

ARTICLE

Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights

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“The world is flat. The sun revolves around the earth. Human beings are either heterosexual or homosexual.”

“There’s nothing in me that is not in everybody else, and nothing in everybody else which is not in me.”

—James Baldwin²

I. INTRODUCTION

If the project of anti-discrimination law is to minimize or eliminate status hierarchies,³ then what is the status hierarchy that lesbian and gay rights advocates seek to dismantle? It has most often been conceptualized as a “sexual orientation” hierarchy in which the

1. MARJORIE GARBER, *BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 14 (1995).

2. Richard Goldstein, “*Go the Way Your Blood Beats*”: *An Interview . . .*, VILL. VOICE, June 26, 1984, at 14.

3. For the purposes of this Article, I will take for granted that this is the case—i.e., that the goal of antidiscrimination law is to eliminate the subordination of historically-disadvantaged or stigmatized groups. That this is a controversial proposition I do not deny, but it is far beyond the scope of this Article to consider its merits. Moreover, others have done so much better than I ever could. See, e.g., J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996).

“heterosexual” subordinates the “homosexual”; hence, the “homosexual” as such seeks equality.⁴ However, this characterization of discrimination against lesbians and gay men asks more questions than it answers. For example: Why is same-sex sexuality stigmatized? What is “bisexuality,” and what is its relationship to “homosexuality”? Where do transsexuals and the transgendered fit into this status hierarchy, or do they? Is it accurate or fair to assign a label to an individual solely on the basis of whether she is sexual with women, men, or both? Is it a complete representation of an individual’s sexuality to do so? One objective of this Article is to refocus attention on these and other questions about the nature of the status we call “sexual orientation.”⁵

For many years, legal scholars and commentators from other disciplines have written in support of the view that what we call “sexual orientation” is, in fact, inextricably connected to or derivative of gender.⁶

4. See, e.g., Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); cf. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

5. A few notes about terminology: I will use the term “gender” and the somewhat more awkward “sex-gender” more or less interchangeably to underscore my belief that it is impossible for us to know where biology leaves off and culture picks up, and to implicitly suggest throughout the text that sex and gender are so closely related as to be conceptually indistinguishable. I will use the phrase “lesbians and gay men” and the more inclusive acronym “LGBT” to denote all those who name themselves as lesbian, gay, bisexual, and/or transgendered, but I will often qualify that by saying “those who identify as” or something similar in order to make it clear that I do not endorse the categories, either theoretically or normatively. At times I will use the phrases “lesbian and gay rights” or the more succinct “gay rights” for the sake of convenience and clarity in referring to that concept as it is popularly understood, though the purpose of this Article is to challenge the concept rather than to discuss it. I try to refrain from using the word “homosexual”; when I find it necessary to do so, I often place the word in quotation marks. I will also not make it a practice to use the word “queer” because it remains unclear whether the usage of the word will be as inclusive as some have hoped. See Michael Warner, Introduction to *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* vii, xxvi-xxviii (Michael Warner ed., 1993); Lisa Duggan, *Making It Perfectly Queer*, *SOCIALIST REV.*, Jan.-Mar. 1992, at 11, 20 (arguing in support of a “queer community” that is “unified only by a shared dissent from the dominant organization of sex and gender”).

6. Many of these are legal scholars. See Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103 (1994); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165 (1998); B.J. Chisholm, *The (Back)Door of Oncale v. Sundowner Offshore Services, Inc.: “Outing” Heterosexuality as a Gender-Based Stereotype*, 10 TUL. J.L. & SEXUALITY 239 (2001); Mary Coombs, *Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male) Sex Sexual Activities*, 8 YALE J.L. & HUMAN. 241 (1996); Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as “Gender*

Some have suggested that because of this, discrimination against those who identify as lesbian, gay, bisexual, and transgendered or transsexual should be construed under anti-discrimination laws as sex discrimination.⁷ For the sake of convenience and clarity, I will refer to these arguments as “gender equality arguments,” by which I mean any argument that attributes bias against and stigmatization of lesbians, gay men, and bisexuals to gender roles and sex-gender hierarchy.⁸ That these arguments are correct in some fundamental sense seems undeniable. Because of the accuracy of the gender-equality paradigm, activists and litigators would do well to center their advocacy around the concept of gender. Only by undertaking this transformative project can we hope to promote equality for those who identify as lesbian or gay.

In Part I, I will briefly synthesize the main arguments offered in support of the gender-equality paradigm. There is a plethora of

Role” Discrimination, 5 S. CAL. REV. L. & WOMEN’S STUD. 105 (1995); Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363 (1997); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Chai R. Feldblum & Lisa Mottet, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623 (2000); Jordan Herman, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After Baehr v. Lewin*, 56 OHIO ST. L.J. 985 (1995); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Sex Discrimination*]; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988); Toni Lester, *Protecting the Gender Nonconformist from the Gender Police: Why The Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court’s Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89 (1999); Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN’S L.J. 226 (1998); Cass R. Sunstein, *Homosexuality and the Constitution*, in SEX, PREFERENCE, AND FAMILY 208 (David M. Estlund & Martha C. Nussbaum eds., 1997); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law As Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppelman, *The Miscegenation Analogy*]. However, scholars and writers from other disciplines have written about the relationship between the two; see, e.g., SANDRA LIPSETZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* (1993); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* (2000).

7. See, e.g., Fajer, *supra* note 6, at 633-51; Koppelman, *Sex Discrimination*, *supra* note 6; Valdes, *supra* note 6, at 303-77. There are two variations to this argument. One is the formal argument that to discriminate against a lesbian, for example, because she is sexual with women is per se sex discrimination because she would not be discriminated against if she were sexual with men, or if she were a man she would not be discriminated against if she were sexual with women. For reasons I discuss below, I am primarily concerned with the second, ideological argument that sexual orientation is derivative of gender and that sexual orientation discrimination advances the cause of male supremacy or patriarchy.

8. I do not include in this category the formal sex discrimination argument, which was accepted in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

scholarship on the gender-equality argument; thus, I do not seek to replicate the work of others here. However, a concise review of these arguments will make clear the fact that we must conceive of sexual orientation as inextricably related to or “because of” gender. It will also frame my discussion of opposing arguments by demonstrating that arguments that conceptualize “sexual orientation” as primarily a sexual phenomenon fail to account for its origins and social meaning.

Having established a foundation for the legitimacy of the gender-equality paradigm, it is important from a legal-strategy perspective to ask whether pursuing a gender-equality vision in the courts will produce favorable results. Gender-equality arguments have received renewed attention from legal advocates of LGBT rights in recent years in two contexts—employment discrimination law and same-sex marriage. Thus, in Part II, I will review the use of gender-equality arguments in employment discrimination cases. In response to commentators who suggested that *Price Waterhouse v. Hopkins*⁹ opened the door to an expansive reading of Title VII’s prohibition of sex discrimination, litigators have been taking the courts by storm with the so-called “sex-stereotyping claim”—and in some cases winning. However, despite *Price Waterhouse*, the law remains unclear as to whether sex discrimination includes discrimination based upon gender characteristics, and remains ignorant—perhaps willfully—of the expansive view of gender suggested in that case.

If the law is making progress toward acceptance of the gender-equality argument in the context of employment discrimination law, we should not hesitate to attempt to apply it in other contexts as well. One area that is critical to lesbian and gay rights advocates is family law. In both litigation and academic commentary on this issue, the use of gender-equality arguments has been less frequent. There are two central family law issues that concern lesbian and gay rights advocates: marriage (gaining the legal right to it) and children (adopting, fostering, retaining custody of, and having legal rights as to them). In Part III, I will look at both of these issues through a gender-equality lens, and examine how LGBT rights advocates have and have not pursued gender-equality strategies with respect to them.

In Part IV, I will present several reasons why the gender-equality paradigm is the most appropriate legal strategy for LGBT rights advocates to pursue. First, gender-equality arguments enable us to evade the double-edged nature of libertarian arguments, such as those that

9. 490 U.S. 228 (1989).

promote LGBT rights by couching them in terms of privacy or free speech. The gender-equality perspective could also play a critical role in resurrecting the LGBT rights movement from the failure of the attempt to have lesbians and gays designated a suspect class. This argument was problematic to begin with, not only because of the inherent weaknesses of equal protection jurisprudence itself, but because of the necessity of defining and solidifying sexual orientation identities that have consistently resisted exactness and containment.

Finally, the most important benefit of the gender-equality perspective is its universalizing potential. In this analysis, everyone is gendered, and everyone is negatively affected by the sex-gender system. Revealing the ways in which sexuality, including same-sex sexuality, is both deeply concerned with and shaped by gender clarifies the goals of feminism—and is ultimately the only way to achieve equality for all people.

While the underlying premise of this Article—that sexual orientation discrimination is a form of sex-gender discrimination—is not new, my work differs from and builds upon that of others in several ways. First, most other commentators addressing this theory have been focused on employment discrimination law (understandably, as that is where the theory has taken root most strongly) or same-sex marriage (where at least the formal sex-discrimination argument has experienced limited success). I address these toward a different end: to demonstrate the truth of the gender-equality perspective and, by extension, to show that the two contexts are related to each other.

Second, to my knowledge, no previous advocate of the gender-equality paradigm has addressed opposing arguments and deconstructed their gendered roots. Progressive scholars rarely give serious consideration to conservative arguments against gay rights. Similarly, conservatives spend more time denying than refuting progressive ones. However, in my view, the arguments of anti-gay and pro-gay commentators, however little else they have in common, both support the gender-equality perspective, even where they purport to oppose or qualify it.

That I find it necessary to address these commentators' arguments illustrates a third way in which my work differs from that of others: I endorse the gender-equality paradigm primarily because I believe it is the truth rather than because I believe that the law will accept it. However, even pragmatism must not deter us from advancing the argument. I believe this so strongly that in Part IV, I undertake a step-by-step

refutation of the notion that any other argument in favor of lesbian and gay rights will be either truly effective or enduring.

Finally, my version of the gender-equality argument goes beyond that of previous commentators because I explicitly argue that sexual orientation categories should be rejected, both culturally and by the law. By making so radical a claim, I hope to emphasize the fact that the categories themselves embody and preserve sex discrimination and rigid gender roles even as advocates for LGBT equality oppose gender inequality. As Audre Lorde famously said, “[T]he master’s tools will never dismantle the master’s house.”¹⁰

II. THE GENDER-EQUALITY CONCEPT

“When I say ‘you faggots,’ I don’t mean, ‘you gay people.’ I mean . . . how do I say this? When you want to degrade somebody, you want to strip him of his manhood. When somebody’s in your face, you want to think of the most degrading thing you can call him to strip him of his manhood. When you call him a faggot, you’re basically calling him a little girl.”

—Eminem¹¹

The idea that sexual orientation inequality and sex-gender are related is by no means a new one. It dates back at least¹² to the late 1960s and early 1970s, when radical feminists addressed the issue of lesbianism as an integral part of women’s liberation.¹³

10. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 112 (1984).

11. *Fight for Your Rights: When Hate Goes Pop* (MTV television broadcast, Apr. 12, 2001). Eminem is a popular white rap artist whose misogynistic and gay-bashing lyrics have made him the subject of intense controversy.

12. In fact, the idea seems to be older still. Author James Baldwin published an obscure essay in 1949 entitled “Preservation of Innocence,” in which he not only decried the label “homosexual” as a denial of human complexity, but also mused that the stigmatization of gay men “corresponds to the debasement of the relationships between the sexes,” suggesting the close relationship between gender and sexual orientation. See James Baldwin, *Preservation of Innocence*, reprinted in 2 *OUTLOOK* 40 (Fall 1989).

13. See, e.g., Sidney Abbott & Barbara Love, *Is Women’s Liberation a Lesbian Plot?*, reprinted in *RADICAL FEMINISM: A DOCUMENTARY READER* 310 (1999); Sidney Abbott & Barbara Love, *SAPPHO WAS A RIGHT-ON WOMAN* (1973); *AMAZON EXPEDITION: A LESBIAN FEMINIST ANTHOLOGY* (Phyllis Birkby et al. eds., 1973); Ti-Grace Atkinson, *AMAZON ODYSSEY* (1974); Charlotte Bunch, *Lesbians in Revolt*, reprinted in *RADICAL FEMINISM: A DOCUMENTARY READER* 332; Anne Koedt, *Lesbianism and Feminism*, in *RADICAL FEMINISM* (Anne Koedt et al. eds. 1973); Nancy Myron & Charlotte Bunch eds., *LESBIANISM AND THE WOMEN’S MOVEMENT* (1975); Radicalesbians, *The Woman-Identified Woman*, reprinted in *RADICAL FEMINISM: A DOCUMENTARY READER* 233 (Barbara A. Crow ed., 2000); Martha Shelley, *Lesbianism and the Women’s Liberation Movement*, reprinted in *RADICAL FEMINISM: A DOCUMENTARY READER* 305 (Barbara A. Crow ed., 2000).

Many gay rights activists of the time came to similar conclusions.¹⁴ Over the years, psychologists have conducted numerous studies documenting the correlation between attitudes about gender roles and attitudes about homosexuality.¹⁵ Even anti-gay, anti-feminist right-wing conservatives continue to make the connection.¹⁶ In response, several legal scholars have adopted these ideas and applied them by arguing that sexual orientation discrimination should be attacked legally by revealing it as sex/gender discrimination.¹⁷

The gender-equality paradigm is well-known but not universally accepted. Many maintain that sexual orientation is primarily about sexuality, even if it is related to gender. There are conservative and progressive versions of this idea. Conservatives focus on the need to regulate human sexuality and, because they support its perpetuation, neglect to discuss the place of sex-gender hierarchy/inequality entirely. Sexual progressives maintain that notions of gender are not adequate to fully explain hostility toward same-sex sexuality because sexuality is itself a site of oppression.¹⁸ It is important for proponents of the gender-equality paradigm to answer the objections to it. I will examine the most prominent arguments and explain why arguments that intend to support a purely sexuality-based interpretation of hostility toward same-sex sexual orientation end up providing support for a gender-based account.

A. “Sexual Orientation” Is a Gender-Based Model of Sexuality

“[I]n every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.”¹⁹

Most Americans understand sex and gender to be the same phenomenon. This understanding, paradoxically, is both true and false. It is false because, within the academy at least, “sex is regarded as a

14. See, e.g., DENNIS ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* 79-84 (1971); DAVID FERNBACH, *THE SPIRAL PATH: A GAY CONTRIBUTION TO HUMAN SURVIVAL* 69-112, 197-208 (1981); HOMOPHOBIA: HOW WE ALL PAY THE PRICE (Warren J. Blumenfeld ed., 1992); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988); JOHN STOLTENBERG, *REFUSING TO BE A MAN* 130-33 (1989); John Stoltenberg, *Pornography, Homophobia and Male Supremacy*, in *PORNOGRAPHY: WOMEN, VIOLENCE, AND CIVIL LIBERTIES* 145, 145-65 (Catherine Itzin ed., 1992); Allen Young, *Out of the Closet: A Gay Manifesto*, *RAMPARTS*, Nov. 1971, at 52.

15. See Parts I.A.3.a and I.B.1 *infra*.

16. See *infra* notes 110-111 and accompanying text.

17. See sources cited *supra* note 6.

18. See Part I.B.2 *infra*.

19. Katherine M. Franke, *The Central Mistake of Employment Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995).

product of nature, while gender is understood as a function of culture.”²⁰ This distinction has been helpful to feminists in disputing the belief that differences between men and women are based solely on biology and advancing the idea that such differences are instead socially constructed. Ironically, however, it has also helped to perpetuate the belief that at least some of the alleged differences *are* biological in origin.²¹ Some conservative academics have simply begun to use the word gender to describe many non-reproductive differences between men and women that they view as the inevitable product of biological sex difference.²² Likewise, it is this understanding that seems to resonate most strongly with the American public.²³ In this way, the popular understanding of sex and gender as being the same thing erases the social constructionist premise of gender theory.

As Katherine Franke has pointed out, there is an important way in which the division of sex from gender has not benefited feminism: it has led to an uncritical acceptance of the existence of biological sex differences and a too-limited view of the wrong of sex discrimination as that which would not have occurred but for biological sex.²⁴ A more accurate picture of the wrong of that which we call “sex discrimination” would implicate the entire spectrum of gendered norms and roles to which individuals are expected to conform based upon their designations as either female or male.²⁵ The primary effects of these norms are the constraint of human agency and the maintenance of sex inequality.

20. *Id.* at 1.

21. Scientific research that is premised upon the idea of biological differences and attempts to identify and prove such differences has continued unabated into the twenty-first century. *See, e.g.*, ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN (2d ed. 1992).

22. *See, e.g.*, Timothy J. Dailey, *Boys Will Be Boys: How a Scientific Cover-Up Led to Gender as a Social Construct*, <http://www.frc.org/papers/insight/index.cfm?getIS01A1&arc=yes> (Family Research Council Web site) (last visited Oct. 5, 2003) (arguing that “[a]ll of human history testifies to the complementary nature of male and female, which forms the foundation of civilization independent of nations, cultures, times, and kingdoms. . . . Those who indulge in utopian fantasies, pretending that the subjective nature of gender is a fait accompli, can never hope to overturn the truth that we are hard-wired in the womb to become men or women. This is a self-evident truth found in all times and ages, among all cultures and peoples, even to the dawn of creation itself”).

23. For example, the success of pop psychologist John Gray’s *Mars and Venus* series of books, lectures, and television programs attests to the willingness of many Americans to believe in essential and intractable differences between the sexes. It is likely that many adherents of the Mars-Venus way of viewing the world see sex differences in large part as biologically determined.

24. Franke, *supra* note 19, at 2-4.

25. *See, e.g.*, David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 999-1008 (2002) (discussing gender as an ideology and an organizing principle).

Some within the academy question the division of human beings into the male/female dichotomy. Biologist Anne Fausto-Sterling has argued for the recognition of five sexes, the three “intermediate” ones being drawn from the classification of persons with some mixture of male and female characteristics that we refer to as “intersexed.”²⁶ Feminist psychologist Sandra Bem notes that with regard to secondary sex characteristics, there is a greater diversity within each sex than between them.²⁷ To maintain gender polarity, secondary sex characteristics are often cosmetically altered to emphasize or create differences that are slight or nonexistent.²⁸ This forced differentiation reveals much about the way that subordinate classes must be marked in order to maintain hierarchy. It might be said that sex differentiation is the foundation of sex discrimination such that it is hard to imagine a world in which one exists without the other.²⁹

If artificial sex differentiation and the presumption of biologically-based, essential sex differences are integral to the maintenance of sex-gender inequality, the law has played more than a minor role in helping to perpetuate them. For example, Franke argues that anti-discrimination law, rather than aiding in the project of moving toward sex-gender equality, has actually hindered it by fostering the myth of “biological” differences—most of which are in fact socially constructed.³⁰ The dominant understanding of sex and gender in our culture and in the law has severely limited the prospects for continuing to move toward equality. If sex difference and sex discrimination are indeed two sides of the same coin, the former must be made unimportant for the latter to be eradicated. In order for this to occur, we must learn to recognize the full extent of

26. Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar./Apr. 1993, at 20-24.

27. See BEM, *supra* note 6, at 80; see also KIMMEL, *supra* note 6, at 2 (arguing that “there are enormous ranges of female-ness and male-ness. Though our musculature differs, plenty of women are . . . stronger than plenty of men. . . . [w]omen do have varying levels of androgens, and men have varying levels of estrogen in their systems”).

28. For example, women wear makeup, have their breasts surgically augmented, and remove facial and body hair; men do not generally wear cosmetics, sometimes have mammary fat surgically removed, and build upper-body strength. See BEM, *supra* note 6, at 159-62 (discussing the ways in which the contemporary American body is gendered).

29. For example, Michael Kimmel notes that

[g]ender is not simply a system of classification by which biological males and biological females are sorted, separated, and socialized into equivalent sex roles. Gender also expresses the universal inequality between men and women. When we speak about gender we also speak about hierarchy, power, and inequality, not simply difference.

KIMMEL, *supra* note 6, at 1.

30. Franke, *supra* note 19, at 2-5.

gender norms and roles in our society. Only by revealing such norms may they be discredited.

One area where gender norms are crucial is in the issue of “sexual orientation.” There is a great deal of persuasive evidence of the ways in which gender is implicated in “sexual orientation.” I will briefly review some of these arguments below to show that a gender-based paradigm for understanding “sexual orientation” elucidates the basis for the widespread fear and hatred of those who identify as lesbian, gay, or bisexual in a way that explanations that focus on sexuality fail to accomplish. This summary will provide the foundation for my discussion of gender-equality themes in employment discrimination law and family law and for my assertion that the law must recognize the gender-equality paradigm.

1. Historical Development of “Sexual Orientation”

The concept of “sexual orientation” is of rather recent vintage, but its development has a long and complex history. The work of many historians and other scholars in uncovering the history of same-sex sexuality has been an invaluable contribution to an understanding of the historical progress of notions concerning same-sex sexual relationships.³¹ Within the realm of legal scholarship, Francisco Valdes’ work has been especially useful to this project. He traces the history of same-sex sexuality and its relevance to gender norms from its origin in ancient Greece to its present incarnation.³² An examination of this history not only reveals that the concept of “homosexuality” is a historically contingent one, but that it has developed in response to changes in gender norms and in service of male supremacy. Thus, the current way of perceiving individuals who have sexual relations with members of their

31. See, e.g., JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980); MICHEL FOUCAULT, HISTORY OF SEXUALITY (Robert Hurley trans., 1978); HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin B. Duberman et al. eds., 1989); HOMOSEXUALITY, WHICH HOMOSEXUALITY? (Dennis Altman et al. eds., 1989); CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 268-83 (1985).

32. See Valdes, *supra* note 6, at 38-54, 84-90; Francisco Valdes, *Unpacking Heteropatriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996); see also 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, 13 (1995); Coombs, *supra* note 6, at 245-47, 250-53; Koppelman, *Sex Discrimination*, *supra* note 6, at 240-45; Law, *supra* note 6, at 198.

own sex is not “natural” or inevitable, but a product of a particular moment in the history of sex/gender hierarchy.³³

Overall, the history of same-sex sexuality, especially its recent history, clearly shows that the concepts of “homosexuality” and “heterosexuality” that we know today are the contemporary product of that history rather than timeless, natural kinds. As historian Jonathan Katz explains:

33. See, e.g., BEM, *supra* note 6, at 99-100. She argues:

The prevailing belief in Western culture has long been that sexual desire is an ahistorical phenomenon whose “primordially ‘natural’” form is heterosexuality (citation omitted). The essence of the social-constructionist challenge is that sexual desire is a biohistorical phenomenon whose form can be as differently shaped from one historical and cultural context to another as the form of eating. So yes, humans everywhere engage in sex, just as humans everywhere eat, but what rules they establish about how and with whom they are sexual, what institutions they set up to enforce those “how” and “who” rules, and even what they define as sexual or sexually desirable in the first place have no universal—or ahistorical—form. From this perspective, nothing is sacred or even biologically special about the requirement of exclusive heterosexuality in the mutually exclusive scripts for males and females in contemporary America; that exclusiveness is simply a historical fact about how sexuality happens to be organized in this particular time and place.

Id. One critical piece of this history was the shift from sodomy as act to homosexuality as identity. See Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1086-89 (1988) (arguing that the *Bowers* Court distorted the historical record in its citation of “ancient” prohibitions on “homosexual” sodomy, noting that illicit sexual acts themselves were what was proscribed, regardless of the sex of those who participated in them). Historian Randolph Trumbach compellingly documents the paradigm shift that took place in the late seventeenth and early eighteenth centuries in England that reconceptualized same-sex sexuality from being primarily a behavior to primarily an identity. See Randolph Trumbach, *The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660-1750*, in HIDDEN FROM HISTORY, *supra* note 31, at 129 [hereinafter Trumbach, *The Birth of the Queen*]; Randolph Trumbach, *Gender and the Homosexual Role in Modern Western Culture: The 18th and 19th Centuries Compared*, in HOMOSEXUALITY, WHICH HOMOSEXUALITY? 149, 151 (Dennis Altman et al. eds., 1988) [hereinafter Trumbach, *Gender and the Homosexual Role*]; Randolph Trumbach, *Sodomitical Subcultures, Sodomitical Roles, and the Gender Revolution of the Eighteenth Century: The Recent Historiography*, in HISTORY OF HOMOSEXUALITY IN EUROPE AND AMERICA 392 (Wayne R. Dynes & Stephen Donaldson eds., 1992) [hereinafter Trumbach, *Sodomitical Subcultures*]. For other discussions of particular interest on the subject of gender and sexuality, see Judith C. Brown, *Lesbian Sexuality in Medieval and Early Modern Europe*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 67 (Martin B. Duberman et al. eds., 1989); Mary McIntosh, *The Homosexual Role*, 16 SOCIAL PROBLEMS 182 (1968); BEM, *supra* note 6, at 82-87; SMITH-ROSENBERG, *supra* note 31.

Male same-sex sexuality had always been regarded as problematic in Western culture, but the idea that a man who participated in such acts was a particular type of person, whose inclination toward same-sex sexuality was a defining feature of his identity, did not emerge until the beginning of the eighteenth century. Trumbach, *Sodomitical Subcultures*, *supra* at 396. Importantly, Trumbach argues that the paradigm shift from acts to identity was caused by the reorganization of gender identity that was occurring as part of the emergence of modern Western culture. *Id.*

sex-difference (the hetero) and sex-pleasure (the sexual) have not always defined the socially authorized essence of the sexes' unions. An official, dominant, different-sex erotic ideal—a heterosexual ethic—is not ancient at all, but a modern invention. Our mystical belief in an eternal heterosexuality—our heterosexual hypothesis—is an idea widely distributed only in the last three-quarters of the twentieth century.³⁴

Same-sex sexuality's history demonstrates that sex and gender norms and roles were an integral part of the development of the concept of sexual orientation.³⁵ At one time, sodomy was a sin, but one that anyone could commit. The relatively recent creation of an identity for those who participate in same-sex sexual acts has had significant consequences: it has exempted “heterosexuals” from same-sex desire, made bisexuality invisible, and reinforced the male-female dichotomy. Thus, it has helped

34. JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 14 (1995).

35. Another key moment in the history of sexual orientation that demonstrates the link between sexuality and gender was the rise of “sexology” in the late 19th century. *See, e.g.,* Valdes, *supra* note 6, at 44-55. The sexologists studied and catalogued personality traits associated with each sex-gender, claiming that the study of such traits was a science; in actuality, they were attempting to pathologize gender nonconformity. *Id.* Sexology helped to make gender into the concept we know today: “the social/public (and sexual/private) performance of [an individual's officially assigned] sex.” *Id.* at 48. By cataloguing the attributes that individuals of each sex were expected to exhibit, sexologists made nonconformity more likely to be noticed and perceived as problematic than it previously had been. One form of nonconformity the sexologists documented was sexual behavior with members of the other sex.

