in each other and in ourselves.<sup>269</sup>

This passage captures how coming out is simultaneously an intensely personal and an intensely political act; indeed, a way of transforming the personal into the political. For this reason, in the post-Stonewall years, much pressure was placed on politically conscious gays to come out. As John D’Emilio puts it, “Among activists, coming out of the closet became the gay equivalent to a biblical injunction. Those who remained in the

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268. Dennis Altman, *What Changed in the Seventies?*, in *HOMOSEXUALITY, POWER & POLITICS* 52, 55 (Gay Left Collective ed., 1980) (quoting Ian Young, *Coming Out in Print*, *GAY SUNSHINE*, Spring 1977, at 13).

269. Adrienne Rich, *Foreword* to *THE COMING OUT STORIES*, at xi, xii-xiii (Susan J. Wolfe & Julia Penelope Stanley eds., 1980).

closet had a shadow cast over their moral character. Their integrity was suspect, their courage lacking, their identity uncertain.”<sup>270</sup>

Given these many years of anti-passing activism, one might ask why passing norms have remained so robust. For there is no doubt that the passing norm has survived post-Stonewall activism. The sole “openly” gay psychiatrist testifying at the 1972 APA convention in favor of deleting homosexuality from the *DSM* was “Dr. Anonymous,” who addressed his audience under a mask and cloak.<sup>271</sup> This is what permitted Dr. Robert Spitzer, a key member of the APA’s Nomenclature Committee, to state in 1973 that he had never met a homosexual psychiatrist.<sup>272</sup> In 1986, Justice Powell’s gay clerk failed to come out to his Justice before oral argument in *Bowers v. Hardwick*.<sup>273</sup> After confiding to his clerk that he had never met a homosexual, Powell went on to cast the deciding vote in *Bowers*.<sup>274</sup>

As these instances suggest, the endurance of the norm cannot be understood without reference to the relational aspect of passing, in which both the performance of the gay individual and the literacy of the straight audience are implicated. On the gay side, two aspects of passing have made it particularly difficult to contest. First, unlike conversion, passing can occur in a selective manner. When one converts, it is assumed that one has converted to all audiences. With passing, however, there are as many closets as there are individuals in one’s audience: “[E]very encounter with a new classful of students, to say nothing of a new boss, social worker, loan officer, landlord, doctor, erects new closets [that] . . . exact from at least [some] gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure.”<sup>275</sup> The multiplicity of gay closets means that gays can choose to be open to pro-gay audiences while remaining closeted to anti-gay ones. That gays have exercised this choice is unsurprising, as many entitlements can turn on selective closeting.<sup>276</sup> Yet while this selectivity might be empowering for individual homosexuals, it has inhibited the ways in which the gay rights movement has been able to resist the passing norm.<sup>277</sup> This collective action problem is what gives

270. D’Emilio, *supra* note 251, at 47-48.

271. See BAYER, *supra* note 8, at 107-10; LEVAY, *supra* note 50, at 223.

272. See BAYER, *supra* note 8, at 125-26.

273. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521-22 (1994).

274. *Id.*

275. SEDGWICK, *supra* note 33, at 68.

276. Sedgwick writes:

Nor—at the most basic level—is it unaccountable that someone who wanted a job, custody or visiting rights, insurance, protection from violence, from “therapy,” from distorting stereotype, from insulting scrutiny, from simple insult, from forcible interpretation of their bodily product, could deliberately choose to remain in or to reenter the closet in some or all segments of their life.

*Id.*

277. See Yoshino, *Assimilationist Bias*, *supra* note 2, at 535.

color to the wish expressed by gay activists that all gays would turn blue,<sup>278</sup> a transformation that would make gays, like most racial minorities, unable to pick and choose among their audiences.

Second, passing norms have also been protected by the gay convention against outing. Writing in 1990, one gay journalist noted:

“Since the birth of the gay-liberation movement 20 years ago, we gay journalists have adhered to a fairly rigid code of conduct on the matter of bringing people unwillingly out of the closet. With the possible exception of closeted political figures who were actively working against the movement (such as the late Terry Dolan and Roy Cohn), it was strictly verboten, an absolute no-no.”<sup>279</sup>

This convention has applied not only to the press, but to gay individuals in quotidian social life.<sup>280</sup> Gays are expected in ordinary conversations to keep each other's secrets, leading some thoughtful commentators to express concern about how the gay community places pressure on its members to lie.<sup>281</sup> The anti-outing norm is sometimes justified by a respect for individual autonomy: “No gay person should deny another the incomparable, irreplaceable, once-in-a-lifetime opportunity to come out of the closet under his or her own steam, as the fruit of deep personal reflection, courage and conviction.”<sup>282</sup> More practically, it is also defended on the basis of gay solidarity—the idea that gays should not place members of their community in harm's way.<sup>283</sup> While the convention thus rests on strong grounds, it also has significantly impeded the ability of gays to challenge passing norms. In its own right, it “seriously limit[s] the number of persons known to be gay,”<sup>284</sup> as the gay community must wait for each individual to avow her gay identity. It also shores up the ability of gays to maintain selective closets, as gays can rely on the audience that knows to keep their secret from the audience that does not.

278. GROSS, *supra* note 9, at 49 (citing Nancy Walker, *Yanking Them Out*, GAY COMMUNITY NEWS, May 14, 1983, at 5).

279. *Id.* at 4 (quoting Stuart Byron, *Naming Names*, ADVOCATE, Apr. 24, 1990, at 37).

280. See generally David L. Chambers & Steven K. Homer, *Honesty, Privacy, and Shame: When Gay People Talk About Other Gay People to Nongay People*, 4 MICH. J. GENDER & L. 255 (1997) (claiming that there is a longstanding social convention among lesbians and gay men not to reveal a person's sexuality unless that person is already out).

281. See *id.*

282. Hunter Madsen, *Tattle Tale Traps*, OUTWEEK, May 16, 1990, reprinted in GROSS, *supra* note 9, at 236, 237.

283. The solidarity principle explains the exception to the convention, as individuals who are harming the gay community relinquish their right not to be harmed by it. As Representative Barney Frank has articulated it, “There's a right to privacy but not to hypocrisy.” GROSS, *supra* note 9, at 3 (quoting Ted Gup, *Identifying Homosexuals: What Are the Rules?*, WASH. JOURNALISM REV., Oct. 1988, at 30-33).

284. Chambers & Homer, *supra* note 280, at 256.

Straights have also contributed to the intractability of the passing norm. Much of this contribution has taken the form of generic anti-gay bias that increases the costs of gay self-disclosure. Yet some aspects of it are specific to passing. In his discussion of passing, Erving Goffman observed that passing depends not only on the performance of the individual attempting to conceal the trait, but also on the “decoding capacity” of her audience.<sup>285</sup> Passing norms are thus maintained not only by gays who do not come out, but by straights who do not recognize a homosexual when they see one.

It may be difficult to see how such ignorance about gays could subordinate them. The Enlightenment equation of knowledge with power tends to underscore how ignorance has diminished the power of straights to regulate homosexuality.<sup>286</sup> Yet this should not obscure how a studied ignorance has also increased that power. Survey after survey has demonstrated that straights who know homosexual individuals are much more likely to be pro-gay,<sup>287</sup> suggesting that anti-gay animus is much easier to preserve when its purveyors are ignorant of homosexuality. It should thus not surprise that a homophobic society should strive to keep its members willfully ignorant of homosexuality, as exemplified by the substance of “no promo homo” statutes and the rhetoric of “crime against nature” statutes. Ignorance of homosexuality is an ignorance into which straights have been laboriously schooled.<sup>288</sup>

The passing norm has thus proved so powerful because it has been secured by a bilateral social contract between gays and straights. Not until the formulation of the military’s policy in 1993 was this contract dubbed “don’t ask, don’t tell.” Yet the arrangement long predated the military policy. The military policy did not spring from the head of Congress, but grew organically out of an underlying culture, taking its strength from the depth of that culture.<sup>289</sup> What did it mean, after all, for Spitzer and Powell to say that they knew no homosexuals? In a post-Kinsey age, these individuals should surely have confronted the claim that such a statement was statistically unviable.<sup>290</sup> That no such cognitive reconciliation occurred

285. GOFFMAN, *supra* note 3, at 48-51.

286. See SEDGWICK, *supra* note 33, at 4-5. See generally THEODOR W. ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT (John Cumming trans., Verso 2d ed. 1986) (1944) (challenging the Enlightenment equation of knowledge and power).

287. See Gregory M. Herek, *Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, in BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 1, 13-15 (John P. De Cecco ed., 1985).

288. Cf. SEDGWICK, *supra* note 33, at 5 (describing the ignorance of men about female sexual consent as an “ignorance in which male sexuality receives careful education”).

289. See Yoshino, *Assimilationist Bias*, *supra* note 2, at 556.

290. See, e.g., BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 82 (1993) (noting that since the appearance of the Kinsey reports, it has been a truism that approximately ten percent of Americans are homosexual); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives To Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 776 (1995) (“Since 1948, when Alfred C. Kinsey and his associates released

suggests that these individuals did not wish to have that knowledge, even as they deployed power that would have enormous consequences over those they sought not to know. It also suggests that there were gay individuals who did not seek to educate them into that knowledge. In this sense, “don’t ask, don’t tell” did not create, but rather diagnosed, an underlying convention that pervaded the culture.

Unsurprisingly, then, one of the most serious threats to the passing norm—the advent of AIDS in the 1980s—did not originate in the cultural realm, but in the epidemiological one. Passing is often figuratively associated with death, an association that has been made particularly strongly in the racial context, where to pass as white has been to die a social death in one’s own community of origin.<sup>291</sup> For gay men, AIDS transformed the figurative equivalence between “passing” and “passing away” into a literal one. Literal death was met with silence—in 1986, when AIDS had caused the deaths of more than eleven thousand Americans, there were still only a handful of obituaries that denoted such deaths to be AIDS-related.<sup>292</sup> Silence, in turn, has been seen to cause literal death, as when censorship of AIDS education has been characterized as condemning homosexuals to death.<sup>293</sup>

As AIDS closets became coffins, the felt costs of the gay closet, particularly for men, increased. While not identical, the AIDS closet and the gay closet interlock. AIDS caused gay individuals to come out *as gay* to combat social and governmental indifference to the epidemic. The anti-passing slogans, “SILENCE = DEATH,”<sup>294</sup> and “We’re here, we’re queer, get used to it,”<sup>295</sup> were both coined in the AIDS context, but have come to speak to the gay experience itself. Moreover, the AIDS closet also undermined the gay closet because it was a much less stable structure. The literal marks that the syndrome has left on the bodies of its victims—perhaps most commonly the Kaposi’s sarcoma lesion—have “outed” its victims as AIDS sufferers and, associatively, as gay.<sup>296</sup> As Bersani wrote in 1995, “Nothing has made gay men more visible than AIDS.”<sup>297</sup>

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their path-breaking study, *Sexual Behavior in the Human Male*, the oft-cited statistic is that ten percent of the population is gay.”).

291. See HENRY LOUIS GATES, JR., FIGURES IN BLACK: WORDS, SIGNS, AND THE “RACIAL” SELF 202 (1987).

292. GROSS, *supra* note 9, at 53.

293. Mark Barnes, *Toward Ghastly Death: The Censorship of AIDS Education*, 89 COLUM. L. REV. 698, 717 (1989) (book review).

294. DOUGLAS CRIMP & ADAM ROLSTON, AIDS DEMO GRAPHICS 14 (1990).

295. Bruce Bawer, *Notes on Stonewall*, NEW REPUBLIC, June 13, 1994, at 24, 26 (discussing the use of the slogan in the gay rights movement).

296. See Suzanne Young, *Speaking of the Surface: The Texts of Kaposi’s Sarcoma*, in HOMOSEXUALITY & PSYCHOANALYSIS 322, 324 (Tim Dean & Christopher Lane eds., 2001) (arguing that Kaposi’s sarcoma operates “as [a] visible indicator[] of a disease that remains severely stigmatizing and that is still associated with socially marginalized groups”).

297. LEO BERSANI, HOMOS 19 (1995).

In a culture radicalized by AIDS, many gays sought urgently to revise the social contract, particularly by attacking the convention against outing. In the early 1990s, outing finally found a pope and a pulpit. The so-called pope of outing was Michelangelo Signorile, a gay journalist and AIDS activist.<sup>298</sup> The pulpit was the gay magazine *OutWeek*, which published a series of articles by Signorile that exposed the homosexuality of such public figures as tycoon Malcolm Forbes.<sup>299</sup> The result was an instantaneous furor that spread not only among gay publications, but also into the mainstream press.<sup>300</sup>

Outing, however, had a short career. Within the gay community, a broad array of voices was raised against the practice.<sup>301</sup> The mainstream press was even more hostile.<sup>302</sup> *OutWeek* closed its doors in 1991, allegedly because advertisers had withdrawn from the magazine.<sup>303</sup> The norm about outing equilibrated back to a standard in which only active hypocrisy by a homosexual could warrant outing. One of the most remarkable things about outing is how little debate there is about it today.

Three decades after Stonewall, passing norms still have a grip on American society. It is true that more and more gays are coming out of the closet, and that straight literacy about gay culture has increased significantly.<sup>304</sup> Yet the modality through which gays come out is still selective and individual, and the privilege of unknowing is still powerfully deployed by straights.<sup>305</sup> It continues to be true that “for many gay people [the closet] is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.”<sup>306</sup>

298. See GROSS, *supra* note 9, at 283-303.

299. See, e.g., Michelangelo Signorile, *The Other Side of Malcolm*, *OUTWEEK*, Apr. 18, 1990, at 40, reprinted in GROSS, *supra* note 9, at 285 (characterizing Malcolm Forbes as gay); see also Michelangelo Signorile, *Gossip Watch*, *OUTWEEK*, Feb. 20, 1991, at 48 (characterizing Jodie Foster as gay); Michelangelo Signorile, *Gossip Watch*, *OUTWEEK*, Dec. 26, 1990, at 45 (characterizing David Geffen as gay); Michelangelo Signorile, *Gossip Watch*, *OUTWEEK*, July 18, 1990, at 45, reprinted in GROSS, *supra* note 9, at 289 (characterizing Merv Griffin as gay).

300. See sources cited *supra* note 9.

301. See, e.g., C. Carr, *Why Outing Must Stop*, *VILLAGE VOICE*, Mar. 18, 1991, at 37 (arguing against outing); Ayofemi Folayan, *Whose Life Is It Anyway?*, *OUTWEEK*, May 16, 1990, reprinted in GROSS, *supra* note 9, at 248 (same); Madsen, *supra* note 282, at 236 (same).

302. See, e.g., “Outing” *Is Wrong Answer to Anti-Gay Discrimination*, *USA TODAY*, Mar. 30, 1992, at 12A (arguing against outing); Mike Royko, *Antsy Closet Crowd Should Think Twice*, *CHI. TRIB.*, Apr. 2, 1990, at 3 (same).

303. See James Cox, “*OutWeek*” *Magazine Goes Out of Business*, *USA TODAY*, July 1, 1991, at 2B (observing that financial woes forced *OutWeek* to close).

304. See generally SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* (2001) (describing the increasing exposure of straight America to gay culture in the 1980s and 1990s).

305. See SEDGWICK, *supra* note 33, at 68.

306. *Id.*



One might counter that even if passing norms endure, the fact that they have replaced conversion norms in many areas reflects significantly decreased animus toward gays. Unlike conversion, passing is something that all gays are assumed to be able to do. Moreover, replacing the demand to convert with the demand to pass seems to create a zone of privacy in which gays can maintain their identities so long as they do not make them public.

While I see something in these distinctions, I also seek to qualify the difference they make. The change in rhetoric from conversion to passing that we see in the orientation context may not always reflect a commensurate change in anti-gay animus. To contextualize my skepticism, I advert to Reva Siegel's theory of "preservation-through-transformation."<sup>307</sup> Preservation-through-transformation posits that status hierarchies can preserve themselves not in spite of, but in part because of, a transformation in their justificatory rhetoric.<sup>308</sup> Siegel argues that as a particular status hierarchy is successfully contested, the justificatory rhetoric underlying that hierarchy becomes discredited.<sup>309</sup> Social institutions repudiate that rhetoric to disassociate themselves from the prior regime.<sup>310</sup> Yet oftentimes the reality of the status hierarchy has not changed to the degree that the rhetoric would indicate.<sup>311</sup> To the contrary, the status hierarchy may be preserved precisely because the rhetoric has changed, permitting social actors to tell a progress narrative that legitimates the status quo.<sup>312</sup> Preservation thus occurs not *in spite of* transformation, but *through* transformation. Like a virus, the status hierarchy mutates to ensure a longevity that would not have been possible if it had remained static.<sup>313</sup>

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307. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, "The Rule of Love"] (inaugurating the preservation-through-transformation concept); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (elaborating on preservation-through-transformation in other contexts).

308. Siegel, "The Rule of Love," *supra* note 307, at 2175-88.

309. *Id.* at 2189.

310. *Id.*

311. *Id.* at 2179-80.

312. *Id.* at 2180.

313. Siegel demonstrates the preservation-through-transformation dynamic with the example of wife beating. Under early Anglo-American law, husbands had the "right of chastisement," that is, the right to subject their wives to corporal punishment. *Id.* at 2118. Due to the efforts of women's rights advocates, no judge recognized this prerogative as such by the late nineteenth century. *Id.* at 2129. Yet Siegel demonstrates that while the right of chastisement had been repudiated as a rhetorical matter, it endured as a substantive matter. Judges continued to condone such chastisement under the rhetoric of affective privacy. *Id.* at 2153. Wife beaters were given immunity from public and private prosecution because courts were reluctant to look into the "home closet," *id.* at 2166 (quoting *Drake v. Drake*, 17 N.W. 624, 725 (Minn. 1920)), a zone of affective privacy where conflict was meant to be consensually resolved. Thus, while the rhetoric of prerogative shifted to the rhetoric of privacy, the underlying status hierarchy remained substantively unchanged.

Preservation-through-transformation does not foreclose the possibility of real social change.<sup>314</sup> Nor does it assume bad intent on the part of the individual legal actors.<sup>315</sup> It does, however, caution that progress narratives about status hierarchies should be approached with intense skepticism. Assuming something material is at stake in a status hierarchy, it seems likely that those who benefit from that hierarchy will be loath to relinquish that benefit.<sup>316</sup> Contestation of that status hierarchy is therefore much more likely to effect rhetorical rather than substantive revision.<sup>317</sup>

Is the shift in emphasis from a gay conversion regime to a gay passing regime an instance of the preservation-through-transformation dynamic? One ground for an affirmative answer is that conversion and passing are tightly intertwined concepts, such that social actors can sometimes achieve the same ends under either regime. Indeed, Janet Halley has argued that passing is a form of conversion. She maintains that when individuals pass, the “result is no mere fib: it is a change.”<sup>318</sup> She continues: “To be sure, what has changed is not the supposed essence of sexual orientation, but the representation of it available for social interpretation. But essences, conceding for a moment their existence, are not visible to legislatures, judges, employers, or police. Social agents work with social meaning . . . .”<sup>319</sup>

Halley here suggests that like Bishop Berkeley’s tree, gays may not exist in at least some senses unless they are perceived. To be homosexual is, in part, to be acknowledged and interpellated by others as such. This is the import of the gay rights slogan “I am out therefore I am.”<sup>320</sup> In other work, I have posited for this reason that gay identity may be linguistically performative, such that “I am gay” is akin to formulations like “I promise,” “I contract,” or “*J'accuse*,” in creating the substance it may seem only to describe.<sup>321</sup> This may explain the transformation—a kind of ontological shudder—that some gays describe on intoning these words for the first time.<sup>322</sup>

One might resist this conflation of passing and conversion by observing that many homosexuals routinely pass without feeling that they have converted. Yet this is not strictly a distinction between conversion and passing, but one between audiences. Gays do not feel as if they have

314. *Id.* at 2179.

315. *Id.* at 2180.

316. *Id.* at 2179-80.

317. *Id.* at 2180.

318. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 934 (1989).

319. *Id.* (emphasis omitted).

320. CRIMP & ROLSTON, *supra* note 294, at 103.

321. Yoshino, *Assimilationist Bias*, *supra* note 2, at 550.

322. *See, e.g.*, Rich, *supra* note 269, at xii-xiii.

converted even when passing to others because they are not passing *to themselves*. For individuals who do not know what they are in their own eyes, the acquisition of particular forms of knowledge may be experienced as change.<sup>323</sup> The assumption of “no promo homo” is that such sexual waverers might, through knowledge about homosexuality, come to know themselves as homosexuals, and, in that instant, become homosexuals.<sup>324</sup>

This convergence between conversion and passing should lead us to question the extent to which a shift in rhetoric from the demand to convert to the demand to pass actually signifies a change in the status hierarchy between straights and gays. For many third parties, after all, the distinction between converted and closeted homosexuals is no distinction at all. In the eyes of such third parties, neither the converted nor the closeted homosexual registers as a homosexual, thereby permitting such third parties entirely to ignore the existence of homosexuality.

## 2. *Legal Contexts*

The progress narrative in which conversion norms cede to passing norms can also be told in the legal context. In the post-Stonewall era, gay plaintiffs would increasingly challenge not only infringements on their right to be gay as a violation of their equal protection right, but also infringements on their right to “come out” as a violation of their First Amendment right to free speech. Even more tellingly, state actors (such as the military) and private actors (such as the Boy Scouts) would defend their anti-gay policies as requiring not conversion but “only” passing. This progress narrative must also be qualified by recognizing the intransigence of passing norms and the preservation-through-transformation concern. To demonstrate this, I take the military’s policy toward homosexuals as my main instance, supplementing it with instances outside that realm.

The United States military’s policy can easily be told as a progress narrative from a conversion demand to a passing demand. In 1981, the military was governed by administrative regulations that stated that “homosexuality [was] incompatible with military service.”<sup>325</sup> This was a formal conversion regime, under which one technically had to convert to heterosexuality to serve. By the early 1990s, the old rhetoric of excluding servicemembers based on their homosexuality alone had come under fire. In 1992, then-President-elect Bill Clinton pledged to “lift the ban” on gays

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323. David Gelman, Donna Foote, Todd Barrett & Mary Talbot, *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46 (describing a man’s gradual realization that he was gay after his twin brother came out to him).

324. See *supra* notes 216-222 and accompanying text.

325. Enlisted Administrative Separations, DoD Directive 1332.14, 47 Fed. Reg. 10,162, 10,178 (Mar. 9, 1982), *quoted in* JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 33 (1999).

in the military just as President Truman ended the racial segregation of the armed forces with a stroke of his pen.<sup>326</sup>

In a backlash against this pro-gay promise, Congress in 1993 enacted a statute governing gays in the military that was quickly supplemented by Department of Defense directives.<sup>327</sup> This jointly created policy came to be known as “don’t ask, don’t tell.”<sup>328</sup> The policy abandons the premise that homosexuality per se is a ground for exclusion—the old language of incompatibility has been struck from the policy. Under “don’t ask, don’t tell,” gays are permitted to serve in the military so long as they do not engage in homosexual conduct, such as homosexual sodomy,<sup>329</sup> or demonstrate a “propensity” to engage in such activity.<sup>330</sup> Insofar as one views such homosexual conduct or propensity to be independent of homosexual status per se, the military’s policy can be read as shifting directly from a conversion regime to a covering regime.

Yet the policy also burdens gay self-identifying speech. If a servicemember self-identifies as homosexual or bisexual, this admission triggers a rebuttable presumption that the individual has engaged in homosexual conduct.<sup>331</sup> As a practical matter, this presumption has proved very difficult to rebut.<sup>332</sup> The policy should thus be understood as burdening not only gay conduct but also gay self-identifying speech. In this sense, the public correctly understood the policy when it took it up under the moniker of “don’t ask, don’t tell.”

The shift from the 1981 regulation to the 1993 statute is therefore a shift from a regime requiring conversion to a regime “only” requiring passing. Again, it is important to realize how broad and burdensome this demand to pass can be. Passing under the policy does not simply mean that one refrains from stating the words “I am gay.” One servicemember was

326. HALLEY, *supra* note 325, at 20.

327. *See id.* at 19-20, 23.

328. *See id.* at 15.

329. 10 U.S.C. § 654(b)(1), (3) (1994).

330. *Id.* § 654(b)(1) (mandating exclusion for a homosexual act); *id.* § 654(f)(3)(b) (defining “homosexual act” to include “propensity”).

331. *Id.* § 654(b)(2) (noting that a servicemember will be separated for “stat[ing] that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts”). The Department of Defense Directive implementing the statute states that an officer’s statement that he is gay “creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do [so].” Dep’t of Def., Directive No. 1332.30, encl. 2, pt. C(1)(b), at 2-2 (effective Feb. 5, 1994).

332. *See, e.g.,* Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126, 1140 (9th Cir. 1997) (Reinhardt, J., dissenting) (noting that “the evidence the military has submitted regarding individual efforts to rebut the presumption raises serious doubts that the safety-valve serves any useful purpose whatsoever, notwithstanding the fact that on rare occasions an isolated service member has successfully availed himself of that procedure in order to escape discharge”); Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (noting that, despite rare instances to the contrary, an open homosexual “has only at best a hypothetical chance to escape separation” under the policy), *vacated*, 89 F.3d 1280 (2d Cir. 1996).

separated from service for wondering if he was gay to his therapist and asking her for information about sexual orientation.<sup>333</sup> Instances such as this tell servicemembers in the military a cautionary tale about how even the most speculative or private act will not be protected.

Many nonetheless read the shift as a progress narrative, believing that the new policy is more lenient toward gays than the old one.<sup>334</sup> After all, even if one concedes that homosexuality is an immutable trait, speech, like other forms of conduct, is eminently within individual control. And the moniker of the policy suggests, however misleadingly, that gays will not be discharged so long as they exercise that control.

Nor is the military the only institution that has created political cover by embracing “don’t ask, don’t tell” as its formal policy. In the 1990s, the Boy Scouts of America was also taken to court for excluding gays.<sup>335</sup> This litigation culminated in a Supreme Court ruling that held that state laws prohibiting discrimination on the basis of sexual orientation could not require the Boy Scouts to admit homosexuals.<sup>336</sup> Throughout this litigation, the Boy Scouts of America rhetorically stressed that it excluded only open homosexuals, rather than homosexuals per se—that is, that it required only passing, not conversion.<sup>337</sup> The organization was correct to believe that the distinction would serve it well. One judge defended the policy by noting that although the Boy Scouts of America knew that some of its members must be gay, it had not instituted an “anti-gay witch hunt” but was merely requiring discretion of its members.<sup>338</sup> While the United States Supreme Court did not make the case explicitly turn on the avowed nature of the homosexuality, it did insistently observe that only “avowed homosexuals” were excluded after repeatedly quoting Boy Scouts language that used the same phrase.<sup>339</sup>

In law, as in broader culture, the shift from a conversion regime to a passing regime has made the passing norm available for contestation. Yet in

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333. HALLEY, *supra* note 325, at 52.

334. *See Gays in the Military: Sensible Compromise?*, L.A. TIMES, May 26, 1993, at B6 (describing the prospective “don’t ask, don’t tell” policy as a chance for “palpable” and “real progress” for gays in the military); *see also* HALLEY, *supra* note 325, at 1 (describing the broad uptake of this progress narrative).

335. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

336. *Id.*

337. *Id.* at 652 (quoting the 1993 position statement of the BSA that maintained that the BSA does “not allow for the registration of *avowed* homosexuals as members or as leaders of the BSA”) (emphasis added); *id.* at 674 (Stevens, J., dissenting) (same).

338. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 294 (N.J. Super. Ct. App. Div. 1998) (Landau, J., concurring in part and dissenting in part).

339. *Dale*, 530 U.S. at 652 (noting that “the official position of the Boy Scouts was that *avowed* homosexuals were not to be Scout leaders” (emphasis added)); *id.* at 655-56 (“The presence of an *avowed* homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.” (emphasis added)). For the Court’s quotations of the Boy Scouts of America’s use of the term “avowed,” *see supra* note 337.

law, as in broader culture, these passing norms have proved difficult to combat in practice. This intransigence may be particularly counterintuitive in the legal realm. In constitutional law, a shift from gay conversion to gay passing corresponds to a shift from a status-based equal protection claim to a speech-based First Amendment claim. At a generic level, this shift in doctrinal rubric would seem to enhance the legal prospects of gay plaintiffs. As I have demonstrated elsewhere, the equal protection jurisprudence contains a strong assimilationist bias, and as such may be seen as a difference-disrespecting amendment.<sup>340</sup> In contrast, the First Amendment has historically been understood as a difference-respecting amendment.<sup>341</sup> In shifting from conversion to passing, then, gays would seem to have shifted toward a stronger legal claim.

Unfortunately for gays, however, this has not proved to be the case. The cases concerning gay passing appear to conform to the cultural understanding that passing is a less significant harm than conversion, rather than the doctrinal understanding that speech-based assimilation is more pernicious than status-based assimilation. The “don’t ask, don’t tell” policy has been upheld as constitutional against First Amendment challenges in every federal appellate court to have considered the issue.<sup>342</sup>

In rejecting the First Amendment claims of gay plaintiffs, all of these courts have assumed that conversion regimes are more pernicious than passing regimes, which are in turn more pernicious than covering regimes. The courts are thus at pains not to address any nexus that might exist between passing and conversion—that is, between homosexual self-identification and homosexual status. Rather, they emphasize the connection between passing and covering—that is, between homosexual self-identification and homosexual conduct. Thus, the primary ground on which the courts have upheld the policy against First Amendment challenges is that the policy does not formally burden speech qua speech. Under the statute, the courts maintain, speech is merely evidence of a propensity to engage in proscribed conduct, and it is this propensity, not the speech itself, that the policy targets.<sup>343</sup>

The courts are also careful to point out, however, that even if “don’t ask, don’t tell” *directly* burdened speech, its constitutionality could still be

340. See Yoshino, *Assimilationist Bias*, *supra* note 2.

341. See David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 326 (1994) (arguing that First Amendment values further “the mutually reinforcing ideals of individual liberty and pluralistic tolerance”).

342. See *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

343. See, e.g., *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996); *Thomasson*, 80 F.3d at 931-33.

assured. This is in part because of the deference that the judiciary must give to military policies.<sup>344</sup> Yet one court has also stressed that even without this military deference, public employers can “restrict certain types of speech to promote the effective performance of [their] function[s].”<sup>345</sup> The controlling test, established in *Pickering v. Board of Education*,<sup>346</sup> states that the courts must seek “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>347</sup> The *Thomasson* court suggested that even absent military deference, coming-out speech may be trumped by the interests of the state in performing its military function.<sup>348</sup>

No Supreme Court majority has ever pronounced on whether coming-out speech is protected under the First Amendment. Yet the highest existing authority directly on this point supports the contention that it is not, even outside the military context. In *Rowland v. Mad River Local School District*,<sup>349</sup> the Sixth Circuit confronted a claim by a guidance counselor who had been terminated for stating that she was bisexual.<sup>350</sup> Unlike the “don’t ask, don’t tell” courts, the *Rowland* court understood the self-identifying speech qua speech to be the ground for dismissal.<sup>351</sup> Yet the Sixth Circuit nonetheless upheld the termination, noting that under the *Pickering* test, an utterance had to touch on a matter of public concern to be protected.<sup>352</sup> *Rowland*’s bisexuality, it maintained, was not such an utterance, as it was “clear that she was speaking only in her personal interest.”<sup>353</sup> The court rejected the argument that an utterance left the realm of the private when it was widely described and debated. Rather, it suggested that the private is an a priori normative concept that describes matters that *ought* to be kept private.<sup>354</sup>

In dissenting from a denial of certiorari in *Rowland*, Justice Brennan, joined by Justice Marshall, made the analytical move so scrupulously avoided by the *Rowland* majority and the “don’t ask, don’t tell”

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344. See, e.g., *Able*, 155 F.3d at 632; *Thomasson*, 80 F.3d at 925. Both of these cases rely on *Rostker v. Goldberg*, 453 U.S. 57 (1981), which held that “judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” *Id.* at 70.

345. *Thomasson*, 80 F.3d at 933.

346. 391 U.S. 563 (1968).

347. *Id.* at 568.

348. *Thomasson*, 80 F.3d at 933-34.

349. 730 F.2d 444 (6th Cir. 1984).

350. *Id.* at 446-47.

351. See *id.* at 449.

352. *Id.*

353. *Id.*

354. See *id.*

majorities.<sup>355</sup> Justice Brennan drew a nexus between speech and status, noting that Rowland's "'speech' perhaps is better evaluated as no more than a natural consequence of her sexual orientation."<sup>356</sup> Brennan went on to observe that "[u]nder this view, petitioner's First Amendment and equal protection claims may be seen to converge, because it is realistically impossible to separate her spoken statements from her status."<sup>357</sup> Brennan's statement recognized that the doctrinal separation of speech from status obscures the interrelationship between the two terms. In doing so, it recognized that passing demands could be tantamount to conversion demands.

This association, however, is not the one embodied within controlling doctrine. This is the reason that conversion regimes that reframe themselves as passing regimes have been so successful in withstanding constitutional challenges. The military policy has clearly rendered itself more constitutionally secure by shifting from a rhetoric of conversion to a rhetoric of passing. Individuals who might have resisted "[h]omosexuality is incompatible with military service" are more likely to acquiesce to "don't ask, don't tell."<sup>358</sup>

This observation should trigger an inquiry as to whether this shift conforms to a preservation-through-transformation account. Has the military been able to preserve a particular goal by transforming its justificatory rhetoric? As the popular debate about "don't ask, don't tell" demonstrated, the military's primary goal is to have a military in which no homosexuals are acknowledged. The main rationale adduced by the military for its policy was "unit cohesion"—the danger that one avowed homosexual within a unit would cause dissension in the ranks.<sup>359</sup> What is threatening to the military, then, is not the knowledge that homosexuals exist in its ranks. Homosexuals have always, and will always, serve in the military. The threat, as D.A. Miller has articulated in a different context, is not knowledge, but rather acknowledgement of knowledge.<sup>360</sup>

355. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of certiorari).