The sexologists thus helped to create the concepts of homo- and heterosexuality, which historical research indicates did not exist before the late 19th century, grounding these new concepts in gender-based conceptions of appropriate behavior. Indeed, given the historical context of the time, it is clear that the policing of gender boundaries was the primary reason for the creation of a stigmatizing label for persons who participated in same-sex sexual acts. *See, e.g.,* BEM, *supra* note 6, at 82-87.

The development of a same-sex sexual identity for women did not occur until the Victorian era. Though originally inversion theory focused on male same-sex sexuality, by the mid-1880s lesbianism began to be included in discussions of the perverse by sexologists. *See* SMITH-ROSENBERG, *supra* note 31, at 268-70. Notably, sexologists did not focus on the sexual behavior of female inverts, but on their social behavior and physical appearance. *See id.* at 270-72. Lesbianism was linked directly to the rejection of traditional female gender roles, cross-dressing, and masculine physical traits, despite the fact that the latter two were rare even among women who had sexual relationships with other women. *See id.* at 271-74.

It was not by chance that the emergence of a same-sex sexual identity for women coincided with a period of feminist activism in which women enjoyed a level of independence previously unknown to them. Unmarried career women and political activists were said to constitute an “intermediate sex” by many doctors and scientists beginning around the 1890s. As Smith-Rosenberg puts it, “the sexologists . . . transposed the amorphous qualities of the[se] socially disorderly [women] into specific forms of sexual deviance.” *Id.* at 267. She notes that “[b]y the 1920s, charges of lesbianism had become a common way to discredit women professionals, reformers, and educators—and the feminist political, reform, and education institutions they had founded.” *Id.* at 280-81. The political function performed by the sexologists was masked by their characterization of feminism as a medical problem rather than, for example, merely a moral deficiency.

to retard the process of making sex difference (and thus sex discrimination) a thing of the past.

2. The Conflation of Gender and Sexual Orientation

A second compelling argument in favor of recognizing a gendered basis for the concept of sexual orientation is the widespread conceptual linkage between gender nonconformity and same-sex orientation. As Andrew Koppelman has noted, the fact that “effeminate” men and “masculine” women are often deemed gay or lesbian in this society regardless of their actual sexual behavior is a social reality that could hardly escape any American’s notice.³⁶ Moreover, it is often the case that even non-physical gender transgressions (such as hobbies and occupations) give rise to the presumption of a same-sex orientation.

This conflation works in the opposite direction as well: lesbians and gay men are popularly assumed to display characteristics designated as appropriate to the other sex-gender. For example, lesbians are assumed to be masculine by virtue of their lesbianism and gay men are assumed to be effeminate by virtue of the fact that they identify as gay. Marc Fajer refers to this phenomenon as the “cross-gender stereotype,” a part of nongay society’s “pre-understanding” of lesbians and gay men.³⁷

The lesbian/gay label is the other side of the conflation of gender nonconformity and same-sex orientation.³⁸ The label is primarily a shaming mechanism used to police individual conformity to non-sexual gender norms. In most instances, it is applied to an individual in the absence of any knowledge of her or his sexual history or identity, and

36. See Koppelman, *Sex Discrimination*, *supra* note 6, at 234-35.

37. Fajer, *supra* note 6, at 607. The existence of the cross-gender stereotype has been demonstrated by a number of studies. See *id.* at 607-10. The stereotype includes beliefs about the physical and personality traits of lesbians and gays, gender presentation through personal appearance and demeanor, and the professions that gay men and lesbians enter. See *id.* Such studies demonstrate a perceptual connection between social gender-role stereotypes and sexual gender-role stereotypes. Those who are known to deviate sexually from their designated gender roles are assumed to also deviate socially. Despite the inaccuracy of the cross-gender stereotype as to a significant number of lesbians and gay men, as well as the gender-nonconformity of many (if not most) self-identified heterosexuals, the stereotype persists. One reason for this is that from the 1970s on, echoing sexology in the late 19th century, scientists have attempted to link gender nonconformity and same-sex sexual orientation. See Valdes, *supra* note 6, at 86-89. The idea has taken root in the public imagination as well. See *id.* at 90-95. Not only does much of the public believe that all social gender nonconformists are also sexual gender nonconformists, but some studies indicate that presenting themselves in a stereotypically gender-appropriate manner can mitigate the hostility directed at individuals who identify as lesbian or gay. See *id.* at 91. Professor Valdes argues that this reflects the primacy of the antipathy toward social gender-role nonconformity. See *id.*

38. See Fajer, *supra* note 6, at 610-11.

sometimes despite such knowledge. This phenomenon is illustrative of the ways in which the lesbian/gay label (and the entire concept of “homosexuality”) has comparatively little to do with sexuality itself and much more to do with maintaining gender hierarchy. The use of the label against men and women who transgress gender boundaries provides persuasive evidence of the relationship between gender inequality and hostility toward same-sex sexuality.³⁹

As psychologist Joseph Pleck has pointed out, “[o]ur society uses the male heterosexual-homosexual dichotomy as a central symbol for all the rankings of masculinity, for the division on any grounds between males who are ‘real men’ and have power and males who are not.”⁴⁰ Thus, men employ the gay label as they would any other symbolic weapon to simultaneously affirm their own masculinity and derogate that of another, regardless of the actual sexual behavior or identity of the labeled individual. The label stigmatizes the individual designated as gay for the precise reason that it enhances the person doing the labeling: the gay man is feminized, and thus a failure at the masculine game, which is premised upon absolute rejection of the feminine.

Just as all men are vulnerable to being labeled gay for failing to conform to stereotypical notions of masculinity, all women are similarly

39. For men and boys, for example, being labeled gay (which usually comes in the form of epithets like “faggot” and “queer”) is more often an accusation of being insufficiently masculine than of actual participation in same-sex sexual acts. “Faggot” and like epithets are often paired with either explicit references to sexual acts, generally anal sex and fellatio, but also accompany non-sexual (in the sense of not being about sexual acts) but gendered epithets like “pussy” and “bitch,” or both. See, e.g., *Dillon v. Frank*, 952 F.2d 463 (6th Cir. 1992) (describing harassment of postal employee in which harassers said and wrote that plaintiff “sucks dicks” and “gives head”); *Vandevanter v. Wabash Nat’l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994), *aff’d on reconsideration*, 887 F. Supp. 1178 (N.D. Ind. 1995) (describing harassment that included calling plaintiff a “dick sucker” and asking him if he could perform fellatio without his false teeth); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 490 (W.D. Wash. 1995) (describing harassment which included plaintiff being called “homo” and “faggot” as well as being threatened with anal rape); *Spearman v. Ford Motor Co.*, 1999 WL 754568 (N.D. Ill. Sept. 9, 1999), *aff’d*, 2000 WL 1646288 (7th Cir. 2000) (describing harassment of male worker that included not only plaintiff being called gay, but also “selfish bitch,” “cheap-ass bitch,” “little bitch,” and “pussy-ass”); *Doe v. City of Belleville*, 119 F.3d 563, 567 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998) (describing harassment that included plaintiff being referred to by the harasser as his “bitch” and being threatened with anal rape).

To recognize these forms of harassment as gender-based is not a huge logical leap. Such labeling is most often a response to an individual’s gender-role characteristics rather than a judgment about his actual sexual behavior or identity. For an excellent discussion of the ways in which same-sex harassment functions to perpetuate gender hierarchies in the workplace, see Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J. L. & FEMINISM 155 (1999).

40. Joseph H. Pleck, *Men’s Power with Women, Other Men, and Society*, in *THE AMERICAN MAN* 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980).

susceptible to the lesbian label for failing to comport themselves in ways that correspond with contemporary gender norms. The labeling process for women is more complex than the one for men, in that appropriate gender-role behavior norms are less well-defined for women, who in general have more freedom to defy traditional notions of gender than men.

Second-wave feminist writers have persuasively described the ways in which the label "lesbian" has been applied to feminists regardless of actual sexual behavior or identity.⁴¹ This phenomenon, often referred to as "lesbian-baiting," clearly demonstrates that gender-role anxiety, in this case concerning women's social gender-role nonconformity, is a catalyst for the application of the sexual gender-deviant label. "Coming out" as a feminist invites the application of the lesbian label because feminists by definition defy traditional gender roles. Some feminists do self-identify as lesbian or bisexual. But for the labeler, actual sexual identity is unimportant; it is gender-role deviance and the agitation it causes that inspires the use of the lesbian label. In other words, feminism and lesbianism are conceptually linked; both speak to gender nonconformity, and as a result, both are unacceptable.

Another illustration of the conflation of same-sex sexuality and social gender atypicality, and how it is primarily designed to maintain the ideology of gender differentiation and inequality, is the fear/assumption that a child who displays gender-atypical behavior will become a gay or lesbian adult.⁴² As Eve Sedgwick has pointed out, the first edition of the

41. See, e.g., PHARR, *supra* note 14, at 19-20. For example, Anne Koedt speaks of "acts of feminine transgression" that inspire the use of the lesbian label:

A woman may appear too self-reliant and assertive; she may work politically for women's rights; she may be too smart for her colleagues; or she may have important close friends who are women. Often women have been called "lesbian" by complete strangers simply because they were sitting in a café obviously engrossed in their own conversation and not interested in the men around them. . . . [T]he purpose is more to scare women back into "place" than to pinpoint any actual lesbianism.

Koedt, *supra* note 13, at 247. The Radicalesbians' widely-read essay "The Woman-Identified Woman" puts it even more strongly:

Lesbian is the word, the label, the condition that holds women in line. When a woman hears this word tossed her way, she knows she is stepping out of line. She knows that she has crossed the terrible boundary of her sex role. . . . Lesbian is a label invented by the Man to throw at any woman who dares to be his equal, who dares to challenge his prerogatives . . . , who dares to assert the primacy of her own needs.

Radicalesbians, *supra* note 13, at 234.

42. This belief dates back at least to the early twentieth century, when psychiatrist Dr. John F. Meagher warned that "[p]arents who sissify their sons tend to make homosexuals out of them." John F. Meagher, *Homosexuality: Its Psychobiological and Psychopathological Significance*, 33 UROLOGIC & CUTANEOUS REV. 505, 508-09 (1929), quoted in JONATHAN KATZ,

American Psychiatric Association's Diagnostic and Statistical Manual that removed "homosexuality" as a psychiatric disorder—the DSM-III, published in 1980—contained a new ailment called Gender Identity Disorder of Childhood.⁴³ The existence of Gender Identity Disorder of Childhood and the accompanying belief that social gender-atypical children will become sexual gender-atypical adults is a compelling substantiation of the view that heterosexuality is an integral part of gender-role socialization and hence that hostility toward same-sex sexuality is directly related to traditional views of the roles of men and women in society.

3. Political and Social Institutions

As Sylvia Law has suggested, one reason for the resistance to lesbian and gay rights is that equality of same-sex relationships and of individuals who identify as lesbian or gay would undermine existing institutions that rely for their vitality on sex-gender differentiation and inequality.⁴⁴ Although one could correctly argue that employment, government, and other "public sphere" institutions serve to perpetuate gender inequality, and that they have played a vital role in oppression of gender nonconformists (including lesbians and gay men), I will

GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY 456 (1983). The theme was picked up again in the late 1960s, when Peter and Barbara Wyden's parenting book *Growing Up Straight: What Every Thoughtful Parent Should Know About Homosexuality* was published. The Wydens were explicit about the connection they saw between same-sex sexuality and gender roles; according to them, a necessary part of raising a heterosexual child was instilling masculinity in boys and femininity in girls. "A mother's acceptance of her role as a truly feminine woman will communicate itself to a daughter at a remarkably early age"; "mother's respect for the father's role as head of the family will help a small boy grow up to be masculine." PETER & BARBARA WYDEN, *GROWING UP STRAIGHT: WHAT EVERY THOUGHTFUL PARENT SHOULD KNOW ABOUT HOMOSEXUALITY* 237(1968). The authors even went so far as to trot out the most prosaic gender-role stereotypes imaginable: that girls should play with dolls and that boys should be told not to cry in a "sexually normal home." *Id.* at 239.

43. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 69, 71 (Michael Warner ed., 1993). This "disorder" is formally identified as the only officially-recognized precursor to same-sex sexual orientation. See Valdes, *supra* note 6, at 84-86. Moreover, as Sedgwick explains, it is diagnosed in vastly different ways in boys than in girls: boys can be diagnosed if they engage in activities coded feminine—wearing girls' clothes or playing with girls' toys—while a girl must believe that she is anatomically male to be diagnosed with GID. See Sedgwick, *supra*, at 71. This development in the field of psychiatry accomplishes the twin goals of reiterating the connection between childhood gender nonconformity and homosexuality in boys and of essentializing sex-gender difference. Further, the differential diagnosis recognizes that it is now considered normal for girls and women to display some characteristics that have been traditionally coded masculine, but posits that if boys display characteristics coded feminine, they must have a psychological disorder.

44. See Law, *supra* note 6, at 218-21.

concentrate on two “private sphere” institutions: the patriarchal family and so-called “heterosexual” intercourse. It is these two institutions that opponents of gay rights most fear will be undermined by gay existence, which suggests that deconstructing them must play a vital role in connecting resistance to “homosexuality” to its basis in gender roles.

a. “Traditional” Marriage and the Patriarchal Family

Although it is currently politically incorrect to acknowledge it, marriage is, as a matter of historical fact and contemporary reality, a patriarchal institution “that looks to ownership, property, and dominance of men over women as its basis.”⁴⁵ Or, as Martha Nussbaum puts it, “one might argue that the institution of marriage as most frequently practiced both expresses and reinforces male dominance.”⁴⁶ William Eskridge has pointed out that “the legal structure of marriage has been the last haven for all sorts of malignant social attitudes, including racism, contempt for the poor, and abuse of women and children.”⁴⁷ However, despite its many disadvantages for women,⁴⁸ marriage remains an enormously popular institution.

Marriage is so popular, in fact, that its attainment became a major goal of the lesbian and gay rights movement in the 1990s and arguably remains its top priority today.⁴⁹ These efforts have met with vociferous resistance from conservatives, who believe that same-sex sexual relationships undermine the institution of “heterosexual” marriage and the patriarchal family.⁵⁰ This fear reflects concerns about undermining the

45. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUTLOOK 8, 8 (1989). For feminist legal perspectives on marriage and family generally, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); E.J. GRAFF, *WHAT IS MARRIAGE FOR?* (1999); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND FAMILY* (1989).

46. MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 295 (1999).

47. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 75 (1996) (parentheticals omitted).

48. For example, studies have shown that working married women make less money than single women, single men, and married men, even when other factors are controlled for, and that they report being more unhappy with their lives than married men and single women. Only single men are more unhappy. Moreover, women who work outside the home still do the majority of the housework and child care. And these factors are only examples. See KATHA POLLITT, *That Survey: Being Wedded Is Not Always Bliss*, in *REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM* 6 (1994); see also KIMMEL, *supra* note 6, at 121-22.

49. See, e.g., ESKRIDGE, *supra* note 47; ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 178-85 (1995).

50. See, e.g., Law, *supra* note 6, at 218-21 (noting that “[a]t its core, secular opposition to homosexual expression and feminism rests on a defense of traditional ideas of family stability”); OKIN, *supra* note 45, at 49-50 (noting that the threat to the family is “the specter that looms large in the minds of the traditionalist right”).

current hierarchical sex-gender system. Put another way, if marriage can only exist between a man and a woman, what does that say about what marriage means in our society?⁵¹

Some feminist legal scholars have argued that same-sex marriage has revolutionary potential for advancing sex-gender equality.⁵² Viewed from this perspective, the struggle for legal recognition of same-sex marriages is simply the next logical step—and a significant one—in the ongoing project of reforming the institution to reflect our society’s changing views about women’s equality. In opposition to same-sex marriage, conservatives often put forth rhetoric that asserts that the sexes are uniquely and necessarily complementary because in most circles it is no longer an acceptable form of public discourse to attack women’s equality directly.⁵³

Social science research corroborates the gender-bias interpretation of conservative opposition to same-sex marriage and same-sex sexuality.

51. E.J. Graff identifies opposition to same-sex marriage as the latest in an historical parade of resistance to marriage reforms that have given women (and, in some cases, men) more freedom in structuring their intimate lives. See GRAFF, *supra* note 45, 252-53; Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2076-80 (2000). This list includes married women retaining ownership of and control over their own property, using birth control, having unimpeded access to divorce, keeping their unmarried names, and working outside the home. Other debates about marriage involved sexuality more directly: for example, whether sex was a duty spouses owed to each other or whether it was an expression of mutual affection (the debate over the existence of marital rape), whether sex should be confined to marriage at all, and whether non-procreative acts were acceptable forms of sexual expression within marriage. What all these debates have had in common is the rhetoric used by those opposing change or reform: that marriage as an institution will be degraded and ultimately destroyed, immorality and godlessness will run rampant, and all of civilization will fall apart. See GRAFF, *supra* note 45, at 251-52.

According to Graff, all of these struggles are in some sense about gender equality, and same-sex marriage is no exception:

Same-sex marriage will imply that the *sexes* are deeply and fundamentally equal. In the spring of 1998, the Southern Baptist Convention passed two closely linked rules: that a wife must “submit” to her husband and that homosexuality must be opposed by every possible means. Those ideas are twin sides of the same coin. If a woman marries another woman, who’s in charge? Restricting marriage to husband/wife pairs is an essential symbol of male supremacy . . . It’s no mistake, in other words, that those most vocally against [same-sex marriage] are also against abortion rights, divorce, childcare, . . . or anything else that might let women escape the nineteenth-century hearth. Same-sex marriage reveals that marriage need not be hierarchical at all, that . . . marriage can be about not obedience but love.

Id. at 159.

52. See, e.g., Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397 (2001).

53. See, e.g., John Finnis, *Law, Morality, and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1064-69 (1994); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 52; see also Parts III.A.2 and III.B.2 *infra*.

Several studies have found that conservative/traditional gender-role attitudes are correlated with anti-gay bias,⁵⁴ as are religiosity and membership in conservative religious sects,⁵⁵ and conservative, nonpermissive views of sexuality.⁵⁶ In a society in which marriage is the only officially sanctioned forum for sexuality and in which “heterosexual” marriage and the family are essential to maintaining the sex-gender system, the proliferation of other expressions of sexuality poses a genuine threat to those institutions and, perhaps, to the sex-gender system itself.

b. (Hetero)Sexual Intercourse

Sexual intercourse (that is, penile-vaginal sex) as an institution often reinforces male dominance as a matter of social meaning in our culture.⁵⁷

54. See, e.g., C.R. Agnew et al., *Proximal and Distal Predictors of Homophobia: Framing the Multivariate Roots of Out-group Rejection*, 23 J. APPLIED SOC. PSYCHOL. 2013 (1993); J. Harry, *Sports Ideology, Attitudes Toward Women, and Anti-Homosexual Attitudes*, 32 SEX ROLES 109 (1995); Gregory M. Herek, *Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RES. 451 (1988) [hereinafter Herek, *Heterosexuals' Attitudes*]; Gregory M. Herek, *Assessing Heterosexuals' Attitudes Toward Lesbians and Gay Men: A Review of Empirical Research with the ATLG Scale*, in LESBIAN AND GAY PSYCHOLOGY 206 (B. Greene & Gregory M. Herek eds., 1994) [hereinafter Herek, *A Review of Empirical Research*]; Mary E. Kite & Bernard E. Whitley, Jr., *Do Heterosexual Women and Men Differ in Their Attitudes Toward Homosexuality?: A Conceptual and Methodological Analysis*, in STIGMA AND SEXUAL ORIENTATION 39 (Gregory M. Herek ed., 1998); A. Simon, *Some Correlates of Individuals' Attitudes Toward Lesbians*, 29 J. HOMOSEXUALITY 89 (1995).

55. See Agnew et al., *supra* note 54; Randy Fisher et al., *Religiosity, Religious Orientation, and Attitudes Towards Gays and Lesbians*, 24 J. APPLIED PSYCHOL. 614 (1994); Herek, *A Review of Empirical Research*, *supra* note 54.

56. See, e.g., T.J. Ficarrotto, *Racism, Sexism, and Erotophobia: Attitudes of Heterosexuals Toward Homosexuals*, 19 J. HOMOSEXUALITY 111 (1990); A. Simon, *Some Correlates of Individuals' Attitudes Toward Lesbians*, 29 J. HOMOSEXUALITY 89 (1995).

57. See, e.g., ANDREA DWORKIN, *INTERCOURSE* (1987); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD A FEMINIST THEORY*]; CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]. The radical feminist critique of (hetero)sexuality was and remains controversial. Its articulators have been dubbed “sex-negative,” puritanical, frigid, and anti-feminist, among other invectives, by those who feel threatened and personally attacked by their questioning of the social meaning of “heterosexual” intercourse. See, e.g., NAOMI WOLF, *FIRE WITH FIRE* 180-97 (1993); KATIE ROIPHE, *THE MORNING AFTER* (1993). Rather than a personal attack upon the intimate lives and the sexual practices of individuals, I believe these critiques are primarily an intellectual inquiry into the cultural meanings of these practices. Let me be absolutely clear that I am *not* asserting that all vaginal intercourse is akin to rape, or that most intercourse is not entered into freely or is experienced as invasive or degrading. However, to deny that intercourse between men and women carries cultural baggage would be intellectually dishonest. The key is that it is possible to question and criticize institutions without necessarily attacking those who participate in them. For an excellent discussion of this point, see LYNN S. CHANCER, *RECONCILABLE DIFFERENCES: CONFRONTING BEAUTY, PORNOGRAPHY, AND THE FUTURE OF FEMINISM* (1998).

Sexual relations between men and women have been described in terms of power, possession, invasion, and degradation, not only by radical feminists, but before feminists by male and female writers of literature, psychology, and law.⁵⁸ Andrea Dworkin makes the case for this conclusion succinctly:

Intercourse occurs in a context of a power relation that is pervasive and incontrovertible. The context in which the act takes place, whatever the meaning of the act in and of itself, is one in which men have social, economic, political, and physical power over women. Some men do not have all those kinds of power over all women; but all men have some kinds of power over all women Intercourse as an act often expresses the power men have over women.⁵⁹

As Andrew Koppelman has noted, a blatant example of the hierarchical meaning of penetrative sexual activity in our society is the use of the word “fuck” (and, as a more socially acceptable euphemism, “screw”)—used alternately to refer to intercourse and to connote harm (e.g., “she got fucked over,” “we’re screwed,” “fuck that,” and of course, the ever-popular “fuck you”).⁶⁰ In our culture, the penetrated person is symbolically dishonored, shamed, and corrupted. That this is the case is illustrated by, for example, the fact that rape is a more serious crime than simple assault,⁶¹ and by the prohibitive legal regime surrounding sexuality that theoretically controls the who, what, when, and where of sexual activity.⁶²

In a social context in which women are subordinated and in which penetration connotes harm, same-sex sexuality necessarily undermines the institution of (hetero)sexual intercourse. Sexual interaction between men destabilizes the myth of the impenetrability of men and their dominant role in sexual intercourse;⁶³ and sexual interaction between

58. See DWORKIN, *supra* note 57; KATE MILLETT, *SEXUAL POLITICS* (1971).

59. DWORKIN, *supra* note 57, at 125-26.

60. See KOPPELMAN, *supra* note 3, at 123.

61. See, e.g., *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) (noting that “[n]othing is more destructive of human dignity than being forced to perform sexual acts against one’s will. Rape is still the ultimate violation”).

62. See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* chs. 1-4 (1998); RICHARD POSNER, *SEX AND REASON* (1992). Until July 2003, thirteen states still had prohibitions on “sodomy.” See <http://www.lambdalegal.org/cgi-bin/iowa/states/list> (last visited Oct. 5, 2003). Although these laws were honored mostly in the breach, they still functioned to stigmatize lesbians and gays and brand them as criminals—this despite the fact that the definition of sodomy in most states that had such laws included behavior in which many different-sex couples engage.

63. A culture in which men are superior to women and in which being the penetrator signifies superiority is necessarily a culture in which penetration of men by other men is problematic. Some commentators have argued that the sodomy taboo is in fact a way of

women challenges the centrality of the penis to sexuality and the notion that sex is necessarily hierarchical.⁶⁴

4. Gender and Sexuality Redux

Sexuality is a vast and diverse set of feelings, desires, and practices. Yet our society reduces an individual's sexuality to the sex-gender of object choice as the most important sexual fact about her, as well as a fact thought to be constitutive of her identity. Moreover, individuals who experience or display no preference or orientation toward one sex-gender or the other, or who refuse to embrace a label, are made invisible in this culture because the sexual orientation concept is premised upon absolute differentiation between the "normal" and the "deviant," a cleavage disrupted by those who identify as bisexual or who reject sexual orientation categories entirely.⁶⁵ This simplification of the complexity of sexual desire to sex-gender of object choice, and the insistence that an individual can only desire members of one sex-gender, demonstrates how deep and essential a division our culture considers sex-gender to be.⁶⁶

Yet sexuality is a potentially limitless field of inquiry. The phrase "sexual preference" could be employed to describe any number of sexual

protecting men from other men. See, e.g., DWORKIN, *supra* note 57, at 155-56; Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459, 1476-77 (1998). If one man can lawfully be penetrated, then all men become vulnerable to penetration (harm). In a society in which there are no legally subordinated classes like slaves and noncitizen women, and thus no clear way to differentiate in terms of political status who may and who may not appropriately be penetrated, women have become the only group that it is acceptable to penetrate. Conversely, the penetrated person is either a woman in fact or made woman-like by the act of penetration.