356. *Id.* at 1016 n.11.

357. *Id.*

358. HALLEY, *supra* note 325, at 1 (noting the perception that the new policy is more lenient because it burdens conduct rather than status).

359. See Yoshino, *Assimilationist Bias*, *supra* note 2, at 553 n.305 (quoting *Policy Concerning Homosexuality in the Armed Forces: Hearings on S. 1298 Before the S. Comm. on Armed Servs.*, 103d Cong. 595-96 (1995) (statement of H. Norman Schwarzkopf, U.S. General) ("The introduction of an open homosexual into a small unit immediately polarizes that unit . . .")); see also *id.* (quoting *Policy Concerning Homosexuality in the Armed Forces: Hearings on S. 1298 Before the S. Comm. on Armed Servs.*, 103d Cong. 821 (1995) (statement of John P. Otjen, U.S. General) ("[B]ased on my experience, [a] statement [of homosexual orientation] alone will cause disruption within the unit.")).

360. D.A. MILLER, *THE NOVEL AND THE POLICE* 206 (1988).



This is a threat that can be met through a conversion regime that says that “homosexuality is incompatible with military service.” Yet it can just as easily be met by a passing regime that says that avowed homosexuality is incompatible with military service. Under both policies, a homosexual who is silent about his orientation will be permitted to serve, while a homosexual who comes out will be expelled. What the military has done in adopting “don’t ask, don’t tell” is not to change its goal, but to draft a policy more narrowly tailored to that goal.

Read in this way, the shift spawns the question of whether the new regime is any better for gays than the old one. Janet Halley answers that the new policy “is *much, much worse* than its predecessor.”<sup>361</sup> She notes that speech creates a rebuttable presumption not of conduct but of a propensity for conduct. Because the presumption is difficult to rebut, and because propensity is tantamount to status, these burdens on speech are effectively a burden on status. This makes the new policy capable of accomplishing the same goals as the old one. But in what sense is “don’t ask, don’t tell” actually *worse* than its predecessor? Halley’s response resonates with a preservation-through-transformation account—she maintains that the new policy is worse because it looks better.<sup>362</sup> The old policy “was as bad as it looked,” and came under fire on that ground.<sup>363</sup> The new policy accomplishes the same end under a much more benign guise. Swaddled in a progress narrative, the new policy becomes less available for contestation.

Halley’s claim that the new policy is actually worse than the old one may seem incredible. Yet the numbers support her claim. Recent reports indicate that exclusions of homosexuals under the new policy far exceed exclusions under the old one.<sup>364</sup> We must thus take seriously the possibility that the shift from a conversion to a passing regime in the military is an instance of preservation-through-transformation, in which anti-gay animus has remained in place not only in spite of, but because of, a change in justificatory rhetoric.

What normative framework am I then espousing? I believe that a society that has committed itself to opposing conversion norms for sexual orientation has also thereby committed itself to opposing passing norms. This is because I believe that to oppose conversion norms is to accept the underlying status as unproblematic. But if that underlying status is unproblematic, then why does identifying it make it problematic? As an alternative but related argument, I also believe that acts of coming out can be sufficiently performative that one cannot burden acts of self-identification without simultaneously burdening the underlying status. The

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361. HALLEY, *supra* note 325, at 1.

362. *See id.* at 2.

363. *Id.*

364. *See* sources cited *supra* note 17.

underlying identity does not exist inertly beneath the speech that describes it, but is partially fashioned by that speech. For both reasons, so long as there is a “right to be” a particular kind of person, I believe it follows that there is a “right to say what one is.” Thus when the military suggests that it is not against homosexuality but only against avowed homosexuality, I intuit an inconsistency that calls the first part of its claim into question.

The tendency of courts to disaggregate status from speech—analyzing the former under an equal protection rubric and the latter under a speech rubric—occludes the nexus that Justice Brennan described in the *Rowland* case. This is true even for courts that reach pro-gay results on such claims. In *Weaver v. Nebo School District*,<sup>365</sup> a federal district court in Utah protected a gay teacher’s status and speech against encroachments by her school board. Wendy Weaver was a high school psychology and physical education teacher who also served as the school’s volleyball coach.<sup>366</sup> In 1997, she responded in the affirmative when asked by a member of the volleyball team if she was gay.<sup>367</sup> This revelation caused the school board to write to Weaver, telling her that she would risk termination if she made statements regarding her “‘homosexual orientation or lifestyle’” to “‘students, staff members, or parents of students.’”<sup>368</sup> It also caused the principal of the school to terminate her employment as a volleyball coach.<sup>369</sup> Weaver challenged the restrictions on her speech on First Amendment grounds and her termination on equal protection grounds.<sup>370</sup>

The court ruled in her favor on both claims. Like the *Rowland* court, it analyzed the speech claim through the balancing framework of the *Pickering* test.<sup>371</sup> Unlike the *Rowland* court, however, the *Weaver* court deemed Weaver’s coming-out speech to be public in nature.<sup>372</sup> It then stated that her interest in making that speech outweighed the school board’s interest in suppressing it, reasoning that the speech had not caused a “‘material and substantial interference or disruption’” in the operation of the school.<sup>373</sup> It therefore found that the school district’s letters had

365. 29 F. Supp. 2d 1279 (D. Utah 1998).

366. *Id.* at 1280.

367. *Id.* at 1281.

368. *Id.* at 1281-82 (quoting Letter from Larry Kimball & Almon Mosher to Wendy Weaver (July 21, 1997)). A subsequent letter clarified that the restrictions on her communications applied only while Weaver was “‘acting within the course and scope of [her] duties as a teacher for the District.’” *Id.* at 1282 (quoting Letter from Larry Kimball & Almon Mosher to Wendy Weaver (Oct. 29, 1997)). Nonetheless, the second letter still “‘strongly encourage[d] [Weaver] to avoid discussions of the foregoing matters at any time with students.’” *Id.*

369. *Id.* at 1281.

370. *Id.* at 1282.

371. *Id.* at 1283-84.

372. *Id.* at 1284.

373. *Id.* at 1285 (misquoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

impermissibly trenched on Weaver's First Amendment rights.<sup>374</sup> Turning to the equal protection claim, the court found that Weaver's dismissal as a volleyball coach violated her equal protection rights. The court observed that even under rational basis review, state action against an individual could not be based on animus alone.<sup>375</sup> It then found that the school district had terminated Weaver from her coaching position simply because of such animus.<sup>376</sup>

Even the *Weaver* court's pro-gay decision on both counts, however, obscures a crucial dimension of how gay speech might relate to gay status. With the exception of a short section of its opinion,<sup>377</sup> the *Weaver* court analyzed the speech claim and the equal protection claim independently. While it took notice of Brennan's opinion in the *Rowland* case,<sup>378</sup> the *Weaver* court did not take up his invitation to describe how speech and status might be interrelated. It is hard to fault the court for not doing so. The doctrinal rubrics are not conducive to identifying that relationship, and such an analysis would not have altered the outcome of this particular case. It could, however, make a difference in other cases where courts seek to protect gay status but not gay speech.

More recently, a justice on a state supreme court explicitly acknowledged the nexus between status and speech. In his concurrence to *Dale v. Boy Scouts of America*,<sup>379</sup> Justice Handler observed the "speciousness of drawing a distinction between discrimination grounded in expression versus status" where the speech concerned self-identification.<sup>380</sup> Drawing on Brennan's analysis in *Rowland*, the concurrence observed that speech and status were sufficiently intertwined to make speech discrimination tantamount to status discrimination.<sup>381</sup> Indeed, the concurrence specifically noted the performative nature of self-identifying speech, drawing on a variety of scholars who have made the point that speech may in part create the thing it names, as opposed to simply describing it.<sup>382</sup>

Such glimmers of sophistication, however, are currently the exceptions that prove the rule. In law, as in culture, passing norms have been retired much more slowly than conversion norms. The relative hardness of passing norms doubtless owes much to the belief that passing is a milder form of

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374. *Id.* at 1286.

375. *Id.* at 1287-88.

376. *Id.* at 1288-89.

377. *Id.* at 1289-90.

378. *Id.* at 1284.

379. 734 A.2d 1196 (N.J. 1999), *rev'd*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

380. *Id.* at 1238 (Handler, J., concurring).

381. *Id.*

382. *Id.* (citing Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 468 (1998); and Yoshino, *Assimilationist Bias*, *supra* note 2, at 550).

assimilation than conversion. The belief appears to be well grounded—just as electroshock therapy may seem more of a harm than the requirement that one pass, so too does the military’s old categorical exclusion seem more of a harm than “don’t ask, don’t tell.” At the same time, however, there are undertheorized continuities between conversion and passing that deserve greater attention. Sometimes self-identifying speech can constitute one’s identity.

How much of a change would this insight require? At first glance, the belief that there is a “right to say what one is” seems to require only a minor adjustment to conventional jurisprudence. Self-identification, after all, is not a broad category of acts. At the same time, however, the observation that an act such as self-identification might constitute identity opens the door to a much more radical challenge to existing jurisprudence. If one concedes that self-identification constitutes identity, what other acts might also constitute identity? It is to this question that I now turn.

### C. *Gay Covering*

Homophobia has been a profound challenge to me, particularly as it manifested itself in my relationships with my two children, Julie and Steve. I came out as a lesbian twelve years ago, after leaving a white middle-class marriage. Together with Julie and Steve, I lived in a Long Island suburb, and became a “known” lesbian after appearing on a television program about lesbian mothers. Because of this exposure, the children experienced varying degrees of homophobia: my lover’s fifteen-year-old daughter was physically roughed up, accompanied by taunts of *lezzie* and *queer*; Steve lost a friend after his friend found out. Mostly the homophobia played itself out in subtle attitudinal ways. During this time, I did not waver in asserting my right to be out.

Six years ago, after breaking up with my lover, I planned a move to Brooklyn. Julie and Steve, then fourteen and eleven, were frightened at the prospect of this move. I tuned in to the fact that they had been through some very rough years which included the divorce, my coming out crisis, and adjusting to living with my lover and her two children. My heart went out to them, and I decided to make a compromise. I told them I would keep a low profile as a lesbian so that they could make new friends without fear of exposure to homophobia. Since they felt me caring about their feelings, this compromise served to rebuild trust and was a kind of healing between us. I agreed to restrict lesbian posters to my bedroom. I was discreet in the neighborhood.

Despite all of this, in the four years we had been here, Julie and Steve still chose to walk ten paces behind me on the street. They rarely brought friends home. Julie could not look me in the eye at school plays and concerts. They never told any friend, no matter how close, that they had a lesbian mother. Rather than easing up as they became connected in the city, they seemed more rigid in their homophobia. They slipped into the expectation that I would remain closeted in their presence, although they never fully trusted that. This provided a false level of sameness for them and increased a painful alienation between us. I ached from their denial of me and my friends. . . .

One evening two years ago, I could no longer bear my complicity in protecting Julie and Steve's insecurities, their fear of difference. I took a stand. I told Julie I would be happy to attend her high school graduation the following week, but if she wanted me there, I would be wearing a lesbian mother button. During the next few days, Julie, Steve and I had many painful conversations.

. . . .

[Julie engaged her courage, and invited me, but] Steve had a more difficult time. As Julie and I were leaving for her graduation, he said, "I'm going to kill myself." It is excruciating to hear one's child make this statement. I did not think he was literally suicidal at the time, but something in him had to die—some illusion of sameness, some illusion of control. He was so threatened by my refusal to be invisible that he chose to live with his father, a move he had wanted previously but did not know how to actualize. Now he could present his father with a good reason: his mother was flaunting her lesbianism. We each felt separate agonies.<sup>383</sup>

The demand to cover appears to be the mildest assimilationist demand. Covering permits an individual not only to be gay, but also to say that she is gay. All covering requires is that the individual modulate her conduct to make her difference easy for those around her to disattend her *known* stigmatized trait. Covering can thus be superficially distinguished from passing—as Goffman put it, passing is about "visibility," while covering is about "obtrusiveness."<sup>384</sup>

Yet again, as the account above demonstrates, covering can also be a severe burden, not least because it can sometimes blur into passing. The mother in the account above—Baylah Wolfe—is not formally passing to

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383. Baylah Wolfe, *Homophobia at Home*, in SAME-SEX MARRIAGE: PRO AND CON 258, 258-60 (Andrew Sullivan ed., 1997).

384. GOFFMAN, *supra* note 3, at 102.

her children. The actions she takes to mute her orientation are not attempts to recant her lesbianism, but rather attempts to dislodge it from the center of attention. At the same time, by keeping her lesbian posters in her bedroom, by being “discreet” in the neighborhood, and by preserving a “low profile,” Wolfe is explicitly making a compromise about her identity. Moreover, while these actions constitute covering vis-à-vis her children, they constitute passing toward strangers. The relational nature of assimilation is again apparent here, as the same act may be either passing or covering depending on the knowledge or literacy of the audience. As Goffman observed, “what will conceal a stigma from unknowing persons may also ease matters for those in the know.”<sup>385</sup>

At the turn of the millennium, we can see a shift in the cultural and legal realms from gay conversion and passing norms toward gay covering norms. In some sectors of American culture, it is now permissible both to be gay and to say that one is gay, as long as one does not flaunt one’s homosexuality. Curiously, the legal realm appears in some cases to have shifted toward covering before the cultural realm. In both contexts, however, we can again tell a progress narrative that characterizes this shift as a salutary one for gays, with the same qualifications.

### 1. *Cultural Contexts*

In describing the shift toward covering norms in cultural contexts, I focus on accounts internal to the gay community. This is because cultural covering discourse is relatively new, and thus much more robustly debated within the community most affected by it. Increasingly, debates about orientation within the gay community pulsate around covering rather than around conversion or passing. The community seems to have reached consensus about conversion (e.g., norms resisting conversion therapy) and passing (e.g., norms favoring coming out but permitting individuals to do it on their own terms). It remains riven, however, by the issue of covering—that is, how much individuals should assimilate into the mainstream *after* they have come out as gay. The main questions currently debated within the gay community are questions about covering: Should gays seek the right to marry?<sup>386</sup> Should gays repudiate other “deviant” groups such as pedophiles<sup>387</sup> or polygamists,<sup>388</sup> or make common cause with them? Should

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385. *Id.*

386. *See, e.g.,* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996) (making the case that gays should seek to marry); *SAME-SEX MARRIAGE: PRO AND CON*, *supra* note 383 (collecting works on both sides of the debate).

387. *See, e.g.,* Duncan Osborne, *The Trouble with NAMBLA*, *ADVOCATE*, Dec. 14, 1993, at 40 (describing the schism between gay rights activists and pedophile activists); Joyce Price,

gays reject stereotypical images of homosexuality, or appropriate these images as part of their culture?<sup>389</sup>

If the debate about conversion divides ex-gays from gays, and the debate about passing divides closeted gays from out gays, the debate about covering divides normals from “queers.” (I place the term “queer” in quotation marks for reasons I describe below.) By normals, I mean a group of people who are openly gay, but who seek to cover their sexual orientations, emphasizing their commonality with straights. These individuals generally believe that the only thing that distinguishes them from straights is their gender of object choice, which they hold to be an irrelevant distinction. I think of this group as including individuals like Bruce Bawer, Jonathan Rauch, Gabriel Rotello, Andrew Sullivan, and Paul Varnell.<sup>390</sup> By “queers,” I mean a group of people who do not seek to cover their orientations, choosing instead to embrace their difference from the mainstream. I think of this group as including individuals like Judith Butler, Janet Halley, Eve Sedgwick, and Michael Warner.<sup>391</sup>

My use of the word “queer” to denominate “gays who refuse to cover” will be controversial. Many queers would repudiate any association with the word “gay,” holding it to represent precisely the essentialization of sexual identity they resist. In popular parlance, however, I believe that the perception that “queers” are gays who refuse to cover is common, not least because normals have cast them in these terms.<sup>392</sup> To avoid coining a neologism, I use the term in this way for the narrow purposes of this discussion. When I use it in this way, however, I place the term in quotation marks.

That said, what is the difference between normals and “queers”? One answer begins by noting what the two groups have in common, which is a great deal. Both groups share a resistance to conversion to being straight, as well as a resistance to passing as straight. Indeed, insofar as conversion and

*Pedophiles Resisting Expulsion from Gay Umbrella Organization*, WASH. TIMES, Nov. 27, 1993, at A4 (similar).

388. Compare David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997) (questioning the schism between gay rights activism and polyamorous activism), with Andrew Sullivan, *Three's a Crowd*, in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 383, at 278 (arguing for a schism between gay rights activism and polyamorous activism).

389. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999) (arguing for an embrace of queer values).

390. See, e.g., BAWER, *supra* note 290; BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY (Bruce Bawer ed., 1996) (including essays by Jonathan Rauch and Paul Varnell); GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* (1998); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995).

391. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2d ed. 1999); HALLEY, *supra* note 325; SEDGWICK, *supra* note 33; WARNER, *supra* note 389.

392. See generally BEYOND QUEER, *supra* note 390 (often describing “queers” as gays who flaunt their sexual identity).

passing are concerned, normals are not necessarily more assimilationist than “queers.” Signorile, whose aspirations for gay culture are characterized by Warner as those of a normal,<sup>393</sup> is more vehemently against passing than most “queers,” as his reputation as the “pope of outing”<sup>394</sup> might suggest. Where the two groups most obviously diverge is around the issue of covering—the degree to which open homosexuals should make their orientations easy for others to disattend.

Normals cover, “queers” do not. Normals seek to minimize the difference that orientation makes at both the positive and normative levels. At the descriptive level, normals believe that gays are actually much more like straights than media representations might suggest. Many of them decry the fact that a small minority of gays—“queers”—appear to speak for the entire community in these representations. Thus Bruce Bawer inveighs against the “men . . . in Speedos” and “[b]are-chested women” in gay pride parades, noting that these visible outliers “prop up misperceptions that undergird continued inequality.”<sup>395</sup> Moreover, to the extent that some gays emphasize their difference from the mainstream beyond being out, normals want them to stop. The niceness of this anti-passing but pro-covering stance is captured by James Collard’s removal of the words “gay and lesbian” from the cover of *Out* when he assumed leadership of that magazine in 1998.<sup>396</sup> The magazine does not pass—its very title *Out* counterposes itself against the closet, the primary trope of passing. But by removing the words “gay and lesbian,” the magazine deemphasizes the homosexuality it has declared. On its cover, it covers.

Curiously, the magazine’s strategy of abstracting upward to being “out” to de-gay itself is not dissimilar from the queer strategy of abstracting upward to being “queer,”<sup>397</sup> suggesting that “queers” can be accused of covering in their self-description. But this similarity is superficial, for “queers” generally choose to emphasize their difference from the mainstream. Through that emphasis, “queers” not only seek to maintain the integrity of their group, but also to transform existing social institutions. In Warner’s words, “Because the logic of the sexual order is so deeply embedded by now in an indescribably wide range of social institutions, and is embedded in the most standard accounts of the world, queer struggles aim not just at toleration or equal status but at challenging those institutions and accounts.”<sup>398</sup> The old slogan “We’re here, we’re

393. WARNER, *supra* note 389, at 188.

394. GROSS, *supra* note 9, at 283.

395. Bruce Bawer, *Truth in Advertising*, in *BEYOND QUEER*, *supra* note 390, at 43, 43.

396. WARNER, *supra* note 389, at 61.

397. See BERSANI, *supra* note 297, at 71. Bersani observes that the inclusiveness of “queer” may also have a dilutive effect, such that gays will once again become invisible within a term that includes so many others. *Id.*

398. Warner, *Introduction* to *FEAR OF A QUEER PLANET*, *supra* note 163, at vii, xiii.



queer, get used to it” suggests these goals not only by giving difference a local habitation and a name (“we’re here, we’re queer”) but also by suggesting that it is non-“queers,” rather than “queers,” who must change to accommodate that difference (“get used to it”).

The different viewpoints held by normals and “queers” can be seen in the critiques that each group levels at the other’s self-description. Normals bemoan the use of the word “queer,” which has historically been a term of insult directed at homosexuals.<sup>399</sup> They acknowledge that “queers” self-consciously aim to invert this historical signification, seeking to “defuse [the word] and rob homophobes of their power to hurt.”<sup>400</sup> Yet normals like Bawer feel that the word cannot be unmoored from its inaugural connotations, any more than the words “cunt,” “kike,” or “gook” can be forced to resignify.<sup>401</sup>

Of course, whether a sign changes its meaning depends on the contexts in which it occurs, making it impossible to predict how a particular sign will grow. Many signs have retained their toxicity despite attempts to sever them from their pejorative roots. Thus, the term “nigger” has generally retained its power to wound despite its resignification in narrower subcultures.<sup>402</sup> But counterexamples exist, and “queers” have one close to home in the pink triangle. The triangle, which originally pointed upward as a symbol of homosexual shame in the Nazi death camps, has now literally and figuratively been flipped, pointing downward as a symbol of gay pride.<sup>403</sup> Indeed, the symbol is arguably more recognizable today as a positive rather than a negative symbol, as many individuals know that it is a symbol of gay pride without knowing that it was used in the Holocaust.<sup>404</sup> It seems difficult to say in the abstract whether the word “queer” will be more like the pink triangle or more like the word “nigger” in its relationship to its historical meanings.

Moreover, if the criticism is that words cannot escape their roots, it can be leveled at normals as well. For “normal,” too, is a word with a history, and a deeply anti-gay one at that. “Normal” has historically served as the warrant for the regulation of homosexuals—as in the “return to normalcy”

399. Bawer, *Introduction* to BEYOND QUEER, *supra* note 390, at ix, xi.

400. *Id.*

401. *Id.* (quoting John Lauritsen).

402. See, e.g., James E. Reynolds, *Talking About That Word: A Black Author Examines the Use, Current and Past, of Six Letters*, SUNDAY GAZETTE MAIL, May 20, 2001, at P1F (describing the continuing “corrosive power” of the word “nigger” to demean blacks and their communities); E.R. Shipp, Editorial, *There’s No Excuse for N Word, Now or Ever*, DAILY NEWS, Mar. 11, 2001, at 39 (arguing that the word “nigger” is offensive, regardless of the speaker’s intent); see also 10 THE OXFORD ENGLISH DICTIONARY, *supra* note 37, at 402 (“Except in Black English vernacular, where it remains common, [the term ‘nigger’ is] now virtually restricted to contexts of deliberate and contemptuous ethnic abuse.”).

403. Yoshino, *Suspect Symbols*, *supra* note 2, at 1787.

404. *Id.*

after World War II, which licensed a “supermania” of homophobic persecution.<sup>405</sup> In seeking to have gayness included within the rubric of the normal, normals are themselves engaged in a project of resignification that would be futile if signs could not resignify. Normals distinguish themselves from “queers” not in their resistance to the project of resignification, but in the kind of resignification they seek. Normals seek to expand a historically positive word to include homosexuality, while “queers” seek to alter the connotation of a historically negative word.

These nomenclatural debates reflect deeper substantive ones, as normals seek to expand historically positive values to include homosexuals, while “queers” seek to make historically negative values into positive ones. Put differently, normals seek to change gays to accommodate the mainstream, while “queers” seek to change the mainstream to accommodate gays. The main tool of normals in this fight is covering—the attempt to demonstrate that gays are no different from straights except in their gender of object choice. Conversely, the main tool of “queers” is the refusal to cover—the attempt to make historical conceptions of deviance resignify as “benign sexual variation.”<sup>406</sup>

The ways in which an individual can cover are so vertiginously plural that they are difficult to catalogue.<sup>407</sup> In an exemplary rather than an exhaustive spirit, I enumerate ten axes along which gays can cover:

- *Abstention from Sodomy vs. Engagement in Sodomy.* Perhaps the most fundamental way in which gays can cover is by refusing to engage in same-sex sodomy, by which I mean—unless I indicate otherwise—any sexual activity between individuals of the same sex. Indeed, sodomy may seem so constitutive of gay identity that it may seem peculiar to characterize abstention from sodomy as covering rather than as conversion. I make much of this peculiarity later.<sup>408</sup> For current purposes, however, sodomy can plausibly be characterized as covering by observing that many believe that one can be gay and self-identify as gay without engaging in sodomy. For

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405. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-61*, 24 FLA. ST. U. L. REV. 703, 733 (1997) (describing the “return to normalcy” as the predicate for a “supermania” of persecution of gays by both federal and state governments); see also LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 119 (1991) (maintaining that the return to normalcy marked a shift from relative tolerance of lesbians to renewed treatment of homosexuality as a pathology).

406. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 278 (Carole S. Vance ed., 1984) (coining the phrase).

407. Because of the audience-dependent nature of assimilation, many of the ways in which gays cover are also ways in which they pass. See *supra* notes 5-6 and accompanying text.

408. See *infra* notes 561-566 and accompanying text.

example, the military contends that the “don’t ask, don’t tell” policy does not burden who gays are or how they self-identify, but what they do.<sup>409</sup> This policy suggests that one can be openly gay without engaging in homosexual sodomy, making sodomy not about conversion or passing, but about covering.

- *Private Displays of Same-Sex Affection vs. Public Displays.* Gays can cover by avoiding public displays of same-sex affection. General norms about sexuality suggest that some sexual acts should occur only in private. Thus, public sexual intercourse is not a “normal” form of sex for either straights or gays. At the same time, it would be rash to think that all forms of acceptable sexual expression are private. Handholding, touching, kissing, etc., are public forms of expression that cite back to, and are funded by, acts that only occur in private. When it comes to these expressions, a clear distinction is made based on the orientations of the individuals who make them. It is not only acceptable for straight couples to engage in these forms of expression, but encouraged or perhaps even expected—the contemporary straight couple who never expresses physical affection in public may, over time, raise questions about the reality or health of their connection. In stark contrast, it is generally unacceptable for gay couples to engage in such forms of expression. Gays who engage in the same activities as straights are perceived to be flaunting their sexuality in an indecent way. This perception explains why even openly gay individuals may refrain from engaging in such displays of affection.

The fact that out gays cover in this way suggests that audiences who are not offended by the statement “I am gay” can still be offended by a tangible demonstration of that fact. The distinction may rest on how starkly each expression cites back to the primal scene of gay intercourse. As a statement made by and about an individual, “I am gay” does not necessarily invoke the transitive act of same-sex intercourse. As a gesture between two persons, handholding may cite that act more directly.

- *Gender Typical vs. Gender Atypical.* Gays can cover by suggesting that their gender of object choice is the only way in which they are gender atypical. As articulated in the discussion

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409. See HALLEY, *supra* note 325, at 1.

of passing, homosexuality is often viewed to be invisible. Yet this is not quite true, as it has long been the case that many individuals believe—rightly or wrongly—that they can intuit who is homosexual. Thus, Foucault describes the public perception, dating from the late nineteenth century, that the sexuality of the homosexual was “written immodestly on his face and body . . . a secret that always gave itself away.”<sup>410</sup> Orientation, then, may not be as invisible as is commonly thought.

One of the dominant stamps through which homosexuality becomes imaginatively legible is gender atypicality. Effeminate men and masculine women are often assumed to be homosexual, suggesting that gender and orientation are bundled in popular consciousness—to be gender atypical is to be orientation atypical and vice versa.<sup>411</sup> One foundational trope to which such bundling can be traced is that of the “invert”—the woman trapped inside a man’s body or vice versa—who sought to express an affect and desire inconsistent with the sex of the body.<sup>412</sup> Whatever the source, there is clearly an enduring conventional wisdom that gender atypicality is a marker for homosexuality.

Thus, gays who seek to downplay their orientation can often effectively do so by conforming to stereotypes about their gender. This is the force of the “straight-acting” homosexual—the butch gay man or the lipstick lesbian. The term “straight-acting” itself suggests how orientation and gender get conflated. To be straight-acting is not to engage in cross-sex sexuality, or even to pretend that one does. Rather, it is to engage in gender performances that are deemed appropriate to one’s sex.

An interesting wrinkle is that not all performances of gender associated with one’s sex will constitute covering on the basis of orientation. Hypermasculine performance in men—as in the couture of the leather daddy or the muscles of the Chelsea queen—is likely to code not as straight, but as gay. As Bersani has noted, the gay gym body’s “theatricalized replication” of the macho straight male body “negates the real

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410. 1 FOUCAULT, *supra* note 41, at 43.

411. 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, 51-55 (1995).

412. See 2 HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX: SEXUAL INVERSION* 12 (London, Univ. Press 1897) (describing the adoption of feminine behaviors and affect by inverted men).

to which it purportedly adheres.”<sup>413</sup> In other words, there may be nothing more effeminate than a hypermasculine man, and, perhaps, nothing more gay. This suggests that gender typicality is not simply masculine for men and feminine for women, but rather a subset of masculine for men and a subset of feminine for women.

- *Straight-Culture Focused vs. Gay-Culture Focused.* Gays can cover by being straight-culture focused. There are aspects of culture, including but not limited to gender-atypical activity, associated with being a gay man or being a lesbian.<sup>414</sup> There are gay fashions (e.g., boxer briefs, Carhharts, goatees); gay music (e.g., ABBA, difranco, lang, Madonna); gay divas (e.g., Davis, Dietrich, Garbo, Garland); gay authors (e.g., Barnes, Bishop, H.D., Proust, Wilde); gay magazines (e.g., *Martha Stewart Living*, *On Our Backs*, *Out*); gay diseases (e.g., hepatitis, HIV); gay drugs (e.g., K, poppers); gay ghettos (e.g., Chelsea, Provincetown); gay films (e.g., *But I'm a Cheerleader*, *Go Fish*); gay TV shows (e.g., *Ellen*, *Will and Grace*); gay sports (golf, gymnastics, rugby); gay operas (all of them?). Daniel Harris has suggested that one of the reasons why such cultures developed was to provide gays with shibboleths through which they could identify each other.<sup>415</sup> Regardless of the validity of this claim, a classic move of gay *disidentification* is to refrain from “dropping hairpins,”<sup>416</sup> that is, to minimize one’s participation in or reference to such cultural icons.

413. BERSANI, *supra* note 297, at 18.

414. For stylistic purposes, I do not disaggregate my examples by gender, although they are of course gendered. It bears note that gay male culture has received far greater uptake than lesbian culture. *See generally* CASTLE, *supra* note 155 (decrying this differential visibility).

415. DANIEL HARRIS, *THE RISE AND FALL OF GAY CULTURE* 16 (1997).

Hollywood suffused the gay sensibility during the first half of the twentieth century, not only because of its usefulness as “found” propaganda, but also because of the power of the new medium to build group solidarity. Given that homosexuals are an invisible minority whose members are not united by obvious physical characteristics and who are indeed often unrecognizable even to each other, they had to invent some method of identifying themselves as a group or risk remaining in the politically crippling state of fragmentation that for decades kept them from organizing to protect their basic civil rights. Blacks are united by their skin color, Chicanos by their language and place of origin, and the disabled by their infirmities. Homosexuals, however, are bound together by something less tangible: by their tastes, their sensibility, by the books they read, the clothes they wear, and the movies they watch.

*Id.*

416. *See* ARMISTEAD MAUPIN, *SURE OF YOU* 109 (1989) (depicting, in fiction, a conversation in which one gay man asks another “Did he drop any hairpins?” to allude to the practice through which gay men indicate their homosexuality to each other).

- *Nonactivist vs. Activist.* Gays can cover by not engaging in gay activism. For gay lawyers, the choice might be framed as one between being a “homosexual professional” (e.g., a tax attorney or tax professor who simply “happens to be gay”) and being a “professional homosexual” (e.g., a lawyer for Lambda Legal Defense or a legal academic who writes primarily on gay issues). Activism, of course, can take many forms beyond one’s profession, including extracurricular involvement in gay rights organizations (many of which, like the Human Rights Campaign, themselves pass or cover to permit their members to pass or cover); attendance at political events like gay symposia, parades, or rallies; or simple public signaling of one’s identity, such as wearing a pink triangle or hoisting a rainbow flag.
- *Prioritizing Other Identities vs. Prioritizing Gay Identity.* Gays can cover by prioritizing their other identities over their gay identity. Because human beings have many identities, they can cover a particular identity with the others. The impetus to cover a stigmatized identity with unstigmatized identities will be particularly strong. This explains why white men who “happen to be” gay so greatly outnumber gays who “happen to be” white or male.
- *Allied with Straights vs. Allied with Other Gays.* Gays can cover by associating mostly or exclusively with straights, keeping their time in the gay community to a minimum. Conversely, gays can flaunt their orientations by associating primarily or exclusively with gays—by living in the gay ghettos of major cities, choosing gay-related occupations, or spending most of their discretionary time with other gays.
- *Allied with the Mainstream vs. Allied with Other “Deviants.”* Gays can cover by rejecting other “deviant” groups like polygamists or pedophiles. To take the instance of polygamists, it is something of a puzzle why the “cross-sex” requirement of contemporary marriage is so much more heavily contested today than the “twoness” requirement of marriage—a discrepancy surely more easily explained by the demographics of the interested parties than by any transcendental truth about the institution itself. Yet in his activism for same-sex marriage, normal Andrew Sullivan categorically dissociates it from polygamous marriage in such transcendental terms. He stonewalls: “Almost everyone seems to accept, even if they

find homosexuality morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse.”<sup>417</sup> “Queers,” on the other hand, have approached this issue with more bemusement. David Chambers concludes an essay describing the parallels between same-sex and polygamous marriage by stating that “we who advocate for changes in the laws of marriage to open it up to gay people need to work to become as understanding of the needs of others as we are asking others to be of us.”<sup>418</sup>

- *Monogamous vs. Promiscuous.* Gays can cover by being or by appearing to be monogamous. Gay men are commonly viewed to be more promiscuous than their heterosexual counterparts. Again, normals seek to dispel that stereotype by hiding or changing the underlying practice. One of the arguments made by normals for legalizing same-sex marriage is that it will civilize gays into domesticated monogamy.<sup>419</sup> “Queers,” on the other hand, seek to change the signification of promiscuity, seeking to distinguish the concept of monogamy from the concept of intimacy.<sup>420</sup>
- *Single or Secretly Coupled vs. Openly Coupled.* Gays can cover by being or by appearing to be single. By not presenting a partner, such individuals prevent others from visualizing same-sex sexual activity. This may explain why even as gay *individuals* have become increasingly visible in our culture, gay *couples* have not. The next best solution is to have a partner with whom one cannot have sex. After reviewing a number of cases in which courts confront gay couples, Mary Anne Case notes that courts are most sympathetic in cases such as the following:<sup>421</sup> a housing case granting the surviving gay spouse a rent-controlled apartment,<sup>422</sup> a family law case granting a lesbian guardianship over her severely disabled lover,<sup>423</sup> and a prison case granting visitation rights to a gay partner of an inmate.<sup>424</sup> Case suggests that “[c]ourts accord the most

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417. Sullivan, *supra* note 388, at 279.

418. Chambers, *supra* note 388, at 83.

419. See, e.g., ESKRIDGE, *supra* note 386, at 9.

420. See WARNER, *supra* note 389, at 115-16.

421. See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1659-61 (1993).

422. *Id.* at 1659-60 (discussing *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 55 (N.Y. 1989)).

423. *Id.* (discussing *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991)).

424. *Id.* at 1660-61 (discussing *Doe v. Sparks*, 733 F. Supp. 227 (W.D. Pa. 1990)).

favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed due to the death, illness, or imprisonment of one of the members of the couple.”<sup>425</sup>

Whether a particular act is considered an act of covering or signaling one’s orientation will usually depend on more than one of the above binaries. Moreover, the same behavior can fall on the covering side of one binary and the signaling side of another. This means that the same act will sometimes be deemed to be an act of covering by some constituencies and an act of signaling by others, depending on the weights those constituencies attach to the different binaries.

Marriage is a classic example of this dynamic. Many gays view marriage as an act of covering, although they of course differ as to whether this act of covering is a healthy or a craven assimilation to the mainstream.<sup>426</sup> Many straights, on the other hand, view marriage as an act of flaunting. Recall that Robin Shahar was fired from the Georgia Attorney General’s office not for being gay or for saying that she was a lesbian, but rather for flaunting her homosexuality by engaging in a same-sex commitment ceremony.<sup>427</sup>

These radically different perceptions of the same act arise because marriage invokes many different covering/signaling binaries, sometimes finding itself on the covering side, at other times finding itself on the signaling side.

Marriage might be viewed as being on the covering side of the following binaries:

- (1) Straight-Culture Focused vs. Gay-Culture Focused (marriage has historically been an institution of straight culture);
- (2) Prioritizing Other Identities vs. Prioritizing Gay Identity (marriage privileges the identity of spouse, or, in some formulations, of human being, over the identity of homosexual);
- (3) Allied with the Mainstream vs. Allied with Other “Deviants” (marriage is seen as a civilizing practice of the mainstream);

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425. *Id.* at 1644.

426. For opposing sides of this debate, see Paula L. Ettlbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK*, Autumn 1989, at 8, *reprinted in part in* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 818 (1997); and Thomas B. Stoddard, *Why Gay People Should Seek the Right To Marry*, *OUT/LOOK*, Autumn 1989, at 8, *reprinted in part in* ESKRIDGE & HUNTER, *supra*, at 817.

427. *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997); *see supra* notes 13-14 and accompanying text.



(4) Monogamous vs. Promiscuous (marriage has historically embodied norms of monogamy).

But marriage might be viewed as being on the signaling side of some other binaries:

(1) Abstention from Sodomy vs. Engagement in Sodomy (same-sex marriage creates a presumption that sodomy is occurring within the marriage);

(2) Private Displays of Same-Sex Affection vs. Public Displays (marriage is a public display of same-sex affection);

(3) Gender Typical vs. Gender Atypical (same-sex marriage does not permit the traditional sex-based division of labor between spouses, requiring at least one of them to engage in “gender-atypical” activity);

(4) Nonactivist vs. Activist (same-sex marriage is an issue about which many gay activists are agitating);

(5) Allied with Straights vs. Allied with Gays (same-sex marriage is an alliance among gays, although, of course, it may also be the ground on which gays ally themselves with straights);

(6) Single or Secretly Coupled vs. Openly Coupled (marriage is a public enunciation of one’s coupled status).

I have gradually expanded the scope of the discussion from one of an internal conflict within the gay community (normals vs. “queers”) to one of a conflict between gays and the heterosexual mainstream. The two conflicts are deeply intertwined—it is because normals have internalized the values of the heterosexual mainstream that they seek to “normify” others in their group.<sup>428</sup> Put more bluntly, the exhortations of normals echo those of the heterosexual mainstream. I now engage that mainstream voice more directly, by hearing how it speaks in the law.

## 2. *Legal Contexts*

In turning to covering in the law, I expected to have some difficulty finding materials that distinguished covering on the one hand from either passing or conversion on the other. This expectation stemmed from the sense that covering was a relatively new cultural demand. It also arose from

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428. GOFFMAN, *supra* note 3, at 108.

the sense that the law—in this instance the case law—might not wish to rely on a distinction between covering on the one hand and passing or conversion on the other. As a prestige discourse that must supply explanations for its actions, case law must explicitly defend the logic and dignity of its distinctions. While everyone knows that the “screaming” homosexual will usually fare less well in life than the straight-acting one, I suspected that the courts might have difficulty making this distinction consequential.

This suspicion proved unfounded. In two major contexts—employment in the civil service and custody/visitation—I found instance after instance in which legal actors predicated an entitlement on whether a gay or lesbian individual covered. Individuals whose homosexuality, even if avowed, was “discreet,” or “private,” kept their jobs or children. Those whose homosexuality was “open and notorious,” or “flagrant,” were not so fortunate. Distinctions regarding covering detected in the cultural sphere recurred with a vengeance in the legal one.

This is not the only similarity between the nonlegal and legal spheres. In both, there is also a discernible trajectory from conversion through passing to covering. In the instances of the laws governing the civil service and custody/visitation, this shift can be articulated as one from a “per se” regime to a “nexus” regime.<sup>429</sup>

Under a per se regime, the status of being gay is per se incompatible with a particular entitlement.<sup>430</sup> In theory, the per se regime tracks the demand to convert, as an individual must convert to being straight to receive the entitlement. In practice, the per se regime tracks the demand to pass, as an individual who successfully passes as straight will not be denied the entitlement. I refer to the per se regime as a conversion/passing regime.

In both the civil service and the custody/visitation contexts, the per se test changes over time into a nexus test.<sup>431</sup> The nexus test explicitly repudiates the idea that homosexuality is a per se bar to a particular entitlement.<sup>432</sup> It requires the party seeking to deny the entitlement to demonstrate that a rational nexus exists between an individual’s homosexuality and that denial. Under a nexus test, it is not permissible for the Civil Service Commission to terminate a federal employee for his homosexuality per se. Rather, the Commission must adduce a nexus between the employee’s homosexuality and the denial of employment.

429. WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 810-11 (2d ed. 1997) (noting the more prevalent use of a nexus test over a per se test in the civil service and custody contexts).

430. *See id.* at 810.

431. *See infra* notes 433-493 and accompanying text (civil service); *infra* notes 494-526 and accompanying text (custody/visitation).

432. *See* RUBENSTEIN, *supra* note 429, at 810-11.

As a matter of strict logic, the nexus test does not map exactly onto a covering regime. Formally, an employer can still terminate a gay employee under the nexus test for his status alone, so long as the employer can show a rational nexus between that status and job inefficiency. As a practical matter, however, the nexus test does map onto a covering regime. This is in part because homosexual status alone is not rationally related to the efficient performance of many functions. The requirement of showing such a nexus often devolves into a demonstration that the individual in question is not only a homosexual, but a particularly egregious specimen of that class. As I show below, courts in the civil service context ultimately rejected the argument that categorical bars on homosexual employees could be rationally justified on public embarrassment grounds. But even after that particular argument was rejected, courts still accepted that bars on homosexuals who flaunted their homosexuality could be so justified. Note that the rationale adduced by the employer for the bar—public embarrassment—remains constant, indicating that the relevant variable is the employee's performance of his homosexuality. The public employer is irrational when embarrassed by a covering homosexual, but rational when embarrassed by a flaunting one. In its operation, then, the nexus test is part of a regime of enforced covering.

In both the civil service and custody/visitation contexts, the courts have largely or entirely replaced the *per se* rule with the nexus rule and have thus replaced a conversion/passing regime with a covering regime. It is important to note that progress in these contexts stands in marked contrast to that made in other areas of the law. At the end of this discussion, I speculate about why the law has moved so precociously in these areas.

#### a. *Civil Service*

At least by 1951, the Civil Service Commission's regulation excluding people who engage in "immoral conduct" from federal employment had been interpreted to exclude homosexuals. In a letter that year to gay activist Donald Webster Cory, the Civil Service Commission stated that the regulation meant that "'homosexuality and other types of sex perversion'" were "'sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service.'"<sup>433</sup> There is ample empirical evidence that the Commission followed this policy even before that date. Between 1947 and 1950, the Commission denied

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433. ESKRIDGE, *supra* note 165, at 69 (quoting Letter from James Hatcher, Civil Service Commission, Investigations Division, to Donald Webster Cory (May 3, 1951), in DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA* 269 (1951)).

employment to 1700 applicants on the basis of their homosexuality or sexual perversion.<sup>434</sup>

The per se regime is reflected in the 1963 case of *Dew v. Halaby*.<sup>435</sup> William Lyman Dew was hired in 1956 as an air traffic controller at the Civil Aeronautics Authority.<sup>436</sup> The agency discharged him two years later based on a CIA investigation that disclosed that Dew had engaged in same-sex sexual activity and had smoked marijuana during his late adolescence.<sup>437</sup> Dew brought suit in federal court against the agency, alleging, inter alia, that due process bars on “arbitrary and capricious” dismissals precluded him from being terminated for his pre-employment homosexual conduct and drug use.<sup>438</sup> The district court granted summary judgment to the government,<sup>439</sup> and the D.C. Circuit affirmed.<sup>440</sup>

Dew’s case turned entirely on the temporal issue. The court considered only whether the dismissal on the basis of *pre-employment* homosexual acts violated due process, simply assuming that the agency could terminate an employee for homosexual acts during employment. The court thus decided that it was not “arbitrary and capricious” for an agency to take pre-employment conduct into account in terminating Dew.<sup>441</sup> But it never directly addressed whether the regulation’s bar on sodomy was itself arbitrary and capricious.

Six years later, judicial doctrine shifted from a per se rule to a nexus rule in *Norton v. Macy*.<sup>442</sup> Clifford Norton was a budget analyst for NASA.<sup>443</sup> He was arrested after Morals Squad officers observed him picking up a man in his car in Lafayette Square, circling the Square, and then dropping him off at their starting point.<sup>444</sup> The police then subjected Norton to over five hours of interrogation—from one to after six that morning—about his activities and sexual history.<sup>445</sup> Norton denied that he had made a homosexual advance on the man in the car, but allegedly admitted that he had engaged in incidental same-sex sexual conduct in the

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434. *Id.* As the following discussion shows, the Commission did not distinguish between “homosexuality” and “homosexual sodomy” at this time. One could infer from this that when conversion is required, the lesser assimilationist demands of passing and covering will also be required. Because all three demands were being made, it is unsurprising that no attempt was made to distinguish among them.

435. 317 F.2d 582 (D.C. Cir. 1963).

436. *Id.* at 583.

437. *Id.*

438. *Id.* at 585.

439. *Id.* at 584.

440. *Id.* at 589.

441. *Id.* at 585.

442. 417 F.2d 1161 (D.C. Cir. 1969).

443. *Id.* at 1162.

444. *Id.*

445. *Id.* at 1162-63.

past.<sup>446</sup> The agency determined that Norton had made a homosexual advance and terminated him.<sup>447</sup> Norton, like Dew before him, brought suit in the District of Columbia.<sup>448</sup>

In Norton's case, however, the court reviewing the claim frontally addressed the issue of whether an agency could constitutionally terminate an employee for homosexual conduct alone. The D.C. Circuit noted that while the Civil Service Commission enjoyed wide discretion over its employees, that discretion was not absolute.<sup>449</sup> Due process required that its dismissals not be "arbitrary and capricious," but rather be made for "cause."<sup>450</sup> This meant that the agency had to demonstrate some "'rational basis' for its conclusion that a discharge '[would] promote the efficiency of the service.'"<sup>451</sup> The question thus arose whether the agency had a "rational basis" to believe that Norton's homosexual conduct would impair the "efficiency of the service."

In finding that it did not, the court underscored the discreteness and discreetness of Norton's homosexual conduct. It emphasized that Norton was "at most an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public."<sup>452</sup> It also observed that there was "no evidence that he was ever engaged in any offensive conduct in public," and that "[h]is private conduct came to light only through police investigative tactics of at least questionable legality."<sup>453</sup> The court presented Norton as an individual who hid his homosexual conduct so assiduously that only improperly aggressive inquiry could have brought it to light.

The court went on to stress, however, that it was not protecting all homosexual conduct: "Lest there be any doubt, we emphasize that we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee."<sup>454</sup> It stated that "[i]f an employee makes offensive overtures while on the job, or if his conduct is notorious, the reactions of other employees and of the public with whom he comes in contact in the performance of his official functions may be taken into account."<sup>455</sup> To be embarrassed by discreet homosexuality was irrational; to be embarrassed by notorious homosexuality was not.

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446. *Id.* at 1163.

447. *Id.*

448. *Id.*

449. *Id.* at 1164.

450. *Id.* (internal quotation marks omitted).

451. *Id.*

452. *Id.* at 1167.

453. *Id.* at 1167 n.27.

454. *Id.* at 1168.

455. *Id.* at 1166.

*Norton* thus attempted to shift the paradigm for federal employees from a regime in which conversion or passing was required to safeguard one's job to a regime in which covering was sufficient. Under *Dew*, the mere statement that one had engaged in homosexual activity was a sufficient ground for exclusion from federal employment. Under *Norton*, such a statement, standing alone, was insufficient. The historical line between the "good" heterosexual employee and the "bad" homosexual employee had shifted, now distinguishing between the "good" heterosexual or covering homosexual employee on the one hand and the "bad" noncovering homosexual employee on the other.<sup>456</sup>

The shift in the civil service rules, however, was not instantaneous. In 1973, four years after *Norton*, a district court in California considered a lawsuit involving Donald Hickerson, a Department of Agriculture supply clerk, in *Society for Individual Rights v. Hampton*.<sup>457</sup> Hickerson had been fired after the civil service discovered that he had been discharged from the military for homosexuality.<sup>458</sup> He brought suit along with a gay rights organization called the Society for Individual Rights, seeking to have his lawsuit certified as a class action.<sup>459</sup> In considering Hickerson's individual claim, the court adhered to the *Norton* rule: It maintained that "the Commission [could] discharge a person for immoral behavior only if that behavior actually impair[ed] the efficiency of the service."<sup>460</sup> The court observed that the Commission had based Hickerson's dismissal "solely upon the fact that plaintiff is presently a homosexual person and the Commission's view that the employment of such persons will bring the government service into 'public contempt.'"<sup>461</sup> Noting that *Norton* had rejected such a view as a rational basis for dismissal, the court ruled for Hickerson.<sup>462</sup>

The court then went on to consider Hickerson's class-action claim. The court certified Hickerson as a representative of the class of "those homosexual persons who[m] the Commission would deem unfit for government employment for the sole reason that the employment of a homosexual person in the government service might bring that service into . . . public contempt."<sup>463</sup> It granted prospective relief to this class, seeking "to prohibit the Commission from continuing to ignore the plain holding of *Norton*."<sup>464</sup> In response to *Hampton*, the civil service finally

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456. I am indebted to Bill Rubenstein for this formulation.

457. 63 F.R.D. 399, 400 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975).

458. *See id.*

459. *See id.*

460. *Id.* at 401.

461. *Id.* at 400.

462. *Id.* at 401.

463. *Id.*

464. *Id.*

changed its employment policy to read as follows: “‘Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt.’”<sup>465</sup> But the new policy also incorporated the limitations that *Norton* had placed on its own holding: “‘You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person’s homosexual conduct affects job fitness . . . .’”<sup>466</sup> The careful inclusion of this language presaged that homosexuals who flaunted their homosexuality would not be protected.

The 1976 case of *Singer v. United States Civil Service Commission*<sup>467</sup> graphically demonstrated the new policy’s failure to protect employees who did not cover. In 1971, John F. Singer took employment as a clerk typist with the Seattle Office of the Equal Employment Opportunity Commission.<sup>468</sup> Unlike the plaintiffs before him, Singer informed the Director of the EEOC at the time of his hire that he was a homosexual.<sup>469</sup> His hire despite this statement testifies to the work of those prior plaintiffs. Nonetheless, the *Norton* rule did not provide Singer with as much protection as he might have expected. Less than a year after he was hired, Singer received a letter from Commission officials asking him to appear at an interview to explain adverse information that had been discovered about him.<sup>470</sup> When Singer appeared at the interview, the officials shared the following information: “‘[Y]ou are homosexual. You openly profess that you are homosexual and you have received wide-spread publicity in this respect in at least two states.’”<sup>471</sup> These sentences neatly articulate the three assimilationist demands, and Singer’s failure to accede to them. Singer had refused to convert (“[Y]ou are homosexual.”); he had refused to pass (“You openly profess that you are homosexual . . . .”); and he had refused to cover (“[Y]ou have received wide-spread publicity in this respect in at least two states.”).

The Commission was sensible to distinguish among these demands. Under its post-*Hampton* policy, the Commission could not terminate Singer for his failure to convert. The Commission might also have had difficulty firing Singer for his failure to pass, as it had hired him despite his open

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465. *Singer v. U.S. Civil Serv. Comm’n*, 530 F.2d 247, 254 n.14 (9th Cir. 1976) (quoting the Commission’s post-*Hampton* policy), *vacated*, 429 U.S. 1034 (1977).

466. *Id.*

467. 530 F.2d 247 (9th Cir. 1976).

468. *See id.* at 248.

469. *See id.*

470. *See id.*

471. *Id.* at 248-49.

homosexuality.<sup>472</sup> By distinguishing conversion and passing on the one hand from covering on the other, the Commission could disclaim reliance on impermissible grounds.

The Commission's focus on Singer's failure to cover was manifest in all the evidence it adduced against him. As summarized by the court, the Commission focused on three overlapping aspects of Singer's homosexual persona—(1) his public displays of same-sex affection; (2) his attempt to get married; and (3) his political activism. With regard to his displays of same-sex affection, the Commission noted that in his previous job, "Singer had 'flaunted' his homosexuality by kissing and embracing a male in front of the elevator in the building where he was employed and kissing a male in the company cafeteria."<sup>473</sup> It further alleged that during his tenure at the EEOC, "Singer openly admitted being 'gay' and indicated by his dress and demeanor that he intended to continue homosexual activity as a 'way of life.'"<sup>474</sup> With regard to his attempt to get married, the Commission stated that in 1971, "Singer and another man applied to the King County Auditor for a marriage license, which was eventually refused by the King County Superior Court."<sup>475</sup> The Commission found that this attempt led Singer to become "the subject of extensive television, newspaper and magazine publicity."<sup>476</sup> This publicity allegedly included articles in the Seattle papers which identified him as an EEOC employee and which quoted him as saying "that he and the man he sought to marry were 'two human beings who happen to be in love and want to get married for various reasons.'"<sup>477</sup> Finally, with regard to his political activism, the Commission alleged that Singer "was active as an 'organizer, leader and member of the Board of Directors of the Seattle Gay Alliance, Inc.'"<sup>478</sup> It mentioned that he had planned a symposium presented by the Seattle Gay Community, participated in a radio talk show on gay issues, and "displayed homosexual advertisements on the windows of his automobile."<sup>479</sup> Based on this evidence, the Commission notified Singer that he was being separated from

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472. A later case concerning the public employment of a homosexual demonstrates the potential problem with firing a gay employee for an orientation that was known at the time of hire. In *Watkins v. United States Army*, the Ninth Circuit ruled en banc in favor of a gay plaintiff, Perry Watkins, who had been discharged from the military for homosexuality. See *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc). The court reasoned that because the military had known that Watkins was gay at the time of his hire, it was equitably estopped from discharging him. See *id.* at 709-11.

473. *Singer*, 530 F.2d at 249.

474. *Id.*

475. *Id.* Singer's attempt to get married also culminated in litigation. See *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

476. *Singer*, 530 F.2d at 249.

477. *Id.*

478. *Id.*

479. *Id.*



the service.<sup>480</sup> The reason given was the same as that given to his predecessors—“his ‘immoral and notoriously disgraceful conduct.’”<sup>481</sup>

The Commission’s emphasis on Singer’s failure to cover was also consistently maintained throughout the Commission’s own appeals process. Singer’s original termination letter underscored that Singer had “‘flaunted and broadcast [his] homosexual activities and [had] sought and obtained publicity in various media in pursuit of this goal.’”<sup>482</sup> The Hearing Examiner who upheld the termination stressed that Singer’s acts had “‘not been limited to activity conducted in private.’”<sup>483</sup> The Board of Appeals and Review that affirmed the Examiner’s decision noted evidence suggesting that Singer’s “‘actions establish that he has engaged in immoral and notoriously disgraceful conduct, openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities.’”<sup>484</sup>

Singer then filed suit in federal district court, alleging not only that his termination was arbitrary and capricious under the Due Process Clause as interpreted by *Norton*, but also that his termination violated his rights to free speech.<sup>485</sup> The district court granted the motion to dismiss with prejudice, and Singer appealed.<sup>486</sup> On appeal, the Ninth Circuit rejected both claims. It accepted that Singer “was not terminated because of his status as a homosexual or because of any private acts of sexual preference.”<sup>487</sup> Rather, his termination was based upon “‘openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities,’ while identifying himself as a member of a federal agency.”<sup>488</sup> The court noted that *Norton* itself “recognized that notorious conduct and open flaunting and careless display of unorthodox sexual conduct in public might be relevant to the efficiency of the service.”<sup>489</sup> Turning to the First Amendment claim, the court acknowledged some precedents that supported the existence of a First Amendment right to communicate a message about homosexuality.<sup>490</sup> Yet the court stated that

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480. *See id.* at 249-50.

481. *Id.* at 250.

482. *Id.* at 250 n.3.

483. *Id.* at 250.

484. *Id.* at 250-51.

485. *See id.* at 251-52. The district court opinion is unpublished.

486. *See id.*

487. *Id.* at 255.

488. *Id.*

489. *Id.*

490. *See id.* at 255-56 (citing *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974) (holding that a teacher’s public statements on homosexuality were protected by the First Amendment); and *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (holding that a gay student organization’s right to association was protected by the First Amendment)).

these cases were factually distinguishable, as “[n]either involved the open and public flaunting or advocacy of homosexual conduct.”<sup>491</sup>

This is a story with a happy ending. The appellate decision in this case was vacated without an opinion by the Supreme Court.<sup>492</sup> Nonetheless, the Supreme Court decision did not result in a change in the applicable standards in the civil service. In May 1998, President Clinton amended the executive order providing antidiscrimination protections for federal employees to include sexual orientation.<sup>493</sup> It remains to be seen whether even this amendment will dislodge the covering paradigm for gay employees.

### b. *Custody and Visitation*

A similar shift from a *per se* rule to a nexus rule can be seen in the custody and visitation contexts. Here I concentrate on a particular form of custody or visitation dispute, in which (1) two individuals of different sexes marry and procreate; (2) one of them subsequently comes out as homosexual; and (3) the two individuals vie for custody or visitation rights. In determining whether the gay parent can receive custody or visitation, courts must decide if gays should have such rights and, if so, what *kind* of gays should have those rights. While rules vary from state to state, both custody and visitation determinations are generally governed by the “best interest of the child” standard.<sup>494</sup> In visitation determinations, courts strongly presume that visitation is in the best interest of the child.<sup>495</sup> Most visitation determinations thus turn not on the question of whether visitation will be allowed, but on what restrictions will be placed upon it.<sup>496</sup>

Unlike the rules governing employment in the civil service, the rules governing custody or visitation are not promulgated by a single body. This makes it more difficult to tell a linear story about how custody and visitation rules have shifted toward a covering regime. A fifty-state survey I conducted of such custody and visitation determinations, however, reveals a general trend toward covering quite similar to that described in the civil service context.

In practice, homosexuality operated as a *per se* bar on custody or visitation in all states until at least the 1970s. A minority of states still

491. *Id.* at 256.

492. *Singer v. U.S. Civil Serv. Comm'n*, 429 U.S. 1034 (1977).

493. The amendment to the order governing federal employment, Executive Order No. 11,478, is contained in Executive Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998). See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 353 (Supp. 2001).

494. RUBENSTEIN, *supra* note 429, at 809.

495. *See id.*

496. *See id.*

adhere to the per se rule.<sup>497</sup> In these states, some courts explicitly maintain that homosexuality or open homosexuality is alone a deciding factor, without delving further into the orientation performance of the gay parent. Others discuss covering only to discount it. Recognizing that a lesbian mother “denies any overt lesbian relationship in the presence of the child and there is no proof to the contrary,”<sup>498</sup> a Kentucky appellate court in 1980 nonetheless refused to grant her custody because of the “potential for endangering the physical, mental, moral or emotional health of the child.”<sup>499</sup> These cases make explicit that a failure to convert or to pass is alone sufficient to result in a denial of custodial rights.

Over time, however, the majority of states have come to adhere to a nexus test. Under this test, gay parents can have custody and visitation rights if they cover. In 1990, the Iowa Supreme Court reversed restrictions placed on a father’s visitation rights. In justifying that reversal, the court observed: “When questioned at some length regarding his private sex life Michael testified: ‘There is no way my children will be exposed to that. There is no way.’ On this record we find no reason to doubt Michael’s testimony.”<sup>500</sup> One year later, a lower court in the same state gave custody to a lesbian couple that had covered: “Both Shawn and Lori testified they are discreet with respect to their sexual relationship and do not engage in any inappropriate behavior in Jeremiah’s presence. We find nothing to contradict this assertion.”<sup>501</sup> Like the *Norton* court, some courts explicitly maintain that the gay individual deserves the entitlement only because she has covered. In 1994, the Indiana Court of Appeals asserted:

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497. Florida is the only state with a statutory per se bar. *See* FLA. STAT. ANN. § 63.042(3) (West 1994) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). The statute was recently upheld in *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001). Numerous cases support the concept that homosexuality alone is a per se reason for denying custody or visitation rights. *See, e.g.*, *S v. S*, 608 S.W.2d 64, 65-66 (Ky. Ct. App. 1980) (denying custody because, although the “wife denies any overt lesbian relationship in the presence of the child and there is no proof to the contrary,” testimony indicated that there is a “social stigma attached to homosexuality”); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (“Such conduct [a lesbian mother showing affection toward and sleeping with her partner] can never be kept private enough to be a neutral factor in the development of a child’s values and character.”); *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981) (“The homosexuality of [the mother] is the overriding factor.”); *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982) (“The question before us is whether this acknowledged, open homosexual relationship involving the custodial parent was shown by the facts to be sufficient change of condition to warrant modification of a child custody order? We answer in the affirmative.”); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (“[T]he conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them.”).

498. *S v. S*, 608 S.W.2d at 65.

499. *Id.* at 66.

500. *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990).

501. *Hodson v. Moore*, 464 N.W.2d 699, 700-01 (Iowa Ct. App. 1991).

Had the evidence revealed that Mother flagrantly engaged in untoward sexual behavior in the boys' presence, the trial court may have been justified in finding her to be unfit and, accordingly, awarded custody to Stepmother. However, without evidence of behavior having an adverse effect upon the children, we find the trial court had no basis upon which to condition Mother's custody of her sons.<sup>502</sup>

As in the *Norton* test,<sup>503</sup> the test that affirms discreet parents sometimes explicitly articulates a threat against indiscreet ones.

It is no idle threat. Courts have not hesitated to punish parents whom they view as flaunters. In affirming the denial of custody to a lesbian mother, the Connecticut Supreme Court noted in 1988 that the trial court had not been concerned "with her sexual orientation per se but with its effect on the children, who had observed in the home inappropriate displays of physical affection between their mother and M while M had resided with them."<sup>504</sup> In reaching a similar result in 1975, the California Court of Appeal observed: "Appellant does not merely say she is homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her daughters in that environment."<sup>505</sup>

The discretion the courts require might, of course, be orientation-neutral. I take it as axiomatic that some forms of sexual behavior in the presence of children are inappropriate. It would thus be important to know whether the court that objected to "inappropriate displays of physical affection" was referring to sexual acts that would have been problematic even if they had occurred between individuals of different sexes. While the nature of the acts in that particular case is unclear, it is generally apparent that the benchmark of sexually appropriate behavior is not orientation-neutral. Several courts explicitly interpret the nexus test to require or to reward passing. A Missouri court of appeals granted custody in 1998 to a lesbian mother after finding that "[t]he children were unaware of Mother's sexual preference, and Mother never engaged in any sexual or affectionate behavior in the presence of the children."<sup>506</sup> Similarly, in 1996, the Georgia Court of Appeals granted custody to a gay father by observing that its "review of the record discloses no competent evidence to cast doubt on the father's testimony that he believes it in his daughter's best interests to

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502. *Teegarden v. Teegarden*, 642 N.E.2d 1007, 1010 (Ind. Ct. App. 1994).

503. See *supra* notes 442-456 and accompanying text.

504. *Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988).

505. *Chaffin v. Frye*, 45 Cal. App. 3d 39, 46-47 (Ct. App. 1975).

506. *Delong v. Delong*, No. WD 52726, 1998 WL 15536, at \*12 (Mo. Ct. App. Jan. 20, 1998), *rev'd in part sub nom.* J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998).

conceal the sexual nature of his relationship with his partner, and that he intends to act accordingly.”<sup>507</sup>

The courts sometimes ascertain whether passing has been successful by asking whether the relationship between the gay parent and her sexual partners is distinguishable from friendship. In affirming a lower court’s denial of custody to a lesbian mother in 1996, a Louisiana court of appeal stated: “The testimony of several witnesses indicates that the public affection displayed by Robin and Karri for each other at various times and in the presence of the children went beyond the casual exchange of affections which might be expected in close female friendships.”<sup>508</sup> The court may have been referring to a standard established six years earlier, in which the same court had reversed an award of custody to a lesbian mother. That court stated:

The mere fact of homosexuality may not require a determination of moral unfitness so as to deprive the homosexual parent of joint custody. However, in this case 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.<sup>509</sup>

If acceptable sexuality for homosexual couples is the appearance of friendship, then clearly the expectations for parents are not orientation-neutral.

Perhaps the most dramatic instance of the covering required in this context can be seen in the restrictions that courts place on the visitation of the gay parent. Rather than simply observing past practices of covering, courts can actually enforce covering in the future through such restrictions. In a case that typifies the kinds of covering demands that courts make of parents, a New Jersey court in 1974 considered a divorced gay father’s suit for visitation rights.<sup>510</sup> The court first determined that parental rights are a constitutionally protected fundamental right that could not be denied, limited, or restricted on the basis of sexual orientation *per se*.<sup>511</sup> It then observed, however, that this did not resolve the issue of whether this particular father’s rights should be curtailed.<sup>512</sup> In conducting that inquiry, the court noted various ways in which the father flaunted his

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507. *In re R.E.W.*, 471 S.E.2d 6, 8 (Ga. Ct. App. 1996).

508. *Scott v. Scott*, 95-0816 (La. App. 1 Cir. 12/15/95), 665 So. 2d 760, 764.

509. *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1990).

510. *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff’d*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

511. *See id.* at 92.

512. *See id.* at 94.

homosexuality. The court observed that the father was employed as the Director of the National Gay Task Force.<sup>513</sup> It noted that he had “involved the children in his attempts to further homosexuality,” taking them with him on protest marches and to “The Firehouse,” which the court described as “a meeting hall for homosexuals.”<sup>514</sup> The court further found that the father “presently lives with a male lover in a building occupied almost entirely by homosexuals,”<sup>515</sup> and that the children “have slept overnight at [the father’s] apartment while he slept with a male lover.”<sup>516</sup> Based on these findings, the court conditioned the father’s visitation rights on judicially mandated covering. It held that during the visitation periods, the father could “(1) not cohabit or sleep with any individual other than a lawful spouse, (2) not take the children or allow them to be taken to ‘The Firehouse,’ . . . (3) not involve the children in any homosexual related activities or publicity,” and “(4) not be in the presence of his lover.”<sup>517</sup>

Such restrictions are not a thing of the past. In 1987, a Missouri court of appeals affirmed a lower court’s restrictions on a gay father’s visitation rights.<sup>518</sup> The court forbade the children from being exposed to persons who “aggressively promote the practice of homosexuality,”<sup>519</sup> and from attending any church that “supports the practice of homosexuality to the extent that it recognizes a ‘holy union’ between homosexuals as the equivalent of marriage.”<sup>520</sup> An Indiana appellate court, citing this case with approval in 1998, prohibited a gay father from having any “non-blood related persons in the house overnight when the children are present.”<sup>521</sup>

In the federal employment context, the shift from a *per se* to a nexus test appeared to represent real progress for gays. In the custody context, that progress is more ambiguous, as the space to which the parents can retreat to express their sexualities is less easily defined. Even courts that have formally adopted a nexus test have sometimes articulated a standard that suggests that the parent must convert. A Missouri court denied custody to a lesbian mother in 1990, noting that “[e]ven if [the] mother remains discreet about her sexual preference . . . [it] ‘can never be kept private enough to be a neutral factor in the development of a child’s values and character.’”<sup>522</sup> This rhetoric suggests the belief that covering may be difficult or impossible in the custody context, as the very closet into which the

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513. *See id.* at 95.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.* at 97.

518. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982).

519. *Id.* at 872.

520. *Id.*

521. *Marlow v. Marlow*, 702 N.E.2d 733, 736 (Ind. Ct. App. 1998).

522. *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 285 (Mo. Ct. App. 1989) (quoting *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987)).

covering homosexual would retreat is the home in which the child is located. One could respond that there are closets within closets, such that the parent could protect her child by expressing her homosexuality only behind closed doors. (Recall Baylah Wolfe's account of how she restricted her lesbian posters to her bedroom.)<sup>523</sup> Yet a Mississippi court in 1999 found these doors to be too thin. In denying custody to a father who acknowledged "that an open sign of affection between homosexual partners is not proper for the child at this age," the court stated that "he merely retreats behind closed and locked door[s]."<sup>524</sup> In such cases, the covering required of the parent runs so deep as to be tantamount to a demand for conversion.

Covering and conversion are intertwined with each other in another way in this context. The reason that the courts in the custody cases appear to be so concerned about how gay parents cover is because they perceive that the failure of such parents to do so will result in the conversion of their children to homosexuality. The custody cases thus illustrate the earlier theme that a complete analysis of assimilation requires attention not only to performers but to audiences.<sup>525</sup> These cases also dramatically demonstrate the point that "no promo homo" conversion discourses are very much alive today.<sup>526</sup> While adults today are less subject to the explicit demand to convert, it remains a truism that wavering children must, if possible, be made into heterosexuals. This attitude about children, however, also has effects on adults. It is because such wavering children must be converted to heterosexuality rather than homosexuality that all gay adults in contact with them must themselves cover their orientations. I would therefore posit that neither gay adults nor gay children will have achieved equality with their straight counterparts until the ultimate orientation of wavering children is a matter of state and social indifference.

In the custody context, then, as in the civil service context, the legal regime has shifted from one that required conversion or passing to one that required only covering. In this context, however, the shift toward the nexus regime may not represent as much progress, given the paucity of spaces in which parents can express their sexuality without being perceived to affect their children adversely. The shift in the custody context may thus conform more closely to a preservation-through-transformation account.

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523. See *supra* note 383 and accompanying text.

524. *Weigand v. Houghton*, 730 So. 2d 581, 586 (Miss. 1999).

525. See *supra* notes 5-6 and accompanying text.

526. See *supra* notes 216-222 and accompanying text.

c. *Precocity of These Contexts*

One remaining question is why the shift toward covering occurred in these two contexts—civil service and custody/visitation—so much more quickly than in others. The dates at which these shifts occurred are strikingly early: *Norton* was decided in 1969, and many states adopted covering rules for custody and visitation in the 1970s and 1980s. These early shifts contrast with other legal or social contexts in which gays are still mired in a conversion/passing regime. Under federal law, for example, private employers can still exclude or expel individuals on the basis of their orientation alone.<sup>527</sup> It is because the shift toward covering is so context-dependent that I have refrained from periodizing the conversion, passing, and covering phases in any global way. The precocity of the civil service and custody/visitation contexts, however, still requires explanation.

The explanation may be a flat-footed constitutional one. I hypothesize that these two contexts moved precociously toward covering because of constitutional norms that blunted the force of the assimilationist demands. In the case of the civil service, the employer in question was the United States government, triggering constitutional protections such as due process and free speech that apply only to state actors.<sup>528</sup> In the case of custody and visitation, the entitlement in question was the right to parent, which is recognized as a fundamental constitutional right.<sup>529</sup> No such constitutional norm is present in the private employment context, as the employers are not public actors, and there is no constitutional entitlement to work.

While the rate at which anti-gay animus shifts toward covering is context-dependent, the trend toward covering seems general. Developments toward gay covering in the civil service and the custody/visitation contexts can be taken as harbingers for developments in other contexts. This means that as time passes, the legal regulation of gays will generally trend away from conversion and passing and toward covering. In some contexts, such as the civil service, the shift in emphasis may reflect clear progress. In others, such as the custody/visitation context, the shift may seem more ambiguous. As in the passing context, one might ask what determines whether one characterizes these rhetorical shifts as progress. That question raises a more profound one about the model of identity I have been employing.

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527. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding that Title VII does not reach orientation).

528. See *supra* note 485 and accompanying text.

529. See *supra* note 511 and accompanying text.



#### D. *The Performative Turn*

I have now retold the history of the gay rights movement as a history in which the assimilationist demands made on gays have shifted in emphasis from conversion, to passing, to covering. This shift reads like an unqualified progress narrative when understood through a particular model of identity, which I have called the classical model. That model assumes (1) that the three forms of assimilation are always independent of each other, and (2) that the forms of assimilation are rigidly ordered in terms of severity, with conversion being the most severe demand, then passing, then covering.

As I have shown, however, such a progress narrative requires qualification. Many gays can experience shifts from conversion demands to passing or covering demands as no progress at all. The paradigm case of such a shift is when an institution shifts from a conversion regime burdening homosexual status to a covering regime burdening homosexual sodomy. Such shifts embody the preservation-through-transformation dynamic, in which rhetoric shifts without commensurately altering the material or dignitary status of gays.

The need to qualify the progress narrative suggests a need to qualify the model that undergirds it. The shift from burdening homosexual status to burdening homosexual sodomy is not much of a shift because sodomy is at least partially constitutive of gay identity. But this observation subverts both assumptions underlying the classical model of gay identity. It subverts the assumption that conversion, passing, and covering are easily distinguishable concepts, as prohibitions on sodomy (a covering demand) are tantamount to burdens on status (a conversion demand). It also relatedly subverts the assumption that covering is always less of a burden than conversion. The classical model must thus be modified.

Such a modification is crucial to prevent covering demands from being trivialized. Under the classical model, covering is figured as so far from the core of identity that it seems plausible that one could impose a covering demand without seriously affecting that identity. The model licenses actors consciously or subconsciously to ignore the possibility that such burdens may not be trivial at all. The modification of the model therefore ought to explore that possibility.

I will call this modified model the performative model of identity to acknowledge its debt to the postmodern theory of status performativity. The theory of status performativity can be traced back to the 1990 publication of Judith Butler's *Gender Trouble*, where Butler develops the theory in the context of sex/gender.<sup>530</sup> Butler's work is notoriously difficult, and I do not

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530. BUTLER, *supra* note 391.

seek to capture its full complexity here. Yet I believe that even a selective appropriation of her theory will clarify my analysis.

Butler begins *Gender Trouble* by noting that conventional wisdom, including feminist theory, sometimes distinguishes between “sex” and “gender,” holding sex to be biological and gender to be cultural—or, in the more colorful language of structural anthropology, holding sex to be “raw” and gender to be “cooked.”<sup>531</sup> Under that formulation, sex is to female as gender is to feminine. This casts sex as a fixed biological category that exists before culture, as part of the “presocial ontology of persons.”<sup>532</sup> As such, sex possesses both temporal and ontological priority over gender—sex is first, and sex is foundational.<sup>533</sup>

Butler assails this distinction by observing that the concept of the “presocial” is itself a social concept. What she means by this is that it is impossible to imagine a realm outside of culture (like sex) without reasoning within the realm of culture. Yet if this is true, the traditional priority of sex over gender is inverted. If the concept of nature as existing outside of culture is always a concept produced within a culture, this means that culture, not nature, possesses temporal and ontological priority. Thus, rather than conceiving of culture as a simple overlay on nature, culture must be seen as the very realm through which we fashion our concept of the natural. Or, to frame it in terms of sex/gender—“[g]ender ought not to be conceived merely as the cultural inscription of meaning on a pre-given sex . . . gender must also designate the very apparatus of production whereby the sexes themselves are established.”<sup>534</sup> Gender is actually constituting the thing whose effect it appears to be.

The relevance of this argument to the classical model of gay identity should be clear. Butler describes the conventional belief that sex is a prediscursive substrate completely independent of the sex-based behaviors or attributes called gender. This belief parallels the classical model’s tenet that homosexual orientation is a substrate completely independent of orientation-related behaviors or attributes such as sodomy. Butler then argues against that wisdom to posit that gender actually constitutes sex. This tracks the critique of the classical model of gay identity that posits that sodomy actually constitutes gay status.

Does this mean, then, that there is no biological substrate to sex? Butler sometimes seems to make this claim, which I call the “strong performative” claim—the assertion that sex is nothing more or less than cultural attributes, acts, or referents. In *Gender Trouble*, Butler suggests that the distinction between biological sex and cultural gender is “no

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531. *Id.* at 47.

532. *Id.* at 5.

533. *See id.*

534. *Id.* at 11.

distinction at all.”<sup>535</sup> According to this claim, there is no substrate we can call sex; rather, sex is entirely constituted through the social matrix we call gender. Butler quotes Nietzsche to underscore this point: “[T]here is no “being” behind doing, effecting, becoming; “the doer” is merely a fiction added to the deed—the deed is everything.”<sup>536</sup> She then appropriates the quotation, contending that “[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.”<sup>537</sup>

The strong performative model of identity is in some ways the exact opposite of the classical model. The classical model’s representation assumes there is a core of identity that is immune to the behavior or social situation of its holder. In stark contrast, the strong performative model of identity assumes that there is no core impervious to the behavior or social situation of its holder. I have represented the classical model of identity as one in which the concentric circles of identity emanate outward, in which status (failure to convert) precedes disclosure of status (failure to pass), which in turn precedes performance of status (failure to cover). The strong performative model of identity might represent those circles as rippling inward, with the innermost “core” standing empty until filled with the behavior and social situation of its holder.

Because it is the antithesis of the classical model, it is unsurprising that the strong performative model does not suffer from the problem I identified with the classical model. The flaw of the classical model was its tendency to trivialize covering. Under the strong performative model, acts that would be denominated as covering could never be deemed tangential to identity. To the contrary, these acts would constitute identity.

In its rejection of the classical model, however, the strong performative model encounters problems of its own. Readers who interpreted Butler to make the strong performative claim voiced strong dissent to her theory.<sup>538</sup> The strong performative claim is most obviously open to critique based on its unsubstantiated rejection of the materiality of the body. It is conventional wisdom that there are phenotypic and genotypic differences between the individuals we call men and those we call women. Those differences appear to be, at least at some level, biologically assured. Butler seems to inveigh against this premise with little engagement with science. In *Gender Trouble*, Butler does briefly note that the indeterminacy of sex

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535. *Id.*

536. *Id.* at 33 (quoting FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 45 (Walter Kaufmann trans., Vintage Books 1969) (1887)).

537. *Id.*

538. See, e.g., Martha Nussbaum, *The Professor of Parody*, *NEW REPUBLIC*, Feb. 22, 1999, at 37 (criticizing Butler’s radical social constructionism); see also JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX,”* at ix-x (1993) (describing the resistance occasioned by *Gender Trouble*’s radical social constructionist claims).

can be seen in the fact that there are so many “biological” places to look for it—she asks whether sex is “natural, anatomical, chromosomal, or hormonal.”<sup>539</sup> Yet it is a long step from saying that sex is biologically overdetermined to saying that sex has no biological substrate at all.

Is Butler truly espousing the strong performative model or is this a misreading of her work? I posit that Butler is actually not making a strong performative claim that there is no biological substrate to sex. Rather, I believe her to be making what I call a weak performative claim. The weak performative claim says that there may be a biological component to sex, but that we will never be sure what that biological component is, as we can only apprehend it through culture (that is, gender). The weak performative claim thus differs from the strong performative claim in two respects. First, it is an epistemological rather than an ontological claim. Second, the weak performative claim suggests that “performative” modifies not categories of identity, but rather aspects of identity.

Regardless of whether this reading of Butler’s work is correct, I espouse the weak performative model as the most accurate and helpful model for understanding human identity for the purposes of antidiscrimination law. A critic might fairly ask why I spend the next pages attempting to defend it as Butler’s view, rather than simply articulating it as my own. I do so in part to give credit to Butler, who has greatly helped my own thinking, but also because I believe that this defense illuminates undertheorized aspects of her theory which are also useful for this kind of analysis.

I believe the key to understanding the distinction between strong and weak performativity lies in the intellectual history of the term “performativity” itself. In using the word “performativity” to describe her theory of status, Butler is drawing on the conceptual antecedent of linguistic performativity, to which I alluded earlier.<sup>540</sup> Linguistic performativity is a theory of speech acts introduced by J.L. Austin in his 1955 William James lectures, later published as *How To Do Things with Words*.<sup>541</sup> It is useful to describe that intellectual debt, as Butler’s theory tracks Austin’s in crucial ways I have not seen theorized elsewhere.

The relevant aspect of Austin’s work is his shift in describing the concept of the performative. Austin begins his work by describing a category of speech that he calls constative speech.<sup>542</sup> Constative speech is speech that can be proven to be true or false, because it describes a reality

539. BUTLER, *supra* note 391, at 10.

540. *See supra* note 321 and accompanying text.

541. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

542. *See id.* at 3.

outside of language.<sup>543</sup> Thus when I say “There is a bull in the field,” it is assumed (1) that the statement can be proven to be true or false, and (2) that it can be so proven because there are material things—the bull, the field—to which the words do or do not correspond.<sup>544</sup> The impetus for Austin’s work is his view that individuals erroneously believe that all speech has this quality. Austin calls this error the constative fallacy.<sup>545</sup> He demonstrates that fallacy by giving examples of speech that creates, rather than simply describes, the things that it names.<sup>546</sup> He observes that when one says “I . . . warn you,”<sup>547</sup> “I promise,”<sup>548</sup> or “I bet,”<sup>549</sup> the warning, the promise, and the bet are not being described, but rather being created, by the words. Austin creates the neologism “performative” to describe this category of words.<sup>550</sup>

From the very outset, however, Austin emphasizes that this distinction between constative and performative speech is provisional.<sup>551</sup> Indeed, immediately after constructing the distinction, he begins to problematize it by observing that the categories constantly overlap, and that there is no grammatical or other way of distinguishing between them.<sup>552</sup> At this point, Austin abandons the distinction between performative and constative categories of speech, stating that “[i]t is time then to make a fresh start on the problem.”<sup>553</sup>

In making this fresh start, Austin shifts from thinking of the two concepts as denominating *categories* of speech to thinking of them as denominating *aspects* of all speech.<sup>554</sup> Austin ultimately describes all

543. *Id.*

544. *Id.* at 33.

545. *See id.* at 3.

546. *See, e.g., id.* at 4-7.

547. *Id.* at 62.

548. *Id.* at 10.

549. *Id.* at 7.

550. *See id.* at 6.

551. *See id.* at 4 & n.1 (describing his initial isolation of the performative category as “preliminary” and observing that this discussion “is provisional, and subject to revision in light of later sections”).

552. *Id.* at 39-93.

553. *Id.* at 91.

554. In the final section of his work, Austin observes that speech can have three different aspects—locutionary, illocutionary, and perlocutionary. The locutionary aspect of speech is what makes it intelligible, the illocutionary aspect is what it accomplishes *in* being spoken, and the perlocutionary aspect is what it accomplishes *by* being spoken. *See id.* at 94-108. Note that because these are all *aspects* of speech rather than *categories* of speech, the same utterance can have all three dimensions. Thus the locutionary aspect of “I promise” makes the promise intelligible as a promise; the illocutionary aspect produces the promise itself; and the perlocutionary aspect produces effects in the listener, such as reassurance or trust. At the end of the work, Austin reconciles his terminology, effectively stating that when the locutionary aspect of an utterance is ascendant, we will perceive it to be constative, and that when the illocutionary aspect of an utterance is ascendant, we will perceive it to be performative. *See id.* at 145-47. For purposes of simplicity, I have retained the terms “performative” and “constative,” and described

speech as having both a descriptive and creative dimension. Thus, he notes that the statement “There is a bull in the field” might simultaneously possess the constative dimension of describing the bull and the performative dimension of warning the listener. Which aspect of the speech is ascendant will depend entirely on context.

I believe that Butler not only follows Austin’s conceptualization of the performative, but also follows his argumentation. Put differently, I posit that Butler initially sets up a *provisional* distinction between performative and constative conceptions of identity for the purpose of contesting her own version of the constative fallacy. In the sex/gender context, the constative fallacy is that gender always describes some stable underlying reality called sex, in the same way that the word “bull” seems to describe the creature. Individuals observe the gender performances of performers—their appearance, dress, affect—and reflexively assume that the chromosomal makeup of these performers can be known from that observation. In contesting that constative fallacy, Butler, like Austin, suggests that signs that appear to describe referents can at times actually create them. In other words, the relationship between gender and sex is less like the relationship between the word “bull” and the bull and more like the relationship between the phrase “I warn you” and the warning. Just as “I warn you” may seem to describe, but actually creates, the warning, so too do our gender practices seem to describe, but actually create, our sex.<sup>555</sup> This conception is what I am calling the strong performative claim—the claim that sex is an entirely performative category.

Like Austin, Butler also appears to modify her conception of performativity over time, shifting from thinking of sex as a purely performative category to thinking of sex as having a performative aspect. *Bodies That Matter*,<sup>556</sup> published three years after *Gender Trouble*, takes up the question of the body’s materiality. In that work, Butler concedes that there are biological “facts” about people that would suggest that the body is not totally culturally constructed, but she maintains that the border between the biological and the cultural is always unknowable.<sup>557</sup> Butler’s shift appears to be one from an ontological claim (“There is no biological sex”) to an epistemological one (“There may be a biological sex, but we

his shift as a change in what these terms modify. Initially they refer to *categories* of speech; ultimately they refer to *aspects* of speech.

555. The analogy between Butler’s status performativity and Austin’s linguistic performativity is not perfectly tight. Status performativity is both broader and narrower than linguistic performativity. It is broader in that Butler is looking not just at words, but at discourse more generally, thinking about how such signifiers as dress, affect, and gesture (in addition to speech) might fashion “sex.” It is narrower in that Butler considers not how discourse generally constitutes “things” but how it specifically constitutes sex. If Butler had wished to make her debt to Austin more explicit, she might have called her book *How To Do Sex with Signs*.

556. BUTLER, *supra* note 538.

557. *See id.* at 10-11.

can never be confident that what we are pointing to is biological sex”). Thus she states: “To claim that discourse is formative is not to claim that it originates, causes, or exhaustively composes that which it concedes; rather, it is to claim that there is no reference to a pure body which is not at the same time a further formation of that body.”<sup>558</sup>

Butler’s shift replicates Austin’s, insofar as she moves from describing sex as a performative category to describing sex as a phenomenon with performative aspects. This weaker performative claim does not gainsay that sex has material dimensions, such as sex-based differences in genotype or phenotype. Rather, it states that these material dimensions do not foreclose the possibility that sex also has performative dimensions, such as sex-based differences in demeanor, affect, or grooming. This is the weak performative model, which I am espousing here.

The weak performative model accepts the possible existence of biological differences along the axes of sex, orientation, or race. It thus does not categorically state that there is no material core to identity. It does, however, challenge the idea that the circles of the model only emanate outward, such that an identity is always established prior to one’s acts. The weak performative model suggests that identity has a performative *aspect*, such that one’s identity will be formed in part through one’s acts and social situation, rather than being entirely guaranteed by some prediscursive substrate.

I hope the weak performative model will strike readers as more intuitively plausible than either the classical model or the strong performative model. In this moment in history, revisionism about the ground of human identity has taken two different turns. On the one hand, many aspects of human identity that have historically been viewed to be biologically given are now being understood to be culturally constructed. Sex and race could stand as instances.<sup>559</sup> On the other hand, the converse is also true—many aspects of human identity that have historically been viewed to be culturally constructed are now being grounded in biological substrates. Alcoholism, depression, and anxiety disorders stand as examples.<sup>560</sup> The same age that gives us postmodernism gives us the Human

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558. *Id.* at 10.

559. See BUTLER, *supra* note 391 (propounding a constructionist theory of sex); K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) (propounding a constructionist theory of race).

560. See J. PARTANEN, K. BRUUN & T. MARKKANEN, *INHERITANCE OF DRINKING BEHAVIOR* (1966) (propounding a genetic theory of alcoholism); NAT’L INST. OF MENTAL HEALTH GENETICS WORKGROUP, NAT’L INST. OF HEALTH, PUB NO. 98-4268, *GENETICS AND MENTAL DISORDERS* (1998), <http://www.nimh.nih.gov/research/genetics.htm> (propounding a genetic theory of depression); Mònica Gratacòs, Marga Nadal, Rocio Martín-Santos, Miguel Angel Pujana, Jordi Gago, Belén Peral, Lluís Armengol, Immaculada Ponsa, Rosa Miró, Antoni Bulbena & Xavier Estivill, *A Polymorphic Genomic Duplication on Human Chromosome 15 Is a*

Genome Project. It would thus be wrong to claim any uniform trend toward grounding identity in either culture or biology. To the contrary, this age appears to be one in which both nature and culture can be given their proper due as causal agents. In permitting the use of both sets of explanations, the weak performative model seems best to capture the specific competences of our age.

To articulate this more concretely in the realm of orientation, the adoption of the weak performative claim leaves room for homosexual identity to be defined both through a gay gene and through homosexual sodomy. Scientists may someday prove beyond peradventure that there is a gene related to same-sex desire. Such a gene might contribute to homosexual status in the way that chromosomes contribute to sex-based status. In its openness to the possibility of such a gene, the weak performative model is similar to the classical model. Yet the weak performative model, unlike the classical model, does not posit that finding a gay gene would immure homosexual status from cultural explanations. Under the weak performative model, the existence of such a gene would not foreclose the contention that homosexual sodomy was also constitutive of gay identity.

The weak performative model helps us understand gay identity better than the classical model. One of the curiosities of gay rights litigation is how both pro-gay and anti-gay individuals espouse contradictory representations of gay identity. In 1996, Lambda Legal Defense Fund sought to distinguish between homosexual conduct and homosexual status in a case involving gays in the military.<sup>561</sup> The court rejected this distinction by acidly noting that Lambda had contended a decade earlier in its *Bowers* amicus brief that homosexual conduct was constitutive of homosexual status.<sup>562</sup> Similarly, even as some anti-gay courts use a status/conduct distinction to withhold protections from gays,<sup>563</sup> so too do others deconstruct that distinction to achieve the same result.<sup>564</sup>

The classical model gives us no purchase into this tension. Under the classical model, the correct view of gay identity is that homosexual status

*Susceptibility Factor for Panic and Phobic Disorders*, 106 CELL 367 (2001) (propounding a genetic theory of anxiety disorders).

561. *Steffan v. Perry*, 41 F.3d 677, 689 (D.C. Cir. 1994) (en banc).

562. *Id.* at 690 n.11 (“Lambda, the gay rights organization representing Steffan, appeared as amicus in *Bowers*. Arguing against the constitutionality of criminalizing homosexual sodomy, it asserted that the ‘regulation of same sex behavior constitutes the total prohibition of an entire way of life’ because homosexuality is inexorably intertwined with ‘homosexual conduct.’” (quoting Amicus Curiae Brief on Behalf of Respondents by Lambda Legal Defense and Education Fund, Inc. at 23 n.28, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-149))).

563. *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 261-62 (8th Cir. 1996) (accepting that the military’s burdens on homosexual conduct were not burdens on homosexual status).

564. *See, e.g., Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that gay status could not be given heightened scrutiny when the conduct that created it was constitutionally criminalizable).



precedes homosexual conduct—that is, that Lambda was right the second time. Any characterization of gay identity that contradicts this view is discredited as wrong or disingenuous. The weak performative model, however, does not treat this tension as an indictment of the logic of those who represent both sides of it. Instead, the model reveals the tension to be an accurate diagnosis of the sociological contradiction of gay identity. Gay status can at times be experienced as existing independently of homosexual sodomy, as perhaps most clearly seen in the instance of celibate individuals who nonetheless conceive of themselves as gay.<sup>565</sup> But gay status can at other times be experienced as constituted by homosexual sodomy, as perhaps most clearly seen in the instance of the individual whose homosexual experience leads him to embrace a gay identity.<sup>566</sup> The weak performative model thus has more tolerance for ambiguity than the classical model. It holds two seemingly opposed conceptions in abeyance long enough to permit the realization that the reality of that identity inheres not in the resolution of the contradiction in favor of one principle, but in the contradiction itself.

The weak performative model also permits a richer understanding of gay history than the classical model. Under the classical model, gay identity simply exists prior to gay conduct, such that covering demands on gay conduct will always seem more benign than conversion demands on gay status. Under the weak performative model, this will not always be the case, as some forms of gay conduct will be recognized to constitute gay identity. Thus while the weak performative model does not fundamentally subvert the narrative that describes a shift from conversion to passing to covering as progress, it qualifies that description. This qualification is crucial, as much of the legitimacy of covering demands arises out of a belief in their relatively trivial nature. Under a weak performative model, one cannot simply assume that covering is not a serious demand. One must instead ask whether a commitment against status discrimination might require us to prohibit discrimination against an act constitutive of that status.

To say that identities have both performative and constative dimensions, however, simply begs another question—how much of a particular identity is performatively constituted? The answer to that question will depend on the identity. I would hypothesize that if individuals were asked to order religion, orientation, race, and sex along a continuum from most to least performative, they would array them in the sequence just given. Indeed, I believe this differential is in part what made *Gender Trouble* so much more controversial and widely read than comparable

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565. See, e.g., KEITH HARTMAN, CONGREGATIONS IN CONFLICT: THE BATTLE OVER HOMOSEXUALITY 73-78 (1996) (describing openly gay priests who are celibate in keeping with their religious vows).

566. Gelman et al., *supra* note 323, at 46.

radical social constructionist theories about race or orientation. The same thesis of social constructionism assails conventional wisdom much more in the sex context than in others.

Focusing on the context of orientation, one might then ask to what extent sexual orientation is performatively constituted, and by which acts. I have been considering sodomy as an act particularly likely to constitute homosexual status. Yet one might question whether sodomy is the only act through which homosexual status is created. In discussing homosexual covering, I described a raft of orientation-related acts, including public displays of affection, gender-atypical activity, and gay activism.<sup>567</sup> Initially, these other acts may appear to be less constitutive of homosexuality than sodomy. Yet we should not dismiss the idea that these other acts might not, in the aggregate, also contribute to homosexual identity. Indeed, Butler's theory of status performativity posits that the status of sex/gender is created not through single acts, but through a set of infinite and infinitesimal acts on the part of the individual and those around her.<sup>568</sup> What makes human identity so difficult to alter or control is that its social meaning is determined by this kind of Foucaultian micropower.<sup>569</sup>

The fact that sodomy is not the only conduct that fashions individuals into homosexuals, however, does not mean that we cannot privilege sodomy over these other forms of activity. Even if many acts contribute to identity, this does not mean that they cannot be prioritized in some way. Indeed, the claim that these performative layers of identity are sedimented in this way may be what permits the weak performative model to incorporate some aspects of the classical model.

How we distinguish among such acts depends on the purpose to which the distinction will be put. I seek to make the distinction for the purpose of determining which forms of covering will be deemed tantamount to conversion in antidiscrimination discourse. That purpose leads me to take a relatively parsimonious view. I posit that homosexual sodomy, while an act in the way that other orientation-related activities are acts, is nonetheless more fundamental to gay identity than, say, living in a gay ghetto.

What we are left with, then, is the idea that certain acts of covering are constitutive in a way that other acts are not. The content of this category of "constitutive" covering will differ for every identity and will be a matter of great dispute for every identity. Nonetheless, I hope the importance of creating such a category is evident. For when we create such a category, we

567. See *supra* notes 408-425 and accompanying text.

568. See BUTLER, *supra* note 538, at x (clarifying that sex/gender is not created by any simple act of choice); BUTLER, *supra* note 391, at 178-79 (contending that sex/gender is constructed through a stylized repetition of mundane acts).

569. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (discussing micropower as both infinite and infinitesimal).

realize that while a shift from conversion to covering may be progress in some generic sense, a shift from conversion to constitutive covering is not.

### III. CONVERGENCE

I hope the preceding discussion makes a free-standing contribution to an understanding of the history of the gay rights movement and of anti-gay discrimination. Yet I generated my model not only to reconceptualize anti-gay discrimination, but also to illuminate discrimination encountered by other groups. I therefore now apply my model to racial minorities and women.

I begin that application by describing the rift between gays on the one hand and racial minorities and women on the other. This rift, which I call the “antidiscrimination schism,” can be seen in both politics and law. The schism justifies itself in part on the ground that racial minorities and women cannot convert or pass, while gays can assimilate in both these ways. The schism, then, can easily be represented by my model, as it relates to the differential capacities of these groups to assimilate.

My model demonstrates that alongside this divergence is a critical and undertheorized convergence. According to my model, even if gays are differently situated from racial minorities and women with respect to conversion and passing, gays are similarly situated to these other groups with respect to covering. The recognition of covering as an assimilationist demand is crucial because covering, unlike conversion or passing, can be required of all three groups.

After positing this convergence around covering, I seek to demonstrate it in greater detail in the contexts of race and sex. In the race context, I note that many of the forms of discrimination from which racial minorities remain unprotected today take the form of enforced covering. In the sex context, I make a similar point. I further show, however, that the sex context differs from both the orientation and the race contexts in that women are more often required by the dominant group not only to cover but also to reverse-cover. Yet this takes nothing away from the fact that all three groups are similarly situated vis-à-vis covering demands. Covering thus provides a ground on which the three groups might make common cause.

#### A. *The Antidiscrimination Schism*

In much of contemporary antidiscrimination discourse, one can see a prioritization of race discrimination over sex discrimination, and of sex discrimination over orientation discrimination. There is a gap between the perceived illegitimacy of race discrimination and that of sex discrimination.

There is another gap between the perceived illegitimacy of race and sex discrimination on the one hand and that of orientation discrimination on the other. The second gap, however, is much wider than the first.

One can see the existence and the relative size of the gaps by looking at equal protection jurisprudence. That jurisprudence requires that courts give the strictest form of constitutional scrutiny to race-based classifications,<sup>570</sup> an intermediate form of scrutiny to sex-based classifications,<sup>571</sup> and the lowest form of scrutiny to orientation-based classifications.<sup>572</sup> The gap between strict scrutiny and intermediate scrutiny is very narrow, as both lead to the presumptive invalidation of legislation relying upon the classification.<sup>573</sup> In sharp contrast, the gap between the two forms of "heightened scrutiny" (strict scrutiny and intermediate scrutiny) on the one hand and the weaker form of scrutiny (rational basis review) on the other is enormous. If a statute is subjected to heightened scrutiny, it is almost invariably struck down; conversely, if a statute is not subjected to heightened scrutiny, it is almost invariably upheld.<sup>574</sup> The gap between heightened scrutiny and rational basis review is effectively the gap between protection and nonprotection. I call this gap the antidiscrimination schism.

What justifies the antidiscrimination schism? There are a number of answers to this question, but a significant one relates to assimilation. Two criteria the courts employ when determining whether a classification merits heightened scrutiny are the immutability and the visibility of the trait on which the classification is based.<sup>575</sup> Traits like race and sex that are viewed

570. *Bush v. Vera*, 517 U.S. 952 (1996) (subjecting voting districts drawn with race as the predominant factor to strict scrutiny); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (subjecting a federal contracting program designed to help racial minorities to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (subjecting legislation excluding individuals of Japanese ancestry from the U.S. West Coast to the "most rigid" scrutiny).

571. *United States v. Virginia*, 518 U.S. 616 (1996) (subjecting a public college's gender-based admissions policy to intermediate scrutiny); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (subjecting gender-based peremptory strikes to intermediate scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (subjecting gender-based discrimination in statutes regulating the sale of alcohol to intermediate scrutiny).

572. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (denying gays heightened scrutiny, in part because of their invisibility), *on remand from* 518 U.S. 1001 (1996), *vacating* 54 F.3d 261 (6th Cir. 1995); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (denying gays heightened scrutiny, in part because "[h]omosexuality is not an immutable characteristic").

573. Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (observing that intermediate scrutiny "has operated quite strictly 'in fact'").

574. See Yoshino, *Assimilationist Bias*, *supra* note 2, at 488.

575. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)) (applying the immutability and visibility factors in its denial of heightened scrutiny to the statutory classifications in the federal Aid to Families with Dependent Children program); *Lyng*, 477 U.S. at 638 (applying the immutability and visibility factors in its denial of heightened scrutiny to the statutory classifications created by the federal food stamp program). For other applications of the immutability and visibility factors, see, for example, *High Tech Gays*, 895 F.2d at 573; *Watkins v. United States Army*, 837 F.2d 1428, 1444-48 (9th Cir.),

to be both immutable and visible are more likely to get judicial protection than traits like orientation that are viewed to be neither immutable nor visible. The rationale appears to be that groups that can assimilate can engage in self-help, and thus do not need to be judicially protected.<sup>576</sup> A group based on a mutable trait can simply convert when faced with discrimination; a group based on an invisible trait can simply pass.

As I have argued elsewhere, this manifests a strong assimilationist bias in equal protection.<sup>577</sup> If a group is not marked by an immutable or visible trait, it is less likely to receive heightened scrutiny. If a group does not receive heightened scrutiny, burdensome legislation against it is almost always upheld. And if burdensome legislation against a group that can convert or pass is upheld, it becomes more likely that members of the group will exercise those powers of conversion or passing to escape the legislation's effects. Put differently, the descriptive claim that the group *can* assimilate because of the mutability or invisibility of its defining trait transmutes into the prescriptive claim that the group *should* assimilate with very little intervening investigation by a court. Because of this, the immutability factor in equal protection analysis effectively translates into a demand that mutable groups convert, and the visibility factor effectively translates into a demand that invisible groups pass.