64. Same-sex sexuality between women, on the other hand, does not involve a penis, and often does not involve any phallic object to replace the penis. In such encounters neither party is necessarily penetrated. In a culture in which penetration of women serves in some way to symbolically reconfirm their inferiority and low social status, the refusal to be penetrated by men is a form of insubordination. Two women having sexual relations can eliminate entirely the hierarchy implicit in our cultural vision of penetration. Thus, sex between women has a non-hierarchical potential unique to that pairing.

65. See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

66. Consider this anecdote from the popular 1980s television sitcom *Designing Women*. Suzanne, played by Delta Burke, was trying to become a member of an exclusive country club. A man from the new members' committee informed her that it would help her case if she had "one or two nifty ancestors," but that she could take license with historical reality. "For example," he quipped, "my great-grandfather was a bisexual Yankee double agent—he swung both North and South." This humorous quote illustrates that it is possible to see something other than sex-gender as the deepest and most essential basis for discriminating in one's erotic life—here, regional affiliation. And it suggests that who we are sexual with is a way in which we express something significant about who we really are and where our loyalties lie. *Designing Women: The Incredibly Elite Bona Fide Blue Blood Beaumont Driving Club* (CBS television broadcast, Feb. 15, 1988).

choices, practices, or desires that individuals make, engage in, or experience. At least one commentator has suggested that we are all “pansexual”—i.e., that none of us can be neatly contained within the existing subcategories employed to describe our sexualities, which are sex-gender-based, and that sexuality comprises more than the sex-gender of our preferred partners.⁶⁷ Eve Sedgwick has offered an excellent list of some of the other possible “sexual orientations” or preferences that could be as meaningful or more meaningful to an individual than the sex-gender of her object choice, for example: how centered on the genitals sexuality is; how large a part of identity sexuality is; how much time an individual spends thinking about sex; how mentally or emotionally involved one is during sex; and one’s preferences for certain sexual objects, acts, roles, or scenarios.⁶⁸

Out of all of these sexual possibilities and hundreds of others, it seems reductive and disingenuous to consider the sex-gender of one’s sexual partner as the most important fact about her sexuality. However, because attraction to the “opposite” sex (heterosexuality) is an integral part of sex-gender roles in our culture, we have minimized or foreclosed inquiries into the far reaches of what sexuality could mean or be. Moreover, the insistence upon duality, coupling, and sex-gender difference has led to the irony that there has come to be an accepted cultural space, in some circles, for the monogamous same-sex couple as counterpart to the (married or not) long-term monogamous different-sex couple—in my view because these couples do not pose a challenge to the idea of sex-gender difference. It is the concept of bisexuality, or, more broadly, the indeterminacy with regard to sexuality that some embrace, that is even more threatening to the current sex-gender order in some ways than is “homosexuality.”⁶⁹

If “homosexual” serves as the “Other” to people who want to feel that their sexualities are normal, the concept of bisexuality undermines that juxtaposition of normal and deviant by suggesting that neither heterosexuality nor homosexuality are intrinsic or fixed. This destabilization of sexual orientation categories has been made imperceptible by the combined investment in the homo/hetero paradigm of those who identify themselves as “heterosexual” and those who

67. Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & L. 297, 297-98 (1999).

68. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 25-26 (1990).

69. See Yoshino, *supra* note 65 (arguing that bisexuality has been erased because self-identified homosexuals and self-identified heterosexuals have mutual interest in stabilizing exclusive sexual orientation, the retention of sex as an important diacritical axis, and the protection of norms of monogamy).

identify themselves as lesbian or gay.⁷⁰ However, it is important to note that the term “bisexual” also tends to essentialize sex-gender difference such that even those who wish to make sex-gender unimportant in their intimate lives are branded with a label, making it clear that it is considered culturally fundamental.

This is a necessarily concise synthesis, given the amount of work done by others on the subject, of some of the reasons why many believe that what we call “sexual orientation” is really a category derivative of gender. I selected the arguments that seemed the most prevalent and/or compelling to describe here. However, commentators who advocate the gender-equality thesis rarely address opposing views. It is as important to bring forth and contest the counterarguments of those who do not associate sexual orientation with gender equality, or who find gender to provide an incomplete explanation for sexual orientation categories.

B. Deconstructing the Gendered Basis of Sexuality-Based Theories of “Sexual Orientation”

“[S]exual orientation keeps the issue of gender central at precisely the moment in human experience when gender really needs to become profoundly peripheral. Insistence on having a sexual orientation in sex is about defending the status quo, maintaining sex differences and sexual hierarchy, whereas resistance to sexual orientation regimentation is . . . where we need to be going.”⁷¹

1. Conservative Arguments

Most conservative thinkers are opposed to greater public acceptance of same-sex sexuality; the content of their claims about “homosexuality” is familiar because they echo popular discourse. Although their arguments do not explicitly touch upon my thesis here, I will sketch their broad outlines and show how they consciously and unconsciously avoid consideration of gender, yet provide support for a gender-based account of “sexual orientation.”

Conservative anti-gay arguments are almost always based on notions of morality and are often articulated as explicitly Christian and

70. See *id.* On bisexuality, see generally Ruth Colker, *Bi: Race, Sexual Orientation, Gender and Disability*, 56 OHIO ST. L.J. 1 (1995); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995).

71. John Stoltenberg, *What Is ‘Good Sex’?*, in REFUSING TO BE A MAN, *supra* note 14, at 106.

scripture-based.⁷² If based on religion alone, these positions would clearly be insufficient to support the law's deplorable treatment of individuals who identify as lesbian or gay.⁷³ However, the overlap between religiously based morality and many widely shared American beliefs and laws (such as criminal laws against murder and theft, both found in religious texts) may save anti-gay measures from Establishment Clause challenges. Indeed, scripture has often been invoked to justify political acts and beliefs throughout American history, and not every precept of Christianity coincides with American law. So despite its purported basis in biblical teachings (which merely begs the question of where the biblical teachings came from), there is more taking place than dogged adherence to a millenia-old religious text.

To explain what lies beneath conservative resistance to gay rights, we must examine how arguments about morality are articulated. Many opposed to gay rights argue against promiscuity⁷⁴ and nontraditional or "deviant" sexual conduct, lumping same-sex sexuality in with incest, polygamy, and bestiality—the slippery slope line of reasoning that posits that allowing same-sex marriage will require legalization of these other proscribed practices.⁷⁵ Other anti-gay commentators speak against the "unnaturalness" of same-sex sexual conduct and emphasize the inability

72. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980) (relying on biblical tradition in refusing to recognize same-sex marriage); *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995) (quoting scriptures from Genesis, Deuteronomy, Matthew, and Ephesians to support holding that marriage is definitionally between a man and a woman); see also ESKRIDGE, *supra* note 47, at 89-104 (identifying and answering conservative arguments against same-sex marriage); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *How. L.J.* 173, 187-224 (1992); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 *Vt. L. Rev.* 149, 188-211 (2000) (quoting letters to the editor published in Vermont newspapers in response to civil unions, many of which explicitly refer to the Bible as the basis of their opposition to homosexuality).

73. See David A.J. Richards, *Sexual Preference As a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 *OHIO ST. L.J.* 491 (1994) (arguing that homophobia is based on religion-inspired bigotry and thus anti-gay initiatives violate the Establishment Clause); Stephen B. Pershing, "Entreat Me Not to Leave Thee": *Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 *WM. & MARY BILL RTS. J.* 289, 299-301 & nn.36-38 (1994) (citing statements in support of lesbian and gay rights from such denominations as the Unitarian Universalists, the United Church of Christ, the American Jewish Congress, the United Methodist Church, and the Protestant Episcopal Church).

74. See Mello, *supra* note 72, at 202-04 (reproducing portions of anti-gay letters to the editor in Vermont newspapers, many of which equate homosexuality with promiscuity).

75. See, e.g., David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 *HOFSTRA L. REV.* 53, 54-60 (1997) (documenting the discussion of polygamy and incest during the Congressional debates over the Defense of Marriage Act).

of such unions to result in procreation.⁷⁶ More generally, conservatives make reference to the existence of the patriarchal family as the basic and necessary unit of society.⁷⁷

Most of these arguments are easily, and often, refuted. For example, it makes little sense to single out individuals who identify as lesbian and gay as promiscuous, because many persons who identify as heterosexual are also promiscuous,⁷⁸ and there is some evidence to suggest that lesbians are, on the whole, less promiscuous than heterosexuals or gay men.⁷⁹ The basis of the promiscuity argument is the belief that “heterosexual” marriage is the only appropriate medium for sexuality. But unless conservatives can satisfactorily explain why they believe this is so,⁸⁰ the promiscuity argument begs more questions than it answers.

76. See, e.g., TONY HONORE, *SEX LAW* 41-42 (1978); HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1993); Harry V. Jaffa, *Sodomy and the Academy: The Assault on the Family and Morality by “Liberation” Ethics*, in *AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* 263 (1984).

77. Conservative judges have often invoked this argument in legal disputes involving children of gay and lesbian parents. See, e.g., *ex parte* H.H., 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., concurring) (“The family unit does consist, and has always consisted, of a ‘father, mother and their children, [and] immediate kindred, constituting [the] fundamental social unit in civilized society.’ . . . The best interests of children is [sic] not promoted by [granting gay parents custody of children,] a subversion of fundamental law, the very foundation of the family and of society itself. The State may not—must not—encourage the destruction of the family”) (internal citations omitted); *Constant A. v. Paul C.A.*, 496 A.2d 1, 6 n.6 (Pa. Super. Ct. 1985) (“Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society. It is clearly evident that the concept of family is essential to society, homosexual relationships are not. A primary function of government and law is to preserve and perpetuate society, in this instance, the family”); *Collins v. Collins*, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1998) (Tomlin, P.J., concurring) (“The nuclear, heterosexual family is charged with several of society’s most essential functions. It has served as an important means of educating the young; it has often provided economic support and psychological comfort to family members; and it has operated as the unit upon which basic governmental policies in such matters as taxation, conscription, and inheritance have been based. Family life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.”).

78. I use the word promiscuity solely to clarify that I refer to that argument as articulated by conservative critics of same-sex sexuality. Because it has a negative connotation in our culture, the proper way to refer to this concept is to note that individuals have “multiple sexual partners.”

79. See Fajer, *supra* note 6, at 558-61.

80. Finnis’ attempt at this makes an at-best tenuous connection between penile-vaginal intercourse and altruism. See Finnis, *supra* note 53, at 1063-70 (arguing that sexual acts without the possibility of procreation—defined to exclude the infertile—can only provide individual gratification and thus do not promote the common good. He goes on to assert that “all who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual ‘selves’ who have them”).

The analogy between same-sex unions and incest, polygamy, and bestiality invokes the same kind of cleavage between “normal” and “deviant” as the homo/hetero divide. There is no clear, essential connection between same-sex sexuality and any of the above sexual practices. Instead, what is at work is the Western, Christian philosophy of sex-negativity and the specious slippery slope—the idea that if society relaxes one traditional restriction on sexuality, all others will soon follow. Similarly, the argument about procreation is baseless. Many individuals who identify as heterosexual are unable to procreate for various reasons (age, infertility, etc.), and many others choose not to procreate by using contraception. Relatively speaking, childless different-sex couples and delayed childbearing are uncontroversial. Thus, procreation cannot be the real issue, despite conservative arguments to the contrary.

“Unnaturalness” is often a one-word accusation; reciprocally, the premise that male-female sexual relationships are “natural” is often recited but rarely defended. Use of the word “unnatural” could be said to reflect opposition to unions that may not result in procreation,⁸¹ but as Nancy Polikoff has pointed out, if that is the case, “one must believe that procreation is the only natural function of human genitals,” a claim that is not supported by biology, but by ideology.⁸² However, there is another related but distinct interpretation of the word “unnatural.” According to constitutional historian and political philosopher Harry Jaffa, it “violates nature” to use “men as if they were women, or women as if they were men.”⁸³ In this analysis, discomfort with or opposition to same-sex sexuality is expressed in terms of nature and undergirded by biblical teachings, but is animated by a rigid view of gender roles, especially as they relate to sexual behavior, and by notions of sex-gender differentiation. Although conservatives concentrate their resistance to lesbian and gay rights mostly on sexual behavior, the background against which they paint their opposition is one in which patriarchal institutions like marriage and the family are, in their view, threatened by those who refuse to participate in them.

From a gender-equality perspective, traditional marriage and the patriarchal family, whatever their merits might be, also undeniably

81. See RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* 96-98 (1994).

82. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *Geo. L.J.* 459, 555 (1990).

83. JAFFA, *supra* note 76, at 256. This idea can be traced back to the Old Testament. See *Leviticus* 20:13 (King James) (“If a man lies with a male as [he lies] with a woman, both of them have committed an abomination.”). Thus, those who adhere to the idea of natural law as the basis of the common law and of American government believe that same-sex sexuality is “unnatural.”

function to maintain sex-gender differentiation and inequality. Thus, conservative claims that address same-sex sexuality in terms of the danger it poses to the family also necessarily address gender issues. Those critiques that address sexual behavior adhere to the premise that men must only be sexual with women, and women must be sexual only with men (preferably within monogamous marriage)—a part of the gender role assigned to men and women in our society. Thus, the entire spectrum of gender roles is implicated within the most common conservative arguments against “homosexuality.”

Nonetheless, it is not merely by inference that one can connect conservative opposition to LGBT rights and sex-gender inequality; right-wing organizations often do the work for us. For example, the Family Research Council’s position statement on human sexuality states:

[B]y upholding the permanence of marriage between one man and one woman as a foundation for civil society, the Family Research Council (FRC) seeks to reverse many of the destructive aspects of the sexual revolution, including no-fault divorce, widespread adultery, and abortion. . . . [W]e challenge efforts by political activists to normalize homosexuality, and we oppose attempts to equate homosexuality with civil rights or compare it to benign characteristics such as skin color or place of origin.⁸⁴

Clearly, the destructive phenomenon referred to here is feminism, euphemistically termed the “sexual revolution.” (Notice that sex/gender is not included in the list of benign characteristics.) A publication available on the website of the American Family Association makes this connection clear: “It is important to recognize the linkages among the component parts of the sexual revolution. Permissive abortion, widespread adultery, easy divorce, *radical feminism*, and the gay and lesbian movement have not by accident appeared at the same historical moment.”⁸⁵ Conservatives are not inaccurate when they make these connections, of course; where they and I part company is in their belief that feminism is the problem rather than the solution.

In addition to opposing the supposed effects of the “sexual revolution” (read: the feminist movement), conservative arguments against same-sex sexuality sometimes seek to incite visceral reactions

84. Family Research Council, *Position Statement on Human Sexuality*, at http://www.frc.org/get.cfm?c=HS_RESEARCH (last visited Mar. 29, 2004).

85. The Ramsey Colloquium, *The Homosexual Movement*, in *HOMOSEXUALITY IN AMERICA: EXPOSING THE MYTHS* 17, available at http://www.afa.net/homosexual_agenda/homosexuality.pdf (last visited Nov. 14, 2003) (emphasis added).

about particular sexual acts.⁸⁶ But for these conservatives, opposition to our culture's more permissive sexuality is closely related to traditional views of gender roles. Their intention is clearly to roll back the gains made by women and individuals with nontraditional sexualities in the latter half of the twentieth century. When examined closely, their positions clearly are motivated by a strong desire to maintain the sex-gender system.

2. Liberal Arguments

The other side of the sexuality argument is made by commentators who seek to conceptualize sexuality separately from gender in support of sexual freedom. These writers have added much of value to the area of gender and sexuality. Still, because they tend to downplay the close relationship between gender and sexuality and because they do not always contest contemporary sexual orientation categories, I believe it is important to address their work and explain why it does not undermine the truth of the gender-equality paradigm for understanding sexual orientation.

The first of these commentators is Gayle Rubin, perhaps best known for an essay that appeared in Carole Vance's sex-wars anthology *Pleasure and Danger*.⁸⁷ In it, she advocates a radical liberationist view of sexuality that is vehemently opposed to governmental regulation of sexuality. Within this essay, Rubin argues that gender and sexuality must be analyzed separately because sexuality is its own site of oppression and social hierarchy.⁸⁸ She states:

“[L]esbian feminist ideology has mostly analyzed the oppression of lesbians in terms of the oppression of women. However, lesbians are also oppressed as queers and perverts, by the operation of sexual, not gender, stratification. . . . [T]he fact is that lesbians have shared many of the sociological features and suffered from many of the same social penalties as have gay men, sadomasochists, transvestites, and prostitutes.”⁸⁹

Rubin goes on to state that she wants “to challenge the assumption that feminism is or should be the privileged site of a theory of sexuality.”⁹⁰

86. Why else would the American Family Association publish the results of a survey that graphically details particular sexual acts considered by many to be deviant (including sadomasochism, anilingus, and group sex)? See *id.* at 23.

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

88. See *id.* at 308.

89. *Id.*

90. *Id.* at 307.

While generally thoughtful and well-reasoned, one troubling aspect of Rubin's commentary is that she implicitly assumes that gay and lesbian identity is solely about sexuality. This is a view that directly challenges the gender-equality perspective, and one that is disputed by other commentators on gay rights. Some theorists, for example, maintain that it is insulting and overly simplistic to reduce an individual's intimate life and relationships to sexuality. They have argued that the fact that lesbians and gay men are thought of as purely sexual beings—whereas individuals who identify as heterosexual are perceived as full individuals whose sexualities are one of many facets of their identities—is one of the misperceptions that feeds the hostility toward those who have same-sex intimate relationships.⁹¹ However, whether Rubin considers sexuality more or less important to same-sex relationships, to concentrate on the sexuality aspect only begs the question of why sexuality in general (and same-sex sexuality in particular) is imbued with such significance and why it is so strictly regulated. It is this question upon which I want to concentrate as I examine the perspectives of these sex-liberal writers.

A less severe perspective on the issue of gender and sexuality than Rubin's is offered by Eve Sedgwick:

[T]he question of gender and the question of sexuality, inextricable from each other though they are in that each can be expressed only in terms of the other, are nonetheless not the same question [I]n twentieth-century Western culture gender and sexuality represent two analytic axes that may productively be imagined as being distinct from one another as, say, gender and class, or class and race. Distinct, that is to say, no more than minimally, but nonetheless usefully.⁹²

Sedgwick goes on to say that “[s]ome people, homo-, hetero-, and bisexual, experience their sexuality as deeply embedded in a matrix of gender meanings and gender differentials. Others of each sexuality do not.”⁹³

In my view, this speaks to the individual's level of subjective awareness about the meaning of sexual activities, which are always and inescapably gendered, rather than any objective property of the activities

91. See, e.g., Fajer, *supra* note 6, at 546 (arguing that “[t]he assumption that gay people's identities are reducible to sexual acts is peculiar and insulting”); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2417 (1997) (noting that “the tendency of mainstream society to view gay people through the totalizing, and hysterical, lens of sexual acts is one reason we need [a federal statute prohibiting employment discrimination based on sexual orientation]”).

92. SEDGWICK, *supra* note 68, at 30.

93. *Id.* at 26.

themselves. Because sexuality is a central sustaining mechanism of male supremacy, it is highly questionable whether sexuality may be meaningfully analyzed without reference to gender and, indeed, whether sexuality may truly be experienced in a nongendered way.⁹⁴ As I will discuss below, it is quite probable that the “sex-negativity” that Rubin decries⁹⁵ is itself a result of the devaluation and subordination of women.⁹⁶ In other words, to say that hostility toward same-sex sexuality is about sexuality is not to say that it is not about gender.

Cheshire Calhoun is another theorist who argues that sexual orientation and sex-gender must be analyzed as two distinct categories.⁹⁷ She argues that even where they work together, patriarchy and heterosexism are separable concepts, and that an end to patriarchy will not necessarily bring about the end of heterosexism.⁹⁸ Many of Calhoun’s writings evince her view that lesbians have been marginalized within feminism and within feminist theory in particular.⁹⁹ This is a common theme in lesbian philosophy. To it I can only answer that the gender-equality perspective that I advocate, whether or not others have framed it similarly, is a part of the solution to this problem, not a part of the problem itself. Unless theorists like Calhoun are invested in retaining current notions of gender and sex-binariness, for reasons suggested by Kenyi Yoshino in his examination of the erasure of bisexuality,¹⁰⁰ they should welcome a universalizing paradigm that, far from marginalizing lesbians and gays, places them squarely in the center of the development of social change.

Another critical perspective on the gender-equality paradigm is offered by William Eskridge, who voices substantial agreement but declines to embrace the argument wholeheartedly, instead proposing a hodgepodge of thoughtful qualifications and objections to it. He remarks that “the sex discrimination argument for homo equality has a

94. See KIMMEL, *supra* note 6, at 221-34 (describing the ways in which sexuality is gendered in our culture).

95. See Rubin, *supra* note 87, at 278.

96. See Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 284-86 (1995).

97. Cheshire Calhoun, *Separating Lesbian Theory from Feminist Theory*, 104 ETHICS 558 (1994).

98. *Id.* at 562.

99. See, e.g., CHESHIRE CALHOUN, *FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN & GAY DISPLACEMENT* (2000); Cheshire Calhoun, *The Gender Closet: Lesbian Disappearance Under the Sign ‘Women’*, 21 FEMINIST STUDIES 7 (1995).

100. See generally Yoshino, *supra* note 65.

transvestic quality, dressing up gay rights in sex equality garb,”¹⁰¹ while admitting that anti-gay attitudes are “connected” to gender inequality.¹⁰² Eskridge then examines some of the same historical evidence suggesting the accuracy of the gender-equality paradigm that I surveyed above, but concludes that “the cultural impulse to reaffirm traditional gender lines is only a fragment of the story.”¹⁰³ Another strand, he says, is “[f]ear of uncontrolled (male) sexuality,”¹⁰⁴ which led to greater emphasis in the law upon punishing sexual perversion than gender nonconformity in the early to mid-twentieth century.¹⁰⁵ Although the women’s movement facilitated, and its successes were correlated with, greater legal protection for lesbians and gays, Eskridge argues, anti-gay rhetoric responsively shifted to emphasize the predatory nature of homosexuality, particularly as to men.¹⁰⁶ Although the fear of the unrestrained sexuality of the gay man is a gendered phenomenon, “compulsory heterosexuality as to men . . . is animated by anxiety about sexuality itself.”¹⁰⁷

It is unclear that Eskridge’s analysis reflects true disagreement with the gender-equality paradigm rather than a more narrow definition of gender than I advocate, one that conceptualizes sexuality as amenable to meaningful analysis without reference to gender. Controlling male sexuality plays a significant role in maintaining sex-gender hierarchy. Because (male) sexual energy is seen as a strong and possibly unmanageable force (once liberated from its marital moorings), men must marry, and marry women, because of the allegedly civilizing effect of the institution upon that energy. As others have noted, the taboo against male-male sexuality serves the important function of protecting men from other men¹⁰⁸ and thus allows men as a class to dominate women (as well as children) as a class.

One problem common to the analyses of Rubin, Sedgwick, Calhoun, and Eskridge is that all implicitly assume the existence of an essential same-sex sexual identity (and thus an essential different-sex sexual identity), whether or not they conceive of that essentialism in biological terms.¹⁰⁹ My argument is that no such identities exist outside

101. William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 *IND. L.J.* 1085, 1110 (1994).

102. *Id.*

103. *See id.* at 1113.

104. *Id.*

105. *Id.* at 1113-16.

106. *See id.* at 1116-17.

107. *Id.* at 1118.

108. *See supra* note 63 and accompanying text.

109. The same is true of Edward Stein’s critique of the sex-discrimination argument. *See* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49

of the minds of human beings in cultures that promote them and that the homo/hetero categories were created (rather than discovered) in response to the needs of sustaining sex-gender difference and hierarchy.

Being a member of the “there’s so such thing as homo- or heterosexuality” school of thought places one on shaky ground, left or right, in a culture in which few contest the truth of those categories.¹¹⁰ It seems to deny the experiences of millions of men and women who so identify themselves and, undoubtedly, truly experience their sexuality as circumscribed by the sex-gender of their preferred partners. Moreover, it seems to trivialize the courage of those faced with persecution for organizing, with some success, around their sexual identities in pursuit of legal and social equality.

What I would like to suggest instead is that we all (myself included) possess cognitive structures and behavior patterns that tend toward fitting into existing cultural categories as opposed to contesting those categories. Moreover, our “feelings” and behaviors originate in part from our knowledge of and familiarity with such categories. It is in part for this reason that arguments from immutability with regard to “sexual orientation,” as with regard to almost anything, are unwise and overly simplistic.¹¹¹ Whatever biological component of sexual tastes or desires that might exist, it almost certainly does not tell the whole story. If the gender-equality paradigm is correct, sexuality is also socially constructed to an unknown extent.

Thus, my argument is not that some individuals who identify as lesbian and gay do not perceive their identity as a sexual one, but rather that that perception has been created and perpetuated by a culture in which gender meanings and gender hierarchy are sustained centrally

UCLA L. REV. 471 (2001). Because his article primarily focuses on the argument as a legal strategy rather than its veracity, I will discuss it in Part IV.D *infra*.

110. Janet Halley is one of the few legal commentators I know of who has expressed explicit dissent. She states that she uses

the terms “homosexuality” and “homosexual”—and, more tendentiously, the terms “heterosexuality” and “heterosexual”—without any implication that they accurately describe any persons living or dead. As I try to use them here, these terms describe rhetorical categories that have real, material importance notwithstanding their failure to provide adequate descriptions of any one of us. Sexual-orientation identities are, then, *facilities* that we use when we attempt to explain ourselves to ourselves, when we seek to situate ourselves in relation to others or others in relation to ourselves, and thus when we seek to gain and wield power, including the power of persuasion.

Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1723 (1993).