The antidiscrimination schism and the assimilationist rationale that undergirds it are not a special creation of the judiciary, but can be seen in broader antidiscrimination discourse. The antidiscrimination schism has been particularly strongly articulated in political statements by racial minorities, some of whom feel that gays are making inappropriate analogies between racial civil rights and gay civil rights. In distinguishing between the military's historical overt discrimination against African Americans and its current overt discrimination against gays, General Colin Powell has stated that "[s]kin color is a benign, nonbehavioral characteristic, while sexual orientation is perhaps the most profound of human behavioral characteristics."<sup>578</sup> Similarly, Alveda King, the niece of Martin Luther King, Jr., has argued that any link between black civil rights and gay civil

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amended by 847 F.2d 1329 (9th Cir. 1988), vacated and aff'd on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc); *Ledesma v. Block*, 825 F.2d 1046, 1050 (6th Cir. 1987); *Cervantes v. Guerra*, 651 F.2d 974, 979 (5th Cir. Unit A July 1981); and *Spence v. Miles Laboratories, Inc.*, 810 F. Supp. 952, 962 (E.D. Tenn. 1992).

576. See, e.g., *Equality Found. of Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995). The *Equality Foundation* court found that homosexuals could not be "burden[ed]" or "penaliz[ed]" by the law because "[m]any homosexuals successfully conceal their orientation." The court went on to hold that "[b]ecause homosexuals generally are not identifiable 'on sight' unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class." *Id.* at 267.

577. Yoshino, *Assimilationist Bias*, *supra* note 2, at 504-06.

578. Jason L. Riley, *Not a Civil Rights Issue*, WALL ST. J., Aug. 13, 1998, at A14 (quoting General Colin Powell).

rights is broken by the mutability of orientation.<sup>579</sup> And Reggie White, the Green Bay Packers' defensive lineman turned popular preacher, has rejected any comparisons between the status of being black and the "sin" of homosexuality by noting that "[h]omosexuality is a decision[,] . . . not a race."<sup>580</sup>

Those calling to close the schism often make emotional appeals about the interconnected nature of discrimination.<sup>581</sup> Thus the late Thomas Stoddard opined that "[t]o a large degree we are bound together by our opponents. Those who hate blacks hate gay people, hate Jews and abuse women, and fighting on behalf of any of us will ultimately lead to the liberation of all."<sup>582</sup> Earl Ofari Hutchinson has observed that "Black people, and especially Black leaders, need to understand that when you scratch a homophobe, underneath you'll invariably find someone who will deny you all your civil rights."<sup>583</sup> Mari Matsuda puts it most sparsely: "[N]o person is free until the last and the least of us is free."<sup>584</sup>

All of these statements have a resonance beyond the reach of logic. It may be that such emotional appeals will ultimately be the most telling in closing the antidiscrimination schism. Yet such statements also fail to engage with the assimilationist rationale adduced to support the schism. Without seeking to undermine these statements, I seek to answer that rationale on its own terms.

One could challenge the schism analytically in a number of ways. I have elsewhere assailed it on the ground that the ability to convert or to pass does not redound to the political advantage of a group in any simple way.<sup>585</sup> A rising number of commentators have also begun to challenge the assumption that racial minorities and women cannot convert or pass.<sup>586</sup> In this discussion, however, I seek to make a claim that is different from, although consistent with, these prior ones. I maintain that, even assuming for the sake of argument that only gays can engage in self-help through conversion or passing, there are still grounds for convergence among all three groups. This is because conversion and passing are not the only ways in which groups can be forced to assimilate. Groups can also be forced to

579. Mark F. Johnson, *Alternative Voices: Civil Rights and Wrongs*, HUMANIST, Mar.-Apr. 1998, at 39.

580. David Callender, "It's Not a Race": Reggie Rips Gays in Talk to Assembly, CAP. TIMES, Mar. 25, 1998, at 2A (quoting Reggie White).

581. I thank Sharon Brooks for the following three quotations.

582. Lena Williams, *Blacks Rejecting Gay Rights Fight as Equal to Theirs*, N.Y. TIMES, June 28, 1993, at A12 (quoting Thomas Stoddard).

583. Earl Ofari Hutchinson, *My Gay Problem, Your Black Problem*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY 303, 304 (Kimberlé Crenshaw ed., 1999).

584. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

585. Yoshino, *Assimilationist Bias*, *supra* note 2, at 519-37.

586. For sources and a further discussion, see *infra* notes 871-884 and accompanying text.

cover. And when we turn to covering, it becomes clear that all three groups—racial minorities, women, and gays—are similarly vulnerable. To substantiate that claim, I discuss race-based and sex-based covering in some detail.

## B. *Race-Based Covering*

In describing race-based covering, I again divide my discussion into cultural and legal contexts. To demonstrate covering in the cultural context, I focus on a nonfiction narrative that recounts how one individual—African-American lawyer Lawrence Mungin—systematically covered his race in pursuit of professional success. I turn to narrative because I believe that listing the axes along which racial minorities cover—many of which are identical to the axes enumerated in the discussion of gay covering—would not add as much to the analysis as a concrete account of the nature and costs of race-based covering. Through narrative, I seek to make the experience of covering more particular, vivid, and tangible.

In shifting to legal contexts, I revert to discussing cases in which individuals subjected to covering demands seek legal redress. I consider the examples of grooming in the Title VII context and language in the equal protection context. In both instances, I demonstrate that racial minorities find themselves largely unprotected from demands to cover. At the same time, I observe traces in these contexts that suggest some potential for an extension of antidiscrimination protections to covering claims. I argue for the exploitation of that potential.

### 1. *Cultural Contexts*

Paul Barrett's *The Good Black*<sup>587</sup> tells the story of Lawrence Mungin, an African-American attorney who brought an unsuccessful race discrimination suit against his law-firm employer, Katten Muchin & Zavis. A graduate of Harvard College and Harvard Law School, Mungin spent all of his life until he decided to file his lawsuit attempting to be "one of the good blacks," covering to assimilate as much as possible into the white mainstream.<sup>588</sup> As a lawyer at Katten Muchin, Mungin suffered a series of career setbacks that culminated in the firm's refusal to consider him for a nomination to partnership.<sup>589</sup> Believing that these setbacks occurred because of his race, Mungin filed suit under Title VII of the Civil Rights Act of

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587. PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999).

588. See *id.* at 6. The idea that a good black is a covering black resonates with the previously discussed idea that a good homosexual is a covering homosexual. See *supra* note 456 and accompanying text.

589. *Id.* at 121.

1964.<sup>590</sup> A jury consisting of seven African Americans and one white awarded him a verdict of \$2.5 million in compensatory and punitive damages.<sup>591</sup> On appeal, a panel of the D.C. Circuit reversed the jury's verdict as unreasonable.<sup>592</sup> The sole dissenter, Chief Judge Harry Edwards, was also the only racial minority on the panel.<sup>593</sup>

In this discussion, I deploy Mungin's story less to argue the merits of his lawsuit than to demonstrate the myriad of ways in which he sought to cover prior to filing it. As Barrett notes, Mungin's decision to litigate was particularly poignant because it cast him in the racialized terms he had sought to eschew for much of his life.<sup>594</sup> Mungin's story suggests that litigation and covering are two different strategies for addressing racism. In Shelby Steele's terms, litigation is an instance of "challenging," and covering an instance of "bargaining."<sup>595</sup>

I would therefore posit that a full-bodied account of covering is not possible if one looks only to primary legal materials. Of course, it is generally true that legal materials provide a reductive representation of broader social phenomena. Yet I wish to suggest that such materials may be particularly prone to ignore phenomena such as covering, which present themselves as alternatives to the strategies provided by law.

To say that law cannot adequately represent the harms of covering is not to say that only individual narratives can do so. As I have shown in the gay context, one can engage in what might be loosely described as a sociological account of covering.<sup>596</sup> I turn to narrative here to make up a lack that is present even in those accounts. This is the absence of a sense of how pervasively and deeply such covering demands affect the individuals on whom they are made. Narrative teaches lawyers to unlearn the distinction between social and legal harm that they have internalized as part of their acculturation into the profession. It reminds lawyers that the ability to critique the law correlates with the ability to describe thickly the social harms they seek to redress.

For Mungin, covering began at home. Mungin was raised in poverty in Brooklyn and Queens by his biracial mother, Helen Mungin.<sup>597</sup> Helen, "who considered herself to be black and had mostly black friends, wasn't ashamed of her racial identity and didn't cut her children off from

590. *Id.* at 144-46.

591. *Id.* at 176, 239.

592. *Id.* at 271-74.

593. *Id.* at 261, 273.

594. *See id.* at 282-83.

595. *Id.* at 162-63 (citing SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 10 (1990)).

596. *See supra* notes 383-428 and accompanying text.

597. BARRETT, *supra* note 587, at 22-24.



theirs.”<sup>598</sup> Yet while Helen did not seek to convert or to pass, she emphasized the importance of covering to all three of her children. She was fond of telling them: “You are a human being first, . . . an American second, a black third.”<sup>599</sup> She punished her children when they spoke “street talk, rather than ‘proper’ English.”<sup>600</sup> She stressed integrationist rather than activist politics, favoring Martin Luther King over Malcolm X, and advising her children that the existing system would treat them fairly if they played by its rules.<sup>601</sup> As Mungin’s sister observed, Helen Mungin “just didn’t make a big thing of race—it was there, but get past it.”<sup>602</sup>

Mungin set out to do this. In junior high, he skipped lunch rather than be seen by his white peers in the mostly black “free-lunch” line.<sup>603</sup> In high school, he excelled in academics, debate, and student government, becoming the school’s first African-American senior class president.<sup>604</sup> These achievements led Mungin to be heavily recruited by a number of Ivy League colleges.<sup>605</sup> When Mungin visited Princeton, an African-American guide took him to an all-black dormitory and radio station.<sup>606</sup> When he visited Harvard, his tour was not racially oriented, and the alumnus-recruiter said: “Larry[,] . . . if you go to Harvard, you will never have to worry about money again for your whole life.”<sup>607</sup> The child was the father of the man—Mungin went to Harvard.<sup>608</sup>

At Harvard College, Mungin continued to deemphasize his racial identity. He laughed along with others at racially laden comments.<sup>609</sup> He stopped cooking collard greens, which his mother used to prepare, when his roommates complained of the odor.<sup>610</sup> He avoided African-American campus groups, dormitories known to be dominated by blacks, and the “soul tables” in the dining hall.<sup>611</sup> The strategy continued to work. After taking a hiatus from college to train in the Navy,<sup>612</sup> Mungin returned to Harvard and successfully applied to Harvard Law School.<sup>613</sup>

When Mungin arrived at Harvard Law School, members of the Black Law Students Association wanted to know why he had failed to join the

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598. *Id.* at 26.

599. *Id.* at 24.

600. *Id.* at 26.

601. *See id.* at 25-26.

602. *Id.* at 25.

603. *Id.* at 29.

604. *Id.* at 29-31.

605. *Id.* at 33-34.

606. *Id.* at 34.

607. *Id.*

608. *Id.* at 63.

609. *Id.* at 64.

610. *Id.* at 65.

611. *Id.* at 66.

612. *Id.* at 71-72.

613. *Id.* at 75.

organization and why he was rooming with a white student.<sup>614</sup> The white roommate was Paul Barrett, who would later become a legal affairs reporter for the *Wall Street Journal* and the author of *The Good Black*.<sup>615</sup> Mungin responded that he was attending law school to receive a credential, not to be an activist.<sup>616</sup> He criticized his black peers for “feeling sorry for themselves and haranguing the law school dean over issues he considered marginal, like how many minority professors had gotten tenure.”<sup>617</sup> Barrett also recalls an incident in which Mungin castigated some boisterous black teenagers who he believed were “confirming every stereotype” about African Americans.<sup>618</sup>

Mungin also covered by keeping silent about his experiences with racism. During their law school years, Barrett heard nothing of the racism that Mungin had encountered in the past.<sup>619</sup> These racist incidents included being asked to leave the house of a white classmate’s parents on explicitly racial grounds,<sup>620</sup> being called an “arrogant nigger” in the Navy,<sup>621</sup> and reading the message “[W]hat are you doing with that nigger friend?” written in toothpaste on his white college roommate’s bathroom mirror.<sup>622</sup> To his credit, Barrett recognizes that this omission was intended to increase, and had the effect of increasing, the comfort level of the whites around Mungin. Barrett describes his relief at how, during law school, Mungin “never tried to make [him] feel guilty with talk of ‘systemic racism.’”<sup>623</sup>

After graduating from Harvard Law School, Mungin worked at three law firms before landing at Katten Muchin & Zavis.<sup>624</sup> At Katten Muchin, Mungin continued to cover, looking and acting the part of the traditional corporate lawyer. Such acts of covering extended to his dress, his speech, his dissociation from other African Americans, and his silence in the face of perceived racial slights.

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614. *Id.*

615. *Id.* at 75, 109.

616. *Id.* at 76.

617. *Id.*

618. *Id.* at 77.

619. *Id.*

620. *Id.* at 68-69.

621. *Id.* at 79.

622. *Id.* at 68.

623. *Id.* at 76. Although Barrett’s honesty and self-awareness should be applauded, his expression of relief provides an occasion to raise serious concerns about his portrayal of Mungin. While the book presents itself as Mungin’s side of the story, it is nonetheless a third-person narrative. This raises general concerns about whether the values of autonomy and accuracy have been preserved. These concerns are exacerbated by the fact that Barrett ironically appears to be one of the whites who benefited from Mungin’s racial performance. Thus, as David Wilkins suggests in a thoughtful review of this work, “by appearing to stand above the fray . . . Barrett fails to acknowledge the manner in which his own opinions and preconceptions have shaped the frame in which he presents Mungin’s story.” David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1926 (1999) (book review).

624. BARRETT, *supra* note 587, at 84-94.

In Barrett's chronicle, repeated reference is made to Mungin's sartorial style—at one point a colleague praises him as the best-dressed person in Katten Muchin's Washington office.<sup>625</sup> While this might make Mungin seem something of a fop, Barrett shows that the consequences of Mungin's style were anything but superficial. Barrett describes how Mungin's grooming practices directly affected perceptions of his race in the middle-class white circles in which he lived and worked. When wearing a suit, Mungin received friendly nods from his neighbors in the suburbs of Alexandria, Virginia.<sup>626</sup> When attired for the gym, he saw the same neighbors "visibly tense up."<sup>627</sup> After Mungin left Katten Muchin, he began to work temporary jobs for which a suit was inappropriate.<sup>628</sup> Mungin testified to the difference this made: "No more am I in Georgetown, dressed like a professional and at least getting some respect on the street. . . . I'm out in Chantilly, Virginia, or wherever, and the secretaries are afraid I'm going to attack them as they go to get in their cars."<sup>629</sup>

Mungin also covered by underscoring his educational credentials. Mungin emphasized his double-Harvard pedigree, "both because he was proud of it and because he knew it sent another reassuring signal to whites."<sup>630</sup> In Barrett's words, Mungin spoke "with a precision that guaranteed his being described as 'very articulate,' a euphemism used by many whites to describe a black person who doesn't use street vernacular."<sup>631</sup> As if he had taken to heart his mother's injunction not to speak "street talk," Mungin scrupulously avoided the use of profanity.<sup>632</sup> Indeed, Mungin's formal personality concerned his African-American lawyers, who thought he identified himself more with his pedigree than with his race.<sup>633</sup>

Mungin further assimilated by dissociating himself from other African Americans, although here the vectors of his racial identification and disidentification were more complex. In a previous law firm, Mungin had taken a younger African-American associate under his wing.<sup>634</sup> The message he sent to that associate was the message that Mungin himself had received—"Don't use race as an excuse; just get it right."<sup>635</sup> When he arrived at Katten Muchin, Mungin was concerned about being typecast as a

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625. *Id.* at 105.

626. *Id.* at 42.

627. *Id.*

628. *Id.* at 148.

629. *Id.*

630. *Id.* at 41.

631. *Id.*

632. *Id.*

633. *Id.* at 142.

634. *Id.* at 43.

635. *Id.*

mentor for other minorities.<sup>636</sup> It seemed that he had some cause for this concern—when the partners hired an African-American student intern, they asked Mungin to play a double role as her work-assignment coordinator and as her mentor.<sup>637</sup> Mungin refused, believing that such segregation would prevent both Mungin and the intern from integrating into the firm.<sup>638</sup> In a seemingly similar spirit, Mungin did not contact any other black lawyer at Katten Muchin until the eve of his lawsuit.<sup>639</sup> This may have paradoxically hurt his ability to negotiate race in the workplace, as it cut him off from a support network versed in that negotiation.<sup>640</sup>

Finally, Mungin covered by not responding to what he believed to be a racialized atmosphere. Just as he had ignored perceived racial slights in the past, so too did he ignore them at Katten Muchin. Mungin's e-mails responding to a failure to get a raise and to what he experienced as a constructive discharge were exceedingly mild in tone.<sup>641</sup> Yet even these missives were deviations from a history of responding to perceived racism with nonperception or nonacknowledgement.<sup>642</sup>

In short, Mungin invested heavily in a "racial-comfort strategy"<sup>643</sup> of covering. As Mungin stated his own credo: "I wanted to show that I was like white people: 'Don't be afraid. I'm one of the *good* blacks.'" <sup>644</sup> In Barrett's analysis, Mungin strove to join a select group of individuals of African-American ancestry—including Tiger Woods, Colin Powell, and Arthur Ashe—who are seen "not as unblack but as not merely, not primarily, black."<sup>645</sup> In other words, Mungin sought to emulate those who had covered successfully.

Mungin's relentless covering strategy, however, did not succeed. Isolated in the branch office in which he had chosen to work, Mungin gradually realized he had no chance of making partner.<sup>646</sup> Only at this point did Mungin question his strategy. Initially, that questioning led him to consider a career more related to his racial identity. Mungin spoke to Barrett about moving out of corporate litigation into civil rights work, describing his admiration for Thurgood Marshall, who had recently passed away.<sup>647</sup> Mungin then began to speak of suing Katten Muchin.<sup>648</sup> Barrett's

636. *Id.*

637. *Id.* at 44.

638. *Id.*

639. *Id.* at 102, 106-07.

640. *See id.* at 108 (describing observations of a prominent black attorney).

641. *See id.* at 116-17, 130.

642. *See id.* at 95, 101, 105, 129.

643. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1290 (2000).

644. BARRETT, *supra* note 587, at 6.

645. *Id.* at 282 (quoting William Raspberry, . . . *A Transcendent Personality*, WASH. POST, Apr. 18, 1997, at A25).

646. *See id.* at 118-21.

647. *Id.* at 110-11.

shock was fueled by his long-term vision of Mungin as someone who “wanted to belong to the system, . . . not challenge it.”<sup>649</sup>

A cynic might read Mungin’s belated embrace of his racial identity as a strategic reaction to nonracialized career adversity. Yet Mungin’s account makes clear that race was always present in his life narrative. Even while he adopted the covering strategy, his systematic resistance to racial stereotyping defined him according to those stereotypes as surely as a photograph is defined by its negative. Mungin did not suddenly start to perform a racial identity when he stopped covering; rather, he started to perform that identity in a different way. Because his lifelong attempt to defuse racism through covering had failed, he shifted to litigation.

In that moment, Mungin was finally able to express what the covering strategy had cost him. He stated:

I was going to have to be more publicly honest about the lie that I was living. It wasn’t that I was around people who were open minded, who thought blacks are terrific. It’s that I was bending over backward all the time to avoid making white people uncomfortable. Like my neighbors [in Alexandria]: Now I’m just tired of making them feel comfortable, I don’t even talk to them. If they say hello, I’ll say hello, but I don’t even bother anymore making them feel comfortable late at night. It’s too much work.<sup>650</sup>

Mungin’s failure to acknowledge the costs of covering before completely abandoning the strategy suggests that part of covering entails repressing the work it requires. At times, covering may be as reflexive as the dilation or contraction of the pupil in response to changing light conditions. At other times, it may be experienced, as Mungin was ultimately to experience it, as an exhausting burden. In either case, however, covering is work.

One of my central claims is that the work of covering, unlike the work of conversion or passing, is imposed on all groups outside the mainstream. If this is true, one might expect to see similarities between the covering practices of racial minorities and those of gays. Mungin’s story vindicates this expectation, as many of the axes along which Mungin chose to cover are familiar from the previous discussion of gay covering. Mungin, for example, prioritized other identities over his minority identity by accepting his mother’s dictum that he was a “human being first, . . . an American second, a black third.”<sup>651</sup> He accepted a nonactivist identity over an activist identity through his choice not to join other students who were protesting

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648. *Id.* at 111.

649. *Id.*

650. *Id.* at 163 (alteration in original).

651. *Id.* at 24.

the paucity of minority faculty.<sup>652</sup> He privileged cultures that were stereotypically white over those that were stereotypically black in his dress and his demeanor.<sup>653</sup> He chose to associate with the mainstream and to dissociate himself from other members of his minority group.<sup>654</sup>

It is, of course, important not to extrapolate too quickly from Mungin's individual narrative to a general claim about the nature of racial covering. The narrative turn in legal scholarship has been repeatedly criticized for its overly quick movement from a single compelling narrative to a normative legal position that impacts so many.<sup>655</sup> I concede that the burden is on the individual adducing such a racial narrative to ensure that it is roughly representative of the stories other racial minorities might tell. Of course, at some level, this burden is impossible for any one narrative to carry. No individual covering narrative can be representative in any strict sense—racial minorities of different backgrounds, professions, and races will cover in different ways.

Yet it bears emphasis that one can easily find examples in other sources of the four kinds of racial covering described above. Thus, in their article *Working Identity*, Devon Carbado and Mitu Gulati demonstrate how racial minorities drastically privilege their identities as workers over their racial identities.<sup>656</sup> Discussing how racial minorities are taught to eschew race-based activism, law professor Richard Delgado describes how he was advised not to write on “civil rights or other ‘ethnic’ subjects” prior to tenure.<sup>657</sup> Writing on how demeanor can affect perceptions of race, African American Brent Staples details his strategy of whistling Vivaldi while taking evening walks to counter negative visual data with positive aural data.<sup>658</sup> Meditating on racial self-hatred, Paulette Caldwell mourns how African-American children “reject association with black people and black culture in search of a keener nose or bluer eye.”<sup>659</sup>

These homologies between race-based and orientation-based covering should lead us to inquire whether covering has a performative dimension in the race context as it does in the orientation context. As I show in the legal

652. *See id.* at 76.

653. *See, e.g., id.* at 41, 105.

654. *See, e.g., id.* at 29, 43-44, 66.

655. *See, e.g.,* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 838-40 (1993) (noting that if a “story is being used as the basis for recommending policy changes, it should be typical of the experiences of those affected by the policy”).

656. Carbado & Gulati, *supra* note 643, at 1262.

657. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984).

658. BRENT STAPLES, *PARALLEL TIME: GROWING UP IN BLACK AND WHITE* 202-03 (1994); *see also* Deborah L. Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 N.Y.U. REV. L. & SOC. CHANGE 217, 217 (1997) (discussing “various strategies of acculturation” used by minority law students).

659. Caldwell, *supra* note 19, at 369.

discussion, covering in the race context, as in the orientation context, is often described as tangential to identity.<sup>660</sup> While conversion and passing demands are deemed to be futile or unreasonable in the race context, covering demands are assumed to be eminently reasonable. In evaluating that assumption, we should ask whether race-based covering can be constitutive of racial identity.

In the orientation context, I showed that covering could be constitutive of identity by demonstrating how often covering rhetorically and conceptually converges with passing and conversion. In the race context, the rhetorical conflation is accomplished by Patricia Williams:

A man with whom I used to work once told me that I made too much of my race. "After all," he said, "I don't even think of you as black." Yet sometime later, when another black woman became engaged in an ultimately unsuccessful tenure battle, he confided to me that he wished the school could find more blacks like me. I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, casually inscribed by definitional demarcations that did not refer to me.<sup>661</sup>

The colleague's demand is a covering demand—he is not asking Williams to convert to being white, or to pass as white. He is, rather, asking her to perform her racial identity in ways that make it easy for him to ignore her race. Williams is entitled to her race, but not to make "too much" of it—there is some excess of race that she can and should control. Yet Williams's reaction to this demand suggests that racial covering may not be so distinct from racial passing or conversion. Williams describes her experience of the covering demand in both the rhetoric of passing ("I felt myself slip in and out of shadow") and the rhetoric of conversion ("I became nonblack for purposes of inclusion and black for purposes of exclusion"). As in the orientation context, covering looks much less reasonable when it can be linked to conversion or to passing.

Social constructionist theories of race conceptually ground Williams's evocative rhetoric. Neil Gotanda usefully catalogues four definitions of race: (1) status-race, (2) formal-race, (3) historical-race, and (4) culture-race.<sup>662</sup> Status-race defines race as a trait that carries intrinsic social status,<sup>663</sup> as in a Jim Crow regime in which whites were viewed to be naturally superior to blacks. A much thinner conception of race, formal-race

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660. See *infra* note 694 and accompanying text.

661. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 9-10 (1991).

662. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 *STAN. L. REV.* 1, 3-5 (1991).

663. *Id.* at 4.

defines race solely in terms of immutable or visible characteristics such as skin color or ancestry.<sup>664</sup> Formal-race views black and white as “neutral, apolitical descriptions” that “are unconnected to social attributes such as culture, education, wealth, or language.”<sup>665</sup> As such, formal-race is the only racial definition that severs race from social context, seeking to define race biologically rather than culturally.<sup>666</sup> Historical-race defines race as a historical construct. It distinguishes itself from both formal-race and status-race in denying the existence of any transhistorical racial essence, such as the essentialized hierarchy of status-race or the essentialized biology of formal-race. Rather, it seeks to locate the meaning of race in a history of subordination.<sup>667</sup> Finally, culture-race defines race as including “culture, community, and consciousness.”<sup>668</sup> Culture-race holds that race is permeable to social discourse in a broader sense than simple historical subordination. It believes that race can encompass “broadly shared beliefs and social practices,” “physical and spiritual” community, and racial “traditions of self-awareness” as well as “action based on that self-awareness.”<sup>669</sup>

For present purposes, the critical distinction is that between formal-race and culture-race. Under formal-race, covering will always be tangential to race. The formal-race concept deems race to be fixed at birth and impermeable to the behavior of its holder. Under such a formulation, behaviors may be correlated with race, but they will never constitute it. In this sense, the formal-race conception tracks a status conception of orientation under which one’s orientation is defined prior to and independently of one’s acts. Both reason from the classical model of identity.

In stark contrast, under culture-race, covering can constitute race. The culture-race conception deems race to be formed at least in part by the racial performances in which one engages. This conception tracks a conduct-based conception of orientation under which one’s orientation is in part defined by one’s acts. Put more broadly, the distinction between formal-race and culture-race is a distinction between a classical and a performative conception of identity.

Adopting a performative conception of identity has more radical consequences in the race context than in the orientation context. This is because there are much stronger norms against discrimination on the basis of status in the context of race discrimination. If covering is adjudged to

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664. *Id.*

665. *Id.*

666. *See id.*

667. *Id.*

668. *Id.*

669. *Id.*



interfere with that status, it will be much more likely to be legally prohibited.

In the legal realm, one can see this point by considering the federal bans on race discrimination. Unlike orientation discrimination, race discrimination is explicitly prohibited in both the equal protection jurisprudence and the statutory language of Title VII. How legislators and courts define “race” in those bans against “race” discrimination has a profound effect on the viability of covering claims. If race in these bans is defined as “formal-race,” then resistance to covering will be much less likely to fall within the ambit of protection. To the extent that it does, it will only be protected as behavior that is correlated to race (as in Title VII disparate impact analysis) rather than behavior that is constitutive of race.<sup>670</sup> If race in these bans, in contrast, is defined as “culture-race,” then covering demands will be much more likely to fall. The definition of race in the legal context will thus have immediate and immense consequence for racial covering. It is to that project of legal definition that I now turn.

## 2. *Legal Contexts*

In this discussion, I take two case studies—one involving grooming discrimination and one involving language discrimination—to show how antidiscrimination law underprotects mutable race-related traits. I seek to demonstrate that this leaves racial minorities vulnerable to the demand that they assimilate through covering. As I did in the orientation context, I then question whether a more performative conception of race could be adopted by the law. In making the affirmative case, I demonstrate historical and contemporary traces of such a conception in the law.

### a. *Grooming*

Mungin covered through his grooming practices.<sup>671</sup> When he wore a suit, he evaded some of the stereotypes that attend African-American men.<sup>672</sup> When he failed to cover in this way, he was immediately assaulted with those stereotypes.<sup>673</sup> This suggests that grooming affects the extent to which racial minorities are perceived as such. In Mungin’s case, the refusal to cover never became a legal issue, as Mungin covered so assiduously. But

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670. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (preventing employers from basing job-related decisions on criteria that have a disparate impact on racial minorities unless the criteria are significantly related to successful job performance).

671. See, e.g., BARRETT, *supra* note 587, at 42, 105, 148.

672. See, e.g., *id.* at 42, 148.

673. See, e.g., *id.*

what would have occurred if Mungin had not covered? Would Title VII have protected his race-based flaunting?

In this discussion, I take up that question by examining how racial grooming is analyzed under Title VII, which bars race discrimination in employment. The leading racial grooming case is *Rogers v. American Airlines*,<sup>674</sup> decided in 1981. Renee Rogers was an African-American woman who worked for American Airlines as an airport operations agent.<sup>675</sup> This job fell under a grooming policy that prevented employees from wearing an all-braided hairstyle.<sup>676</sup> On its face, the policy was race-neutral and gender-neutral—whites as well as African Americans, and men as well as women, were prohibited from wearing all-braided hairstyles.<sup>677</sup> But the practice of wearing all-braided hair itself was (and is) neither race-neutral nor gender-neutral; this “cornrow” hairstyle is one strongly associated with African-American women.<sup>678</sup> Rogers, who wore cornrows, therefore challenged the policy under Title VII as a form of race and gender discrimination.<sup>679</sup> I focus here on the race discrimination claim.

In rejecting Rogers’s race discrimination claim, the court noted that the grooming policy on its face applied equally to members of all races.<sup>680</sup> While true, this fact in itself was not fatal to Rogers’s claim. Under the analysis of the landmark case of *Griggs v. Duke Power Co.*,<sup>681</sup> a Title VII plaintiff can prevail against a facially neutral policy if she can show that it has a disparate impact on a protected group. Thus, Rogers could still have won her suit if she had demonstrated that the policy had a disparate impact on African Americans. Had she made that showing, the employer could only have defended the policy on the ground that it was a business necessity.

In rejecting the disparate impact claim, the court observed that Rogers had not maintained “that an all-braided hair style is worn exclusively or even predominantly by black people.”<sup>682</sup> It further observed that the defendants had “alleged without contravention” that Rogers only adopted her all-braided hairstyle after it “had been popularized by a white actress [Bo Derek] in the film ‘10.’”<sup>683</sup> In noting this contention, the court implied that the cornrow hairstyle was not especially associated with African-

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674. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

675. *Id.* at 231.

676. *Id.*

677. *Id.*

678. Caldwell, *supra* note 19, at 379.

679. *Rogers*, 527 F. Supp. at 231.

680. *Id.* at 232.

681. 401 U.S. 424 (1971).

682. *Rogers*, 527 F. Supp. at 232.

683. *Id.*

American culture. This, of course, strains credulity, as Derek's cornrows were themselves an appropriation of an African-American style.<sup>684</sup>

Nonetheless, the court could simply have stopped at this point—if the grooming policy was not an instance of disparate treatment or disparate impact, it was permissible under Title VII. Yet the court continued its discussion, turning to other grounds on which it could dismiss Rogers's claims. As if it recognized the strength of Rogers's claim, the court bolstered its analysis with alternative rationales.

The main alternative rationale was that Rogers's cornrows were unprotected because they were mutable. In developing this rationale, the court distinguished between the "Afro/Bush" style and cornrows. The court posited that the Afro/Bush style *might* be protected under Title VII "because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics."<sup>685</sup> The court then maintained that "an all-braided hairstyle is a different matter," insofar as "[i]t is not the product of natural hair growth but of artifice."<sup>686</sup> The court observed that "[a]n all-braided hairstyle is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."<sup>687</sup>

In an analysis echoing equal protection reasoning, the *Rogers* court thus made immutability a predicate for protection. Afros were protected only insofar as they were immutable. Mutable traits, no matter how race-related, were not protected. To clarify this point, the *Rogers* court quoted language from *Garcia v. Gloor*,<sup>688</sup> a Fifth Circuit case holding that workplace English-only rules did not violate Title VII even if they had a disparate impact on Mexican Americans:

"[Title VII] is directed only at specific impermissible bases of discrimination—race, color, religion, sex, or national origin. National origin must not be confused with ethnic or sociocultural traits. . . . Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter, or that impose a burden on an employee on one of the prohibited bases. . . . '[A] hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is

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684. See Caldwell, *supra* note 19, at 379.

685. *Rogers*, 527 F. Supp. at 232.

686. *Id.*

687. *Id.*

688. 618 F.2d 264 (5th Cir. 1980).

related more closely to the employer's choice of how to run his business than to equality of employment opportunity.”<sup>689</sup>

In this analysis, the *Gloor* court used immutability as a gatekeeping mechanism in two related senses. First, it observed that only classifications based on immutable attributes were protected under Title VII (with the exception of religion, of which more later<sup>690</sup>). Thus race, color, sex, and national origin were protected because they were “beyond the victim's power to alter.”<sup>691</sup> Second, the court determined that protections for even these classifications extended only to their immutable *aspects*. Thus national origin—the status of being Mexican American—was not to be confused with “ethnic or sociocultural traits” such as the use of the Spanish language. These two points get conflated in the court's analysis, which assumes that all that is meant by national origin is the immutable aspect of national origin.

The *Rogers* court appropriated this analysis to reason that (1) Rogers's Title VII claim was one based on race; (2) the definition of race was limited to traits that one could not change, like skin color, bloodlines, or, perhaps, the texture of one's hair; (3) cornrows did not fall within this definition because they were mutable; and (4) cornrows were therefore not protected by Title VII. The *Rogers* court thus defined race as formal-race rather than as culture-race. Once it adopted that definition, Rogers was not protected from covering demands.

Note that in this vulnerability to covering demands, racial minorities are no more protected by Title VII than sexual minorities. Rogers was protected from the requirements of conversion and of passing—she did not have to become a white man or appear to be a white man to retain her job. In this way, she was more protected than a homosexual, who could be fired for not converting or passing without Title VII redress.<sup>692</sup> But once the traits for which Rogers sought protection were characterized as mutable, no matter how race-salient, she ran into difficulties. She was not protected from the assimilationist demand to cover—to minimize the race-salient traits that made her different from others.

The problem with this Title VII analysis is that it scants the performative dimension of race. Rogers made precisely this argument to the court, contending that the cornrow style “has been and continues to be part

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689. *Rogers*, 527 F. Supp. at 232 (quoting *Garcia*, 618 F.2d at 269 (quoting *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975))) (second alteration in original).

690. See *infra* notes 889-896 and accompanying text.

691. *Garcia*, 618 F.2d at 269.

692. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding that Title VII does not reach orientation).

of the cultural and historical essence of Black American women.”<sup>693</sup> In these words, Rogers urged the court to embrace culture-race, suggesting that grooming practices were partially constitutive of the “essence” of her racial identity.

Somewhat surprisingly, the court was not entirely deaf to these urgings. The court could have simply relied on *Garcia* for the proposition that mutable traits were not protected. Yet again, rather than relying on this ground alone, the court continued with a legally gratuitous, but perhaps sociologically impelled, analysis. In tacit response to Rogers’s claim that her grooming practice was essential to her racial identity, the court countered that the choice of a hairstyle was of “relatively low importance.”<sup>694</sup> In other words, the court fleetingly entertained the concept that race could be partially defined by one’s acts, but stressed that the act of grooming was too trivial to count as such an act.

As seen in the orientation context, adopting a performative conception of status inevitably raises the question of which performances fundamentally constitute that status. Even after one adopts a culture-race analysis of Rogers, one must still ask whether covering demands pertaining to grooming are sufficiently constitutive of race to violate bans on race discrimination. For many, other race-related traits—such as language—will appear more deeply constitutive of racial identity. This judgment has much to do with the perceived triviality of appearance.

I could challenge that perception by observing that discrimination on the basis of skin color is itself a form of appearance discrimination. Less tendentiously, I could observe that even sartorial appearance has consequences that are anything but trivial. Depending on whether he was wearing a suit or not, Mungin was treated as a lawyer or a potential mugger.<sup>695</sup> One should therefore inquire whether Renee Rogers’s cornrows had similar effects.

In answering that question, I look again to the interiority of narrative. While Rogers did not supply an individual account of her cornrows, law professor Paulette Caldwell has supplied an eloquent one.<sup>696</sup> In discussing the *Rogers* case, Caldwell acknowledges the popular intuition that “hair is such a little thing.”<sup>697</sup> Yet Caldwell’s purpose is to deploy her own experiences as an African-American woman to subvert the intuition that covering is trivial. She begins her essay by rooting her hair in a set of associations:

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693. *Rogers*, 527 F. Supp. at 232 (quoting Plaintiff’s Memorandum in Opposition To Motion to Dismiss at 4-5, *Rogers* (No. 81-4474)).

694. *Id.* at 231.

695. See *supra* notes 625-629 and accompanying text.

696. Caldwell, *supra* note 19.

697. *Id.* at 368.

I want to know my hair again, to own it, to delight in it again, to recall my earliest mirrored reflection when there was no beginning and I first knew that the person who laughed at me and cried with me and stuck out her tongue at me was me. I want to know my hair again, the way I knew it before I knew that my hair is me, before I lost the right to me, before I knew that the burden of beauty—or lack of it—for an entire race of people could be tied up with my hair and me.

I want to know my hair again, the way I knew it before I knew Sambo and Dick, Buckwheat and Jane, Prissy and Miz Scarlett. Before I knew that my hair could be wrong—the wrong color, the wrong texture, the wrong amount of curl or straight. Before hot combs and thick grease and smelly-burning lye, all guaranteed to transform me, to silken the coarse, [resistant] wool that represents me. I want to know once more the time before I denatured, denuded, denigrated, and denied my hair and me, before I knew enough to worry about edges and kitchens and burrows and knots, when I was still a friend of water—the rain's dancing drops of water, a swimming hole's splashing water, a hot, muggy day's misty invisible water, my own salty, sweaty, perspiring water.

When will I cherish my hair again, the way my grandmother cherished it, when fascinated by its beauty, with hands carrying centuries-old secrets of adornment and craftswomanship, she plaited it, twisted it, cornrowed it, finger-curled it, olive-oiled it, on the growing moon cut and shaped it, and wove it like fine strands of gold inlaid with semiprecious stones, coral and ivory, telling with my hair a lost-found story of the people she carried inside her?<sup>698</sup>

Caldwell's narrative recuperates the complexity of racial meanings lost in the *Rogers* case. In it, her hair grows into puzzles, becoming a metaphor for the unruliness of those meanings.

One way of making sense of that complexity is to see that all four of Gotanda's racial categories are represented in this passage. In the first paragraph, Caldwell yearns to regain a view of her hair as a formal-race trait. In that vision, her hair is simply one trait among many that permits her to identify herself in the mirror. The described moment of self-identification is not ordinary, but foundational—it is the moment in which the infant first realizes that the image in the mirror is a representation of herself because the image's laughter, tears, gestures, and hair correspond to the self's.<sup>699</sup> In Lacanian theory, this is the moment that inaugurates self-consciousness, when the child is able to differentiate between self and

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698. *Id.* at 365.

699. *Id.*

nonself.<sup>700</sup> For Caldwell, hair in this desired moment is an individual trait like a laugh—it identifies her as a person, not as a member of a racial minority. In this important sense, then, Caldwell and the *Rogers* court agree: Both feel the allure of formal-race as a prelapsarian concept in which hair has no racial meanings. Where Caldwell diverges from the court is in casting this moment as irretrievable. To find the moment before her hair was freighted with racial signification, Caldwell must return to the very origins of self-consciousness—her “earliest mirrored reflection.”<sup>701</sup>

When racial consciousness explicitly intrudes in this passage, it intrudes as status-race and historical-race. The images of status-race—“Sambo and Dick, Buckwheat and Jane, Prissy and Miz Scarlett”<sup>702</sup>—are terms from a child’s lexicon, again suggesting the speed with which children are inducted into racial consciousness. Even if that status hierarchy is offered as a vestige of the past—as in Prissy and Miz Scarlett—memory carries it into the present as historical-race. And whether these hierarchies are experienced as contemporary realities or historical heritage, their tutelary effect is the same: Black children are taught that they are the wrong race. That lesson often attaches to their appearance, as evidenced in sources as disparate as the doll studies in *Brown v. Board of Education*<sup>703</sup> and Toni Morrison’s *The Bluest Eye*.<sup>704</sup> In this passage, it attaches to Caldwell’s hair, which is “the wrong color, the wrong texture, the wrong amount of curl or straight.”<sup>705</sup>

Against these definitions of race, Caldwell posits culture-race as a salvific alternative. Recall that Gotanda’s culture-race included “broadly shared beliefs and social practices,” “physical and spiritual” community, and racial “traditions of self-awareness.”<sup>706</sup> In Caldwell’s account, cornrowing is cast as one such shared practice that occurs across generations of women in physical and spiritual community. The cornrows further express racial traditions of self-awareness, in that the grandmother’s braiding expresses “centuries-old secrets” and tells the “story of the people

700. JACQUES LACAN, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, in *ÉCRITS: A SELECTION 1* (Alan Sheridan trans., W.W. Norton & Co. 1977) (1966).

701. Caldwell, *supra* note 19, at 365.

702. *Id.*

703. 347 U.S. 483, 494 n.11 (1954) (citing K.B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (Midcentury White House Conference on Children & Youth, 1950)); see also RICHARD KLUGER, SIMPLE JUSTICE 317-19 (1976) (describing the *Brown Court*’s use of psychologist Kenneth Clark’s “doll studies,” which demonstrated that black children attending segregated schools preferred white dolls to black dolls).

704. TONI MORRISON, *THE BLUEST EYE* (1970) (telling the fictional story of an African-American girl who prays for her eyes to turn blue).

705. Caldwell, *supra* note 19, at 365.

706. Gotanda, *supra* note 662, at 4.

she carried inside her.”<sup>707</sup> Moreover, unlike formal-race, culture-race seems to be retrievable. Culture-race does not require that one forget the narratives of status-race or historical-race, but rather that one remember the counter-narratives that could imbue the trait in question with different significations.

How trivial, then, is hair? One way to pursue that question is to ask why, if hair is such a trivial matter, American Airlines was so insistent on requiring Rogers to alter her hair, even going so far—with the court’s approval—to ask Rogers *literally* to cover her hair with a hairpiece.<sup>708</sup> In reading the *Rogers* case, one can hear American Airlines and the court asking Rogers: “Why is this so important to you?” To which it seems Rogers could fairly have responded: “Why is this so important to *you*?” The vehemence of American’s objection suggests that while hair might be trivial in some Lacanian moment of preconsciousness, it cannot be so in any moment human agents recognize as their own. In the dialogue between American and Rogers, cornrows become a symbol of resistance to assimilation, and therefore a symbol of insubordination. The individual wearing them is “seen as having the stereotypical characteristics commonly associated with black will and willpower—undisciplined, insubordinate, unwilling to melt.”<sup>709</sup> Rogers’s hair must thus be understood not as a simple attribute but rather as a site of racial contest.

Indeed, one can imagine that an African-American woman might be indifferent to whether she wore cornrows or not until her hair became identified as such a site of contest. Consider the individual who picks up a button emblazoned with “Black Power” at a political rally who absently affixes it to her office bulletin board. Assume that at this moment the individual does not care whether the button is in her work environment or not. Now suppose that the individual’s supervisor tells her (to her surprise) that she must remove the button. Is it still not completely rational for that individual to insist on retaining the button not in spite of, but because of, the prohibition on it? At the point where the supervisor has insisted on the button’s removal, the button changes in social meaning. It becomes fraught with meanings it did not have before.

#### b. *Language*

Mungin covered by eschewing black vernacular,<sup>710</sup> suggesting a nexus between language and race. This nexus has been explicitly theorized in the debate surrounding Ebonics, where some commentators have argued that

707. Caldwell, *supra* note 19, at 365.

708. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

709. Caldwell, *supra* note 19, at 392-93.

710. See BARRETT, *supra* note 587, at 41.



“Black English” is a constitutive element of race.<sup>711</sup> How much weight does the law give the view that language might partially constitute race? How much should it give?

The Supreme Court faced these questions in the 1991 case of *Hernandez v. New York*.<sup>712</sup> At issue in *Hernandez* was the prosecutor’s use of peremptory strikes to eliminate two Latino prospective jurors in a criminal case with a Latino defendant.<sup>713</sup> Since the Supreme Court’s decision in *Batson v. Kentucky*,<sup>714</sup> striking a potential juror on the basis of her race is a violation of the equal protection guarantees of the Fifth and the Fourteenth Amendments. The prosecutor defended the strikes by contending that they were not based on race, but rather on the potential jurors’ facility in Spanish.<sup>715</sup> The Court had to decide whether such language-based discrimination was constitutionally impermissible race discrimination.<sup>716</sup>

Six Justices upheld the constitutionality of these language-based strikes by reasoning that they were not race-based strikes. There was, however, no majority opinion. It is instructive to compare the four-member plurality written by Justice Kennedy<sup>717</sup> and the two-member concurrence written by Justice O’Connor,<sup>718</sup> as the opinions agreed on almost everything except the definition of race. The two opinions agreed that the case turned on the plausibility of the race-neutral reason the prosecutor had adduced for striking the Latino jurors.<sup>719</sup> The opinions also agreed that the race-neutral reason was that the prosecutor questioned the ability of Spanish-speaking jurors to respect the official translation of the Spanish-language testimony anticipated in the case.<sup>720</sup> The opinions finally agreed that this reason was plausible, and that it required a decision in the state’s favor.<sup>721</sup> Yet in evaluating that reason, the two opinions revealed very different conceptions of race, conceptions that could have great significance for future cases.

Without categorically differentiating between language and race, Justice Kennedy’s plurality opinion concluded that the discrimination in

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711. See generally THE REAL EBONICS DEBATE: POWER, LANGUAGE, AND THE EDUCATION OF AFRICAN-AMERICAN CHILDREN (Theresa Perry & Lisa Delpit eds., 1998).

712. 500 U.S. 352 (1991). I follow the Court’s use of the term “Latino” and its characterization of Latino identity as a “race.” See *id.* at 355, 358.

713. *Id.* at 356.

714. 476 U.S. 79 (1986).

715. *Hernandez*, 500 U.S. at 356.

716. See *id.* at 358-59.

717. *Id.* at 355-72 (plurality opinion).

718. *Id.* at 372-75 (O’Connor, J., joined by Scalia, J., concurring in the judgment).

719. Compare *id.* at 358-59 (plurality opinion), with *id.* at 372-73 (O’Connor, J., concurring in the judgment).

720. Compare *id.* at 361 (plurality opinion), with *id.* at 375 (O’Connor, J., concurring in the judgment).

721. Compare *id.* at 372 (plurality opinion), with *id.* at 375 (O’Connor, J., concurring in the judgment).

this case did not constitute race discrimination. The plurality stressed that the prosecutor was distinguishing not between Spanish speakers and non-Spanish speakers, but rather between individuals who would defer to the court translator and individuals who would not.<sup>722</sup> In other words, the plurality framed this particular case as involving discrimination on the basis of deference to translation rather than discrimination on the basis of language. The plurality thereby cast the strikes at two removes from race discrimination, as lack of deference to a translator was related to facility in Spanish, which was in turn related to race. As the defendant correctly observed to the Court, this reasoning was tenuous, as lack of deference to a translator would always arise from facility in the non-English language that the translator was employed to interpret.<sup>723</sup> The plurality, however, rejected this claim on the ground that even a strong correlation between lack of deference and facility in Spanish did not collapse the distinction between the two for legal purposes.<sup>724</sup>

It appears possible that the plurality emphasized the broken link between language facility and lack of deference to give itself room to sustain a link between language facility and race without deciding the case in Hernandez's favor. The plurality showed a surprising openness to the defendant's claim that language and race were so intertwined that language discrimination was race discrimination. The plurality opined:

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.<sup>725</sup>

Thus the opinion ruled against Hernandez without foreclosing the possibility that language discrimination might be race discrimination.

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722. *See id.* at 361 (plurality opinion).

723. *See id.* at 361-62.

724. *See id.* at 362.

725. *Id.* at 371.

Justice Kennedy's discussion of race was remarkable in entertaining the possibility of a juridical definition of race as culture-race. Rather than assuming that race was an obvious, biologically predetermined concept, the opinion expressed uncertainty about "the breadth with which the concept of race should be defined for equal protection purposes."<sup>726</sup> At a general level, this statement was subversive in its simple acknowledgement that the definition of race could differ according to the purpose to which it was put. More specifically, Justice Kennedy observed that for equal protection purposes, it could well be that a definition of race should reflect a sociological nexus between race and language. He articulated that nexus by observing that "ridicule and scorn" of a language "all too often result from or initiate racial hostility."<sup>727</sup> This intrication of language and race led him to speculate that "for certain ethnic groups and in some communities, . . . proficiency in a particular language, *like skin color*, should be treated as a surrogate for race under an equal protection analysis."<sup>728</sup> His analysis was thus open to the claim that language is no less (or more) tangential to racial identity than skin color. If that claim were true, language discrimination would be race discrimination. This is why Justice Kennedy posits that the Court "would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors."<sup>729</sup>

Justice O'Connor's concurrence took a sharply different view of race. The concurrence accepted that a nonracial justification might be a pretext for race discrimination.<sup>730</sup> But it stated that if the Court accepted the nonracial justification as true, it could not analyze the case as involving race discrimination. For Justice O'Connor, language in this case was such a nonracial, nonpretextual justification. Thus even if there were a 100% correlation between speaking Spanish and being of Hispanic descent, O'Connor would not analyze language discrimination as race discrimination: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."<sup>731</sup>

Justice O'Connor's and Justice Kennedy's opinions did not differ in assuming that burdening a nonracial trait is permissible even if it has a disparate impact on racial minorities. That assumption is the legacy of *Washington v. Davis*,<sup>732</sup> and all six Justices in the majority acceded to its legitimacy. The difference between the two opinions lay rather in whether

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726. *Id.*

727. *Id.*

728. *Id.* (emphasis added).

729. *Id.*

730. *See id.* at 375 (O'Connor, J., concurring in the judgment).

731. *Id.*

732. 426 U.S. 229 (1976).

they believed language to be a nonracial trait. While Justice Kennedy was open to the possibility that race might incorporate language, Justice O'Connor was not. Justice O'Connor never explicitly addressed the claim that race might include language, but rather assumed it. For her, the fact that *Batson* only prohibited jurors from being struck “‘solely on account of their race’”<sup>733</sup> was dispositive of Hernandez’s claim. Justice Kennedy’s opinion and Justice O’Connor’s opinion demonstrate the difference between culture-race and formal-race. While these differing definitions did not lead the Justices to different results in this particular case, they could be immensely consequential in cases to come.

### 3. *The Performative Turn in Race*

One of the notable aspects of Justice Kennedy’s opinion is that it is a legal opinion that could ultimately protect a covering claim under equal protection analysis. This is startling against the background knowledge that covering claims have not been protected under existing equal protection and Title VII regimes. The surprise occasioned by a court’s embrace of a performative definition of race may also be fueled, however, by the fact that the concept of status performativity is widely associated with postmodern theory. Such an association may lead to the perception that a performative theory of race is too radical or destabilizing to be accepted by a court.

If one accedes to this perception, one will approach the argument that courts should extend existing protections for race to individuals resisting covering demands as purely academic. Yet such an accession does an injustice not only to the covering analysis, but also to the courts. While courts may not frame their conceptualization of race in the postmodern argot of performativity, they are certainly able to conceive of race in a performative way. If one looks back in time, one can see historical instances in which courts not only entertained, but actually embraced, such performative conceptions of race.

I will do no more than touch on two historical instances in which courts adopted performative conceptions of race, relying on the incisive work of Ariela Gross<sup>734</sup> and Ian Haney López.<sup>735</sup> Gross focuses on the performative aspects of race in nineteenth-century racial determination trials—that is, trials held to determine whether individuals were black or white for the purposes of discerning whether they were slaves.<sup>736</sup> According to Gross,

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733. *Hernandez*, 500 U.S. at 373 (O’Connor, J., concurring in the judgment) (quoting *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)) (emphasis altered).

734. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109 (1998).

735. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

736. See Gross, *supra* note 734, at 111.

legislatures sought to define race according to a binary system based on the formal-race criterion of ancestry.<sup>737</sup> Yet because that racial essence could not be easily detected, courts relied on external evidence to ascertain it. Specifically, courts often relied on racial performances to determine racial identity. Gross's study encompasses sixty-eight trials of racial determination appealed to state courts in the South in the nineteenth century—a sample that represents all of the extant records of such cases that she could locate.<sup>738</sup> Gross's examination of these cases leads her to conclude that “over the course of the antebellum period, law made the ‘performance’ of whiteness increasingly important to the determination of racial status.”<sup>739</sup>

Thus, “[d]oing the things a white man or woman did became the law’s working definition of what it meant to be white.”<sup>740</sup> Some of the conduct that the courts found salient has a chilling contemporary resonance. Individuals were adjudged white for their association with and acceptance by whites,<sup>741</sup> for the gentility of their demeanor,<sup>742</sup> and for the straightness of their hair.<sup>743</sup> For these individuals seeking to escape slavery, no less than for Mungin or Rogers, covering was rewarded. With this difference—in the race trials, covering was more openly acknowledged to be a form of conversion.

The statement that these performances converted race could be contested on the ground that these acts were believed to be evidence of a preexisting racial identity, the language through which blood would tell. Yet this objection simply restates the constative fallacy—the misperception that actions are describing an identity they are actually creating.<sup>744</sup> Because the nature of an individual’s blood was not evident to juries in these cases, the racial performances were only imaginatively describing that blood, and were actually creating a status that might have had no objective referent. Racial performances were not the evidence of race but rather its elements.<sup>745</sup> It may well have been that the investment in the constative fallacy was such that the acts were never explicitly acknowledged to be constitutive. But as a practical matter, they were constitutive in precisely this way—“To be white was to act white: to associate with whites, to dance gracefully, to vote.”<sup>746</sup>

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737. *See id.*

738. *Id.* at 120.

739. *Id.* at 112.

740. *Id.*

741. *See id.* at 159.

742. *Id.*

743. *Id.* at 139.

744. *See AUSTIN, supra* note 541, at 3.

745. Gross, *supra* note 734, at 118-19.

746. *Id.* at 162-63.

Formal-race was to receive an even more direct challenge in the early 1920s, in the racial prerequisite cases described in Haney López's *White by Law*. The racial prerequisite cases were another set of racial determination trials that occurred to ascertain whether aliens could become citizens of the United States. From 1790 until 1870, only whites were permitted to naturalize.<sup>747</sup> For much of the period from 1870 to 1952 (the year when racial bars on naturalization were abolished), only whites and blacks were eligible for citizenship.<sup>748</sup>

Like the antebellum race trials, then, these cases had to determine the race of individuals for the purpose of allocating a crucial entitlement. In the racial prerequisite cases, however, the courts were forced to be much more explicit about their definitions of race because they could not delegate that definitional project to juries. When the issue came to the Supreme Court, the Court sought to define race as formal-race, first as a matter of skin color, then as a matter of blood. As Haney López describes, however, these attempts encountered serious obstacles in a pair of cases—*United States v. Ozawa*<sup>749</sup> and *United States v. Thind*<sup>750</sup>—that came to the Court in quick succession in 1922 and 1923.<sup>751</sup>

Ozawa concerned a Japanese immigrant who sought naturalization on the ground that he was white. Ozawa's brief, which he wrote himself, argued in part on performative grounds.<sup>752</sup> Ozawa set forth the following facts:

“(1) I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. (2) I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. (3) I am sending my children to an American church and American school in place of a Japanese one. (4) Most of the time I use the American (English) language at home, so that my children cannot speak the Japanese language. (5) I educated myself in American schools for nearly eleven years by supporting myself. (6) I have lived continuously within the United States for over twenty-eight years. (7) I chose as my wife one educated in American schools . . . instead of one educated in Japan.”<sup>753</sup>

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747. See HANEY LÓPEZ, *supra* note 735, at 43.

748. See *id.* at 44.

749. 260 U.S. 178 (1922).

750. 261 U.S. 204 (1923).

751. HANEY LÓPEZ, *supra* note 735, at 79-80.

752. See *id.*

753. *Id.* at 80 (quoting Ozawa's brief).

Ozawa's application, however, was rejected by the District Attorney for the District of Hawaii on the ground that he was not a "white person."<sup>754</sup> Formal-race, in the form of skin color, trumped culture-race.

Yet Ozawa had an answer to this objection. As he was to articulate all the way to the United States Supreme Court, which he reached eight years later, Ozawa believed that his skin was, in literal terms, "white." In support of his argument, he adduced anthropological testimony. This testimony stated, *inter alia*, that the typical Japanese "are whiter than the average Italian, Spaniard or Portuguese,"<sup>755</sup> and that "the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which whites assume as their own privilege."<sup>756</sup>

The Court, of course, rejected this argument, unanimously denying Ozawa's application.<sup>757</sup> In doing so, however, the Court was pressured into disclaiming full reliance on the test of skin color. It observed that "to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation."<sup>758</sup> This rejection of skin color as the ultimate arbiter of whiteness did not mean that the Court moved away from a formal-race conception. Instead, the Court shifted from one formal-race conception to another, moving from skin color to blood. The Court held that "the words 'white person' are synonymous with the words 'a person of the Caucasian race,'" and that Ozawa was "clearly of a race which is not Caucasian."<sup>759</sup> Ancestry traceable to a particular ethnographic group, rather than skin color, became the court's bulwark against the culture-race conception of race that Ozawa had forwarded.

Unfortunately for the Court, another plaintiff was waiting in the wings to challenge its newly minted definition of whites as individuals with Caucasian ancestry.<sup>760</sup> Only months after it handed down its decision in *Ozawa*, the Court heard oral arguments in *Thind*.<sup>761</sup> Bhagat Singh Thind was an immigrant from India.<sup>762</sup> As the Court conceded, Indians had been characterized by "certain scientific authorities" as Caucasians.<sup>763</sup> Thus, under *Ozawa*'s definition of white persons, Thind was white.

What, then, was the Court to do? Formal-race conceptions rely primarily on skin color or blood. Yet such literal definitions of formal-race

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754. *Id.* at 81.

755. *Id.* (quoting Ozawa's brief).

756. *Id.*

757. *United States v. Ozawa*, 260 U.S. 178, 198-99 (1922).

758. *Id.* at 197.

759. *Id.* at 198.

760. See HANEY LÓPEZ, *supra* note 735, at 86.

761. *United States v. Thind*, 261 U.S. 204 (1923).

762. See *id.* at 206.

763. *Id.* at 210.

would not exclude *Ozawa* or *Thind*, individuals who were in common knowledge not white. The Court resolved this dilemma by relying on that common knowledge. It stated that “[w]hat we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.”<sup>764</sup> This definition, it found, “does not include the body of people to whom the appellee belongs.”<sup>765</sup> As Haney López observes, “the Supreme Court abandoned scientific explanations of race in favor of those rooted in common knowledge when science failed to reinforce popular beliefs about racial differences.”<sup>766</sup>

In deferring to common knowledge, the Court both exposed and preserved the fiction of formal-race. It exposed that fiction in revealing the impossibility of articulating a definition of race as a particular skin color or ancestral group. Yet the Court simultaneously preserved that concept by placing it in the care of the community, in the same way that antebellum race trials placed racial definition in the hands of the jury. *Thind* was a stroke of ingenuity and disingenuity.

Reading the Supreme Court’s opinions in *Ozawa* and *Thind* places a certain pressure on contemporary judicial deployments of formal-race. Given that the Court has effectively admitted that it cannot coherently define race, how can Justice O’Connor (for example) be so confident that language is not race? Implicit in her confidence is a definition of race as skin color or ancestry that stands in tension with the lessons of the racial prerequisite cases, to say nothing of the antebellum racial determination cases.

More generally, these instances suggest that performative conceptions of race are not a recent postmodern phenomenon. We could ask why the concept of formal-race has had such a long life in antidiscrimination jurisprudence, given that its coherence has been so trenchantly called into question by these historical episodes.

There are doubtless many answers to this question, but I believe one significant one pertains to context. I distinguish here between what I call “formation” cases and what I call “treatment” cases. Formation cases are cases in which determining the racial identity of the party is the issue before the court, as in the antebellum trials or in the prerequisite cases. In these cases, the question before the court is “What race is this individual?” In contrast, treatment cases are cases in which the topic of dispute is how an

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764. *Id.* at 214-15.

765. *Id.* at 215.

766. HANEY LÓPEZ, *supra* note 735, at 79-80.



individual has been treated on the basis of a race that is already known or stipulated, as in the generic equal protection or Title VII case.

My hypothesis is that courts are much more likely to adopt a performative conception of race (culture-race) in the formation context and a classical conception of race (formal-race) in the treatment context. This is because courts have more difficulty sustaining the illusion that race is a prediscursive concept when forced to confront the issue directly, as both the antebellum cases and the naturalization cases demonstrate. Yet because of the convenience—both moral and administrative—of formal-race, the courts fail to internalize the lessons about race they have learned in the formation context. When the courts turn to the treatment cases, in which the definition of race can be assumed without being articulated, the courts slip, either consciously or not, into a discourse of formal-race.

What should not remain occluded in this account is that treatment cases are, in their own way, also formation cases. If a court holds that (1) race is protected, but (2) language is not protected, then the only logical inference is that (3) language is not race. What is pernicious about these cases is that race is being defined *sub silentio* by statements about what race is not, without any obligation to define precisely what race is. This is disquieting because the Court has shown itself unable to satisfy that obligation—or, put differently, because the Court's practice suggests that formal-race cannot be formally defined.

The dispiriting ability of courts to sustain such inconsistent definitions of race should not detract from the more hopeful insight that the courts are not endemically incapable of adopting culture-race. History teaches that culture-race is not a radical concept, at least in the formation context. It is possible that Justice Kennedy's conception of culture-race may yet be embraced.

### C. *Sex-Based Covering*

I now turn to sex-based covering as my final case study. As in the race context, I begin with a nonfictional narrative. This narrative is an account written by Ann Hopkins<sup>767</sup> about her experience as a plaintiff in the landmark sex-discrimination case of *Price Waterhouse v. Hopkins*.<sup>768</sup> Hopkins's narrative demonstrates how sex-based covering both converges with and diverges from orientation-based and race-based covering. Like Singer and Mungin, Hopkins was required to cover by making her status as a member of a subordinated group easy to disattend along some axes. Unlike Singer and Mungin, however, Hopkins was also required to

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767. ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* (1996).

768. 490 U.S. 228 (1989).

“reverse cover,” that is, to signal her outgroup status along other axes. Through this narrative, I demonstrate that women are differently situated from gays or racial minorities in that the dominant group routinely asks them both to cover and to reverse cover.

Turning to legal contexts, I demonstrate this convergence and divergence. I show how along some dimensions, such as pregnancy or motherhood, women are systematically asked to cover in ways that are deeply analogous to the ways in which gays or racial minorities are asked to mute their identities. I then show how along other dimensions, such as grooming or demeanor, women are sent much more conflicting messages—they are asked to occupy a middle ground that is neither too masculine nor too feminine.

### 1. *Cultural Contexts*

Ann Hopkins’s *So Ordered*<sup>769</sup> is an autobiographical account of her famously successful suit against Price Waterhouse, a major accounting firm.<sup>770</sup> In 1982, Hopkins was the sole woman among the eighty-eight nominees for partnership at the firm.<sup>771</sup> Although she possessed the best record among those nominees for generating new business, Hopkins was not elected.<sup>772</sup> She brought suit under Title VII, alleging that she had been discriminated against because of her sex. She prevailed in her lawsuit at every stage, including at the Supreme Court.<sup>773</sup>

Like Mungin, Hopkins engaged in much activity that could be characterized as covering. Many of the positive comments she received during her partnership review related to stereotypically male attributes—she was described as “strong,” “decisive[],” “independen[t],” and “demand[ing].”<sup>774</sup> As Mary Anne Case points out in her incisive analysis of the *Hopkins* case, all of “these adjectives come straight out of the masculinity scale of one of the most influential psychological inventories in sex-role research.”<sup>775</sup> One account of the injustice of Hopkins’s partnership denial, then, was that she bore all of the burdens of covering without reaping any of its benefits.

769. HOPKINS, *supra* note 767.

770. *Hopkins*, 490 U.S. 228.

771. *Id.* at 233 (plurality opinion).

772. *See id.* at 233-34.

773. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), *aff’d in part, rev’d in part, and remanded*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d and remanded*, 490 U.S. 228 (1989), *modified*, 737 F. Supp. 1202 (D.D.C.), *aff’d*, 920 F.2d 967 (D.C. Cir. 1990).

774. *Hopkins*, 490 U.S. at 234 (plurality opinion).

775. 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, 12 (1995).

In Hopkins's case, however, it is harder to ascertain whether Hopkins herself would have characterized her actions as covering. In Barrett's narrative, there is a moment in which Mungin explicitly acknowledged how hard he was working to fit into the mainstream.<sup>776</sup> Hopkins makes no such admission. To the contrary, the impression that Hopkins conveys in the narrative is that she is, in stereotypical terms, male-identified. Describing her childhood, Hopkins speaks of herself as a tomboy. She recounts that she "had to take home economics" because "only the boys could take shop," and that she brought home a "D" because she "ironed on the wrong side of the ironing board."<sup>777</sup> She describes herself as an outsider who "cried a lot over [her] difficulties coping with sororities and cheerleaders and snobbery and bias."<sup>778</sup> Speaking of her education in a single-sex college, Hopkins describes her "unstatistical" belief "that most interesting women attended women's colleges."<sup>779</sup> She maintains that going to such a college had a significant impact on her development: "I learned to depend on myself and on the analytical integrity of an answer to a question or a solution to a problem before I was taught to depend on or defer to members of the opposite sex or their point of view."<sup>780</sup>

It is, of course, important not to read the book through the filter of the lore surrounding the case—that Hopkins was viewed to be male-identified. Such a filter might obscure many details in Hopkins's account that demonstrate stereotypically feminine behavior. Thus Hopkins speaks of her youthful enjoyment of "Victorian formalities," of how she "wore white gloves and hats when the occasion called for it, learned ballroom dancing, went to debutante balls."<sup>781</sup> Yet the dominant impression created by the narrative is that Hopkins does possess many stereotypically masculine traits. Thus Hopkins describes her rejection of her mother's suggestions to study "literature, history, art, and philosophy," in favor of an undergraduate major in mathematics.<sup>782</sup> After earning a master's degree in that field, Hopkins returned to her alma mater to engage in the stereotypically feminine profession of teaching, but then left it a year later because it was not her calling.<sup>783</sup> She instead moved into the stereotypically masculine corporate world, working successively for IBM, the Computer Sciences Corporation, the accounting firm of Deloitte & Touche, and

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776. BARRETT, *supra* note 587, at 163.

777. HOPKINS, *supra* note 767, at 6.

778. *Id.* at 8.

779. *Id.* at 9.

780. *Id.*

781. *Id.* at 4.

782. *Id.* at 9.