111. Cf. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994).

through control of sexuality. In other words, *sexuality is the method or the mechanism of control, but the reason for the control is the perpetuation of the sex-gender system*. Because our current notion of “sexual orientation” is contaminated by its basis in the perpetuation of sex-gender hierarchy, we should think carefully about the wisdom of retaining it. Not only does the homo/hetero paradigm keep sex difference salient, it also limits sexual agency and exploration by requiring that sex discrimination in one’s sexual relations remain fixed over the course of a lifetime. In other words, the primary function of labels is to limit rather than to liberate. In order to facilitate progress toward gender equality, sexuality must be allowed to remain fluid and volitional.¹¹²

Sexuality is an issue central to gender equality, although why and how are undoubtedly contested realms within feminism. The feminist consensus about the importance of sexuality should facilitate recognition that the concept we call “sexual orientation” is antithetical to gender equality because it emphasizes—indeed, requires—sex differentiation and discrimination. However, the voices of those who perceive sexuality as separate, or separable, from gender remain virtually hegemonic. Janet Halley, who has arguably done some of the most insightful, groundbreaking work in the area of sexual orientation and the law, states that she does not disagree with the gender-equality paradigm, but that she believes

it is only part of the picture. . . . Though they intersect, gender and sexuality exceed and differ from one another. . . . Indeed, any assumption that hetero/homosexual dynamics must originate in, or ultimately produce, gender hierarchy or gender identity gives analytic priority to heterosexuality, with its definitional dependence on the concept of male and female, or masculine and feminine, as matching opposites.¹¹³

I must respectfully disagree with Halley’s analysis here. To the contrary, the very idea that sexuality must be defined by sex difference or sameness between partners could only originate in a culture in which such difference has been marked, noticed, or created, and in which it is seen as significant. In order to eliminate the homo/hetero divide,

112. I rather like singer Michael Stipe’s quip that “labels are for canned food . . . I am what I am—and I know what I am.” ROLLING STONE, Oct. 20, 1994, *quoted in* THE ADVOCATE, Nov. 15, 1994, at 95, *quoted in* GARBER, *supra* note 1, at 39. Although Stipe later came out as a gay man and may have made the statement simply to keep the media guessing, his remark captures a positive new tendency to remain open to possibilities and to deemphasize “sexual orientation” as a central aspect of the self.

113. Halley, *supra* note 110, at 1724-25.

promote greater sexual freedom, and eradicate gender hierarchy, we must minimize and make unimportant sex difference, from which the homo/hetero paradigm emerged. Male/masculine and female/feminine as matching opposites must be exposed as a false dichotomous way of classifying and limiting human beings.

In this analysis, to say that sexuality exceeds gender is to speak in the abstract, not grounded in contemporary sociological reality. Although being able to envision a world beyond the one we inhabit is necessary to advance social change, to separate sexuality from gender strains the powers of abstraction. For as I noted above, to say that sex-negativity is the problem that makes nontraditional sexualities so difficult for our culture to tolerate (as the above commentators have suggested) begs the question of why our culture is sex-negative to begin with.

One answer to that question is this: if the goal of Western civilization is to transcend the body—to be spiritual, pure, of the divine, above this earth—then sexuality—the mechanics of it, the necessity of it to the preservation of the species—is one of those things, like eating and eliminating (also sites of obsession, revulsion, and fetish) that ties us to the body and frustrates our quest to transcend it. It is telling that the two “dirtiest” words in the English language mean, respectively, sexual intercourse and feces.¹¹⁴ In Western civilization, sexuality represents nature, the body, irrationality, and unreason. Not coincidentally, so does woman/female/feminine. In this way, Catharine MacKinnon’s assertion that “sexuality is the linchpin of gender inequality”¹¹⁵ may be closer to a (if not the) mark than many of her feminist critics would like to admit. While gender and sexuality are not precisely the same thing, gender has been a primary forum for Western culture’s expression of its aspirations and for the subordination of those who cannot seem to live up to them. This is not to deny that other subordinations such as race have been pivotal, but rather to suggest that gender is at least as firmly entrenched as any other group hierarchy and may have the potential to endure longest.

So, rather than asking how sexuality *is* related to gender, we should ask, “how is sexuality *not* related to gender?” This approach admittedly implicates the double bind of identity politics—that is, how can we get

114. Note the FCC regulations that regulate decency in radio and television broadcasting: what may be prohibited is “programming which . . . describes or depicts sexual or excretory activities or organs . . .” 47 CFR § 76.701(a).

115. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, reprinted in *THE SIGNS READER: WOMEN, GENDER, AND SCHOLARSHIP* 227, 245 (Elizabeth Abel & Emily K. Abel eds., 1983).

beyond gender by taking account of it, but how can we get beyond gender *without* taking account of it? To live in the tension¹¹⁶ of that double bind and to try to move toward a world in which sexuality and gender are not relevant to each other and, in fact, might both ideally recede in importance altogether, requires us to acknowledge that we do not yet inhabit that world. Thus, for the moment, sexuality and gender remain inextricably connected.

Why, then, is there so much resistance to fully embracing the gender-equality paradigm? Nan Hunter points out that although all of the major feminist organizations support gay rights, “one has no sense that anyone, including them, feels like this is their argument.”¹¹⁷ As a feminist who *does* feel like this is my argument, I remain puzzled as to why so many activists in both communities have consistently failed to see the connection, or insist upon downplaying it when they do acknowledge its existence. It has been LGBT rights organizations rather than women’s rights groups that have seized upon the gender-equality strategy in litigation.¹¹⁸ Despite this, it does not seem yet to have been fully embraced as belief rather than one more weapon in the arsenal.

Yet, how else can the inclusion of the transgendered in lesbian and gay rights organizations be interpreted than as an admission that gender norms and roles are what these organizations are battling? Arguably, one could imagine that the transgendered would have looked first to women’s rights groups for assistance. But there is the rub—women’s rights groups, both in name and in mission, have been slow to embrace the idea that men are often victimized by gender roles just as surely as women are.¹¹⁹ Since many individuals who identify as transgendered are men, and since physical forms of gender nonconformity are often conflated with same-sex sexual orientation, transgenders ended up in the sexual orientation bin.

116. I credit Angela Harris for this delightful phrase. See Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 744 (1994).

117. Hunter, *supra* note 52, at 409.

118. See Feldblum & Mottet, *supra* note 6, at 634-35 (discussing efforts by LGBT litigators to engage women’s rights groups on the gender-equality argument).

119. See BEM, *supra* note 6, at 149-51; NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* 5-6 (1998). A look at the websites of some of the most prominent women’s rights organizations, such as the National Organization for Women and the National Women’s Law Center, reveals that these organizations are primarily concerned with issues that most directly affect women and girls. See <http://www.nowldef.org>; <http://www.nwlc.org>. This is not to say that this work is not meritorious and important to furthering feminist goals, but to suggest that it reflects a perhaps-outdated vision of feminism in which women are seen mainly as victims and men mainly as oppressors. It has become clear that reality is much more complicated.

The unintended effect of this placement has been to contribute to a limited definition of sex discrimination, both in the courts and in the popular imagination. By maintaining the separation of the “women’s rights movement” and the “LGBT rights movement,” the former can be seen as conventional and acceptable and the latter as deviant and abnormal.¹²⁰ In a time of backlash, it is understandable that women’s rights groups want to be perceived by courts, legislative bodies, and the public as fighting for relatively uncontroversial ends that fit within existing legal categories and protections. However, the perception of lesbians, gays, bisexuals, and the transgendered as too far outside the mainstream to deserve the law’s protection has been facilitated by their segregation from more accepted forms of gender nonconformity that are the province of women who identify and/or are perceived as heterosexual.

Securing the rights of all Americans to defy traditional gender roles is crucial to ensuring both freedom and equality. Indeed, it is important to recognize that gender nonconformity is more the norm than the exception, and that when one individual’s right to flout gendered expectations is limited, it endangers everyone’s right to do so, even those whose behavior is considered within the mainstream today. Fully embracing the gender-equality approach to advocating for LGBT rights will benefit both the women’s movement and the LGBT rights movement because they will become mutually reinforcing.¹²¹

An examination of the law’s treatment of the gender-equality paradigm makes clear the need for its recognition and highlights the ways in which all kinds of gender nonconformity are connected. In the next two Parts, I will discuss the ways in which the gender-equality paradigm for understanding sexual orientation appears in two legal contexts: employment discrimination law and family law.

120. Even the ultraconservative Heritage Foundation’s Patrick Fagan has stated that “[m]ainstream feminists are focused on a worthy concern: removing obstacles to the advancement of women in all walks of life.” Patrick F. Fagan, Robert E. Rector, and Lauren R. Noyes, *Why Congress Should Ignore Radical Feminist Opposition to Marriage*, available at <http://www.heritage.org/Research/Family/bg1662.cfm> (last visited Mar. 12, 2004).

121. See also Feldblum & Mottet, *supra* note 6, at 653-54 (arguing that “those who litigate on behalf of gay rights, women’s rights, and/or transgender rights have an obligation to work together to enhance the judicial outcomes for all groups under the sex discrimination laws”).

III. GENDER EQUALITY ARGUMENTS IN EMPLOYMENT DISCRIMINATION LAW

In this Part, I will discuss the use of legal arguments that Title VII's prohibition of sex discrimination includes discrimination based upon sexual orientation.¹²² Claims of this kind were made and explicitly rejected early in the history of Title VII litigation, but they were not well developed, nor were the courts sophisticated enough to fully understand them.¹²³ Before *Price Waterhouse v. Hopkins*, Title VII was interpreted to mean that gender-based characteristics—that is, those that do not seem dependent on biological sex—could not be used to invoke the statute's protection.¹²⁴ Plaintiffs, mostly men, who were treated adversely by their employers because of their failure to conform to contemporary gender norms, almost uniformly were denied relief, whether they were men with long hair, transsexual men, or gay men. The courts' rejection of all of these claims stems from an uncritical judicial acceptance of an employer's right to exact gender conformity as a condition of employment.

After *Price Waterhouse* was decided, some commentators remarked upon its potential revolutionary uses in advancing the right of employees not to conform to gender stereotypes.¹²⁵ Although probably only a plaintiff like Ann Hopkins—a hard-working employee who was just gender-conforming enough to evoke sympathy—could have won that case, the principle it invokes is easily universalizable. Unfortunately, little has changed since the case was decided to enrich the courts' understanding of the complexity of the interconnection between sex and gender, much less how these two concepts explain sexual orientation discrimination. Despite the fact that *Price Waterhouse* interpreted Title

122. See, e.g., Valdes, *supra* note 6, at 38-54, 84-90; Valdes, *supra* note 32; see also Case, *supra* note 32, at 13; Coombs, *supra* note 6, at 245-47, 250-53; Koppelman, *Sex Discrimination*, *supra* note 6, at 240-45; Law, *supra* note 6, at 198. See generally Fajer, *supra* note 6; Franke, *supra* note 19; Julie A. Greenberg, *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149 (2002); Hunter, *supra* note 52; Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005 (2002); Geoffrey S. Trotier, *Dude Looks Like a Lady: Protection Based on Gender Stereotyping Discrimination as Developed in Nichols v. Azteca Restaurant Enterprises*, 20 LAW & INEQ. 237 (2002); Valdes, *supra* note 6; Anthony E. Varona and Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000).

123. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

124. 490 U.S. 228 (1989).

125. See Case, *supra* note 32, at 36-46; Franke, *supra* note 19, at 95-97.

VII to prohibit employment decisions based upon sex-stereotyping, lower courts vary in their understandings of what *Price Waterhouse* means when sex-stereotyping claims are raised in other contexts and by other kinds of plaintiffs (i.e., not upper-class white heterosexual women).

Moreover, the existence of “sexual orientation” as a sexual/private aspect of gender-role norms has not yet been recognized or accepted. Some scholars read *Price Waterhouse* to prohibit sex-stereotyping from factoring into employment decisions and to say that all gender stereotypes—including sexual orientation—are intimately connected to the discrimination at which Title VII is directed.¹²⁶ If this reading of *Price Waterhouse* is correct, then the courts that held that sexual orientation discrimination did not violate Title VII were wrong, and those rulings do not survive *Price Waterhouse*.

Some courts have accepted gender-equality arguments based upon sex-stereotyping in cases in which plaintiffs were wronged because of their failure to conform to stereotypical notions of masculinity or femininity.¹²⁷ Most of these cases involve same-sex sexual harassment¹²⁸—not surprisingly, since same-sex harassment is a primary context in which dominant conceptions of masculinity are enforced by men upon other men to maintain the ideology of male/masculine supremacy.¹²⁹

In this Part, I will first look at how the courts define sex and gender—i.e., as separate concepts or interchangeable. Unfortunately, there is broad scale confusion as to how to define sex and gender and their relation to each other and Title VII. I will then review three types of

126. See, e.g., Case, *supra* note 32, at 48-50; Feldblum & Mottet, *supra* note 6, at 643; Franke, *supra* note 19, at 95-97.

127. See, e.g., *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Sanchez v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001); *Spearman v. Ford Motor Co.*, 2000 WL 1646288 (7th Cir. Nov. 3, 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252 (1st Cir. 1999); *Ianetta v. Putnam Invs. Inc.*, 142 F. Supp. 2d 131 (D. Mass. 2001).

128. The door to these claims was opened by the Supreme Court’s 1998 decision in *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998), which held that same-sex sexual harassment is actionable under Title VII if it is “because of sex.” Prior to *Oncale*, one circuit had ruled that same-sex harassment was not actionable under any circumstances. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994). Some others had held that it was actionable only if the harasser was gay (thus presumably motivated by sexual desire for the victim). See *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996). Thus, same-sex harassment claims based upon this type of sex-gender discrimination were barred in those circuits until *Oncale* was decided.

129. See, e.g., *Axam & Zalesne*, *supra* note 39; *Vicki Schultz, Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

cases of sex-gender discrimination that were decided adversely in the years before *Price Waterhouse*—those dealing with dress and grooming codes, transsexuals, and homosexuals. Though these contexts have been analyzed separately by other commentators, they are rarely addressed as being connected to each other. My focus will be on the ways in which the cases I discuss impact the gender-equality argument for recognizing sexual orientation discrimination as one form of sex discrimination.

The gender-stereotyping argument accepted by the Court in *Price Waterhouse* has won recognition in several circuits in recent years.¹³⁰ However, while the gender-equality paradigm has been gaining ground, it will ultimately fail to encompass all instances of gender discrimination in employment until the concept of “sexual orientation” is recognized as an aspect of gender. Gender (and thus gender nonconformity) must be conceptualized as a continuum whose every point deserves the law’s protection. We are at a critical time right now for moving in that direction.

A. *Sex and Gender in the Courts*

As discussed in Part I, the relationship between sex and gender in our culture is complex, but is not popularly understood as such. Most outside of the academy use the two words interchangeably. Similarly, many courts are unaware of the distinction between sex and gender. Recall that sex is generally understood to mean the biological differences between males and females (i.e., chromosomal makeup, genital structures, external secondary sex characteristics, or some combination thereof). Gender, though often conflated with sex, “has come to be used [to denote] the roles, characteristics, and stereotypes associated with members of a particular sex, that is, a person’s gender concerns a person’s masculinity or femininity or some aspects thereof.”¹³¹

Although even archconservative Justice Scalia acknowledged the difference between sex and gender,¹³² the federal courts differ widely on

130. See *infra* Part II.C. (discussing and citing recent Title VII cases that involve the sex-stereotyping claim).

131. EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 31 (1999). The conflation of these two terms in the law seems to have come about in large part because of now-Justice Ruth Bader Ginsburg who, when she served as a litigator before the Supreme Court in the 1970s, began using the term “gender” synonymously with “sex” at the suggestion of her then-secretary to avoid having the word “sex” raise the specter of sexuality in the minds of the judges before whom she was litigating. See Case, *supra* note 32, at 10-11.

132. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 n.1 (1994) (Scalia, J., dissenting) (noting that “[t]he word gender has acquired the new and useful connotation of cultural and attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes”).

whether they discuss sex and gender as the same phenomenon. When courts do recognize the difference, they differ as to whether they see Title VII as prohibiting discrimination based upon gender characteristics or upon biological sex only, and in whether an individual's sexuality is a part of her sex or gender.¹³³

For example, one district court, in evaluating a sex-stereotyping claim by a gay male plaintiff who argued that sexual orientation was an aspect of gender, accepted the argument but rejected the claim, stating that

while "sex" is immutable, "gender" is considered to encompass "masculinity" and other sexual aspects of a person's personality. Thus, if gender and sex were equivalent under Title VII, Title VII would prohibit the harassment of a male because of effeminate behavior or the perception that he is gay. However, Title VII clearly does not prohibit harassment based on the victim's sexuality.¹³⁴

While the court's implicit recognition that sexual orientation is a gender-based trait is promising, its failure to acknowledge that *Price Waterhouse* dictates a contrary result is a predictable response to the prospect of extending protection to classes of individuals considered deviant.¹³⁵

In *Hopkins v. Baltimore Gas & Electric Co.*, the United States Court of Appeals for the Fourth Circuit had the following to say about the meaning of sex and gender:

133. See, e.g., *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (stating that "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation") (citation omitted); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) (recognizing the distinction between sex and gender but noting that in that circuit, sex and gender are not considered distinct concepts for Title VII purposes, and that gender-based mistreatment is considered sex discrimination); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir.1996) (using the terms "sex" and "gender" interchangeably); *Davis v. Sheraton Soc'y Hill Hotel*, 907 F. Supp. 896, 902 (E.D. Pa. 1995) (holding that sex and gender are not the same thing, and that Title VII protects only on the basis of biological sex). Compare *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (noting that "[t]he term 'sex' [in Title VII] is not synonymous with the term 'gender'" and that "'gender' refers to an individual's sexual identity"), with *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1293 n.5 (S.D. Iowa 1995) (stating that gender is synonymous with sex but does not include sexual behavior or identity).

134. *Klein v. McGowan*, 36 F. Supp. 2d 885, 890 (D. Minn. 1999).

135. For example, *Price Waterhouse* seems to have made no difference whatsoever in protecting transsexuals who undergo surgery. See *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.C. 1994) (saying that transsexuality is not included in the definition of sex in D.C. Human Rights Act, citing Title VII precedent); *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987) (finding that discrimination on basis of gender-corrective surgery does not constitute discrimination on the basis of sex under the Pennsylvania Human Relations Act, citing Title VII precedent).

[T]he meaning of the term “sex” as used in [Title VII] has become the subject of judicial and academic debate. Viewed in the abstract, a prohibition of discrimination based on “sex” is broad and perhaps even undefinable. Arguably, such a prohibition might be read to preclude discrimination based on human psychological and physiological characteristics or on sexual orientation In the context of Title VII’s legislative history, however, it is apparent that Congress did not intend such sweeping regulation.¹³⁶

The *Hopkins* court goes on to assert that “there is no need to distinguish between the terms ‘sex’ and ‘gender’ in Title VII cases . . . courts . . . have used the term [sic] ‘sex’ and ‘gender’ interchangeably to refer simply to the fact that an employee is male or female.”¹³⁷ Incredibly, the court cited *Price Waterhouse*, the case that affirmed that gender stereotyping based on nonbiological characteristics indeed violates Title VII, to support its conclusion that sex and gender are the same thing.¹³⁸

As I noted in Part I, to argue that courts should recognize sex and gender as two completely separate concepts has its own inherent dangers. If gender was truly separate—and separable—from sex, this fact would facilitate the argument that Title VII was only intended to strike at discrimination based upon biological sex. But, as Katherine Franke has pointed out, most differences between men and women, even those we think of as “natural,” are caused by gender norms rather than by essential or biological dissimilarities.¹³⁹ Thus, sex is actually indistinguishable from gender. Franke concludes that to truly eradicate sex-gender-based hierarchy would require “a fundamental right to determine gendered identity independent of biological sex.”¹⁴⁰ To accomplish this, courts must recognize that the wrong of sex discrimination is that individuals are forced into gendered roles, and a remedy for sex discrimination must reach all instances in which gender norms and hierarchies are enforced against individuals who transgress them—including norms touching upon sexuality. Thus, aspects of individuals that we now delineate as “gender” or “sexuality” are inherently a part of “sex.”

Unfortunately, Title VII’s prohibition of sex discrimination was interpreted narrowly from the earliest days of litigation, and this narrow interpretation guaranteed that individuals who identify as lesbian or gay would not be able to claim that they had been discriminated against on

136. 77 F.3d 745, 749 (4th Cir. 1996).

137. *Id.* at 749, n.1.

138. *Id.*

139. Franke, *supra* note 19, at 2.

140. *Id.* at 4.

the basis of sex. Three main kinds of gender nonconformists brought Title VII sex discrimination claims in the 1960s, '70s, and '80s: men who displayed traditionally feminine gender characteristics in personal appearance or demeanor; transsexuals; and gay men and lesbians. These three kinds of plaintiffs were viewed similarly by the courts, were conflated with each other in judicial decisions, and were all denied relief for the same gender-based reasons.

B. Title VII Gender Nonconformists: The Early Years

Several legal scholars have commented on the implications for Title VII of disparate dress and grooming standards for men and women in the workplace.¹⁴¹ Many of the most well-known early cases concerned men who wore their hair long, challenging employer grooming codes that required men, but not women, to keep their hair short.¹⁴² Almost all the plaintiffs lost, and the courts viewed their claims with skepticism, if not outright hostility.¹⁴³ This provides some insight into why the tide turned

141. See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Case, *supra* note 32, at 61-75; Franke, *supra* note 19, at 75-80.

142. See, e.g., *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Willingham v. Macon Tel. Publ'g Co.*, 352 F. Supp. 1018 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *rev'd en banc*, 507 F.2d 1084 (5th Cir. 1975). In one case, a male employee challenged his employer's rule that required men, but not women, to wear a tie. *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977). In a rare case in which a woman brought a challenge to a sex-based rule that women wear dresses or skirts, the court similarly ruled that such a rule did not violate Title VII. *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979).

143. In rejecting one such Title VII sex discrimination claim, the court noted that reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination "because of sex."

Fagan, 481 F.2d at 1117 n.3. Another judge was more colorful in his dismissal of the possibility that Title VII prohibited disparate dress codes:

If this interpretation of the Act is expanded to its logical extent, employers would be powerless to prevent extremes in dress and behavior totally unacceptable according to prevailing standards and customs recognized by society. For example, if it be mandated that men must be allowed to wear shoulder length hair despite employer disfavor, because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses. . . . Continuing the logical development of plaintiff's proposition, it would not be at all illogical to include lipstick, eye shadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict to female attire and bedeckment. It would be patently ridiculous to presume that Congress ever intended such [a] result

Willingham, 352 F. Supp at 1020.

in favor of allowing different grooming standards for men and women.¹⁴⁴ Despite the fact that long hair was fashionable for men at the time, the courts recognized that to hold that allowing long hair for women but not men was sex discrimination—while required by a literal reading of the statute—would be the first step toward dismantling a whole class of gender distinctions. This they would not do. Title VII, in this view, was intended only to address employment opportunities for women,¹⁴⁵ not “to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹⁴⁶ The spectrum was simply too broad and the norms too important.¹⁴⁷

144. Long hair in males was a significant source of litigation in the late 1960s and early 1970s. A number of cases were brought in the context of school dress codes and many discriminatory policies were invalidated under equal protection or due process, while others were upheld. *Compare* *Stull v. Sch. Bd. of W. Beaver Jr.-Sr. High Sch.*, 459 F.2d 339 (3d Cir. 1972), and *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1971), and *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970), with *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 409 U.S. 989 (1972); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972), and *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). Several early Title VII cases also invalidated disparate dress and grooming policies for men and women. See *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (C.D. Cal. 1972); *Donohue v. Shoe Corp. of Am. Inc.*, 337 F. Supp. 1357 (C.D. Cal. 1972); *Rafford v. Randle E. Ambulance Serv.*, 348 F. Supp. 316 (S.D. Fla. 1972) (dictum); *Roberts v. Gen. Mills, Inc.*, 337 F. Supp. 1055 (N.D. Ohio 1971). Cases holding the opposite relied upon by the courts in *Fagan* and *Willingham* included *Baker v. California Land Title Co.*, 349 F. Supp. 235 (C.D. Cal. 1972) and *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402 (D.D.C. 1972).

145. See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (noting that “it is . . . generally recognized that the major thrust of the ‘sex’ amendment was towards providing equal opportunities for women”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (asserting that “the clear intent of [Title VII] was to remedy the economic deprivation of women as a class”); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (citing legislative history addressing employment discrimination against women); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1973) (asserting that “the intent of Congress [was to] guarantee [] equal job opportunity for males and females”); *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1120 (D.C. Cir. 1973) (arguing that the purpose of Title VII was to address discrimination against women). Notice how this harmonizes with the perception of sexism as a problem that only disadvantages women. However, the Supreme Court explicitly rejected this characterization of Title VII in *Oncale*, stating that although

male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

523 U.S. at 79 (1998).

146. *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

147. This reading of the statute quickly became hegemonic. Even the EEOC has acquiesced to the decisions of the courts on different dress and grooming standards for men and women and no longer brings challenges to them as it did in the beginning. See EEOC Compl. Man. (CCH) § 619.2 (2000). The narrow interpretation of Title VII is also illuminated by the few

As Mary Anne Case has pointed out, what this kind of differential treatment of men and women in the workplace signals is “the continuing devaluation, in life and in law, of qualities deemed feminine.”¹⁴⁸ More important is the inevitable result of this devaluation for the future of a transformative legal movement whose goal is to promote gender equality. The narrow manner in which Title VII has been interpreted guarantees that the statute will not accomplish even its most modest goals. For equal employment opportunity (to which even the most conservative judge will pay lip service) to have any meaningful chance to become a reality, the law must take aim at that entire spectrum of differential treatment. Or, as Case puts it pithily, “the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well.”¹⁴⁹ Thus, under the current interpretation of Title VII, the statute will not be able to even begin to ameliorate the harms of sex discrimination, no matter how broadly or narrowly one tries to define those harms.