783. *See id.* at 11-12.

finally Price Waterhouse.<sup>784</sup> Hopkins's account of her working years describes her tendency to engage in binary thinking,<sup>785</sup> her inattention to context,<sup>786</sup> her hatred of therapy or counseling,<sup>787</sup> her preference for action over introspection,<sup>788</sup> and her motorcycle, which she began to drive after she crashed her car on a camping trip.<sup>789</sup>

This is not to say that Hopkins was exempted from covering demands. One such covering demand was that she make her pregnancies easy to ignore. At Deloitte & Touche, Hopkins became pregnant for the first time.<sup>790</sup> She perceived the time she would need to give birth to her child as a medical procedure that would keep her "away from work for a couple of weeks."<sup>791</sup> Her supervisor apprehended the situation differently, reacting as if she "were planning to quit," and elevating her "pregnancy to the level of a professional crisis."<sup>792</sup> Similarly, Price Waterhouse criticized Hopkins for bringing her children to work on certain occasions.<sup>793</sup>

Nonetheless, it was not Hopkins's failure to cover that doomed her partnership chances at Price Waterhouse. The negative comments during her review centered not on perceptions of her excessive femininity, but on perceptions of her excessive masculinity. One partner advised her to "[w]alk more femininely, talk more femininely, dress more femininely, wear make-up and jewelry [and] have [her] hair styled."<sup>794</sup> Another suggested that Hopkins take "a course at charm school."<sup>795</sup> Others described Hopkins as "macho," or as "'overcompensat[ing] for being a woman."<sup>796</sup> Still others complained of her use of profanity, although one partner candidly admitted that the perception of her swearing was heightened "[j]ust because it's a lady using foul language."<sup>797</sup> Even those who supported Hopkins often framed their support in gendered terms. One partner observed that Hopkins had "matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate."<sup>798</sup> Previous female

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784. *See id.* at 12, 18, 28, 61. At the time, Deloitte & Touche was known as Touche Ross & Co. *See id.* at 27.

785. *Id.* at 89.

786. *Id.*

787. *See id.* at 267.

788. *See id.*

789. *Id.* at 19, 25.

790. *Id.* at 43.

791. *Id.* at 44.

792. *Id.*

793. *See id.* at 225.

794. *Id.* at 148.

795. *Id.* at 202.

796. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (quoting defendants' exhibits 30 and 31).

797. *HOPKINS*, *supra* note 767, at 209.

798. *Id.* at 202.

candidates for partner had been criticized for being too much “like one of the boys,” for being “women’s libber[s],” or for behaving like “Ma Barker.”<sup>799</sup>

These demands strikingly contrast with the demands described in the orientation and race contexts. The demands that employers made of Singer or Mungin were covering demands—demands that the individual make his difference from the dominant group easy to ignore. Hopkins, in contrast, was not asked in these comments to act more masculine but rather to act more feminine. She was not asked to cover, but rather to reverse cover.

This is not to say that reverse covering demands are not made of gays or racial minorities. Perhaps most evidently, members of the groups themselves make such demands, as when “queers” ask gays to be “more gay”<sup>800</sup> or when racial minorities exhort fellow members not to be “oreos”<sup>801</sup> or “bananas.”<sup>802</sup> Less obviously, the dominant groups within these classifications also make reverse covering demands. Straights can ask gays to perform according to stereotype in certain realms, although the contours of those realms may be strictly delimited. Thus Butler describes the irony of how drag (which often codes as gay) is a form of “high het entertainment” when performed on the stage but not when performed by the individual seated next to one.<sup>803</sup> Subtler reverse covering demands are also more pervasive—as when a gay man is asked for advice about fashion or design.<sup>804</sup> Similarly, ethnic and racial minorities can also be subjected to demands for minstrelization. This can take the form of required deference or submissiveness, as when an African American who behaves in what would be an ordinary manner for a white is perceived to be “uppity.”<sup>805</sup> It can also take the form of a demand that such minorities be more “ethnic,”

799. *Id.* at xiii.

800. *See supra* notes 390-398 and accompanying text.

801. African Americans who are perceived to act “too white” may be criticized as “oreos” by other African Americans. *See, e.g.,* Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. ILL. L. REV. 1095, 1099 (describing how African Americans who failed to wear dashikis were sometimes called “oreos” by Black Nationalists); Carolyn Edgar, *Black and Blue*, RECONSTRUCTION, 1994, at 13, 16 (describing how the author, an African-American woman, was denominated an “[o]reo” by other African Americans when she associated too much with whites).

802. Asian Americans who are perceived to act “too white” may be criticized as “bananas” by other Asian Americans. *See, e.g.,* ERIC LIU, THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER 34 (1998) (describing how the author, an Asian American, was referred to as a “banana” by other Asian Americans for engaging in stereotypically white behaviors).

803. BUTLER, *supra* note 538, at 126.

804. Barbara Ellen, *A Girl’s Best Friend*, OBSERVER, July 29, 2001, at 3, 2001 WL 20934821 (noting the popular characterization of gay men as attractive companions for straight women in part because of their ability to discuss fashion and interior design).

805. Roger Wilkins, *On Being Uppity*, MOTHER JONES, June 1990, at 6 (arguing that white society terms Jesse Jackson and Marian Wright Edelman “uppity” because of their assertiveness).

as when individuals are asked—as Mungin was<sup>806</sup>—to be available to mentor a coworker of the same background.<sup>807</sup>

Nonetheless, I believe it is no accident that Hopkins's account features the reverse covering demand more prominently than either Singer's or Mungin's. It is my sense—admittedly impressionistic—that the dominant group more routinely requires reverse covering in the sex/gender context than in the orientation or race contexts. This may be because stereotypically feminine traits are more likely to be valued as appropriate to at least some spheres of life. The stereotypically feminine attributes of nurture, empathy, intuition, and so forth, were and are valued in the domestic sphere. In contrast, there are fewer spheres in which traits stereotypically associated with homosexuals or racial minorities are valued. I take the import of *Bowers v. Hardwick*,<sup>808</sup> for example, to be that there is no place where consensual homosexual sodomy could be valued, not even in the private space of one's own home.

Hopkins thus found herself subjected simultaneously to both the demand to cover and the demand to reverse cover. She was asked to strike an Archimedian mean between the poles of being too masculine and being too feminine. The nature of that mean is perhaps best reflected in the partner's comment that Hopkins had “matured from a tough-talking somewhat masculine and hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate.”<sup>809</sup> This comment reveals that while being too masculine is not valued, being too feminine is not valued either. To succeed as a woman, one must have the correctly titrated balance of masculine and feminine traits. One must be “authoritative” and “formidable,” but remain an “appealing lady.” The necessity of striking such a balance is also evident in another partner's comment that Hopkins had “overcompensated for being a woman.”<sup>810</sup> Again, this language suggests that some compensation is appropriate, but that “overcompensation” is not. If a woman covers too much, then the reverse covering demand will be made to bring her back into the zone of appropriate behavior.

The opposition between the two demands should not obscure what they have in common—both relate to performative and mutable aspects of Hopkins's identity. When Hopkins first perceived that her career at Price Waterhouse was endangered, she expressed the desperate hope that the problem was something “other than sex, that [she] could start to work on,

806. See BARRETT, *supra* note 587, at 44.

807. See LAWRENCE O. GRAHAM, MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD 82 (1995) (describing how white-run organizations “hope and expect that their senior black officials will attempt to recruit and mentor junior black staffers”).

808. 478 U.S. 186 (1986).

809. HOPKINS, *supra* note 767, at 202.

810. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality opinion).

especially given that changing sex was not an option.”<sup>811</sup> This comment reflects her naiveté about how sex can be “worked on” without having a sex change. In my terms, Hopkins associated assimilation with conversion, failing to discern that Price Waterhouse was asking her to cover and reverse cover. For while Price Waterhouse did not wish Hopkins to change her sex, it certainly wished her to work on her sex-based performances. Only one partner at Price Waterhouse explicitly articulated a categorical animus toward women, and the other partners assiduously disavowed any reliance on this position.<sup>812</sup> Yet many partners unwilling to articulate categorical animus toward women were quite comfortable voicing objections to a certain *kind* of woman. This was the woman who did not perform her gender in the middle band between hypermasculinity and hyperfemininity. Thus when Hopkins’s friend and colleague Sandy Kinsey was asked in court whether Price Waterhouse treated women fairly, she perceptively responded that it had treated *her*, as an individual woman, fairly.<sup>813</sup> Because she did not fall out of the median band of acceptable gender performance, Kinsey had not felt the policing effects of either the covering or reverse covering demands.

Hopkins’s “sex change” comment is not an outlier. Hopkins’s narrative gives the impression that she was generally oblivious to gender dynamics. Hopkins did not think of her gender as a potential ground for discrimination until after Price Waterhouse failed to promote her. When asked by a friend whether she believed gender had been a factor, her initial reaction was disbelief. Both she and the friends present at that conversation “found unimaginable any notion that gender influenced business decisions.”<sup>814</sup> Similarly, when asked by her attorney in an early consultation whether she had encountered sexist remarks at work, she responded that there were “none that [she] could recall,” but that she “infrequently recognized sexist comments.”<sup>815</sup> This is a remarkable statement in light of the sheer volume of sexist remarks that had been made directly to Hopkins by that point.

A comparison with Mungin’s narrative should lead us not to treat this obliviousness as simple naiveté. Mungin remained in denial about the effects of racism in his life until that denial became intolerable. It may be that part of the process of fitting in at Price Waterhouse for Hopkins entailed repressing her experiences with sexism. Perhaps Hopkins “infrequently recognized sexist comments” because that was a strategy of corporate survival.

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811. HOPKINS, *supra* note 767, at 139.

812. *See id.* at 221.

813. *See id.* at 228.

814. *Id.* at 139.

815. *Id.* at 153.

In any event, the litigation proved to be such an education in gender consciousness that Hopkins was soon unable to see the case in nongendered terms. One of the fascinating aspects of Hopkins's account is how much the litigation ultimately framed her final understanding of what had occurred at Price Waterhouse. During litigation, one of her attorneys sent her a poem consisting of five limericks, the first of which read: "There once was a woman named Ann / who was told to act less like a man / told to be very sweet / and to dress oh so neat / and to walk with a shake of her can."<sup>816</sup> This is how Hopkins ultimately understood her own case, and how tens of thousands of law students have been taught it. Yet this characterization is a far cry from her initial belief that no sexist comments had been made to her at Price Waterhouse.

Hopkins's narrative suggests that the gender consciousness the trial instilled in her led her to negotiate gender more carefully. Hopkins soon realized that the press coverage of her litigation was itself a trial of whether she could perform her gender in such a way as to be a sympathetic plaintiff. In the face of this judgment, she became much more receptive to the reverse covering demand. Hopkins describes her own sensitivity—described by her friends as hypersensitivity—to having her "brown Coach bag" described as a "'beat up brown' briefcase"<sup>817</sup> or to having reporters judge her house or her attire when they came to interview her.<sup>818</sup> Even more tellingly, Hopkins tells the following anecdote about preparing for a television appearance with her daughter Tela:

On one occasion, when a producer asked me to step down the hall for makeup, a startled Tela asked, "You're not going to do that are you, Mom?" She seemed even more startled at my reply: "Tela Margaret, that woman is in charge and I'm going to do what she says."<sup>819</sup>

When asked to wear more makeup by someone in charge, Hopkins decided to do so this time.<sup>820</sup> Her accession to such reverse covering demands can also be seen in the photograph on the jacket of her book, where she is pictured with makeup, jewelry, and styled hair.

Hopkins's narrative demonstrates how she was pervasively subjected to both covering and reverse covering demands throughout her life. The fact that the latter were more strongly evident than the former suggests simply

816. *Id.* at 362.

817. *Id.* at 358.

818. *See id.* at 359.

819. *Id.* at 357.

820. Of course, it is important to observe that in this instance the "someone" was a woman who was not Hopkins's employer, and that the makeup requirement here was presumably sex-neutral.



that she was generally more on the masculine side of the spectrum of gender performance. It also suggests that all professional women may be pushed toward the middle of the spectrum through the policing effects of the covering and reverse covering demands.

## 2. *Legal Contexts*

I will return to Ann Hopkins's Supreme Court victory for the purposes of describing how courts have treated the distinctive double bind in which women find themselves. Before doing so, however, I wish to consider the ways in which courts have treated a simple covering demand, taking up the instance of pregnancy.

### a. *Pregnancy*

One of the ways in which Hopkins was pressured to cover was around issues of pregnancy and motherhood. When she announced her pregnancy at her first accounting firm, it was taken as an announcement of her resignation.<sup>821</sup> Similarly, Hopkins was criticized by Price Waterhouse for bringing her children to the workplace.<sup>822</sup> To be recognized as authentic workers, then, women must deemphasize their roles as potential or actual mothers.<sup>823</sup> To what extent is discrimination against those who refuse to cover in this way discrimination on the basis of sex?

The Supreme Court delivered a startling answer to this question in 1974 in the case of *Geduldig v. Aiello*,<sup>824</sup> where it held that pregnancy discrimination was not sex discrimination for the purposes of the equal protection guarantee. At issue in *Geduldig* was California's disability insurance program, which did not cover work loss that resulted from pregnancy.<sup>825</sup> A group of female California employees brought a class action suit claiming that this program violated their rights under the Equal Protection Clause. They contended that such pregnancy discrimination was sex discrimination that triggered intermediate scrutiny.<sup>826</sup> In rejecting this claim in a footnote, the Court observed:

[T]his case is thus a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson*, involving discrimination based upon gender as such. The California insurance program does not exclude

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821. See HOPKINS, *supra* note 767, at 44.

822. See *id.* at 225.

823. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 31 (2000).

824. 417 U.S. 484 (1974).

825. *Id.* at 484.

826. See *id.* at 486 & n.1.

anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.<sup>827</sup>

Pregnancy is here dissociated from sex (“gender as such”) through the observation that while all pregnant persons are women, not all nonpregnant persons are men. Because pregnancy is not perfectly correlated to being a woman, pregnancy discrimination is not sex discrimination.

Knowing the Court’s antidiscrimination logic, one finds it hard not to look for the immutable/mutable distinction here. While the language of mutability is sub rosa in the *Geduldig* opinion, Dan Danielsen has hypothesized that what broke the link between pregnancy and sex for the Court was that pregnancy, unlike sex, can be chosen.<sup>828</sup> The volitional aspect of pregnancy may have been particularly visible to the Court as it had decided *Roe v. Wade*<sup>829</sup> in the preceding Term.<sup>830</sup>

The simple statement that the Court does not recognize pregnancy discrimination as sex discrimination should be sufficient to demonstrate the troubling narrowness of the Court’s definition of sex for purposes of equal protection. Closer examination of the sex discrimination jurisprudence, however, reveals an even more disturbing tension in the Court’s analysis. The Court’s grant of intermediate, rather than strict, scrutiny to sex is sometimes justified on the ground that there are “real differences” between

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827. *Id.* at 496 n.20 (citations omitted).

828. Dan Danielsen, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 NEW ENG. L. REV. 1453, 1458 (1992).

829. 410 U.S. 113 (1973).

830. Danielsen, *supra* note 828, at 1458.

the sexes.<sup>831</sup> Thus, unlike any two racial groups, men and women are deemed to be biologically different in ways that could justify their differential treatment.<sup>832</sup> One of the fundamental differences that the Court has found between men and women is their differential ability to become pregnant.<sup>833</sup> Thus pregnancy is simultaneously not sex and the fundamental difference between the sexes.<sup>834</sup>

In another surprisingly performative turn, Congress rejected the *Geduldig* Court's conception of sex. Two years after *Geduldig*, the Supreme Court extended its holding that pregnancy discrimination was not sex discrimination to the context of Title VII in *General Electric Co. v. Gilbert*.<sup>835</sup> In *Gilbert*, the Court rejected a Title VII challenge to a plan very similar to that in *Geduldig*.<sup>836</sup> The Court again observed that the nexus between pregnancy and sex was insufficient to warrant protection of pregnancy under Title VII's bar on sex discrimination. This time, however, the Court's decision was susceptible to legislative override. Congress availed itself of that opportunity by enacting the Pregnancy Discrimination Act of 1978.<sup>837</sup> The Act framed itself as a clarification of the meaning of the existing Title VII provision barring sex discrimination, explicitly defining sex discrimination to encompass discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."<sup>838</sup> Rather than adding pregnancy as an additional ground to sex, the Act thus articulated a more encompassing definition of sex that included pregnancy. In this sense,

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831. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 9-14, 26-31 (1995).

832. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 618-27 (4th ed. 2001).

833. See, e.g., *Nguyen v. INS*, 121 S. Ct. 2053, 2060 (2001) ("In the case of the mother, the [parental] relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth. In the case of the father, the uncontested fact is that he need not be present at the birth."); *Miller v. Albright*, 523 U.S. 420, 436 (1998) (Stevens, J.) ("Nor can it be denied that the male and female parents are differently situated in this respect. The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record."); *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (plurality opinion) ("[Y]oung men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.").

834. These two premises can be reconciled by observing that pregnancy itself has both a performative and nonperformative dimension—one can distinguish between the act of becoming pregnant and the capacity to become pregnant. Thus one could say that the fact that one chooses to become pregnant does not mean that the capacity to become pregnant is not a fundamental difference between the sexes. The distinction, however, is too nice, as the capacity shapes the choice—this is a choice that only one of the sexes can make.

835. 429 U.S. 125 (1976).

836. *Id.* at 132.

837. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)).

838. *Id.*

the Pregnancy Discrimination Act took a performative view of sex, noting that an individual's sex incorporated the acts in which she engaged.

In the equal protection domain, however, the Court has not retreated from its view that pregnancy discrimination is not sex discrimination. In 1993, the Court decided *Bray v. Alexandria Women's Health Clinic*,<sup>839</sup> a case turning on the question of whether antiabortion activism represented animus against women. In answering in the negative, an opinion for the Court by Justice Scalia cited *Geduldig* for the proposition that pregnancy discrimination was not sex discrimination. To demonstrate the "continuing vitality of *Geduldig*,"<sup>840</sup> the Court observed that in a pair of earlier cases concerning funding for abortions, it had determined that "the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination."<sup>841</sup> Far from limiting *Geduldig*'s reach, the Court has thus affirmed its premise in the abortion context. In doing so, it adheres to a deeply nonperformative conception of sex as constituting only biological genotype or phenotype.

#### b. *Demeanor and Grooming—The Double Bind Revisited*

The judicial treatment of pregnancy is very similar to the judicial treatment of other covering activities such as homosexual sodomy or grooming. This demonstrates that women are in some ways similarly situated to gays or racial minorities. Yet as Hopkins's narrative demonstrates, women are also differently situated from these other groups because they are caught in a particularly severe double bind. I now consider how the courts have dealt with this distinctive aspect of sex-based covering.

The evidence that Hopkins was explicitly subjected to both covering and reverse covering demands was important to her legal victory. An expert witness for Hopkins—psychologist Susan Fiske—offered a crucial characterization of Hopkins's predicament as a "double bind."<sup>842</sup> Fiske first explained stereotyping, testifying that "[t]he overall stereotype for feminine behavior is to be socially concerned and understanding, soft and tender, and the overall stereotype for a man, all other things being equal, is that [he] will be competitive, ambitious, aggressive, independent, and active."<sup>843</sup> Fiske maintained that because stereotypically male traits are valued in many work environments, women who seek to succeed in such environments are

839. 506 U.S. 263 (1993).

840. *Id.* at 272 n.3.

841. *Id.* at 273 (discussing *Maier v. Roe*, 432 U.S. 464 (1977); and *Harris v. McRae*, 448 U.S. 297 (1980)).

842. HOPKINS, *supra* note 767, at 236.

843. *Id.* at 234.

placed in a “double bind.”<sup>844</sup> This bind is a “conflict between the assertiveness and aggressiveness required to get the job done and the image required to fit the female stereotype.”<sup>845</sup>

Fiske’s concept played a major role in the Supreme Court’s analysis. The plurality ruling in Hopkins’s favor stated that Title VII prohibits “sex stereotyping,” observing that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>846</sup> This language would appear to protect women from both covering and reverse covering demands. Yet the plurality also opined that Price Waterhouse had placed women in an “intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”<sup>847</sup> The plurality thus provided two theories on which Price Waterhouse’s treatment of Hopkins was illegal: (1) It involved sex stereotyping, and (2) it placed Hopkins in a Catch-22.

Under the first theory, Title VII’s conception of sex expands to encompass a performative dimension. A prohibition on sex stereotyping means that one cannot penalize a woman for behaving in ways that corroborate or violate one’s stereotypical conception of a woman, thereby extending protections of “sex” to protections of “gender.” In such a regime, a demand for either covering or reverse covering is cognizable as a Title VII violation. Under the second theory, women can be forced to modify their activity so long as the demands that are made upon them are not inconsistent. In this regime, a demand for either covering or reverse covering is permitted, but demands for both together are not. The second theory obviously affords much narrower protections than the first.

I believe the plurality opinion clearly espouses the first theory.<sup>848</sup> But it is no surprise to me that subsequent courts have notoriously failed to apply that theory, as the theory has a radical breadth.<sup>849</sup> Most of the courts that seek to cabin Title VII’s protections to a nonperformative conception of sex simply ignore the “sex stereotyping” language.<sup>850</sup> Yet at least one court has explicitly used the Catch-22 theory to restrict the reach of the sex-stereotyping theory. In *Dillon v. Frank*,<sup>851</sup> the Sixth Circuit considered the case of a man who had been taunted and harassed for being perceived to be a homosexual.<sup>852</sup> Dillon sought to bring his case within the ambit of *Hopkins* protection by contending “that he was subjected to such

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844. *Id.* at 236.

845. *Id.*

846. *Price Waterhouse v. Hopkins*, 490 U.S. 235, 251 (1989) (plurality opinion).

847. *Id.*

848. *See Case, supra* note 775, at 45.

849. *See id.*

850. *See id.* at 71-75.

851. No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

852. *Id.* at \*1.

stereotyping in that he was not deemed 'macho' enough by his co-workers for a man, and that the verbal abuse resulted from this stereotyping."<sup>853</sup> One of the grounds on which the court rejected this claim pertained to the Catch-22. The court observed that the *Hopkins* Court had

emphasized the "intolerable and impermissible Catch-22" in the stereotyping in that case. A desirable trait (aggressiveness) was believed to be peculiar to males. If Hopkins lacked it, she would not be promoted; if she displayed it, it would not be acceptable. In our case, Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a "Catch-22."<sup>854</sup>

In other words, Dillon was not in a Catch-22 because no one in the workplace wished him to be more effeminate. Because only the reverse covering demand was made of him, he was not placed in a double bind. This reading of *Hopkins* thus makes it a case that prohibits only an impermissible double bind, not sex stereotyping alone. This interpretation severely limits the applicability of *Hopkins*, as can be seen in its premise that *Hopkins* can never be applied to protect effeminate men.

It is easy to see why courts have sought to limit the reach of the sex-stereotyping theory. Such a theory would make a myriad of covering and reverse covering claims legally cognizable. Yet it is unclear that a "double bind" theory provides a particularly good gatekeeping mechanism, at least insofar as women are concerned. The implication underlying the phrase "intolerable and impermissible Catch-22" is that the covering and reverse covering demands cannot be simultaneously fulfilled. But how much of a Catch-22 is the conjunction of covering and reverse covering demands? It is hard to imagine that most professional women are not subjected to both the demand to cover and the demand to reverse cover. Many of them, like Sandy Kinsey in Hopkins's account, appear to succeed in balancing these demands.

The Supreme Court's emphasis on the Catch-22, then, is simultaneously both sophisticated and naive. It is sophisticated in that it recognizes that women may be differently situated from other groups in having the dominant group consistently impose seemingly contradictory demands upon them. It is naive in its belief that these demands cannot be reconciled. This naiveté is troubling in that it obscures the more fundamental problem in these work situations. What is "intolerable" in these cases is not that the demands are contradictory, but rather that *either*

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853. *Id.* at \*5.

854. *Id.* at \*10 (citation omitted).

demand is made at all. To the extent that the Catch-22 rationale is deployed, it will still mean that women who *can* assimilate must do so.

In this sense, the Catch-22 rationale is yet another instantiation of immutability as a gatekeeping concept in antidiscrimination jurisprudence. The limitation of protection to sex-based Catch-22s is a limitation to situations that individuals cannot control. It is because individuals cannot lift themselves out of the double bind that Title VII does so. Implicit within the limitation is the belief that individuals who can control their gender-based performances must do so.

What we see in the sex-stereotyping reading of the *Hopkins* plurality opinion—which I take to be the most faithful reading of that opinion—is a remarkable yet unfulfilled promise. The sex-stereotyping theory defines “sex” under Title VII in a more expansive way, much in the way that Justice Kennedy’s opinion in *Hernandez* suggested that race might be defined. Under this more expansive definition, sex includes behavioral attributes that would be favored in men but disfavored in women. As such, sex extends beyond mere biological facts and into cultural ones. That extension blurs the distinction between sex and gender.

The blurring of the distinction between sex discrimination and gender discrimination, however, will obviously be resisted. As noted earlier, there is a conventional wisdom that distinguishes between sex as a biological, prediscursive fact and gender as a cultural, discursive fact.<sup>855</sup> That wisdom has been internalized by the law. As Justice Scalia has noted, “The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”<sup>856</sup> Scalia’s words come from an equal protection case, but they diagnose the resistance to the sex stereotyping theory in the Title VII context as well. If “sex” in Title VII were to incorporate Scalia’s “gender,” then cases involving effeminate men or masculine women would fall within the ambit of sex discrimination.

### 3. *The Performative Turn in Sex*

In discussing race, I noted that the best evidence for the proposition that the judiciary can adopt a performative conception of race is that it has already done so. I hypothesized that the courts were particularly likely to do so in formation cases like the antebellum race trials or the racial

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855. See *supra* notes 531-533 and accompanying text.

856. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

prerequisite cases.<sup>857</sup> I now seek to demonstrate that the same premise obtains in the sex context.

In the sex context, such formation cases include cases concerning the sex of transsexuals. In these cases, courts have to decide whether transsexuals are men or women for the purposes of determining whether they can change their birth certificates,<sup>858</sup> whether they can play in women's sports leagues,<sup>859</sup> or whether they can have valid marriages to individuals who presumably share their chromosomal sex.<sup>860</sup>

I found fifteen such reported cases. While the majority of these cases adopt a nonperformative conception of sex (i.e., the transsexual is always the sex she was born), a significant minority seemed to adopt a performative conception of sex (i.e., the transsexual can become her postoperative sex). This suggests judicial receptivity to the concept of sex as a performative category that might inspire some optimism about a broader judicial embrace of such a conception. As in the racial prerequisite cases, however, this receptivity is deeply qualified.

To begin with the easy point, courts that assigned a transsexual her preoperative identity almost uniformly embraced a nonperformative conception of sex. These courts most often relied on the individual's chromosomes. As one New York court succinctly stated, "male-to-female transsexuals are still chromosomally males while ostensibly females."<sup>861</sup> By emphasizing the immutable nature of the chromosomes, courts underscored the futility of human agency to alter an individual's sex. As one court observed in 1973, "surgery for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality."<sup>862</sup> Next to chromosomes, genitals were the prime nonperformative signifier adduced by the courts. Such courts focused on the fact that no amount of human ingenuity could create a natural penis or a vagina. In ruling that a female-to-male transsexual's postoperative penis was not a penis, the court noted that hormone treatments and surgery had not produced a penis capable of "assuming male duties and obligations inherent in the marriage relationship."<sup>863</sup> In other words, one uncopyable mark of the natural penis

857. See *supra* notes 734-766 and accompanying text.

858. *In re Rivera*, 627 N.Y.S.2d 241 (Civ. Ct. 1995).

859. See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

860. See, e.g., *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

861. *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (quoting a report by the Committee on Public Health of the New York Academy of Medicine).

862. *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973); see also *Ulane v. E. Airlines*, 742 F.2d 1081, 1083 (7th Cir. 1984) ("Ulane's chromosomes . . . are unaffected by the hormones and surgery.")

863. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974).



was its ability to become erect. These courts seemed to manifest a grim satisfaction in the futility of transsexual performance. If the performative conception holds that iterated acts and citations accrete to form an identity,<sup>864</sup> the classical conception holds that these acts and citations, no matter how often repeated, do not cumulate and do not change the prediscursive identity.

In contrast, courts that ruled that transsexuals were their postoperative sex at least in part adopted a performative conception of identity. Two kinds of performances—sexual and gender performances—seemed to be particularly salient. Courts strove mightily to read the transsexual's sex back into a heterosexual matrix, noting, for example, that a male-to-female (MTF) transsexual had to be a woman because she engaged in “normal” heterosexual sex with her male spouse.<sup>865</sup> Other courts emphasized gender performance. As a New York state court noted,

This individual dresses, acts, and comports himself as a member of the opposite sex. The applicant appeared before this court and, were it not for the fact that petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any *other* female.<sup>866</sup>

Note that a linguistic sex change occurs over these two sentences, from the individual comporting “himself” in the first one to the person being found indistinguishable from any “other” woman in the second.

These courts in the 1960s and 1970s demonstrated a striking willingness to accede to performative conceptions of sex that are now marked as postmodern. The conventional wisdom—then as now—is that sex is a stable prediscursive substrate on which orientation and gender are built. When Butler suggests that the arrow of causation runs the other way—positing that sex is actually a back formation from orientation and gender—her ideas are labeled radical. Yet here one observes courts some three decades ago quite placidly noting that an individual's orientation and gender performances are the causes rather than the effects of his or her sex. If the MTF transsexual sleeps with men then she must be a woman—orientation here determines sex, rather than vice versa. If an MTF dresses like a woman, then, for juridical purposes, she is a woman—gender here determines sex, rather than vice versa.

Yet while the courts reifying the postoperative identity of the transsexual seem to embrace a performative conception of that identity, that embrace is always partial. The facially performative discourse of these

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864. BUTLER, *supra* note 391, at 179.

865. See *Littleton v. Prange*, 9 S.W.3d 223, 227 (Tex. App. 1999).

866. *In re Anonymous*, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968) (emphasis added).

courts keeps falling back into a kind of essentialization of sex, much as in the racial prerequisite cases.

While this occurs in more than one way, I wish to focus on the essentialism embodied in the concept of the gendered “soul.” I take this term from expert testimony in one case, where a physician stated that “‘Elaine Francis Ladrach has undergone a gender transformation from male to female establishing a somatic gender to match that of her soul.’”<sup>867</sup> The courts themselves use less religious language, relying on concepts like “psychological sex” rather than the concept of the gendered soul.<sup>868</sup> But the idea is the same—like nested Russian dolls, the female soul is nested inside a male body which is nested inside a female performance. To frame it in the rhetoric of fraud that is so pervasive in these opinions,<sup>869</sup> it is as if the court were to say that one could remove Elaine Ladrach’s clothes and postoperative body to expose her male chromosomes, but why stop there? Why not remove the chromosomes and expose the underlying female soul? If the two guarantors of essentialist reasoning are Nature and God, here the latter steps into the void left by the former.

The virtue of the soul is that it cannot be known except through behavioral signifiers—the indicia of the soul are thus performative indicia. The soul thus effectively reifies the performative acts in which the individual engages, but disguises that project of invention as a project of detection. Yet this, again, is the constative fallacy against which Austin inveighed.<sup>870</sup> It reads the performative formation of gender back into a constative enterprise. In this constative paradigm, the essentialist substrate has not been rejected, but rather shifted from body to soul. Thus, the courts fall back into the constative fallacy even as they reject the concept of biological essentialism.

867. *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. Ct. 1987) (quoting a physician’s letter).

868. *See, e.g., M.T. v. J.T.*, 355 A.2d 204, 209-11 (N.J. Super. Ct. App. Div. 1976) (discussing how an MTF transsexual’s surgery had aligned her anatomical sex with her psychological sex to render her a woman for legal purposes); *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (describing testimony that “Dr. Richards is psychologically a woman” as part of its determination that an MTF transsexual was a woman for legal purposes); *In re Anonymous*, 293 N.Y.S.2d at 837 (observing that where “the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made”).

869. *See, e.g., M.T.*, 355 A.2d at 210 (observing that transsexuals are not committing fraud on the public but rather attempting to reveal their true sexes); *Matter of Anonymous*, 582 N.Y.S.2d 941, 942 (Civ. Ct. 1992) (rejecting a transsexual’s application to change her name on grounds of preventing fraud); *Richards*, 400 N.Y.S.2d at 272 (finding no risk that the plaintiff was engaging in fraud); *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (noting that the transsexual’s interest in concealing her sex change was “‘outweighed by the public interest for protection against fraud’” (quoting a report of the Committee on Public Health of the New York Academy of Medicine)).

870. *See AUSTIN, supra* note 541, at 3.

Thus, like the racial prerequisite cases, the transsexual cases that reify postoperative identity both expose and preserve the classical conception of identity. The cases expose the fiction that sex is a biological phenomenon by observing that gender performances, rather than chromosomes, determine one’s sex. Yet at the same time, they preserve the fiction that sex is a prediscursive phenomenon (even if not a biological phenomenon) by observing that these performances are evidence of an underlying gendered soul. These acts are the evidence, not the elements, of identity.

This insight should again inspire both optimism and pessimism for the judiciary’s ability to fashion a jurisprudence that would protect gender under protections for sex. On the one hand, it demonstrates that courts are in some ways the ultimate institutions for reifying performative identities—for transforming “acting as if” into “is” through their linguistic performativity. Yet at the same time, it suggests the reluctance of the courts to relinquish a classical model of identity in which they are detecting, rather than in any sense inventing, those identities.

*D. Synthesis*

It is time to pull some information together. The previous discussion of discrimination can be diagrammatically expressed as follows:

FIGURE 2.