Another example of how the dominant interpretation of Title VII fails to remedy the workplace and cultural norms that cause sex discrimination is the line of cases concerning the effeminate man, the subject of Case’s ground-breaking article. It is difficult to place the effeminate man cases squarely in one category because, as Case shows, they overlap both the dress-code cases and the “homosexuality” cases.

exceptions to the laissez-faire approach of courts to the question of disparate dress and grooming requirements for men and women. One is cases in which women, but not men, were required to wear a uniform. *See Carroll v. Talman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (holding that employer dress policy that required female employees to wear color-coordinated skirts or slacks and a jacket, tunic or vest, where male employees were only directed to wear proper business attire, violated Title VII); *O’Donnell v. Burlington Coat Factory Warehouse*, 656 F. Supp. 263 (S.D. Ohio, 1987) (holding that dress code requiring female clerks to wear a “smock” while allowing male clerks to wear a shirt and tie perpetuated sexual stereotypes by encouraging a tendency to assume that uniformed women had lesser professional status than those in normal business clothes). The second exception concerns cases in which women, but not men, were required to wear a revealing or sexually provocative costume. *See EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that revealing lobby attendant uniforms violate Title VII); *Marentette v. Mich. Host, Inc.*, 506 F. Supp. 909 (E.D. Mich. 1980) (holding that sexually provocative waitress uniforms may violate Title VII). These kinds of dress code policies clearly marked women workers as inferior to their male counterparts and thus more closely fit the paradigmatic Title VII case of sex discrimination. But more importantly, these instances could be seen as unlawful sex discrimination because the women who were challenging the policies were not seen by the courts as impermissibly violating gender norms. In that they were trying to be more like the men they worked with, they were rewarded for that effort, consistent with the image of the ideal worker as possessing masculine traits. Similarly, Ann Hopkins was protected from sex discrimination because at least some of her perceived “masculine” attributes were necessary for success in her profession.

148. Case, *supra* note 32, at 3.

149. *Id.* at 68.

For example, in *Smith v. Liberty Mutual Insurance Co.*, the United States Court of Appeals for the Fifth Circuit held that Title VII does not prohibit employers from discriminating against men they perceive as effeminate.¹⁵⁰ However, the court conflated effeminacy and sexual orientation (a mistake that has become quite common) such that it is difficult to tell whether they meant to say that effeminacy itself was an unprotected characteristic or effeminacy in gay men was unprotected.

Another “effeminate man” case that illustrates the ways in which different types of gender nonconformity are connected (because it may be categorized as concerning dress code, effeminacy, and sexual orientation) is *Strailey v. Happy Times Nursery School, Inc.*, in which a male nursery school teacher who was fired for wearing a small hoop earring claimed that the school had violated Title VII for relying on a stereotype that men “should have a virile rather than an effeminate appearance.”¹⁵¹ Though Strailey did not base his claim on, or even mention, homosexuality, his case was nevertheless consolidated with two others whose plaintiffs did. The paradox that emerges is that Strailey’s case can be read in multiple ways. It is akin to cases in which plaintiffs violated their employers’ conception of appropriate grooming standards for men, analogous to *Smith* in that he based his claim on effeminacy, and related, at least in the eyes of the court, to cases in which individuals who identified as gay or lesbian brought Title VII sex discrimination claims, which undoubtedly colored the judgment of the judges who decided his case.¹⁵²

A different kind of gender nonconformist in the early cases is the transsexual. Legal advocacy for and academic commentary about transsexuals has exploded in the past ten years or so.¹⁵³ It might be said

150. 569 F.2d 325 (5th Cir. 1978).

151. *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 331 (9th Cir. 1979) (consolidating *Strailey v. Happy Times Nursery Sch., Inc.*).

152. The Ninth Circuit has recently stated explicitly that *DeSantis* is no longer good law in light of *Price Waterhouse*. See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

153. See Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001); Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133 (2000); Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51 (1999); Susan Etta Keller, *Operations of Legal Rhetoric: Examining*

that transsexuals and the transgendered constitute a sort of midpoint or intermediate conceptual space between men who are perceived as effeminate or who wear an earring or long hair, on the one hand, and gay men and lesbians, on the other, at least in the popular and judicial imagination, in which all three groups exist along the same continuum of gender nonconformity.¹⁵⁴

For example, one notable fact about the transsexual cases is that the courts often cited Congress's alleged intention to exclude "sexual preference" from the meaning of sex in Title VII to support their finding that transsexuals should not be included either,¹⁵⁵ even when courts recognized that transsexuality was distinct from "homosexuality."¹⁵⁶ Though on one level the decisions of these courts may be read as exemplifying the principles of judicial restraint, legislative intent, and prudent statutory interpretation,¹⁵⁷ I am interested in exploring some of the underlying, gender-based reasons why the courts were so unwilling to extend Title VII protection to transsexuals.

Transsexuality is sometimes conflated with homosexuality,¹⁵⁸ demonstrating that there are strong conceptual connections between the two. Both transsexuals and "homosexuals" are gender-role deviants, but transsexuals want to change their physical sexual characteristics, while

Transsexual and Judicial Identity, 34 HARV. C.R.-C.L. L. REV. 329 (1999); Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223 (1997); Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism*, 24 N.Y.U. REV. L. & SOC. CHANGE 383 (1998); Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Circuit Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals' Right to Marry*, 9 TUL. J.L. & SEXUALITY 1 (2000); Kristin R. Rowland, *Amorphous Employment Discrimination Protection for Transsexuals: Doe v. Boeing*, 4 TEMP. POL. & CIV. RTS. L. REV. 367 (1995); Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"*, 4 MICH. J. GENDER & L. 275 (1997); Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997).

154. See Greenberg, *supra* note 122, at 151.

155. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984); *Holloway v. Arthur Andersen*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 370-71 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975).

156. See *Ulane*, 742 F.2d at 1083 n.3, 1084-85.

157. Indeed, this is almost always how the courts themselves justified their decisions. See *supra* note 145 and accompanying text.

158. See, e.g., *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 480 (D. Kan. 1995) (noting that manager who hired James "made no inquiry regarding [her] sexual orientation and had no knowledge . . . that James was a transsexual"). But see *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D. D.C. 1994) (noting that "in a Title VII context, courts have firmly distinguished transsexuality from homosexuality").

the self-identified gay man or lesbian usually does not. However, the transsexual is by definition also “homosexual” in some sense. When a man becomes a woman through sex-reassignment surgery, he remains a man chromosomally (and in the minds of many people), so if he then has relationships with men “he” is in some sense engaging in same-sex sexual behavior. However, if this same individual has relationships with women after sex-reassignment surgery, “she” is also engaging in same-sex sexual behavior because she appears to be a woman. In part because of this double bind, the transsexual is not considered an acceptable gender-conforming citizen.

In spite of this, there is a way in which transsexuals as a group could be regarded as gender conformists.¹⁵⁹ While seemingly denying the deductive gender assigned to them based upon biological sex, they actually *ratify* the proposition that gender and sex must match. When transsexuals’ gender identity initially does not match sex, sex is changed to match gender. This represents an attempt to conform, but its visibility and methods are so disquieting that transsexuals remain outcasts. Our culture demands that a discordant gender identity should be changed (or covered). It is disturbing to many that an individual could feel so strongly that his (feminine) gender identity does not match his (male) sex that he would undergo sex-conversion surgery, perhaps because it is so counterintuitive that anyone would voluntarily take on a subordinate role. Transsexuality also undermines this culture’s fundamental belief that men and women are essentially different creatures with masculine and feminine gender identities flowing causally and directly from biological sex.

In this way, transsexuality deals a devastating blow to the foundation of our culture’s normative gender-role ideology because it challenges the illusions that allow the sex-gender hierarchy to remain in place. Transsexuals are at once not convincing enough (men parading around in women’s clothes, ridiculous spectacles, or a threat to other women),¹⁶⁰ and too convincing (men who might attract other men by appearing to be

159. A form of this idea has also been articulated by feminist sociologist Janice Raymond, although her critique of MTF transsexuals reflects what I believe is an outdated view of gender inequality as primarily harming women. See JANICE RAYMOND, *THE TRANSEXUAL EMPIRE* (1993).

160. See *supra* note 155 and accompanying text; see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-49 (8th Cir. 1982) (noting that several female coworkers of the plaintiff threatened to quit if plaintiff was allowed to use the women’s restroom).

women, something the homophobic man greatly fears).¹⁶¹ Thus, like other gender nonconformists, they are deemed unworthy of the law's protection.¹⁶²

The courts have treated plaintiffs who brought sex discrimination claims based upon disparate dress and grooming standards, effeminacy, and transsexuality similarly. These plaintiffs were denied relief purportedly based upon Congressional intent in enacting Title VII or, more honestly, upon a "community standards"-type rationale.¹⁶³ However, what ties these cases together is the subterranean element of revulsion at the gender nonconformity the plaintiffs manifested. The final piece of this whole is the rejection of the inclusion of sexual orientation in Title VII.

The central case in this area is *DeSantis v. Pacific Telephone & Telegraph Co.*, in which the United States Court of Appeals for the Ninth Circuit rejected three separate arguments that would allow sexual orientation to be included in Title VII's prohibition of sex discrimination.¹⁶⁴ Despite the fact that no other circuit had addressed the precise issue, the court in *DeSantis* held that Congress did not intend to include sexual orientation within the meaning of "sex discrimination."¹⁶⁵ Notably, the court characterized itself as "following" two arguably unrelated cases: *Holloway v. Arthur Andersen*, a case that concerned

161. See KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 72-73 (1994) (discussing the scene in the film *The Crying Game* in which a man who is attracted to a transsexual he believes is a woman, vomits upon seeing the transsexual's penis).

162. In addition to foreclosing the sex discrimination argument, Congress specifically excluded transsexuals from the Americans with Disabilities Act and, retroactively, from the Rehabilitation Act. See 29 U.S.C.A. § 705(20)(F)(i) (West 1999) (excluding transvestites and transsexuals from protection under the Rehabilitation Act of 1973); 42 U.S.C. § 12208 (1994) (excluding transsexualism, transvestism, and homosexuality from coverage as "disabilities" under the ADA).

163. See, e.g., *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (noting that wearing pants is accepted for women, while wearing dresses is not accepted for men); *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353 (S.D. Ohio 1987) (in rejecting students' challenge to policy prohibiting students from wearing opposite-sex clothing to the prom, court states that boys and girls are equally burdened because both must wear clothing acceptable to the community). Although neither of these are Title VII cases, the contexts are analogous.

164. 608 F.2d 327 (9th Cir. 1979). I will discuss only the first of these arguments, but would like to note that the plaintiffs in *DeSantis* attempted to make a disparate impact argument, alleging that discrimination against homosexuality has a disproportionate impact on men because there are more gay men than lesbians and because an employer is more likely to discover that a male employee is gay than that a female employee is a lesbian. *Id.* at 330-31. They also made the formal disparate treatment sex-discrimination argument, claiming that an employer may not treat male employees who prefer males as sexual partners differently from women who prefer males as sexual partners. *Id.* at 331.

165. *Id.* at 332.

transsexuality, not sexual orientation;¹⁶⁶ and *Smith v. Liberty Mutual Insurance Co.*, which the *DeSantis* court described as holding that “sexual preference” was not within the meaning of sex discrimination under Title VII, but which states only that effeminacy is not a protected characteristic.¹⁶⁷ *DeSantis* explicitly illustrates the existence of the cultural continuum of gender nonconformity that ties the “long hair cases,” the effeminacy cases, and the transsexual cases with cases like *DeSantis* together in one ensemble.¹⁶⁸

The legacy of *DeSantis* is what is referred to by Francisco Valdes as the “sexual orientation loophole,”¹⁶⁹ in which an employer can convert a sex discrimination claim into a sexual orientation claim whenever the complainant either identifies as lesbian or gay or is perceived to make such an identification.¹⁷⁰ The courts have been reluctant to accept the idea that a gay man could be discriminated against on the basis of sex, though they seem to have had less of a problem with the idea that a lesbian could be.¹⁷¹ This is probably due in part to a disinclination to believe that men are discriminated against at all because they are seen as the socially advantaged group. Significantly, however, it demonstrates a lack of understanding of the gendered basis of sexual orientation.

In a general way, then, all of the above cases—from those about men with long hair to those about men who have sex with men—are about how employers and judges deal with gender nonconformity. The same language and the same knee-jerk disgust toward the plaintiffs (and sympathy for the plight of the employer) emerge across contexts of grooming regulations, effeminacy, transsexuality, and homosexuality. And the results of the cases amounted to one basic principle: gender nonconformity did not fall within the meaning of Title VII’s prohibition of sex discrimination in employment.

166. *Id.* at 329 (citing 566 F.2d 659 (9th Cir. 1977)).

167. *Id.* at 332 (citing 569 F.2d 325 (5th Cir. 1978)).

168. *Id.* (“We agree and hold that discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . does not fall within the purview of Title VII.”).

169. Valdes, *supra* note 6, at 146-48.

170. *See, e.g.*, *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Dillon v. Frank*, 952 F.2d 403, 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 713-15 (E.D. Tex. 2000); *Sarff v. Cont’l Express*, 894 F. Supp. 1076, 1081 (S.D. Tex. 1995). *But see* *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864-65 (8th Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 592-94 (7th Cir. 1997); *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000).

171. *See, e.g.*, *Samborski v. W. Valley Nuclear Servs.*, 1999 WL 1293351 (W.D.N.Y. Nov. 24, 1999); *Valdes v. Lumbermen’s Mut. Cas. Co.*, 507 F. Supp. 10 (S.D. Fla. 1980).

C. *Price Waterhouse's Impact on the Gender-Equality Perspective*

The continued vitality of the cases described above has been called into question by *Price Waterhouse v. Hopkins*, decided by the Supreme Court in 1989.¹⁷² Some commentators have questioned whether sex-differentiated dress and grooming codes and cases that hold that effeminacy is not a protected characteristic survive *Price Waterhouse*.¹⁷³ The question is how far *Price Waterhouse* reaches and in what contexts it applies. Some courts have begun to accept *Price Waterhouse's* gender-stereotyping rationale in the context of same-sex harassment¹⁷⁴ and various other contexts somewhat analogous to Title VII.¹⁷⁵ There is now a

172. 490 U.S. 228 (1989). The plaintiff in that case, Ann Hopkins, was a partnership candidate at the famous accounting firm. Her partnership was placed on hold one year and she was not renominated for partnership the next. *Id.* at 228. In making its decision, the firm relied upon comments from partners that were clearly based upon sex stereotypes and described Hopkins in both positive and negative terms that emphasized her sex as weighing upon their assessment of her qualifications. *Id.* The most persuasive individual piece of evidence offered by Hopkins was her supervisor's suggestion that if she wanted to make partner the next year, she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." *Id.* at 235. The Court, in finding in favor of Hopkins, opined:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. at 251 (citations omitted).

173. *See, e.g.*, Case, *supra* note 32, at 49-50. As to dress codes, however, the courts have not budged. *See* Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000) (noting that employers can require sex-differentiated uniforms and impose sex-differentiated appearance standards as long as they are equally burdensome to men and women); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998) (holding that policy prohibiting long hair for men does not violate Title VII); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2d Cir. 1996) (same); Austin v. Wal-Mart Stores, 20 F. Supp. 2d 1254 (N.D. Ind. 1998) (same).

174. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (noting that the Supreme Court in *Price Waterhouse* "implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (noting that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . , a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped notions of masculinity" in the context of a same-sex harassment case); Doe v. City of Belleville, 119 F.3d 563, 580-82 (7th Cir. 1997), *vacated on other grounds* (holding that "the Supreme Court's decision in *Price Waterhouse* makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles").

175. *See* Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that under the Equal Credit Opportunity Act, plaintiff might have been discriminated against on the basis of sex when a bank employee refused to provide him with a credit application because he was dressed in traditionally feminine attire); Schwenk v. Hartford, 204 F.3d 1187, 1200-1202

growing body of cases from which one can draw in analyzing how this argument has fared.

Probably the most promising case decided by a federal appellate court is *Nichols v. Azteca Restaurant Enterprises, Inc.*, in which the Ninth Circuit held that a male employee who was harassed in gender-based terms based on a perception that he was effeminate had been discriminated against on the basis of sex in violation of Title VII.¹⁷⁶ The fact that his harassers had also referred to the plaintiff as a “faggot”¹⁷⁷ did not adversely affect his claim—but his sexual orientation (either as he himself sees it or as his harassers perceived it) was never mentioned either. So, was the plaintiff a heterosexual man whose sexual orientation was not remarked upon because the “faggot” accusation was false, or was the issue deliberately evaded by his attorneys in order to avoid the sexual orientation loophole?¹⁷⁸

One answer to this question, at least in the Ninth Circuit, emerged a year later in *Rene v. MGM Grand Hotel, Inc.*, in which the plaintiff was an openly gay man.¹⁷⁹ A majority of the en banc court clearly wanted to find in Rene’s favor, but the split opinions and sloppy reasoning elucidate the continuing confusion about sex, gender, sexual orientation, and how they relate to sex-stereotyping. Seven of the eleven judges who heard the case concurred in the result, but for different reasons. The plurality opinion based the decision on the premise that unwanted sexual touching of “areas of the body linked to sexuality [] is inescapably ‘because of . . . sex.’”¹⁸⁰ In this analysis, the fact that the harassers may have also been motivated by the plaintiff’s sexual orientation is irrelevant to his Title VII claim.¹⁸¹ Although the court claimed to be guided by *Oncale*, its opinion may conflict with *Oncale* to the extent that its opinion states that not all “workplace harassment, even harassment between men and women, is

(9th Cir. 2000) (holding that gender and sex are covered by Title VII and using Title VII analysis in interpreting the Gender Motivated Violence Act).

176. 256 F.3d 864 (9th Cir. 2001). For example, his harassers targeted the way he walked and the way he held his serving tray—which they characterized as “like a woman”—and calling him “she,” “her,” and “fucking female whore.” *Id.* at 870.

177. *Id.*

178. There is certainly a factual answer to this question that I deliberately did not research—the theoretical dimensions are often more easily discernable when one has the freedom to question courts’ motivations.

179. 305 F.3d 1061 (9th Cir. 2002).

180. *Id.* at 1066.

181. *Id.*

automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁸²

The concurring judges would have decided the case under the sex-stereotyping rationale despite the plaintiff’s acknowledged sexual orientation.¹⁸³ The opinion implied that the sexual touching alleged was “because of sex” since the harassers were heterosexual, they touched Rene as they would touch a woman to whom they were sexually attracted.¹⁸⁴ The concurring opinion also analogized the case to *Nichols*, noting that both plaintiffs were referred to in female terms—in Rene’s case, “sweetheart” and “muñeca” (the Spanish word for “doll”).¹⁸⁵ The dissent, in arguing that Rene had not stated a cognizable Title VII claim, noted that Rene himself had characterized his harassers as being motivated by sexual orientation in addition to sex.¹⁸⁶ This reflects a common disagreement among courts as to whose perceptions of the harassment or whose motivations are at issue—those of the harassers or those of the victims.¹⁸⁷

Taken together, the fact patterns and decisions in *Nichols* and *Rene* suggest a trend that is borne out in other same-sex harassment cases. The words and actions chosen by the harassers—in addition to the way the victim interprets the harassment—determines whether a Title VII claim will succeed or not. Regardless of the harassers’ motivations, a mere difference in words used (“faggot” rather than “bitch,” for example) can doom a claim. This is an illogical result. It allows the harassers to evade liability based on the same motivations by using different words or actions. If the gender-equality paradigm were accepted by the courts, the sexual orientation loophole would close because it would not matter whether the gender-based motivations of same-sex harassers were expressed in sexual or gender terminology.

182. *Id.* at 1073 (Hug, J., dissenting) (quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

183. *Id.* at 1069 (Pregerson, J., concurring).

184. *Id.* at 1068. Rather than making this argument explicitly, the court allowed Rene’s testimony to this effect to suffice.

185. *Id.* at 1069 (Pregerson, J., concurring) (citing 256 F.3d 864, 874 (9th Cir. 2001)).

186. *Id.* at 1072 (Hug, J., dissenting).

187. *Compare* *Shermer v. Ill. Dep’t of Transp.*, 171 F.3d 475, 478 (7th Cir. 1999) (noting that “the record contains no evidence regarding Shermer’s physical appearance or mannerisms, [the defendant’s] perceptions of Shermer’s appearance and/or mannerisms or [the defendant’s] idea of a stereotypical male”), *with* *Martin v. N.Y. State Dep’t of Corr. Servs.*, 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002) (asserting that “to avoid bootstrapping sexual orientation claims under Title VII, a plaintiff must demonstrate th[at] he does not, or at the very least is not perceived to, act masculine”).

Even in same-sex harassment cases that have acknowledged the relevance of the sex-stereotyping argument, the plaintiffs still did not prevail, either because the sex-stereotyping argument was not raised at trial or because the facts of the case, as interpreted by the court, did not support a finding of sex-stereotyping. This often occurred because the harassment was phrased in terms of sexual orientation or because the plaintiffs characterized the harassment as being based on sexual orientation.¹⁸⁸

Even if the gender-stereotyping prohibition in *Price Waterhouse* continues to be accepted by the courts, it will not necessarily provide a panacea for lesbian and gay rights advocates in litigating employment discrimination cases because of the way it has been interpreted. As the court took pains to point out in *Simonton v. Runyon*, the sex-stereotyping argument “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But [it would plainly afford relief] based upon sexual stereotypes.”¹⁸⁹ Thus, under this limited interpretation, only those gay men who could show that they looked or acted stereotypically feminine could obtain relief on the basis of the sex-stereotyping claim.

This raises interesting problems of proof. How would one show that he was stereotypically feminine (or that she was stereotypically masculine)? It is unlikely that the harasser or discriminator would truthfully testify to her or his gender-based perceptions of the plaintiff if

188. See *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1063, 1065 (7th Cir. 2003) (emphasizing that plaintiff characterized harassment as being based upon his coworkers' perception of his sexual orientation); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (arguing harassment in terms of sexual orientation at trial level); *Shermer v. Ill. Dep't of Transp.*, 171 F.3d 475, 478 (7th Cir. 1999) (dismissing plaintiff's sexual stereotyping argument because he did not raise this theory in previous proceedings nor in his complaint); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (stating that plaintiff's gender-stereotyping argument was not presented to the district court); *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 316 (S.D.N.Y. 2003) (stating that plaintiff's claims of sex discrimination were actually grounded in her sexual orientation); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 737 (E.D. Pa. 2002) (finding inference of sex discrimination “too attenuated” to support claim of sex-stereotyping); *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 446-47 (N.D.N.Y. 2002); *Trigg v. N.Y. City Transit Auth.*, 2001 WL 868336, at *6 (E.D.N.Y. July 6, 2001) (noting that plaintiff's perception of his harasser's taunts as based on sexual orientation precluded a gender-stereotyping claim); *Dandan v. Radisson Hotel Lisle*, 2000 WL 336528, at *3 (N.D. Ill. Mar. 28, 2000); *EEOC v. Trugreen Ltd. P'ship*, 122 F. Supp. 2d 986, 994 (W.D. Wis. 1999); see also *Kay v. Independence Blue Cross*, 2003 WL 21197289, at *5 (E.D. Pa. May 16, 2003) (finding existence of gender-stereotyping discrimination where sexual-orientation terminology was used, noting that plaintiff had never alleged sexual orientation discrimination).

189. 232 F.3d 33, 38 (2d Cir. 2000).

doing so would increase the plaintiff's likelihood of prevailing at trial. It is also unlikely that there will be written evidence of such perceptions as there was in *Price Waterhouse*. Would the court require testimony from others? If so, whom? From whose point of view must the plaintiff be found to be stereotypically feminine?¹⁹⁰

Some courts have suggested that the burden of demonstrating that he is, or is perceived as, gender-nonconforming is on the plaintiff.¹⁹¹ This implies that the parties responsible for judging the extent of gender nonconformity will be judges and, where applicable, juries. If this is the approach that most courts take, plaintiffs will likely have to rely on popular cultural notions of what constitutes masculinity and femininity. This method is highly problematic, as many individuals are consciously unaware of the persistence of sex-gender inequality and thus may overlook important factors.¹⁹² Of course, the alternative—relying on the defendant to admit perceptions of gender nonconformity—would be far less likely to aid plaintiffs in proving sex-stereotyping claims.

Unfortunately, most courts are still unwilling to recognize same-sex sexuality as being germane to gender,¹⁹³ despite the fact that the relevance

190. In *Shermer v. Illinois Department of Transportation*, 171 F.3d 475, 478 (7th Cir. 1999), the court suggests that a successful plaintiff must show that the harasser him- or herself saw the victim as gender nonconforming. See *infra* note 210 and accompanying text. In *Kay*, 2003 WL 21197289, at *6, the court stated that “plaintiff need not specifically show that he was viewed as womanly” since he had shown that his coworkers “found him in some way not to be stereotypically masculine.”

191. *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002) (asserting that “to avoid bootstrapping sexual orientation claims under Title VII, a plaintiff must demonstrate th[at] he does not, or at the very least is not perceived to, act masculine”); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 737 (E.D. Pa. 2002) (in denying plaintiff's motion for summary judgment, court asserts that he “does not point to any specific characteristic, trait, or behavior which would indicate he was somehow unmanly or perceived to be so”).

192. See DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* (1997).

193. There are at least two exceptions to this rule. In *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002), the court implicitly recognized this argument in dicta.

[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker he perceives to be gay, whether effeminate or not because he thinks, “real men don't date men.” The gender stereotype at work here is that “real” men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don't do.

Id. Similarly, in *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002), the court stated that the lesbian plaintiff could show that the harassment she suffered

of sexuality to sex discrimination has been recognized in the harassment context.¹⁹⁴ So while the gender-stereotyping argument may cover many cases of employment discrimination against individuals who identify as gay or lesbian, it will probably fail to cover those instances in which an employee mistakenly believes that he or she can be “out” in the workplace. Courts have remained unwilling to find that sex discrimination occurred in cases in which there was actual knowledge of the self-identified sexual orientation of the plaintiff because actual knowledge activates the sexual orientation loophole, which has remained so salient that it has foiled many gender-stereotyping claims.¹⁹⁵

The inevitable question that emerges is whether the Supreme Court will apply its decision in *Price Waterhouse* to the effeminate man, the masculine lesbian, the ultrafeminine woman, or the otherwise gender-conforming lesbian or gay man—in other words, can an employer be guilty of violating Title VII based on gender-stereotyping when the plaintiff is not a marginally masculine heterosexual woman? Because *Doe v. City of Belleville*¹⁹⁶ was decided by the United States Court of Appeals for the Seventh Circuit in 1997, before *Oncale* was decided, the Court could have foreclosed the gender-stereotyping argument in the

was based on sex in two ways: first, because her harasser “would not have acted as she . . . did if Plaintiff were a man dating a woman, instead of a woman dating a woman . . . then Plaintiff was discriminated against because of her gender.” This is the formal sex discrimination argument that was rejected in *DeSantis*. 608 F.2d 327, 331 (9th Cir. 1979). Second, the *Heller* court found that the plaintiff could pursue a sex-stereotyping claim, that is, that

a jury could find that [the harasser] repeatedly harassed (and ultimately discharged) [the plaintiff] because [the plaintiff] did not conform to [the harasser’s] stereotype of how a woman ought to behave. [The plaintiff] is attracted to and dates other women, whereas [the harasser] believes that a woman should be attracted to and date only men.