	Conversion	Passing	Covering
Race	Blood  (formal-race)	Skin Color  (formal-race)	Race-Salient Behavior (e.g., language)  (culture-race)
Sex	Chromosomes  (sex)	Secondary Sex Characteristics  (sex)	Sex-Salient Behavior (e.g., pregnancy)  (gender)
Orientation	Orientation “Gene”  (status)	Orientation Self-Identification  (status)	Orientation-Salient Behavior (e.g., sodomy)  (conduct)

For the three classifications (race, sex, and orientation), I have identified the traits to which the three assimilationist demands (conversion, passing, and covering) apply. Thus, for race, the conversion demand applies to blood or ancestry, the passing demand to skin color, and the covering demand to race-salient behavior such as language. For sex, conversion applies to chromosomes, passing applies to visible secondary sex characteristics, and covering applies to sex-salient behaviors, such as pregnancy. For orientation, conversion applies to the (hypothetical) orientation gene, passing applies to self-identifying speech about orientation, and covering applies to orientation-salient conduct such as sodomy.

This schematization illuminates both divergence and convergence among the social situations of racial minorities, women, and gays with regard to assimilation. The divergence is represented by the bold horizontal line, which represents the antidiscrimination schism. This line reflects the perception that individuals cannot change or hide their formal-race attributes or their sex attributes, but that individuals can change or hide their orientation-status attributes. This perception can be used to justify protecting gays less than racial minorities or women.

I have argued that focusing on this divergence has obscured an equally important convergence among the social situations of the three groups. The bold vertical line distinguishes between immutable and mutable *aspects* of each classification. It demonstrates that if immutability is the only ground on which a group can defend against assimilation, then all three groups are vulnerable to the demand to cover their race-salient, sex-salient, or orientation-salient attributes. It thus suggests a ground of coalition among the interests of all three groups.

Both the divergence and the convergence have been reified by antidiscrimination law's emphasis on immutability. Major strands of Title VII and equal protection jurisprudence have used immutability to justify protecting race and sex but not orientation (the horizontal line). Major strands of Title VII and equal protection jurisprudence have also used immutability to justify protecting only the immutable aspects of race or sex (the vertical line). The result of these two moves has been to restrict much of federal antidiscrimination protection to the shaded area bounded by the two lines.

#### IV. CRITIQUES

Throughout my discussion, readers have doubtless thought of significant criticisms of my analysis. I here consider three major criticisms I have encountered of my framework, arrayed in ascending order of perceived significance.

### A. *The Questionable Primacy of Orientation*

An initial criticism relates to the primacy I have given gays in developing this model, a primacy based on the belief that gays can assimilate in more ways than either racial minorities or women. This belief might be assailed in at least two ways. First, one might point out that racial minorities and women are not without their capacity to convert or to pass. Second, one might suggest that even if one assumes that gays can engage in more forms of assimilation than racial minorities or women, this does not render gays unique. Other groups, notably religious minorities, can assimilate in all the ways that gays can. Why do I ascribe such primacy to orientation in developing my model of assimilation as discrimination?

#### 1. *Passing and Conversion in the Contexts of Race and Sex*

The claim that gays can pass and convert while racial minorities and women cannot merits significant qualification. It would be particularly odd to assert that passing is an orientation-based rather than a race-based phenomenon given that the primary historical association of the term, when used in this sense, has been with race. As Elaine Ginsberg observes, “The genealogy of the term *passing* in American history associates it with the discourse of racial difference and especially with the assumption of a fraudulent ‘white’ identity by an individual culturally and legally defined as ‘Negro’ or black by virtue of a percentage of African ancestry.”<sup>871</sup> The American practice of racial passing extends from antebellum slaves passing to escape slavery<sup>872</sup> to contemporary accounts of “cyber-race,” or racial passing on the Internet.<sup>873</sup> It has been described in a wide array of media, including scholarship,<sup>874</sup> fiction,<sup>875</sup> memoir,<sup>876</sup> and law.<sup>877</sup> Ignoring how

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871. Elaine K. Ginsberg, *Introduction: The Politics of Passing*, in *PASSING AND THE FICTIONS OF IDENTITY* 1, 2-3 (Elaine K. Ginsberg ed., 1996).

872. See, e.g., WILLIAM CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY* (Mnemosyne Publ'g Co. 1969) (1860).

873. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000).

874. See, e.g., HENRY LOUIS GATES, JR., *THIRTEEN WAYS OF LOOKING AT A BLACK MAN* 180-214 (1997); SUSAN GUBAR, *RACECHANGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE* (1997); ADAM LIVELY, *MASKS: BLACKNESS, RACE AND THE IMAGINATION* 161-202 (1998); *RACIALLY MIXED PEOPLE IN AMERICA* (Maria P.P. Root ed., 1992); GAYLE WALD, *CROSSING THE LINE: RACIAL PASSING IN TWENTIETH-CENTURY U.S. LITERATURE AND CULTURE* (2000); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”*: *Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997).

875. See, e.g., FRANCES E.W. HARPER, *IOLA LEROY, OR SHADOWS UPLIFTED* (1988); JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912); NELLA LARSEN, *PASSING* (Random House 2000) (1929); NELLA LARSEN, *QUICKSAND* (Negro Univ. Press 1969) (1928).

876. For memoirs about African-American individuals passing for white, see, for example, TOI DERRICOTTE, *THE BLACK NOTEBOOKS: AN INTERIOR JOURNEY* (1997); REBA LEE, *I PASSED FOR WHITE* (1955); JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR,*

racial minorities can pass also scants how they can convert. Recall that Janet Halley observed that the line between passing and conversion can often be blurred in the orientation context.<sup>878</sup> This observation also applies in the race context. Accounts of racial minorities who pass in all aspects of their lives testify that the act is not just one of deception, but one of change.<sup>879</sup>

A similar set of observations can be made in the sex/gender context. Women have long passed as men to gain access to professions, services, institutions, or relationships that would otherwise have been closed to them.<sup>880</sup> Men have also passed as women.<sup>881</sup> Indeed, it might be observed that sex-based passing is more generally available than race-based passing to the broad run of individuals. When individuals pass systematically, as musician Billy Tipton and diplomat Chevalier d'Eon de Beaumont did, the question again arises of whether this practice is passing or conversion.<sup>882</sup> Moreover, in the sex context, sex changes provide a direct physiological route to, or signifier of, conversion.<sup>883</sup>

Nonetheless, passing is not as widely available to racial minorities or to women as it is to gays.<sup>884</sup> Nor is conversion perceived to be as widely possible for racial minorities or for women as it is for gays. Thus, while I eschew absolute distinctions, I still hold that gays are distinguishable from racial minorities and women in their general vulnerability to all three assimilationist demands.

COMMUNITY (1995); and GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE* (1995). For accounts of white individuals passing as African Americans, see, for example, JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1976); and GRACE HALSELL, *SOUL SISTER* (1969).

877. Two of the canonical cases concerning race discrimination in constitutional law—*Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944)—involved passing: *Plessy* could have passed, but did not; and *Korematsu* could not pass, but sought to do so.

878. Halley, *supra* note 318, at 934; see *supra* note 318 and accompanying text.

879. See, e.g., Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1151-53 (2001) (describing instances in the context of race of “permanent passing,” in which African Americans “transformed themselves into whites . . . , shedding their African American racial identities”).

880. See, e.g., MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 67-70 (Routledge 1997) (1992); KATZ, *supra* note 36, at 209-79; LORETA JANETA VELAZQUEZ, *THE WOMAN IN BATTLE* (C.J. Worthington ed., Arno Press 1972) (1876); *BOYS DON'T CRY* (Fox Searchlight Pictures 1999); *YENTL* (MGM/UA 1983).

881. See GARBER, *supra* note 880, at 259-66; see also MRS. DOUBTFIRE (Twentieth Century Fox 1993); *TOOTSIE* (Columbia Pictures 1982).

882. See GARBER, *supra* note 880, at 67-70 (noting Tipton’s life as a man and the disbelief of his surviving children when he was discovered to be a woman at his death); *id.* at 259-66 (noting Chevalier d’Eon de Beaumont’s long legal interpellation as a woman and the disbelief of her surviving companion when she was discovered to be a man at her death).

883. See, e.g., HARRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* (1966); DEIRDRE MCCLOSKEY, *CROSSING: A MEMOIR* (1999); JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE* (1979).

884. See SEDGWICK, *supra* note 33, at 75 (making this point with regard to orientation and race).

Indeed, I believe such demands figure significantly in almost every gay individual's life history. Some nineteenth-century biologists believed that "ontogeny recapitulate[d] . . . phylogeny," that is, that the development of an individual replayed the development of her species.<sup>885</sup> Thus, the human fetus would travel the course of human evolution, its embryonic gill slits recalling its fishy evolutionary ancestors.<sup>886</sup> While this tenet has been falsified as a matter of human biology, I think it holds as a matter of gay sociology—the individual life histories of "out" gays mimic the trajectory of the gay rights movement. Gay individuals must first struggle to be gay against the demand to convert. After they accept themselves as gay, they must resist the demand to pass. Finally, even after coming out, gays must grapple with the demand to cover. Open gays thus move through the three assimilationist demands as individuals in addition to negotiating them as a community.

It is for this reason, I think, that queer theory—one of whose basic tenets is the interrogation of assimilation in all its forms—grew out of the gay context rather than out of the race or the sex contexts. Queer theory sometimes appears to disown its sexual roots in following the "aggressive impulse of generalization"<sup>887</sup> that impels it to abstract away from gay difference to human difference. Yet even as it generalizes, I believe that queer theory does so less by transcending its sexual origins than by importing sexuality into every context it colonizes. Just as Freud archly acceded to the criticism that psychoanalysis reduces everything to sexuality,<sup>888</sup> so too does queer theory never forget its sexual mark. Again, I think this is no accident—I believe queer theory cites back to the context of orientation because it is underwritten at least in part by the anti-assimilationist narratives that ground gay lives.

## 2. *The Case of Religion*

A different challenge to the primacy of orientation in my account might point to the case of religion as a better template for anti-assimilationist politics. Like gays, religious minorities can—in imagination or in fact—convert, pass, and cover. Moreover, unlike gays, religious minorities have acquired both constitutional and Title VII protections despite their ability to assimilate.<sup>889</sup> The greater historical protection of religion would seem to

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885. STEPHEN JAY GOULD, *ONTOGENY AND PHYLOGENY* 7 (1977).

886. *Id.*

887. Warner, *supra* note 398, at xxvi.

888. See SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE* (1920), *reprinted in* 18 STANDARD EDITION, *supra* note 74, at 1, 52 (1955).

889. For examples of constitutional protections under the Free Exercise Clause, see *Sherbert v. Verner*, 374 U.S. 398 (1963), which upheld a woman's right to refuse to work on her Sabbath without relinquishing her right to unemployment benefits under the Free Exercise Clause of the

make religion a better instance than orientation for thinking about assimilation as discrimination.

I certainly agree that religion is a fascinating context for examining questions of assimilation, and that the model of assimilation I have developed here could have been generated from that context.<sup>890</sup> Yet I nonetheless believe that orientation is a better context for analyzing questions of assimilation if the purpose is to reconsider assimilation on the basis of race and sex. This is because religion has been both marginalized and domesticated in American law and culture.

Religion has been cloistered away from broader equality discourse. The distinction between religion and other canonical antidiscrimination categories such as race and sex is both reflected in and reinforced by the doctrinal distinction between the First Amendment and the Fourteenth Amendment. To see this, consider the following simple claim: I do not think the courts could sustain the current equal protection jurisprudence if they did not have recourse to the First Amendment. If the First Amendment did not exist, religious claims would be brought as equal protection claims. In such a circumstance, I believe courts would feel obliged to grant religious classifications heightened scrutiny. But this would mean that the courts would not be able to deploy immutability and visibility as gatekeeping criteria for heightened scrutiny, for religion is neither (biologically) immutable nor visible.<sup>891</sup> The continued juridical reliance on immutability and visibility in the equal protection context thus testifies to

First Amendment; and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which found that Wisconsin's compulsory high school education requirement violated Amish parents' right to free exercise of religion. For examples of Title VII protections for religion, see *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978), which found religious discrimination under Title VII where an employer failed to accommodate the employee's participation in Saturday bible class activities when such activities constituted a "religious obligation"; and *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), which upheld a Title VII action by two anesthesiologists claiming they were denied participation in a medical school's program to provide cardiovascular services to a Saudi Arabian hospital because they were Jewish.

890. The ringing anti-assimilationist language of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), suggests that the Court has thought deeply about issues of assimilation in the context of religion. At issue in *Barnette* was a regulation of the West Virginia State Board of Education requiring children in the public schools to salute the American flag. The plaintiffs, who were Jehovah's Witnesses, contested the regulation as a violation of their right to free exercise. In enjoining the enforcement of the regulation against the plaintiffs, the Court stated that the freedom to differ extended not only to uncontroversial subjects, but also "to things that touch the heart of the existing order." *Id.* at 642. The Court then stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.*

891. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2366 (1997) (observing that defenders of immutability in equal protection analysis justify the protection of religious classifications not on the ground that religion is immutable but on the ground that it is covered by the First Amendment).



the distinction between religion and other equal protection categories. Moreover, I believe this distinction can also be seen in the treatment of religion in Title VII jurisprudence. “Unlike Title VII’s race and sex discrimination provisions, the antidiscrimination provision concerning religion expressly requires ‘reasonable accommodation.’”<sup>892</sup> This requirement similarly distinguishes religion from other antidiscrimination categories protected by the statute.

Religion’s marginalization in antidiscrimination discourse is somewhat surprising, as First Amendment protections for religion long predated the Fourteenth Amendment’s protections for race and other categories. Yet it is as if the temporal priority of the First Amendment has made religion less, rather than more, foundational to contemporary civil rights discourse. Because religion is sequestered from other forms of equality discourse, claims about religion are unlikely to affect an analysis of race or sex. In contrast, claims about orientation have generally been brought under the equal protection guarantees, and will therefore have more direct doctrinal consequences for how those categories are analyzed.

Just as importantly, religion has been domesticated. One can illuminate this with a question: Why did queer theory not arise out of the religious context? This question seems strange because religion, by which is really meant Christianity, is popularly figured in American discourse as a force for “normalcy” rather than for “queerness.” As such, it is unlikely to provide the template for resistance to other forms of assimilation.

Of course, there are many religions that could not be described as “mainstream” belief systems. Yet to the extent that religions do not fit into mainstream conceptions of religion—such as Christianity—they are likely to remain unprotected. Thus in *Goldman v. Weinberger*,<sup>893</sup> a Jewish rabbi was precluded from wearing a yarmulke in the military because it violated a uniform regulation. Under this uniform regulation, only religious paraphernalia that were not obviously visible were permitted. The majority failed to address the dissent’s argument that “[t]he visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties.”<sup>894</sup> Moreover, a concurrence drew on the government’s argument that to permit Goldman to wear his yarmulke would permit a Rastafarian to wear dreadlocks and a yogi to wear saffron robes.<sup>895</sup> Thus the line between protected and unprotected religious paraphernalia, while framed in neutral

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892. Vikram David Amar, *State RFRA's and the Workplace*, 32 U.C. DAVIS L. REV. 513, 515 (1999).

893. 475 U.S. 503 (1986).

894. *Id.* at 520 (Brennan, J., dissenting).

895. *Id.* at 512 (Stevens, J., concurring).

terms, adhered with great precision to the line between Christianity and non-Christianity.

I do not mean to say that religion cannot provide a useful way of conceiving of an antidiscrimination paradigm that opposes assimilation. A number of commentators have cogently argued that it may provide the template for conceptual extensions of existing equality jurisprudence.<sup>896</sup> Yet I do think the points raised above make orientation a stronger basis on which to ground the model of assimilation as discrimination.

### B. *The Unarticulated Benefits of Assimilation*

The second objection is that my assault on assimilation is too broad. Assimilation, after all, is often a good thing. Indeed, it seems fanciful to be for or against assimilation, as assimilation simply exists as a requirement of cultural intelligibility, of culture itself. This is true even of coerced assimilation. One does not, for example, often hear complaints about the state forcing would-be criminals to become law-abiding citizens through the criminal law system, or about the state's requiring the illiterate to become literate through the public education system.<sup>897</sup> It thus seems strange to predicate a new civil rights paradigm on the belief that coerced assimilation is necessarily pernicious.

This objection helps me clarify what I am not arguing. I am not arguing that all forms of assimilation are per se bad. Rather, I am arguing against the countervailing presumption in both law and culture that all forms of assimilation are per se good. This countervailing presumption can be seen in the law in the equal protection and Title VII examples above—when the courts discover that a group can assimilate, they assume it should.<sup>898</sup> My critique of this paradigm is not that all forms of assimilation are malign, but rather that courts ought not so lightly presume they are all benign. My argument holds that assimilation is not per se anything, but must be analyzed in a more case-specific manner.

This point, however, only begs the question of how to distinguish between legitimate and illegitimate forms of assimilation. This is particularly true with covering, which is available to almost every individual along almost every axis of identification. One might ask how covering differs from general socialization—that is, the expectation that everyone's behavior will revert to a socially acceptable mean.

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896. See, e.g., DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 173 (1999); Gotanda, *supra* note 662, at 66-67; Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 137 (2001).

897. Yoshino, *Assimilationist Bias*, *supra* note 2, at 505.

898. *Id.* at 506.

Put differently, the ubiquity of covering simultaneously heightens and lowers the salience of the practice. Because covering is so widespread, it will be conceptually familiar: Everyone has covered. Yet this precise aspect of covering might fairly prompt a critic to inquire what makes covering such a harm. If everyone must give up something to enter society, what makes particular forms of covering—such as those on the basis of race, sex, and orientation—worthy of particular concern?

My response to this question differs according to whether I am thinking about a legal context or a broader social one. Within the law, my answer is relatively conservative and positivistic. I believe that what makes covering on the basis of race, sex, or orientation different from many other forms of covering is that Americans—as a matter of popular legislation or articulated constitutional principle or both—have enumerated or begun to enumerate these axes as being of special legal concern. In short, Americans have expressed a commitment against racism, sexism, and, to a lesser extent, homophobia. The way in which these commitments are formed through national, legislative, or judicial debate and analysis is doubtless riddled with imperfection. Yet this is the process Americans have, and these are the commitments they have made. As a legal matter, then, I am less asking that Americans make new commitments than I am asking them to live up to preexisting ones.

When I shift to thinking about this objection in the social realm, I find myself answering less like a lawyer and more like a queer theorist. Here I am much more willing to agree that gay assimilation (for example) does not differ in kind from other forms of assimilation. Yet I do not think this concession means that gay assimilation is therefore unproblematic. Rather, I seek to create consistency in the other direction, asking if those other seemingly innocuous forms of socialization might not also be worthy of interrogation.

Consider in this regard Sedgwick's wonderful "queer" critique of the cultural celebration of Christmas:

The depressing thing about the Christmas season—*isn't it?*—is that it's the time when all the institutions are speaking with one voice. The Church says what the Church says. But the State says the same thing: maybe not (in some ways it hardly matters) in the language of theology, but in the language the State talks: legal holidays, long school hiatus, special postage stamps, and all. And the language of commerce more than chimes in, as consumer purchasing is organized ever more narrowly around the final weeks of the calendar year, the Dow Jones aquiver over Americans' "holiday mood." The media, in turn, fall in triumphally behind the Christmas phalanx: ad-swollen magazines have oozing turkeys on the cover, while for the news industry every question turns into the

Christmas question—Will hostages be free *for Christmas*? What did that flash flood or mass murder (umpty-ump people killed and maimed) do to those families' *Christmas*? And meanwhile, the pairing “families/Christmas” becomes increasingly tautological, as families more and more constitute themselves according to the schedule, and in the endlessly iterated image, of the holiday itself constituted in the image of “the” family.<sup>899</sup>

In a narrow sense, of course, the celebration of Christmas does fit into the canonical antidiscrimination category of religion. Yet what really troubles Sedgwick about Christmas is not that it favors a dominant religion—as she observes, “in some ways it hardly matters” whether the state speaks in the voice of theology.<sup>900</sup> For Sedgwick, the Christmas phenomenon is disturbing not because it is religious, but because it is monolithic. It is a phenomenon where all cultural meanings are made to line up with each other, eliding even the possibility of a more richly diversified set of viewpoints.

One need not make a federal case out of Christmas to share the sentiment that even something as facially trivial as the “secular” celebration of Christmas might be worth resisting. Indeed, no litigation could adequately capture or redress the harm of these moments in which culture seems to “speak[] with one voice.”<sup>901</sup> Such forms of micropower must be contested where they are deployed—that is, in the realm of broader culture. In that realm, one is permitted to ask, more sweepingly than in the realm of law, why things that speak so monolithically must do so. “What if the richest junctures,” Sedgwick asks, “weren't the ones where *everything means the same thing*?”<sup>902</sup>

This is the question queer theory asks in every realm, interrogating every social norm more broadly than any legal proceeding could. It is unsurprising that many of the most vigorous proponents of queerness are academics, as academics have made a vocation of questioning such common understandings. It might be said that queer vices—detachment from the real world, immaturity, frivolity—are academic vices.<sup>903</sup> But it might be said with equal truth that queer values—the ability not to take other people's judgments as one's judgments, the ability to imagine alterities, the ability to engage in deep play—are academic values. The

899. EVE KOSOFSKY SEDGWICK, *Queer and Now*, in TENDENCIES 1, 5-6 (1993).

900. *Id.* at 5.

901. *Id.*

902. *Id.* at 6.

903. See Nussbaum, *supra* note 538, at 42-44 (criticizing queer theorist Judith Butler for her “abstract pronouncements, floating high above all matter,” her “naively empty politics,” and her “pessimistic erotic anthropology [that] offers support to an amoral anarchist politics”).

compensatory pause that an intellectual makes before she accepts a conventional notion can be a faculty of conscience and compassion.

What accounts for the stark difference between my aspirations for law and for culture? The answer is the well-rehearsed description of law's relative violence.<sup>904</sup> It is because legal interpretation is a modality of "pain and death" that it must perforce be a conservative modality used only to dismantle social conventions that have been widely interrogated.<sup>905</sup> In contrast, debates in the broader social realm are often not marked with such violence, thereby offering a freer field for debate, contingency, and play. This differential must be exploited before the benefits of my framework can be realized. Individuals who are forced to cover their depression, their obesity, their histories of sexual abuse (to take but a few examples) generally will not have legal redress even under my paradigm. This observation does not mark the limit of the harm of coerced covering, but rather the limit of what the law can currently do to redress it.

### C. *The Problem of Essentialization*

The final, most serious, objection is that the concept of covering essentializes identity in a way that is ultimately damaging to its possessor. To describe someone as "covering" is to assume that some underlying identity is being covered. But this may misdescribe the way in which identities are experienced. We can easily imagine Hopkins taking umbrage at the allegation that she was covering some deeper womanhood in being an aggressive, intelligent, high-powered manager. She might say that she was just being herself. Protecting particular traits as constitutive of particular identities thus risks essentializing those identities as always embracing those traits. If feminine behavior is protected because it is constitutive of being a woman, then nonfeminine women like Hopkins will be told that they are covering simply because they do not conform to that stereotype. My model then risks falling into the very stereotyping that the antidiscrimination paradigm has set out to retire.

My initial response to this objection is that the risk of essentialization ought not to be understood in a vacuum, but rather relative to the risks of alternative regimes. It is the risk of essentialization that facially lends such credibility to formalistic regimes that denude identities of any content, such as color-blindness, sex-blindness, and orientation-blindness. Yet while the risk of essentialization is a serious one, I believe that the costs of such formalistic regimes are greater. It is only under such regimes that legal actors seem to take leave of any realistic sense of how acts correlate with

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904. See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

905. See *id.* at 1601.

identities—finding that sodomy is not an issue of orientation, pregnancy is not an issue of gender, and language is not an issue of race. In my mind, this formalism has been extraordinarily detrimental to the causes of civil rights for all three classifications.

The trick, then, is to ascertain whether there is any room between essentialism and formalism. I believe there is. Take, for example, Janet Halley's observation:

Of course it is rational to say that homosexuals—real homosexuals, professed homosexuals, or people designated by others as homosexuals for good conventional reasons—are more likely to engage in homosexual sodomy than everyone else. (To my mind that is one of the great things about homosexuals, but I acknowledge that many people disagree with my moral position on this point.)<sup>906</sup>

No one could correctly call Halley an essentialist or a formalist, but she here illuminatingly points out that one need not be either to observe correlations between behavior and identity that exist in the world. To say that anyone who rejects orientation-blindness must therefore be falling into essentialist thinking is thus false. My model similarly seeks to exploit the space between the essentialism of stereotypical thinking and the aridity of identity-blindness.

Neil Gotanda's elegant terminology helps limn this space in the racial context. Recall that Gotanda distinguished among status-race, formal-race, and culture-race.<sup>907</sup> Status-race is Jim Crow—a stereotypical essentialization of racial identity that has a severely negative valence for most Americans.<sup>908</sup> Formal-race is color blindness—an attempt to empty racial identity of any associations whatsoever.<sup>909</sup> Formal-race gets much of its traction through its contrast to status-race. Emptying races of any attributes whatsoever seems like a plausible response to a long historical practice of imbuing racial minorities with negative stereotypical attributes. Yet Gotanda's signal contribution is to demonstrate that this opposition elides another alternative. This alternative is culture-race, which holds that one need not be a racist to see that there are cultural attributes that correlate with or constitute racial identity.<sup>910</sup>

Those who espouse formal-race will naturally seek to discredit culture-race by conflating it with status-race. Thus in the *Adarand* opinion, Justice Thomas sought to merge the (culture-)race consciousness of affirmative

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906. Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 438 (1997).

907. Gotanda, *supra* note 662, at 4.

908. *See id.*

909. *See id.*

910. *See id.* at 4-5.

action with the (status-)race consciousness of Jim Crow, which he said that American society had overcome at the cost of “immeasurable human suffering.”<sup>911</sup> Similarly, an adherent to this view would conflate my model with the gross stereotyping that the antidiscrimination paradigm was constructed to combat. This rhetorical criticism is highly effective, as there will be times when it will be hard to determine whether a particular formulation of race is status-race or culture-race. That indeterminacy will encourage many to cleave to a strict formal-race standard.

Yet there is a world of difference between culture-race and status-race. Justice Stevens was making such a distinction in *Adarand* when he spoke of how the majority was conflating a welcome mat with a “No Trespassing” sign.<sup>912</sup> Similarly, I hope it hardly needs to be said that protecting cornrows or Ebonics because they correlate with African-American identity is not the same as Jim Crow.

My hope is that a comparison of the risks of essentialism and the risks of formalism illuminates how the risks are not all on one side. Yet I freely concede that this comparison alone does not overcome the concern about how covering might contribute to essentialist thinking. The concern still remains that whenever a racial minority, woman, or homosexual is seen behaving in a nonstereotypical manner, she will be vulnerable to the interpretation that she is “covering.” The preceding comparison of risks is not an argument against that concern, but rather a more realistic and sympathetic backdrop for the argument I now attempt.

It is worth starting with the exact nature of the concern. To take an anecdotal example, consider two gay professional men of my acquaintance—call them *A* and *B*. *A* recently described to me how *B*, who behaves fairly systematically in stereotypically “straight-acting” ways, became incensed upon reading an article about a gay lawyer who left his legal job to begin performing in a drag revue. *A* asked *B* why he had had such a strong reaction to the article. *B* responded that such a public transformation made life harder for him: It strengthened the assumption that no matter how conservative or masculine his behavior was, all of this behavior was window dressing for an essentially effeminate gay self. In other words, the lawyer-turned-drag queen further overdetermined *B*’s own behavior. Without the narrative template that the article reinforced, *B* was a conservative, straight-acting professional. Read through that narrative template, he was now a conservative, straight-acting professional who was simply biding his time until he could put on a dress.

In an analogous fashion, illuminating the concept of covering may make it harder to falsify stereotypes through behavior that does not conform

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911. *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

912. *Id.* at 245 (Stevens, J., dissenting).

to them. Without the concept of covering, *B*'s stereotypically masculine behavior might actually subvert the stereotype that all gays are effeminate. With the introduction of the covering concept, however, *B*'s behavior becomes susceptible to another interpretation—his masculine behavior is merely an act of assimilation to the mainstream. Note that under this interpretation, not only *B*'s group, but *B* himself is harmed. Gays are irretrievably stereotyped as effeminate, and *B* is cast as a self-hating and duplicitous assimilationist.

Of course, there is a significant difference between insisting on covering as a certainty and introducing it as a possibility. Assuming that *B* must be covering is clearly pernicious, as it elides the possibility that there might be other reasons for his behavior. Introducing covering as a possibility, on the other hand, could actually be illuminating. After all, to put it bluntly, *B* could be covering. So long as one does not assume that covering is occurring, is there any harm in suggesting that it is a possibility, leaving it to the individual to provide the ultimate determination?

The answer to this question may actually be affirmative. In some instances, such as Mungin's case, an individual may recognize that he has been modulating his identity in a fairly systematic way to assimilate into the mainstream. In other instances, perhaps as in Hopkins's case, an individual may not feel as if her accession to the dominant group's norms is a form of assimilation. Human motivation and behavior being what they are, however, I would posit that in the run of cases, the motivation for a particular behavior will not be clear, even to the individual who is engaging in that behavior.

In such circumstances, leaving it to the individual to determine whether she is covering or not risks blaming the victim. It smacks yet again of placing the responsibility for identity on the individual who is being disadvantaged on the basis of that identity. *B* should not have to spend time psychoanalyzing his motivations for engaging in straight-acting activity when the straight mainstream that makes such activity adaptive is oblivious to its own motivations.

As exemplified by *B*'s case, then, the objection to covering has two components—it reinforces stereotypical thinking and it places the burden on minority groups to justify their own behavior. The question then arises of whether these problems are endemic to the concept of covering, or whether they pertain only to one conception of covering.

In arguing for the latter view, I posit that the two problems are actually related. The stereotyping danger arises from an analysis that focuses on the agent's performance of the activity—others observe *B* and then make a hypothesis that he is covering, which it is up to *B* ultimately to rebut. Yet as



suggested earlier,<sup>913</sup> Goffman would view this as a reductive analysis of covering. In Goffman's view, social presentations are less an activity engaged in by a performer than a gesture between a performer and a highly particularized audience. To be true to the sources of covering, one would have to take into account its relational nature—that is, one would have to consider not only the covering performances made by the agent, but also the covering demands made by the audience.

Returning to *B*, one might therefore ask who *B*'s audience might be. At a minimum, it seems that *B* is performing his masculinity for a general imagined audience which the article—in his view—will transform into a tougher crowd. This audience is asking *B* to engage in masculine-identified behaviors or to suffer the consequences. The article will make its demand harder to satisfy because *B* will now not only have to behave in masculine ways, but also have to persuade that audience that these behaviors are not obscuring his true identity.

Once the audience is brought into view, a focus on the performer seems misplaced. Asking whether *B* is covering seems much less relevant to an anti-homophobic project than asking whether *B*'s audience is demanding that he cover. After all, I assume that the only reason *B* is concerned about the article—or his orientation-associated behaviors more generally—is because he is concerned about satisfying an audience. If that audience's demand for his performance is illegitimate, then energies should be devoted to contesting that demand, rather than to ascertaining whether *B*'s conformity to that demand is due to choice or chance.

Note that this conceptualization of covering, which focuses on covering demands rather than on covering performances, not only lifts the burden from the object of the assimilationist demand, but also at least mitigates the stereotyping concern. Nothing needs to be assumed about the way gays actually behave to claim that they should not be asked to conform to stereotypically straight behaviors. Contesting covering demands, unlike contesting covering performances, is thus arguably an anti-stereotyping move.

Even if one accepts my model based on this argument, the real question will arise of how to determine *which* traits will “count” as traits that ought to be protected against covering demands. It takes little imagination to envision the claims that would flood the courts if a performative model of identity were adopted. Again, I have my own views about which kinds of performative traits—sodomy, pregnancy, language—might constitute the identities to which they are correlated. Yet I am less interested in having my own views about these traits prevail than in having the conversation that

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913. See *supra* notes 5-6 and accompanying text.

would proceed from the premise that *some* such traits partially create the identities to which they only appear to be attached.

Having this conversation—whether through litigation or through public debate—will itself tax the nation's commitment to the antidiscrimination principle. Great care will be required to ensure that the debate that determines which are the fundamental aspects of any given identity are sufficiently inclusive. I have particular trepidation about this aspect of the project, as I do not think there are many precedents for such inclusive debates. One obvious skew in current identity politics debate is an inattention to the intersectionality of identity.<sup>914</sup> The “gay” experience that often makes it into the mainstream media is predominantly the white male gay experience.<sup>915</sup> To protect attributes that are specifically white male gay traits as constitutive of gay identity is to ameliorate one problem while exacerbating another.

Nonetheless, I feel strongly that communities will be able to reach consensus about some traits. Sodomy is again my example in the gay context. It may be that the gay community cannot collectively agree on much else that binds it together as a group. But this limiting principle will only make the areas of agreement more compelling to mainstream society. To some extent, the danger itself may foster the rescuing power.

## V. CONCLUSION

I conclude with my aspiration for the model of discrimination I have been propounding. My critique of the current paradigm of discrimination is that it fails to focus on the question of assimilation, or, more broadly, on the question of change. This failure is somewhat puzzling. Civil rights practice, after all, is fundamentally about who has to change: The homosexual or the homophobe? The woman or the sexist? The racial minority or the racist? Yet the current paradigm errs prescriptively in extending greater protections to those who cannot change, and errs descriptively in characterizing identities like race and sex as being incapable of any kind of change. I believe that it could not err in either of these ways if it more closely examined the ubiquity of assimilation. When we see how much we all can and do change along every axis of our identity, we should apprehend that any account of discrimination that does not take assimilation into account is

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

915. See, e.g., CASTLE, *supra* note 155 (describing the erasure of lesbians in popular gay rights discourse); Darren L. Hutchinson, “Gay Rights” for “Gay Whites”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1360 (2000) (describing the erasure of gay men and lesbians of color in popular gay rights discourse).

fundamentally impoverished. Just thinking of such change, I hope, will change us.