195 F. Supp. 2d at 1224. Although these methods are based on the same facts, they are distinct methods of showing sex discrimination. The sex-stereotyping claim in the case was bolstered by the harasser’s comments to the plaintiff about a pair of shoes that she wore that the harasser considered masculine and questions about who “wore the dick” or “wore the pants” in the plaintiff’s relationships. *Id.* at 1217.

194. According to *Oncale*, sexuality is relevant but not determinative to a sexual harassment case. 523 U.S. 75 (1998). While sexual desire on the part of the harasser for the victim may provide one means of showing that harassment is “because of sex,” not every case involving harassment with sexual content will be because of sex. For an exceptional look at the ways in which *Oncale* limited relief for both traditional and nontraditional plaintiffs and complicated the issue of causation, see David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

195. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Martin v. N.Y. State Dep’t of Corr. Servs.*, 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 737 (E.D. Pa. 2002); *Dandan v. Radisson Hotel Lisle*, 2000 WL 336528 (N.D. Ill., Mar. 28, 2000).

196. 119 F.3d 563 (7th Cir. 1997).

context of same-sex harassment in dicta in *Oncale*, and did not do so.¹⁹⁷ However, if the question were to go before the Court today, it seems unlikely that the *Higgins* line of cases would survive the increasingly conservative Court.

Still, the acceptance in several circuits of the gender-stereotyping argument is a welcome development for all gender nonconformists. The way in which these cases may allow us to hope that sexual orientation discrimination may one day be recognized as sex discrimination is this: they reopen the door to realizing the vision of a Title VII that *does* seek to eradicate the entire spectrum of disparate treatment of men and women caused by sex-stereotyping. When and if this vision is fully embraced by the courts and becomes widely accepted, it will become easier to make the argument that sexuality is a component of an individual's assigned gender role and thus that it is an impermissible basis on which to discriminate against that individual.¹⁹⁸ Employment discrimination law is a critical context in which to achieve equality for all gender nonconformists because work is such a central part of the lives and identities of individuals in our culture.¹⁹⁹

IV. GENDER-EQUALITY ARGUMENTS IN FAMILY LAW

*“Work outside the home can be revolutionized by a strike, a lawsuit, or a trip to the EEOC, but it’s behind the closed doors of families that equality can be hardest to find.”*²⁰⁰

If work is a defining feature of identity, no less defining is the network of alliances and relationships with those individuals with which each person shares her life, many of which we might call family relationships. It is often said that the family is the foundation of our entire culture,²⁰¹ and consequently its continued vitality is of great societal concern. Many social changes are opposed in terms of their effect upon the family, though this kind of rhetoric is most accurately characterized as directed at sustaining male supremacy and gender polarity rather than family relationships per se. Thus, gender equality

197. Although the opinion was vacated in light of *Oncale*, the portion of the opinion that addressed the gender-stereotyping claim remains good law. See *Jones v. Pac. Rail Servs.*, 2001 WL 127645, at *2 (N.D. Ill. Feb. 14, 2001); *EEOC v. Trugreen Ltd. P’ship*, 122 F. Supp. 2d 986, 993 (W.D. Wis. 1999).

198. That at least two courts have recognized this argument is a promising sign. See *supra* note 193 and accompanying text.

199. See, e.g., Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

200. JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 46 (2000).

201. See *supra* note 77 and accompanying text.

issues have been perhaps most hotly contested in the legal regimes surrounding employment and the family. Sexual orientation is no exception to this phenomenon. Because identifying as lesbian or gay often entails the formation of family or family-like relationships that defy the traditional definitions, the resistance to the formation of lesbian and gay families has been especially fierce—both with regard to marriage and with regard to children.

In 1993, the Hawaii Supreme Court accepted the formal sex discrimination argument in the context of same-sex marriage—that is, that if a man may marry a woman but may not marry another man, a sex-based classification has been created by the state and must be subjected to heightened scrutiny.²⁰² This was an unusual decision—other courts faced with the sex-discrimination argument had dismissed its straightforward logic by circumventing it and defining marriage as a relationship between a man and a woman,²⁰³ as would Congress soon thereafter in passing the Defense of Marriage Act (DOMA).²⁰⁴ The next legal victory for same-sex marriage advocates occurred in 2000 in Vermont, where the Vermont Supreme Court ruled in *Baker v. State* that the state could not deny the benefits of marriage to same-sex couples.²⁰⁵ The resulting “civil union” law was the first of its kind in the United States.²⁰⁶ However, the reasoning in *Baker* was not based upon sex discrimination. Finally, in 2003, Massachusetts became the second state to judicially determine that the benefits of marriage could not be denied to same-sex couples.²⁰⁷ Again, the case was decided on rational basis grounds rather than on a gender-equality rationale. In the marriage context, then, the use of gender-equality arguments has seen very little success, far less overall than in the employment context. Still, it is important to examine same-sex marriage through a gender-equality lens.

Some commentators have emphasized the potential of same-sex marriages to help advance the goal of a gender-equal society.²⁰⁸ If this is true, then legalizing same-sex marriage ostensibly should be a goal of both women’s rights activists and LGBT rights activists. However, there

202. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In Hawaii, sex-based classifications are subject to strict scrutiny, and the Hawaii Supreme Court ruled that the state had not met its burden. *Id.*

203. See, e.g., *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

204. See, e.g., Defense of Marriage Act, 28 U.S.C. § 17376 (1996).

205. 744 A.2d 864 (Vt. 1999).

206. See 2000 Vermont Laws P.A. 91 (H. 847).

207. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

208. See, e.g., *Becker*, *supra* note 6; *Hunter*, *supra* note 52.

are good reasons to seriously question the validity of such a view. Same-sex marriage is not necessarily a step in the right direction; not every victory in court *against* those who are anti-gay rights is a victory *for* the goals for which we should strive. From a gender-equality perspective, the push for same-sex marriage is a compromise whose results may well run counter to real progress.

Where the gender-equality paradigm is especially useful and little remarked upon is in examining how the law has treated those who identify as lesbian and gay in relation to children. Here, it is clear that some judges, states, and commentators are concerned about gender when forming opinions about whether lesbian and gay parents should be allowed to have custody of or adopt children,²⁰⁹ whether this concern is articulated openly or expressed in coded language. When expressed directly, they posit two basic ideas: first, that children of lesbian and gay parents are more likely to be gay themselves (sexual gender nonconformity); and second, that children of lesbian and gay parents are likely to have “gender identification” or “gender role behavior” problems (social gender nonconformity).²¹⁰

Advocates of lesbian and gay parental rights have responded to such accusations by presenting social science research suggesting that neither is justified. While this approach may be effective in some individual cases (although in fact it is usually not effective), it is dishonest. Moreover, it will undermine the normative goal that I believe LGBT rights advocates and feminists are trying to achieve—a world in which gender is not relevant to an individual’s biological sex, social status, educational and employment opportunities, life chances, and possibilities for happiness. We should seriously consider the consequences of making arguments whose implications will ultimately hurt our chances of achieving equality for all. The realm of family law, where it seems most likely to fail, may well be the place where the gender-equality paradigm is most in need of recognition.

209. See, e.g., Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 280-89, 291-99 (1998); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 651; Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 71-78 (1996).

210. Such concerns are not always expressed directly. In Part I.B.1, *infra*, I discussed the ways in which concerns about “homosexuality” that do not seem to be directly related to gender are actually closely connected to it. For a discussion of the other rationales judges commonly use to avoid giving custody or visitation rights to lesbian or gay parents, see Ball & Pea, *supra* note 209, at 279-308; Shapiro, *supra* note 209, at 646-60; and Strasser, *supra* note 209, at 68-88.

The likely explanation for the relative lack of gender-equality arguments in family law involves both strategy and substance. In terms of strategy, lesbian and gay rights advocates know that because of the perceived centrality of the family to our society and the presumed necessity of heterosexuality to the survival of the family, gender-equality arguments are probably too radical to be well received in the family law context. Substantively, it is unclear whether LGBT litigators believe that the identity is about gender or whether the strategy has been utilized merely on the basis of expediency.²¹¹

A. *Marriage*

The legalization of same-sex marriage is, alongside abortion rights and religious symbolism in government, among the most contentious issues of the new millennium. In fact, given the events that have unfolded in the months leading up to this Article going to press, one could argue that same-sex marriage is the number one hot-button issue of 2004.²¹² Numerous legal and moral arguments for²¹³ and against²¹⁴ same-

211. There are signs that many LGBT rights advocates do perceive the connection between nontraditional sexual identities and gender inequality. The ACLU's Lesbian and Gay Rights Project, for example, has stated explicitly that its position is that gender identity is connected with gay rights, although their advocacy is focused on individuals who identify as transgendered. See *The Work of the ACLU: Linking Gender Identity and Gay Rights*, at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9213&c=105> (last visited Dec. 30, 2003) (linking gender identity and gay rights). Even more promising is the existence of two organizations that are dedicated to working for gender equality as broadly defined to include sexual orientation: GenderPAC and the New York Association for Gender Rights Advocacy (NYAGRA). See <http://www.gpac.org/gpac/index.html> (last visited Dec. 30, 2003) (stating that "GenderPAC is the national advocacy organization working to ensure every American's right to their gender free from stereotypes, discrimination and violence, regardless of how they look, act or dress or how others perceive their sex or sexual orientation" and that "we use gender in the most inclusive sense—including transgender as well as sexual orientation, because we believe the mainspring of homophobia is gender, i.e., the prejudice that gay men are insufficiently masculine or lesbian women necessarily inadequately feminine . . . we also include sex and sexism, because we believe the basis for misogyny is our culture's devaluation and derision of femininity and vulnerability"); <http://www.nyagra.tripod.com/bylaws020311.htm> (last visited Nov. 5, 2003) (stating that NYAGRA "is a membership organization that advocates at the state and local level for self-determination in gender statement and identity" and "sees its constituency as including all individuals who experience discrimination and violence because of the ways in which they choose to express their gender"). Increasingly, antidiscrimination laws aimed at protecting lesbians, gays, and bisexuals include gender identity and expression as well. Though in most cases the intention behind the inclusion of gender identity is to protect the transgendered, such laws could potentially protect all gender nonconformists.

212. The same-sex marriage story is continuing to unfold as this Article goes to press, but some of the most interesting and highly-publicized events are the issuance of marriage licenses to same-sex couples in locales such as San Francisco, New York, New Mexico, and Oregon; the California Supreme Court's unanimous decision to halt same-sex marriages in that state on March

sex marriage have been offered by legal scholars of various political stripes. Although often overlooked in the furor, there is also a debate within the lesbian and gay community about the wisdom of pushing for the right to marry and the normative merits of the institution.²¹⁵ My interest here is in exploring how gender-equality arguments have been articulated in the marriage context, first in the courts and then in the literature, and evaluating the extent of their success and persuasiveness.

1. *Baehr v. Lewin* and the Miscegenation Analogy

The sex-discrimination argument in favor of same-sex marriage is not a recent development. In short form, the argument is that if a man can marry a woman but cannot marry a man, the state has created an invidious classification based on sex. As Andrew Koppelman has pointed out, *Loving v. Virginia*, in which the Supreme Court declared miscegenation laws unconstitutional in 1965,²¹⁶ provides support for the sex-discrimination argument because one basis for the decision was that the prohibition on interracial marriages furthered the ideology of white supremacy.²¹⁷ Similarly, prohibiting same-sex marriages may be said to further the ideology of male supremacy.²¹⁸ This argument was dubbed the “miscegenation analogy,” and has been incredibly influential in the same-sex marriage debate.²¹⁹

11, 2004; and President Bush’s February 2004 endorsement of a constitutional amendment to ban same-sex marriage.

213. See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998); ESKRIDGE, *supra* note 47.

214. See, e.g., Finnis, *supra* note 53; Robert George, *Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate*, in MAKING MEN MORAL (1993); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Raymond O’Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429 (1998); Wardle, *supra* note 53. Obviously, there is a great deal of overlap between moral and legal arguments, especially when they are all published in legal periodicals.

215. See generally ESKRIDGE, *supra* note 47, at 51-85 (discussing the community’s debate over same-sex marriage).

216. 388 U.S. 1, 12 (1967).

217. See Koppelman, *The Miscegenation Analogy*, *supra* note 6.

218. *Id.*

219. See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 971-72 (Mass. 2003); Baker v. State, 744 A.2d 864, 887, 898 (Vt. 1999) (dismissing the miscegenation analogy); see also Nicholas D. Kristof, *Marriage: Mix and Match*, N.Y. TIMES, Mar. 3, 2004.

Although courts were unreceptive to this argument when it was first put forth,²²⁰ the sex-discrimination argument was revived in the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*.²²¹ In that case, the court rejected the plaintiffs' argument that the refusal to issue a marriage license to a same-sex couple constituted a denial of due process, but accepted the argument that it constituted sex discrimination, violating the state constitutional provision prohibiting sex discrimination.²²² In response to the dissent's assertion that there was no sex discrimination because neither a male nor a female could marry an individual of his or her own sex, the majority pointed to *Loving v. Virginia*.²²³ However, the court failed to flesh out the similarities between the two cases by recognizing that prohibiting same-sex couples from marrying perpetuates male supremacy in the same way as miscegenation laws perpetuated white supremacy—a crucial factor in the *Loving* decision.²²⁴ Thus, the reasoning was insubstantial and unsatisfying even to many who agreed with the outcome.²²⁵

As promising as *Baehr* might have seemed for the possibility of the acceptance of sex- or gender-discrimination arguments in the context of lesbian and gay rights claims, it was overturned by a ballot initiative that amended Hawaii's state constitution to define marriage as a union between one man and one woman.²²⁶

220. For example, in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court rejected the miscegenation analogy, stating that

Loving does not indicate that all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

191 N.W.2d at 187. Two other early challenges to the prohibition of same-sex marriage failed because the courts found that there was no sex discrimination, but rather an inability of two individuals of the same sex to enter into a marriage because of the definition of marriage itself. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

221. 852 P.2d 44 (Haw. 1993).

222. *Id.* at 50.

223. *Id.* at 67-68 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

224. See Koppelman, *The Miscegenation Analogy*, *supra* note 6.

225. See, e.g., Fajer, *supra* note 6, at 634; Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 683 (1980). Though both Karst and Fajer wrote before the *Baehr* decision, both expressed concern that the formal sex-discrimination argument for gay rights was not substantial enough to sway opinion or to answer the questions it inevitably begs.

226. See HAW. CONST. art. 1, § 23; H.R. 117, S.D. 1, C.D. 1, Conf. Comm. Rep. No. 1 (1997); approved by legislature at 1997 Haw. Senate J. 766 & 1997 Haw. House J. 922. For commentary on the Hawaii amendment, see *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000). The same thing happened in Alaska. In *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998), an Alaska court ruled that choosing a marital partner is a fundamental right that cannot be interfered with by the state.

2. A Civil Union: The “Definition of Marriage” and *Baker v. State*

In 2000, Vermont became the first state in the United States to confer the benefits and protections of marriage on same-sex couples, in response to the Vermont Supreme Court ruling the year before in *Baker v. State*.²²⁷ The decision was hailed as a victory for the gay rights movement and a promising sign for the future of same-sex marriage. For my purposes here, the important inquiry is what the court’s opinion in *Baker* has to say about understanding same-sex marriage as deeply concerned with gender equality. Additionally, because the regime created by the Vermont legislature in response to *Baker* is segregated,²²⁸ what impact will the civil union law have upon the way we think about the institution of marriage? Do the developments in Vermont aid or inhibit the recognition of the gender-equality view of “sexual orientation”?

The opinion of the majority in *Baker* says little about gender. The court answered the plaintiffs’ sex-discrimination claim by saying that because the law was not *intended* to discriminate on the basis of sex, it did not violate the common benefits clause.²²⁹ The court went on to dismiss the idea that there is any similarity between miscegenation laws

absent a compelling reason. In November 1998, only months after the court’s decision, voters amended the Alaska Constitution to require that all marriages be between a man and a woman. See ALASKA CONST. art. 1, § 25 (codifying 1998 Legislative Resolve 71).

227. 744 A.2d 864 (Vt. 1999).

228. Some have referred to the civil union law as creating a “separate but equal” system; because I disagree with the “equal” part, I will refer to it simply as “segregated.” See 2000 Vermont Laws P.A. 91 (H. 847). For academic commentary on the issue, see Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Unequal)*, 25 VT. L. REV. 113 (2000) (arguing that although the civil unions law will have some positive results, the law is an example of government-prescribed segregation and is an example of how separate is inherently unequal); Mello, *supra* note 72, at 242-73 (arguing that the civil union law promotes segregation and describing the harms of segregation by comparison to race context). *But see* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (defending civil unions as both providing the important rights and privileges that attach to marriage in Vermont and allowing gays and lesbians to define the institution without having to adhere to all of the traditions of different-sex marriage).

229. 744 A.2d at 887 (noting that “[p]laintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy”). The outcome of the case was much more limited than most people realize: the majority held only that the plaintiffs were entitled to “obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples,” *not* that such couples were entitled to be married. *Id.* at 886. The exclusion of same-sex couples from the benefits and protections of marriage violated the Common Benefits Clause of the Vermont Constitution because the state’s purported reasons for doing so did not have “a reasonable and just basis,” when “viewed in the light of history, logic, and experience.” *Id.*

and laws prohibiting same-sex marriage, at least in terms of furthering the ideologies upon which they are based.²³⁰

More promising was Justice Johnson's partial concurrence and partial dissent, in which she stated that the Vermont marriage statute was "a straightforward case of sex discrimination."²³¹ What distinguishes Johnson's opinion is that it recognizes both the sex-discrimination argument and the gender-equality argument. First, Johnson explained:

A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a License.²³²

Although the sex-based classification most directly impacts lesbians and gay men, perceiving that the discrimination is sex-based is important because the preservation of the sex-based classification in the statute "is a vestige of sex-role stereotyping."²³³ Johnson reviewed the history of the status of a married woman under the law, from coverture to formal equality, and concluded that "[t]he question . . . is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today."²³⁴

On the other hand, the arguments offered by the state to support the sex-based classification are chilling in their baldness:

(1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.²³⁵

To support its arguments about sex differences, the state relied on feminist psychologist Carol Gilligan's work and other feminist writings

230. *See id.* at 887.

231. *Id.* at 905 (Johnson, J., concurring in part and dissenting in part).

232. *Id.* (Johnson, J., concurring in part and dissenting in part).

233. *Id.* at 906 (Johnson, J., concurring in part and dissenting in part).

234. *Id.* (Johnson, J., concurring in part and dissenting in part).

235. *Id.* (Johnson, J., concurring in part and dissenting in part).

on changes in the law since women began to participate in the legal profession.²³⁶

Justice Johnson responded:

[C]arried to its logical conclusion, the State's rationale could require all marriages to be between people, not just of the opposite sex, but of different races, religions, national origins, and so forth, to promote diversity. Moreover, while it may be true that the female voice or point of view is sometimes different from the male, such differences are not necessarily found in comparing any given man and any given woman. The State's implicit assertion otherwise is sex stereotyping of the most retrograde sort. Nor could the State show that the undoubted differences between any given man and woman who wish to marry are more related to sex than to other characteristics and life experiences. In short, the "diversity" argument is based on illogical conclusions from stereotypical imaginings²³⁷

Johnson concluded that the idea that marriage requires a man and a woman was based upon the outmoded conception that a marriage creates one juridical person (the man/husband) out of two, and thus should be ruled unconstitutional.²³⁸

Justice Johnson's opinion reflects an explicitly feminist understanding of the law of marriage and the struggle for gay and lesbian rights; thus, it is a hopeful development in state constitutional law. However, that Johnson was the only member of the Vermont Supreme Court who decided the case on sex discrimination grounds is discouraging. Did the rest of the court believe that the sex-discrimination rationale could not withstand the coming backlash, or did it not believe that exclusion of same-sex couples perpetuated the ideology of male supremacy and promoted sex discrimination? Either way, *Baker* did not bode well for the recognition of either the sex-discrimination argument or the gender-equality thesis. Indeed, its reasoning was repeated four years later.

3. Same Song, Second Verse?: *Goodridge v. Department of Health*

On November 18, 2003, the Massachusetts Supreme Judicial Court handed down its long-awaited decision in *Goodridge v. Department of Health*.²³⁹ The outcome was close (4-3) but favorable for same-sex marriage advocates: the court held that denial of the protections,

236. *Id.* (Johnson, J., concurring in part and dissenting in part).

237. *Id.* at 910 (Johnson, J., concurring in part and dissenting in part).

238. *Id.* at 912 (Johnson, J., concurring in part and dissenting in part).

239. 798 N.E.2d 941 (Mass. 2003).

benefits, and obligations of marriage to same-sex couples in Massachusetts violated the state constitution. The *Goodridge* opinion tracked *Baker* very closely—the majority decided the case on a *Romer*-esque rational-basis standard,²⁴⁰ and one concurring justice would have decided the case on the basis of sex-discrimination²⁴¹ under Massachusetts' ERA.²⁴² The three dissents were comparatively mild in tone, mostly opining that the extension of marriage to same-sex couples was a decision for the legislature, not the courts, to make,²⁴³ and cautioning that same-sex households have not yet been shown to be as optimal as opposite-sex ones for the rearing of children.²⁴⁴

As in *Baker*, the legislature was afforded the opportunity to act upon the court's decision,²⁴⁵ but with an interesting twist: when the state Senate requested an opinion from the court about the constitutionality of a civil union bill, the court responded that relegating same-sex couples to civil unions would violate the Massachusetts constitution.²⁴⁶ In response to this opinion, the legislature began discussing a constitutional amendment to bar same-sex marriage.²⁴⁷ The original anticipated outcome that the Massachusetts legislature would follow Vermont and establish a civil union type system now seems unlikely to occur. While Massachusetts must, according to the court, begin issuing marriage licenses on May 17, 2004, a constitutional amendment could not appear on the ballot until 2006, leaving the status of couples who marry in the interim undetermined should the amendment become part of the Massachusetts Constitution.

None of these developments are especially promising for the future of the gender-equality paradigm. The civil marriage and civil union arrangement in Vermont is a segregated system: just as same-sex

240. *See id.* at 960-61.

241. *See id.* at 970-73 (Greaney, J., concurring). Justice Greaney's analysis focused overwhelmingly on the formal sex-discrimination argument and, aside from a brief comment that "the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage," failed to touch upon the gender-equality argument explored in greater detail in Justice Johnson's partial concurrence and partial dissent in *Baker*. *Id.* at 972-73 (Greaney, J., concurring).

242. *See* MASS. CONST. pt. 1, art. 1, *amended by* MASS. CONST. art. 106 (stating that "... [e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin").

243. *See* 798 N.E.2d at 974-75 (Spina, J., dissenting), 982 (Sosman, J., dissenting), 983 (Cordy, J., dissenting).

244. *See id.* at 978-79 (Sosman, J., dissenting), 995-1001 (Cordy, J., dissenting).

245. *See id.* at 969-70.

246. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

247. *See, e.g.,* Fred Bayles, *Amendment Passes 1st Tests in Massachusetts*, USA TODAY, Mar. 12, 2004, at A3.

couples may not marry, different-sex couples cannot choose to have a civil union instead of a civil marriage. The status of same-sex couples as separate from (and implicitly beneath) opposite-sex couples under the civil unions law renders the supposed improvement more cosmetic than substantive in terms of status harm. Because civil unions are not available to different-sex couples, any transformative value that recognition of same-sex marriage might have had for the concept of marriage as a whole is undermined because the law does nothing to destabilize the gendered construction of opposite-sex marital relationships. With “heterosexual” marriage as a distinct type of domestic relationship (and one implicitly favored), it remains officially unquestioned in the law and thus in the popular imagination.

It is probable that the Vermont decision to establish civil unions was made to avoid the outcomes in Hawaii and Alaska based on the “definition of marriage,” also embodied in DOMA and many state laws that define marriage in terms of sex-gender.²⁴⁸ However, judging by the events playing out in Massachusetts in 2004, civil unions may be all that same-sex couples can expect given the current conservative cultural climate and public opposition to same-sex marriage.²⁴⁹ Nevertheless, the debate among activists and academics about whether civil unions represent progress or segregation continues.²⁵⁰ But from a gender-equality perspective, this debate is not especially meaningful. In the push for same-sex marriage, the normative deficiencies of the institution itself, and the question of whether the state should condition economic benefits

248. See ALA. CODE § 30-1-19 (2002); ALASKA STAT. § 25.05.013 (2002); ARIZ. REV. STAT. § 25-101 (2002); ARK. CODE ANN. § 9-11-208, § 9-11-109 (2002); DEL. CODE ANN. tit. 13 § 101 (2002); FLA. STAT. ch. 741.212 (2002); GA. CODE ANN. § 19-3-3.1 (2002); HAW. REV. STAT. § 572-1 (2002); IDAHO CODE § 32-209 (2002); 750 ILL. COMP. STAT. 5/213.1, 5/212 (2002); IND. CODE § 31-11-1-1 (2002); KY. REV. STAT. ANN. § 402.005, § 402.045, § 402.040 (2002); LA. CIV. CODE ANN. art. 89 (2002); ME. REV. STAT. ANN. tit. 19-A, § 701 (2002); MD. CODE ANN., FAM. LAW § 2-201 (2002); MICH. COMP. LAWS ANN. § 551.1 (2002); MINN. STAT. § 517.03 (2002); MISS. CODE ANN. § 97-3-5 (2002); MO. REV. STAT. § 451.022 (2002); MONT. CODE ANN. § 40-1-401 (2002); NEB. REV. STAT. CONST. Art. I, § 29; N.C. GEN. STAT. § 51-1.2 (2002); N.D. CENT. CODE § 14-03-01 (2002); OHIO REV. CODE ANN. § 3101.01 (2002); OKLA. STAT. tit. 43 § 3.1 (2002); 23 PA. CONS. STAT. ANN. § 1704 (2002); S.C. CODE ANN. § 20-1-10 (2002); S.D. CODIFIED LAWS § 25-1-38 (2002); TENN. CODE ANN. § 36-3-113 (2002); UTAH CODE ANN. § 30-1-2 (2002); VA. CODE ANN. § 20-45.2 (2002); WASH. REV. CODE § 26.04.020 (2002); W. VA. CODE § 48-2-603 (2002); WYO. STAT. ANN. § 20-1-101 (2002). *But see* Mello, *supra* note 72, at 235-39 (arguing that the Vermont legislature’s decision was prompted by political pragmatism, especially the fact that it was an election year).

249. The percentage of Americans who oppose same-sex marriage is approximately two to one. See <http://www.gallup.com/content/default.asp?ci=10960> (noting that attitudes regarding same-sex marriage have remained consistent for the past five years).

250. See *supra* note 228.

on pair relationships, remain virtually unquestioned. I will discuss these issues in the next section.

4. A Gender-Equality Perspective on Same-Sex Marriage

As I noted in Part I.A.3, marriage is historically and presently a problematic institution for feminists.²⁵¹ Because of this, commentators such as Paula Ettelbrick and Nancy Polikoff have put forth feminist-oriented arguments as to why marriage should not be at the top of the LGBT rights agenda.²⁵² No one, to my knowledge, in the LGBT community disputes that same-sex couples should legally have the right to marry. The question, rather, is whether marriage should be a priority, and whether it is an institution that should be valorized and perpetuated. Some believe that same-sex marriage is the shortest, fastest route to equality for those who identify as lesbian and gay. Given the developments in Vermont and Massachusetts,²⁵³ we should carefully consider the potential consequences of prioritizing marriage over other issues. Indeed, we should critically weigh the merits of marriage itself.

One version of the pro-gay argument against marriage is put forth persuasively by Michael Warner. He argues that while queer activism and culture was once concerned with legitimating diverse forms of sexuality and intimate relationships, the new focus is on gay marriage—to the exclusion of a more broad-based social justice platform that promotes acceptance of and protection for all individuals, no matter what their sexuality or living arrangements.²⁵⁴ This focus has the effect of privileging the monogamous couple relationship (and therefore those in such relationships) at the expense of all others.²⁵⁵

251. A paper on the Heritage Foundation website, although written from a perspective hostile to feminist critiques of marriage, chronicles many of the more prominent feminists who have written about the drawbacks of marriage. See Fagan et al., *supra* note 120.

252. See Ettelbrick, *supra* note 45; Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'*, 79 VA. L. REV. 1535 (1993).

253. Another lawsuit is currently pending in New Jersey. See *Lewin v. Harris*, No. L-00-4233-02 (N.J. Super. Ct. Law Div., Oct. 8, 2002). This lawsuit is currently on appeal to the New Jersey Supreme Court.

254. MICHAEL WARNER, *Beyond Gay Marriage*, in *THE TROUBLE WITH NORMAL* 81-147 (1999). For an exceptional discussion of an alternative formulation to privileging married or committed couples, see MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

255. *Id.* Similar arguments have been made much more frequently in the mass media since the issue of same-sex marriage has emerged as an even higher-profile issue. See, e.g., Lisa Duggan, *Holy Matrimony!*, *THE NATION*, Mar. 15, 2004, at 14; Richard Kim, *The Descent of Marriage*, *THE NATION*, available at <http://www.thenation.com/doc.mhtml?i=20040315&s=kim> (last visited Mar. 12, 2004); Sheerly Avni, *Unwedded Bliss*, available at <http://www.salon.com/>

Although Warner is not making an explicitly feminist argument, his position lends support to and enriches the arguments made by Ettelbrick and Polikoff. Clearly, that Americans feel financially or socially pressured into marriage detrimentally affects gender equality. I suspect that this is why marriage is currently experiencing such a surge in popularity. The idea that marriage or a marriage-like relationship is necessary to a happy, fulfilling life seems rarely to be contested in popular culture these days.²⁵⁶ As Warner points out, the hegemony of marriage has the effect of stigmatizing all individuals who are unmarried and perpetuating the belief that sexuality must be justified by love and be expressed in monogamous relationships.²⁵⁷ Thus, the push for marriage lends credence to the slippery-slope arguments put forth by conservatives because it cedes their premise—that the male-female marriage model is the ideal intimate relationship.²⁵⁸

For these reasons, society might be more hostile to the argument that marriage/long-term monogamy is normatively flawed and should be dethroned as the preferred way to order one's intimate life, than to the argument that two men or two women should be legally allowed to mimic heterosexual marriage. I am skeptical of the optimism of some marriage advocates who believe that legal marriage for lesbians and gays will “reduce social homophobia”²⁵⁹ and “do something amazing to the entire institution of marriage.”²⁶⁰ After all, we have ample historical precedent to conclude that the award of formal legal rights does not necessarily lead to social equality. Status hierarchies are, structurally and culturally, deeply embedded in our society and have proven quite resistant to change. I am reminded of Justice Harlan's dissent in *Plessy v.*

mwt/feature/2003/01/10/anti_marriage/index.html (last visited Mar. 12, 2004); Fred Bruning, *Altared States*, available at <http://www.newsday.com/mynews/ny-p2two3691424mar01,0,7675544.story> (last visited Mar. 12, 2004).

256. Witness the incessant parade of television shows that promote marriage, such as ABC's misogynistic *The Bachelor* and its counterpart *The Bachelorette*, Fox's *Average Joe*, The Learning Channel's *A Wedding Story*, Lifetime Television's *Weddings of a Lifetime*, and ABC's *Who Wants to Marry a Millionaire*. Fortunately, there are other programs, such as HBO's highly-acclaimed comedy series *Sex and the City*, that acknowledge and contest the norms that pressure young Americans into marriage.

257. See WARNER, *supra* note 254.

258. The subtitle of William Eskridge's book *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (1996) makes this point succinctly. See also JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004) (arguing that legalization of gay marriage can only strengthen the institution, pervasive separate-but-equal strategies would weaken the institution of marriage, and that same-sex marriage is the only social reform that can save gays from the “adolescent and unfulfilling lifestyle” of love and sex outside of marriage).

259. ESKRIDGE, *supra* note 47.

260. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 57, at 27.

Ferguson, in which he argued that allowing African Americans to ride on the same train with whites would not threaten white supremacy.²⁶¹ And so, as we have seen during the twentieth century, it in many ways has not.²⁶²

Moreover, as Warner points out, the presumption that marriage is transformable “places a high rating on conscious will. . . . Even when we think we are transforming something, we are not free from the history that socially constructs both marriage and us.”²⁶³ He goes on to argue that

[t]he definition of marriage, from the presupposition of the state’s special role in it to the culture of romantic love—already includes so many layers of history, and so many norms, that gay marriage is not likely to alter it fundamentally, and any changes it does bring may well be regressive.²⁶⁴

Again, although Warner does not couch his arguments in terms of gender-equality, his analysis resonates with mine. Just as racial integration, including the repeal of miscegenation laws, did not put an end to the dominance of the ideology of white supremacy, neither will integration of lesbians and gays into the institution of marriage attack the ideology that undergirds their oppression: sex-gender differentiation and hierarchy. Two integral parts of gender inequality are the practice of (compulsory hetero)sexuality and the regulation of sexuality by the state: marriage is deeply implicated in both of these things because it is the institution that is designated by the state as the only appropriate forum for sexuality. Keeping marriage legally restricted to male-female couples is one piece, but *only* one piece, of its role in the state’s regime for controlling sexuality and punishing those who resist the state’s vision of the good life. For marriage to be the only officially sanctioned way to live one’s life punishes individuals who choose not to marry, who are divorced, who have multiple sexual partners, who are single parents, and so on. The ability to freely choose how to order one’s intimate life is a right integral to gender equality; thus, the hegemony of marriage necessarily undermines it.

If marriage between men and women remains unequal after same-sex marriage is legalized, as it undoubtedly will, male supremacy will remain the dominant ideology. Same-sex marriage is not likely to alter

261. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”)

262. See, e.g., Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

263. WARNER, *supra* note 254, at 127.

264. *Id.* at 129.

that outcome, especially if the rhetoric employed to accomplish the goal of inclusion in the institution is internalized and same-sex marriage becomes nothing more than an assimilative tool for those who aspire to be the gay version of the Huxtables.²⁶⁵ If this is the direction we are going, we will end up with a world in which there will be “good gays” as there are “good blacks” and in which long-term, monogamous same-sex relationships (but not nonmonogamous relationships or single individuals of any nontraditional sexuality) are accepted because they are relatively rare and thus unthreatening to the maintenance of the sex-gender system. This vision goes hand in hand with the argument that same-sex orientation is biologically or socially immutable and thus that same-sex orientation is a numerically rare natural kind and a harmless aberration that will not threaten the propagation of the species.²⁶⁶ The assimilative path represents a profoundly regressive view of the role of same-sex sexuality in contemporary American culture. Because it does not sufficiently take account of the true reason for the stigmatization of same-sex sexuality—maintenance of gender inequality—it will ultimately be impotent in combating it.

B. Children

In no area of law is the issue of lesbian and gay rights more contentious than any context involving children.²⁶⁷ The idea of a world in which same-sex couples or lesbian or gay individuals raise children alongside opposite-sex couples or “heterosexual” individuals is very threatening indeed to those who oppose lesbian and gay existence. In fact, the specter of lesbian and gay parenting may be a significant part of the reason for the fierce opposition to same-sex marriage.²⁶⁸

Much has been written about lesbian and gay custody issues,²⁶⁹ adoption,²⁷⁰ and second-parent issues.²⁷¹ Several commentators have

265. See John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1445 (1997) (describing the Huxtable Family Syndrome as illustrated by the wildly popular Cosby Show, in which the Cosby family was presented as “just like” white families).

266. See, e.g., Polikoff, *supra* note 82, at 558-59.

267. See generally David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999); Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915 (2001).

268. See Wardle, *supra* note 53, at 884-91 (arguing that legalizing same-sex marriage might provide implicit judicial approval for “homosexual parenting”).

269. See, e.g., David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665 (1991); Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

noted that courts routinely justify their decisions against lesbian and gay parents in these cases in a variety of ways, including: social disapproval and possible ostracism of the child;²⁷² concern that the child is at risk of molestation by the parent or a partner;²⁷³ justifications based upon the illegality of the presumed sexual activity of the parent;²⁷⁴ and more generalized pronouncements that the child's moral development will be

270. See, e.g., Williams E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579 (1996); Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497 (1998).

271. See, e.g., Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997); Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991).

272. See, e.g., M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982) (accepting expert testimony that child will face social stigma because of gay parent to support change in custody); *In re M.J.S.*, 44 S.W.3d 41, 72 (Tenn. Ct. App. 2001) (Tomlin, J., dissenting) (citing social stigma as a reason to deny adoption to a same-sex couple); *Pulliam v. Smith*, 476 S.E.2d 446, 448 (N.C. Ct. App. 1996) (quoting trial court's finding that "there is a possibility of exposing children to embarrassment and humiliation in public because of the homosexuality of the [gay father] and his relationship with [his partner]... Living daily under conditions stemming from active homosexuality practiced in the [father's] home may impose a burden upon the two minor children by reason of the social condemnation attached to such an arrangement, which will inevitably afflict the two children's relationships with their peers and with the community at large"); *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (concluding that because mother had chosen not to hide her same-sex relationship, it was likely to cause embarrassment to her child); *Peyton v. Peyton*, 457 So. 2d 321, 324-25 (La. Ct. App. 1984) (noting that "embarrassment to the child" was one factor in evaluating whether a parent's sexual lifestyle was damaging to a child); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (noting that trial judge's finding that child had not been teased by his friends was an important factor in custody decision). Of course, it is important to note that many courts have rejected the social-stigma argument against gay parenting as well, some comparing the issue to race or disability. See, e.g., *In re J.M.G.*, 632 A.2d 550, 552 (N.J. Super. Ct. Ch. Div. 1993) (noting that courts often assume that harassment and stigmatization will occur, but that even where they do, courts should not give them effect); *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) (asserting that the merits of a custody arrangement should not depend on others' reaction to the parent and the effect it has on the child, analogizing having a same-sex parent to having a disabled parent or a parent in an interracial relationship).

273. See *Ex parte J.M.F.*, 730 So. 2d 1190, 1193 (Ala. 1998) (noting that father's fear that child had been sexually abused stemmed from fact of mother's lesbianism, though no evidence of sexual abuse was found); *J.L.P. v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (using expert testimony with respect to molestation of minor boys by adult males as relevant to custody decision).

274. See *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (stating that "the conduct inherent in lesbianism is illegal in Alabama," and cites sodomy statute in support of custody decision against lesbian mother); *Chicoine v. Chicoine*, 479 N.W.2d 891, 896-97 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part) (noting that lesbian mother is "committing felonies" citing sodomy statute); *Collins v. Collins*, 1998 WL 30173, at *6 (Tenn. Ct. App. May 30, 1988) (Tomlin, J., concurring) (citing sodomy statute as justification for denying lesbian mother custody); *J.L.P. v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (citing proscription on sodomy as one reason to deny gay father custody).

affected by the parent's sexual orientation.²⁷⁵ All of these concerns reflect recognition of and give judicial effect to anti-gay bias, but simply to point them out as such does not dig deep enough. Certainly, cultural myths that lesbians and gays are predatory and hypersexual partially give rise to the hostility toward lesbian and gay parents, but they do not tell the whole story.

In this Part, I will argue that in this as in other contexts the major, overarching concern is that the children of lesbians and gays will be gender-role nonconformists, whether sexually, socially, or both. This concern is often expressed in terms of concern that the children themselves will somehow learn "homosexuality" from their parent(s), which in turn is often expressed in terms of morality, propriety, and other coded terminology.²⁷⁶ But the fear of gender-role nonconformity is increasingly expressed directly, often in suggestions that children need to have one parent of each sex because their understanding of humanity will be truncated by having two examples of one sex rather than one of each.²⁷⁷ This argument is deeply problematic because it presumes the kind of inherent and intractable differences between the sexes that feminists have spent years challenging and refuting. It is a harbinger of the biological gender essentialism that is the hallmark of contemporary conservative, antifeminist thought. It has also been an effective means of limiting the rights of lesbian and gay parents.

275. See, e.g., *Ex parte* H.H., 830 So. 2d 21, 37 (Ala. 2002) (Moore, C.J., concurring) (noting that the mother had "participated in . . . illicit and immoral conduct . . . [and] would knowingly expose her children to its devastating effects"); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (stating that "a court cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development"); *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (asserting that there would be "no salutary effect for the young child in exposing him to the mother's miasmatic moral standards"); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (stating that "the father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian"). See also Shapiro, *supra* note 209, at 646-60; Strasser, *supra* note 209, at 69-88.

276. See, e.g., *Black v. Black*, 1988 WL 22823, at *2 (Tenn. Ct. App. Mar. 10, 1998) (court asserts that "subjecting children to living arrangements such as [a mother and her lesbian partner] on a daily basis could not be a proper atmosphere for young, pliable minds. We do not presume to make any moral judgments concerning Mother's activities insofar as it applies to consenting adults. However, when such a lifestyle could affect the molding of young minds, this Court must look at the social and moral aspects of the lifestyle"); *Pulliam v. Smith*, 476 S.E.2d 446, 448 (N.C. Ct. App. 1996) (quoting findings of trial court that gay father's "conduct is not fit and proper and [he] will expose the two minor male children to unfit and improper influences").

277. See *infra* notes 285-289 and accompanying text.

1. The Learned-Behavior Theory

Perhaps the most well-known and widely-cited account of the conservative opposition to lesbian and gay parents is Lynn Wardle's article, *The Potential Impact of Homosexual Parenting on Children*, in which he makes a number of arguments that prove to be quite helpful in revealing the gender basis of homophobia.²⁷⁸ One of these is the widespread belief that children of lesbians and gays are more likely to identify as lesbian or gay themselves as adults.²⁷⁹ Several courts have openly uttered this concern over the years,²⁸⁰ although in most cases the belief lurks beneath the articulated reasoning, hinted at only in coded terms like "moral," "proper," "fit," and "wholesome."²⁸¹ The essence of the belief might best be described as follows: because homosexuality is a lifestyle choice and not an immutable trait, it is also a learned behavior. If children grow up with homosexuality as the primary model of sexual/romantic love presented to them, they will learn to relate to members of their own sex in a sexual/romantic way. This outcome must be avoided at all costs.

The "learned-behavior" axiom has several corollaries, including the presumption that a gay or lesbian parent is promiscuous and will model that behavior to the children as well; the fear that the sexuality of the lesbian or gay parent is so wild and uncontrollable that she or he might molest her or his own child; and the conviction that the more open the gay or lesbian parent is about his or her personal relationships with same-sex partners, the more objectionable it is for that parent to be the custodian of a child.²⁸² All of these corollaries speak to the concern that

278. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833.

279. *See id.* at 851-54.

280. *See, e.g.*, *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., dissenting) (judge states that lesbian mother "has harmed these children forever" and "should be totally estopped from contaminating these children"); *In re Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) (rejecting trial court's view that children should be taught to be heterosexual and that visitation should not be allowed with gay father because it might cause the child harm); *Black v. Black*, 1988 WL 22823, at *3 (Tenn. Ct. App. Mar. 20, 1988) (asserting that "it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and . . . there is a strong possibility, because of the living arrangements of [the] mother and her lover, the children would be subjected to such influences"); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *J.L.P. v. D.J.P.*, 643 S.W.2d 865, 867-69 (Mo. Ct. App. 1982); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (accepting expert testimony that "homosexuality would be more likely to be learned by one who was exposed to it than by an individual who was not" and "that homosexuality is a learned trait").

281. *See supra* note 276 and accompanying text.

282. *See Shapiro, supra* note 209, at 647-49; *see also Ex parte J.M.F.*, 730 So. 2d 1190, 1194 (Ala. 1998) (change in mother's same-sex relationship "from a discreet affair to the creation

the child or children will identify as gay or lesbian as adults if they are allowed to live with a lesbian or gay parent, i.e., that the child will be a sexual gender nonconformist.

Some courts have premised their decisions *not* to disfavor lesbian and gay parents based on sexual orientation on the plethora of studies that indicate that children of lesbian and gay parents are not more likely to be lesbian or gay themselves.²⁸³ While this reasoning has undoubtedly helped many lesbian and gay parents retain custody of their children, it is premised upon the idea that if being lesbian or gay *were* a learned behavior, it would constitute a harm to children that would justify custody restrictions for lesbian and gay parents. In light of more recent studies that indicate that children of lesbian and gay parents are more likely to consider a same-sex relationship,²⁸⁴ advocates for lesbian and gay parents should seriously consider the consequences of disputing the learned-behavior theory such that it becomes the basis of custody decisions.

of an openly homosexual home environment” was sufficient to justify change in custody); Van Driel v. Van Driel, 525 N.W.2d 37, 39 (S.D. 1994) (upholding award of custody to lesbian mother and noting that the mother has been discreet about her relationship with her partner); Larson v. Larson, 902 S.W.2d 254, 255-56 (Ark. Ct. App. 1995) (court notes, in context of a custody dispute, that lesbian mother and her partner had applied for a marriage license and that they had engaged in sexual activity when the children were in the house); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (court asserts that although the mere fact of a parent’s homosexuality does not require a finding of unfitness, in a case in which the gay parent “openly resides with his or her partner . . . primary custody with the homosexual parent would rarely be held to be in the best interests of the child”).

283. Bezio v. Patenaude, 410 N.E.2d 1207, 1215-16 (Mass. 1980) (citing expert testimony indicating that most children raised by same-sex couples or by lesbian or gay parents become heterosexual adults); *In re J.M.G.*, 632 A.2d 550, 553-54 (N.J. Super. Ct. Ch. Div. 1993) (citing social science research indicating that children of lesbian and gay parents are no more likely than other children to identify as gay or lesbian as adults); Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (citing studies indicating that children of lesbian mothers are not more likely to be lesbian or gay); Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (stating that “this court takes judicial notice that . . . there is substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual”); *In re Caitlin*, 622 N.Y.S.2d 835, 840-41 (N.Y. Fam. Ct. 1994) (after noting that a reasonable objection to an adoption by a lesbian or gay parent “could be made if it could be shown that upbringing by same-sex parents negatively impacted the children . . .,” the court states that “[p]erhaps the greatest concern voiced about such children is [] that they will grow up to be homosexual, and that this” is not borne out by social science research).

284. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 OFFICIAL J. AM. SOC. ASS’N 159, 163 (Apr. 2001) (noting that “it is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian/gay parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents”).

2. The Gender-Identity Formation Theory

A second concern that has increasingly been articulated as a negative result of allowing lesbians and gays to be parents is that the children of such parents will not develop an “appropriate” gender identity, i.e., that they will be social gender nonconformists.²⁸⁵ For example, when the Mississippi legislature passed Senate Bill 3074,²⁸⁶ which prohibits two individuals of the same sex from adopting children together, in March 2000, the state director of the right-wing Christian American Family Association, instrumental in passing the bill, stated that one of his “primary fears [about same-sex couples adopting was] gender identity problems.”²⁸⁷ Some state courts have articulated the gender-identity formation theory in child custody or adoption cases to justify custody decisions that disfavored lesbian or gay parents.²⁸⁸ Others have expressed gender-based concerns in less coherent ways.²⁸⁹

285. See Wardle, *supra* note 278; Adams, *supra* note 270, at 593-95. Adams quotes extensively from the amicus brief filed by the right-wing Rutherford Institute in *Cox v. Florida Department of Health & Rehabilitative Services*, a case challenging Florida’s ban on gay adoption, in which the Institute described their position on proper homes for children as follows:

It takes two opposite sex people to nurture and raise children properly until they can care for themselves. In terms of sexual development: Boys need fathers so they can develop their own sexual identity; they need mothers so they can learn how to interact with the opposite sex. Girls need mothers so they can learn what it is to be a woman; they need fathers so they know how to interact with the opposite sex.

Adams, *supra* note 270, at 594-95. The brief went on to say that “[h]omosexuality . . . is fundamentally a problem of gender identity.” *Id.* at 595.

286. See 2000 Miss. LAWS 535, 2000 Miss. S.B. 3074.

287. Gina Holland, *Law Says Gays Can’t Adopt*, SUN HERALD, July 9, 2000.

288. The same argument has been raised in cases of transsexual or transgendered parents. See *D.F.D. v. D.G.D.*, 862 P.2d 368, 375 (Mont. 1993) (recounting and overruling trial court’s findings that child’s mental health was at risk and “that the child faced irreparable sexual misidentification” if joint custody was granted to cross-dressing father).

289. See *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002) (Moore, C.J., concurring) (citing *Leviticus* 20:13 (King James)) (offering the biblical argument that “the law of the Old Testament enforced [a] distinction between the genders by stating that ‘[i]f a man lies with a male as [he lies] with a woman, both of them have committed an abomination.’”); *Ward v. Ward*, 742 So. 2d 250, 253 (Fla. Dist. Ct. App. 1996) (citing fact that little girl “preferred to wear men’s cologne” as evidence of harm to child justifying change of custody); *Pulliam v. Smith*, 501 S.E.2d 898, 903-04 (N.C. 1998) (in justifying custody modification, the court notes that the children had seen their father and his partner “demonstrate physical affection, including kissing each other on the lips . . . [which] took place in the home in front of the children as the ‘provider’ of this couple prepared to leave for work” and that the father “kept photographs of ‘drag queens’ in the home”); *Breisch v. Breisch*, 434 A.2d 815, 817 (Pa. Super. Ct. 1981) (noting as evidence of harm that mother “is a lesbian who effects a masculine appearance, wears men’s clothing, and has a masculine oriented mental status”); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (citing testimony of psychologist who, when “[g]iven the choice of whether a homosexual relationship involving a mother in the submissive role or a normal relationship wherein males and females adhere to their roles,” the psychologist chose the latter and stated “it would be very difficult for [the boy] to learn and approximate sex role identification from a homosexual environment”); see also Yvonne A.

For example, a trial court in Illinois found that “having [a child] in the presence of gays and lesbians was endangering his gender identity and morals,”²⁹⁰ and went on to find that the child “has . . . a gender identity problem . . . and notwithstanding the child’s gender identity problem, which she learned [sic] in 1987, the [mother] took the child to a gay-lesbian parade.”²⁹¹ The same court accepted testimony from a psychiatrist who had never even met the child that “[he] might not develop a gender role identity and may be confused about what it is to be a male.”²⁹² Fortunately, the appellate court dismissed these findings and indicated that it was “disturbed by the judge’s numerous homophobic comments.”²⁹³ Still, given that many parents cannot afford the expense of an appeal,²⁹⁴ the possibility that these notions are widespread among trial judges does not bode well for lesbian and gay parents.

In Louisiana, an appellate court found that while a joint custody arrangement was proper, greater custodial time should be awarded to the father because the mother’s sexual orientation “is known and openly admitted, . . . there have been open, indiscreet displays of affection beyond mere friendship and . . . the child is of an age where gender identity is being formed.”²⁹⁵ In making this finding, the court accepted the testimony of a psychologist who gave the following statement on gender identity:

A two year old child is at a stage of development where they [sic] are forming a gender identity and learning sex appropriate roles for their own sex, whatever, masculine and female roles. It’s preferable that they have good role models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.²⁹⁶

Tamayo, *Sexuality, Morality and the Law: The Custody Battle of a Non-Traditional Mother*, 45 SYRACUSE L. REV. 853, 865 n.46 (1994) (describing questions asked by guardian ad litem in lesbian-mother custody case trying to establish gender roles in her relationship with her partner, such as “who is the man in your house?”).

290. *Pleasant v. Pleasant*, 628 N.E.2d 633, 638 (Ill. App. Ct. 1993) (describing the findings of the trial court).

291. *Id.* at 639.

292. *Id.*

293. *Id.* at 642.

294. Although the state is obliged to provide a free transcript to a parent in a case that involves termination of parental rights, it has no obligation to do so in a routine custody case. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

295. *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1st Cir. 1990).

296. *Id.* at 1275 (quoting testimony of psychologist) (spelling error by court reporter corrected).

Such fears are also being articulated as a concern about proper gender identification—the related but distinct idea that parents must be heterosexual because girls have to learn how to become women from (real) women, and boys have to learn how to be men from (real) men. For example, in *Lofton v. Kearney*, a challenge to Florida’s 1977 law banning adoption by homosexuals, one of the state’s primary arguments in support of the law’s rational basis was that homosexual parents would be unable to provide “proper gender identification.”²⁹⁷ The state argued in its memorandum of law supporting the motion for summary judgment that

sexual and gender identity is shaped through years of interaction with parents of both sexes, during which time a child identifies with similarities of the same sex parent, while she is imprinted with and develops expectations about the characteristics of the opposite sex, as well. The importance of dual-gender, heterosexual role modeling has been recognized by other courts [C]hildren optimally need both male and female influences to develop appropriately.²⁹⁸

Arguments about stigmatization and stability, usually front and center, were mentioned almost as afterthoughts.²⁹⁹

In affirming the grant of summary judgment to the state in *Lofton*, the United States Court of Appeals for the Eleventh Circuit prominently recounted the dual-gender parenting argument made by the state, noting that Florida’s asserted purpose in denying adoption to gays and lesbians was to “provide . . . the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a [sic] vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling.”³⁰⁰ The only other arguments the state put forth were that homes with married parents provided greater stability³⁰¹ and that it had an interest in promoting public morality.³⁰² Clearly, the state found its gender-based arguments the most compelling, as did the court.

297. 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001). *Id.* at 1383. *See also supra* notes 235-237 and accompanying text (describing similar arguments made by the state of Vermont in *Baker*).

298. Defendant’s Motion for Final Summary Judgment and Incorporated Memorandum of Law at 15-16, *Lofton v. Kearney*, 57 F. Supp. 2d 1372 (S.D. Fl. 2001) (No. 99-10058).

299. *Id.* at 16.

300. *Lofton v. Kearney*, 358 F.3d 804, 818 (11th Cir. 2004).

301. *See id.* at 818-19. Given the high divorce rate, such an argument is tenuous at best.

302. *See id.* at 819 n.17.

Some courts, in support of lesbian and gay parenting rights, have cited social science research suggesting that children of lesbian and gay parents do not differ significantly from children of heterosexual parents with respect to gender role behavior or gender identity.³⁰³ Advocates for gay and lesbian parents have utilized these theories in arguing that such parents should not be disadvantaged in custody disputes because of sexual orientation.³⁰⁴ Again, the implicit concession is that if the gender-role behavior of children of lesbian and gay parents *did* differ from that of children of “heterosexual” parents, that difference would provide a sufficient ground for limiting or denying custody to gay parents.

3. Protecting the Unconventional Family³⁰⁵

The most common response of gay and lesbian rights advocates, in both the courts and in the academy, to the learned-behavior and gender-role formation theories is to rebut them by reviewing and citing the social science evidence.³⁰⁶ It is unclear whether studies that claim to demonstrate conformity to traditional sex roles and sex-typed behavior of children of gay and lesbian parents were undertaken in response to conservative accusations of gender-role nonconformity or in anticipation of them. Either way, while their purposes are well-intentioned, the use of such studies by advocates of lesbian and gay parental rights is likely to have deleterious consequences.

Dr. Charlotte Patterson is one of the leaders in the field of social science research on this subject, and she has testified in lesbian and gay custody cases to her findings and those of other studies of children of lesbian and gay parents.³⁰⁷ She writes:

303. See, e.g., *In re J.M.G.*, 632 A.2d 550, 553-54 (N.J. Super. Ct. Ch. Div. 1993) (citing study finding that children of gay and lesbian parents “fall within normal bounds” with respect to gender identity and gender role behavior); *Blew v. Verta*, 617 A.2d 31, 36 n.2 (Pa. Super. Ct. 1992) (same); *In re Caitlin*, 622 N.Y.S.2d 835, 840-41 (N.Y. Fam. Ct. 1994) (same).

304. See, e.g., Amicus Curiae Brief of Distinguished Professors of Psychology, University of Mississippi in *Weigand v. Houghton*, No. 97-CA-01246 at 5 (arguing that sexual orientation of a parent does not prevent boys from acting masculine and most girls from acting feminine and citing numerous studies to this effect).

305. As will be discussed below, the title of this section is inspired by feminist psychologist Sandra Lipsitz Bem’s memoir on egalitarian marriage and feminist child-rearing. See SANDRA LIPSITZ BEM, *AN UNCONVENTIONAL FAMILY* (1998).

306. See, e.g., Ball & Pea, *supra* note 209; David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994); Shapiro, *supra* note 209.

307. See Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992); Charlotte J. Patterson, *Lesbian and Gay Families with Children*, in *THE LIVES OF LESBIANS, GAY MEN, AND BISEXUALS: DEVELOPMENTAL, CLINICAL, AND CULTURAL ISSUES* (Ritch C. Savin-Williams and Kenneth Cohen eds., 1995); see also Tamayo, *supra* note 289, at 859-62

Courts have expressed concern about sexual identity among children living in the custody of their lesbian or gay parents. Would girls in lesbian or gay homes grow up thinking of themselves as boys? Would boys grow up acting effeminate, or girls grow up behaving in masculine ways? Might children of lesbian or gay parents themselves grow up to be lesbian or gay? Reviewing the social science research on these questions [N]ot one study provides any evidence for concern.³⁰⁸

Patterson's characterization of the data as providing no evidence of harm (i.e., difference) is typical of the approach of articles in legal periodicals that weigh in favor of parental rights for lesbians and gays. Shockingly, many ostensibly pro-gay commentators cite social science studies that conclude that children of lesbian and gay parents are not in any significant way different from children of "heterosexual" parents without even questioning the implications of doing so or merely addressing the implications in a brief exculpatory sentence or footnote.³⁰⁹ Equally surprising is the fact that so few commentators spend any time at all asserting that identifying as gay or lesbian or engaging in so-called cross-sex behavior cannot appropriately be characterized as "harm."³¹⁰

Why should we be surprised and, moreover, why should we be upset to find that children of lesbian and gay parents are more likely to identify themselves as lesbian or gay as adults? Even if the learned-behavior theory were true, why are we so defensive if we truly believe that "there is nothing wrong with being gay or lesbian"?³¹¹ The conservative

(describing Dr. Patterson's testimony in perhaps the most well-known and written-about lesbian custody case, *Bottoms v. Bottoms*).

308. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 198-99 (1995).

309. See Adams, *supra* note 270, at 595-98; Ball & Pea, *supra* note 209, at 296-97 n.225 (noting in a footnote that the authors "question the notion . . . that children with 'relatively conflict-free acceptance of traditional gender roles' is a proper public policy goal"); Flaks, *supra* note 306, at 366 (citing social science evidence on gender roles and sexual orientation and noting that "questions about the desirability of perpetuating traditional gender roles is beyond the scope of this Article"); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOC. 21, 23-24 (1997); Kathryn Kendell, *Sexual Orientation and Child Custody*, 35 TRIAL 42, 42 (1999); Polikoff, *supra* note 82, at 544-45, 562; Shapiro, *supra* note 209, at 646-60; Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 722-23 (1998); David M. Rosenblum, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1676 (1991).

310. See Strasser, *supra* note 209, at 71-74 (noting that "willingness to accept that it would in fact be a harm to become gay or lesbian is unsettling [because] [s]uch a view seems to condone if not endorse the stigmatization of gays and lesbians," and noting that "there are clear difficulties" with allowing the fear that children of gays and lesbians will fail to conform to traditional gender roles to inform adoption policy "given the [Supreme] Court's unwillingness to allow states to enforce stereotypical roles for males and females").

311. *Id.* at 71.

opposition to lesbian and gay parents is premised upon an antagonism toward the existence of individuals who have a solid and public identity as gender-role nonconformists. When we answer that hostility with denials that the lives and courage of these individuals will have any lasting effect on their children or on the world, we sanction the bigotry we are trying to eradicate.

With regard to social gender-role behavior, to argue that children of lesbians and gays are no different from children of heterosexual parents will have equally harmful consequences for the future of the gender-equality paradigm and, indeed, the goal of gender equality itself. The findings of studies in this area are decidedly mixed, rather than balm for conservative fears.³¹² The studies indicate that children of lesbians³¹³ are no more likely to want to be of the opposite sex (and thus be diagnosed with gender identity disorder), and that lesbians' male children showed no significant differences from heterosexuals' male children in terms of dress, toy, and play preferences. However, they also show that daughters of lesbians are somewhat more likely to dress in "boyish" clothes, "see themselves in traditionally masculine jobs, such as doctor, lawyer, engineer, or astronaut, . . . [and] more likely to engage in rough-and-tumble play . . . [but] played with dolls just as often as the daughters of heterosexual women."³¹⁴ One study has concluded that girls have more flexibility in selecting their toys, types of play, and clothing because they are less likely to be censored for selecting masculine-typed things than boys are for selecting feminine-typed things, but that this trend was consistent between lesbian mothers, heterosexual mothers, and two-parent heterosexual families.³¹⁵ This is consistent with Mary Anne Case's observation that women are allowed to display masculine traits but men are not allowed to display feminine traits.³¹⁶

312. See Erica Goode, *A Rainbow of Differences in Gays' Children*, N.Y. TIMES, July 17, 2001, at F1 (discussing new study published in the *American Sociological Review* examining the social science research and concluding that children of lesbian and gay parents do exhibit some differences from children of "heterosexual" parents, including more flexibility with regard to gender roles and higher likelihood of considering having a same-sex sexual relationship).

313. Most of the studies done to date have studied children of lesbian mothers. *Id.*

314. Ball & Pea, *supra* note 209, at 292-93. Cf. Julie Schwartz Gottman, *Children of Gay and Lesbian Parents*, in *HOMOSEXUALITY AND FAMILY RELATIONS* 177, 190-91 (Frederick W. Bozett & Marvin B. Sussman eds., 1990); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (both finding no significant differences in gender development).

315. See Beverly Hoefler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981).

316. See Case, *supra* note 32.

Lynn Wardle's interpretation of these studies is that there are "significant differences between children raised by lesbian mothers versus heterosexual mothers in family relationships, gender identity, and gender behavior."³¹⁷ This is a gross overstatement of what the studies actually concluded, which was that daughters of lesbian mothers might be more likely to display a combination of traditionally masculine and traditionally feminine traits. If the studies are right, then these daughters do not exhibit any behavior that would be considered outside the mainstream by most people. A girl aspiring to be a doctor or a lawyer is hardly gender-atypical behavior in the twenty-first century. It is important to note that the most commonly cited studies have been criticized for methodological deficiencies and that their accuracy is questionable.³¹⁸ Nevertheless, whether there are significant differences or not, the legally relevant question is whether any differences found signify harm.

Thus, what I want to concentrate on here is not the results of the studies cited, but how the use of such studies bears upon the future of the gender-equality paradigm. I cannot stress too strongly that the belief that children of lesbian and gay parents will display gender-atypical behavior is an utterly illegitimate basis upon which to deny such parents custody, visitation, or adoption rights. To cite studies reassuring opponents of gay rights that this belief is unfounded in support of lesbian and gay parents endorses their belief in the legitimacy of the goal of raising gender-conforming children. If such a goal is judicially accepted, it could portend disastrous consequences for all parents who wish to raise their children to defy traditional gender roles.

For example, in her book *An Unconventional Family*, feminist psychologist Sandra Lipsitz Bem describes her egalitarian marriage and feminist child-rearing practices. Bem developed several nontraditional parenting practices to inoculate her children against being inculcated into traditional gender roles, homophobia, and sex-negativity. Inherent in her brand of parenting were things such as accepted nudity, allowance of "cross-gender" behavior, acceptance of masturbation, and early sex education—all practices that probably would have rendered her an unfit parent in the eyes of many family court judges in this country, then and now.³¹⁹ At the end of the book, Bem includes interviews she conducted with her adult children reflecting on their upbringing.³²⁰ Both children

317. Wardle, *supra* note 278, at 852.

318. See, e.g., Stacey & Biblarz, *supra* note 284.

319. See BEM, *supra* note 305.

320. See *id.* at 178-205.

come across as intelligent, articulate, well-adjusted, and also somewhat gender-nonconforming³²¹—as one might expect. For these two gifted, vibrant adults to be characterized as having been harmed by their upbringing is ludicrous. But when we argue that lesbian and gay parents will raise gender-conforming children in *support* of their right to custody, we are simultaneously arguing that people who raise gender-nonconforming children are less than fit parents. This is a result that will ultimately hurt both lesbian and gay parents and the prospect of achieving gender equality in our society.

Moreover, for the state to enforce gender conformity in the area of family law does not harmonize with the emerging norms in employment discrimination law that proscribe the enforcement of gender stereotypes. The connection between the contexts is clear: if children are forced to replicate traditional gender roles and behavior in the home, they will most likely continue to replicate them as adults at the office. Even though the (rare) nonconformist may not legally be punished, no major transformation in the way Americans view sex-gender will occur unless it begins at home. Thus, advocates of utilizing the gender-equality paradigm in the employment context must concern themselves with its use in the family law context as well, for it is here that gender lines are perhaps most rigidly policed. Arguments by conservatives about sex-gender difference and “complementarity” are nothing more than tactics designed to perpetuate gender inequality and stigmatize all individuals who do not conform to traditional gender roles. These ploys must be contested lest the gains we have made in moving toward gender equality be eviscerated and forgotten.

V. WHY THE LAW MUST RECOGNIZE THE GENDER-EQUALITY PARADIGM

As I have shown in Parts II and III, examining the contexts of employment discrimination and family law reveals that sex-gender

321. For example, her son sometimes wears skirts, prefers “emotionally intense discussion[s] of the inner details of life,” and is more affectionate with other men than most men he knows. *Id.* at 181-84. He also “find[s] it annoying” that he is more attracted to women than to men, and says that “being manly is the last thing I want to be.” *Id.* at 186-87. When asked how his upbringing had enhanced his life, he answered simply, “I get to be a complete person. That’s what it comes down to.” *Id.* at 190. Her daughter considers herself more aggressive than most women in dating situations, does not remove her body hair, has been attracted to both men and women, and does not necessarily believe in monogamy. *Id.* at 195-98. She expressed discomfort with the fact that she wants to be attractive as a woman, and stated that it was difficult to deal with dating because she felt like “an ugly-duckling gender nonconformist who had a problem with being a girl and a problem with femininity because I knew it was a conventional gender trap just waiting to eat me up and spit me out in a little pink bow.” *Id.* at 200.

inequality, broadly defined to include sexual orientation discrimination, can only be combated through legal recognition of the gender-equality paradigm. I will now discuss why the gender-equality paradigm is superior to other legal strategies and argue that the law must acknowledge its truth.

Toni Massaro's 1996 article *Gay Rights, Thick and Thin*, makes an admirable effort at evaluating the various legal strategy approaches to litigating for lesbian and gay rights, organizing them into the helpful categories of "thick" or complex, layered doctrinal arguments—First Amendment, privacy, and equality—and "thin" or simple, unadorned arguments—calls for rational basis, à la *Romer v. Evans*,³²² accompanying appeals to the empathy of judges.³²³ Massaro's thesis is that the thin doctrinal arguments are the best strategy for pursuing gay rights.³²⁴ Because the article is so well-written and well-organized, yet its thesis in my view so far off the mark, I will borrow Massaro's categories as a jumping-off point for my discussion of why the law must recognize the gender-equality paradigm in understanding "sexual orientation."

A. *Reason and Empathy: Romer's Rational Basis Test and Normalizing Narratives*

According to Toni Massaro,

the lesson of [*Romer v. Evans*] is that [gay rights] advocates should avoid thick doctrinal arguments that alter existing legal categories, extend the upper echelon tiers of review, or construct gay rights as such. Rather, they should emphasize thin doctrinal arguments that merely say that homosexuality cannot and should not be a basis for official discrimination.³²⁵

Litigants, she says, should appeal to neutrality principles, conventional understandings, and rationality, and should not attempt to persuade judges to define or endorse homosexuality or bisexuality.³²⁶

While in the short term Massaro's strategy might be more successful than others, as was illustrated by the 2003 decision in *Lawrence v. Texas*, several objections can be raised in response to it. First, the thin-argument approach has little or no substantive content and thus is too shallow to pack any kind of real punch, especially in terms of the law's role in changing attitudes as well as actions. The implicit or

322. 517 U.S. 620 (1996).

323. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).

324. *Id.* at 47.

325. *Id.*

326. *Id.*

explicit contention of those who advocate a rational basis approach to gay rights is that discrimination against nontraditional sexualities is irrational.³²⁷ Such theorists see *Romer v. Evans* and *Lawrence v. Texas* as significant victories in the struggle for acceptance of those sexualities. But *Romer* and *Lawrence* are too unsteady pegs on which for gay rights advocates to hang our hats.³²⁸

From a gender-equality perspective, and probably from other perspectives as well, discrimination against nontraditional sexualities is absolutely rational. It is willfully ignorant to posit that there is no logical basis for the state to discriminate against those it sees as undermining institutions and hierarchies that contribute to its stability and enable its survival. Such an approach attempts to paint nontraditional sexualities as benign and as having little effect on society. This obscures the likelihood that lesbians, gays and bisexuals would not be so demonized if they did not pose a real threat to someone's vision of the good. People who are sympathetic to gender equality and sexual freedom tend not to perceive this threat, so to them the prejudice seems irrational. But to those who find the sex-gender system to their advantage, such discrimination is eminently rational, just as racism is rational because it redounds to the self-interest of certain segments of society. Our job is to convince judges that this kind of discrimination is *wrong* and thus should not be endorsed or perpetuated by the state. As Cass Sunstein has argued, the claim that discrimination against nontraditional sexualities is irrational is actually "a moral argument about liberty and equality, one that opposes other moral arguments. The claim of irrationality disguises the necessary moral argument."³²⁹

Thus, Massaro's suggestion that the Court's decision in *Loving v. Virginia* was precipitated by a change in judges' perception of the rationality of laws against interracial marriage is unpersuasive. She contends that once judges began to see miscegenation statutes as the product of "mere hostility" (thus irrational), it was at that point that they were found unconstitutional.³³⁰ But the existence of miscegenation

327. To her credit, Massaro acknowledges that "the bias against homosexuality is not easily reduced to the status of an irrational legislative reflex, given the long history of treating this prejudice as a sensible expression of cultural and religious values." *Id.* at 93-94.

328. It is significant to note here that Justice O'Connor was the only member of the six-Justice majority in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), who would have decided the case on the basis of Equal Protection based on the decision in *Romer*. *Lawrence*, 123 S. Ct. at 2484-88 (O'Connor, J., concurring). This supports my thesis that to argue that anti-gay animus is irrational does not get at the root of the problem.

329. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 5 (1994).

330. Massaro, *supra* note 323, at 94.

statutes was a central piece of the Jim Crow agenda for reasons that go far beyond “mere hostility”; they functioned to perpetuate the ideology of white supremacy, not only by implicitly stating that people of color were too far beneath whites to qualify as appropriate spouses (and sexual partners), but also by trying to keep the distinctions between such persons as marked as possible by preventing mixed-race births.³³¹ As in the case of sex, marked racial difference was (is) critical to the maintenance of hierarchy and discrimination. To characterize miscegenation laws as based upon “mere hostility” is to gloss over the ways in which they promoted white supremacy and reified the concept of race.

Even if it is an accurate characterization of what went on in the minds of judges to say that miscegenation laws began to look irrational, it is hardly constructive to advocate acquiescing to the often insubstantial analysis by judges of issues of such critical importance to making progress toward equality. On the contrary, one would hope that our goal would be to persuade judges by educating rather than by appealing to unawareness of cultural dynamics. Similarly, to put all our eggs in the irrationality basket in the case of gay rights is to waste a valuable opportunity to expose what lies behind the animus toward individuals who have nontraditional sexualities.

The other piece of Massaro’s thin-argument strategy is appealing to the empathy of judges through narrative and personal experiences. The idea is that if judges realize that same-sex relationships are based on love and caring that is in all relevant respects the same as the romantic love that “heterosexual” couples feel for each other, the moral opprobrium that comes from such judges’ perceptions that same-sex relationships are primarily sexual, thus not deserving of the law’s protection, may be overcome.³³²

There are a number of reasons why this approach is a bad idea. First, it gives too much credence to natural law arguments against “homosexuality” that posit that same-sex sexuality is tantamount to masturbation and cannot be a positive good.³³³ Rather than countering the natural law camp’s assertion that sexuality is evil unless sanctified by heterosexual marriage and the possibility of conception,³³⁴ an attempt to

331. See *Loving v. Virginia*, 388 U.S. 1, 7-11 (1967).

332. Massaro, *supra* note 323, at 102-08. This idea has also been advanced by Professor Marc Fajer. See Fajer, *supra* note 6, at 516-70.

333. See, e.g., Finnis, *supra* note 53, at 1063-70.

334. See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 265-76 (1995) (describing conservative and natural law arguments in favor of discrimination against homosexuals).

justify nontraditional sexuality through love would actually tend to ratify that premise. Moreover, the prim, romanticized vision of sexuality that such stories promote represents just so much sentimentality about long-term monogamy and romantic love—a vision that is not only flatly false with respect to many sexual relationships between people of all sexualities, but also one that promotes stigmatization of any sex that takes place outside of the officially-sanctioned monogamous-couple model. As noted above, this vision hardly furthers either sexual freedom or gender equality.³³⁵

Perhaps the strongest objection to the thin-argument strategy Massaro advocates is its possible collateral effects. Why the thin-argument strategy has been successful, at least in the short term, is that thin arguments avoid the subject of the transformative effect that acceptance of nontraditional sexualities could have upon society. This type of legal strategy is troubling because it concedes too much and asks for too little. Though all of the various strategies that have been tried have drawbacks and limitations, yielding to rational basis is to place victory today at all costs above a more meaningful, if less immediate, victory down the line. The consequence of avoiding the subject of transformation may be giving up on transformation as a goal of the movement—either consciously, by settling for “the best we can do” right now, or unconsciously, through neglect. This has occurred in the women’s rights movement with the transformation of the discourse on abortion from one of women’s equality to privacy and choice³³⁶ and in the civil rights movement with the conversion of the subject of affirmative action from being primarily about remediation to being primarily about diversity.³³⁷ If we decide that today is more important than tomorrow, we will have to live with the consequences of that decision.

B. Neutrality: The Problem with Libertarian Arguments

Some commentators have argued that strategies that emphasize individual rights and principles of neutrality—chiefly the First Amendment and the right to privacy—are the most promising for

335. See *supra* Parts III.A.3 and IV.A.

336. See MACKINNON, FEMINISM UNMODIFIED, *supra* note 57, at 93; Polikoff, *supra* note 252, at 1541-43. See generally FROM ABORTION TO REPRODUCTIVE FREEDOM (Marlene G. Fried ed., 1990).

337. This idea was first advanced and conditionally accepted in the context of graduate school admissions in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), was marginally accepted in *FCC v. Metro Broadcasting*, 497 U.S. 547 (1990), was cast into doubt by *Adarand v. Peña*, 515 U.S. 200 (1995), and was recently upheld in the academic context in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

litigating lesbian and gay rights.³³⁸ As Massaro notes in her critique of these libertarian arguments, the First Amendment has been a relatively successful argument in certain contexts for pressing gay rights-based claims, in part because this approach appeals to principles of neutrality in free speech that are considered by many to be quintessentially American.³³⁹ Privacy claims, she observes, have been far less successful because of the *Bowers v. Hardwick* canard and the general reluctance of courts to extend substantive due process.³⁴⁰ Of course, since *Bowers* was overturned in July 2003, the privacy claim has made a significant comeback.³⁴¹ Still, the use of libertarian arguments, successful or not, remains problematic.

While I agree with some of Massaro's critique of libertarian arguments for gay rights—for example, that both the free speech and privacy approaches fail to cover critical contexts in which individuals would need the law's protection³⁴²—I take issue with many of her conclusions about the merits of these approaches. From a gender-equality/anti-subordination perspective, the main problem with neutrality arguments is that their effect is often to sanction existing misallocations of power and status. For example, although the First Amendment was once primarily a litigation vehicle for progressive or left causes, it has been coopted by the right in the past twenty or thirty years to undermine the gains made by feminism, anti-racism, and the gay rights movement, a phenomenon J.M. Balkin calls "ideological drift."³⁴³ Freedom of association, for instance, has long been and remains a potent weapon of those who wish to discriminate against others on bases the state may view as illegitimate,³⁴⁴ making the use of such claims to advance gay rights, in Massaro's words, "the riskiest approach of all," since "freedom to choose one's companions typically works both ways."³⁴⁵

338. On the First Amendment, 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 (1994); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993); and Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998). On the right to privacy, see, for example, Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989).

339. Massaro, *supra* note 323, at 58-61.

340. Massaro, *supra* note 323, at 63 (citing 478 U.S. 186 (1986)).

341. See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

342. Massaro, *supra* note 323, at 61-64.

343. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-84.

344. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

345. Massaro, *supra* note 323, at 66-67.

Yet, while acknowledging their limitations, Massaro comes to some troubling conclusions about the merits of neutrality-based arguments. She describes freedom of expression as “isolat[ing] the true nature of some—perhaps most—opposition to gay rights. It focuses judicial attention on the ‘offense-to-our-sensibilities’ objection that underlies many anti-gay measures in a constitutional setting that flatly rejects ‘mere offense’ as a reason for official censure.”³⁴⁶ This argument is closely related to the characterization of anti-gay prejudice as irrational, which, as noted above, is evasive and overly simplistic. Although the discourse in popular culture³⁴⁷ and sometimes in judicial opinions³⁴⁸ often concentrates on visceral reactions, that does not answer the question of what *causes* those reactions. Massaro’s implicit suggestion that we dumb our arguments down to appeal to the masses promotes a strategy of acquiescing to low-level cognitive processes rather than trying to educate people about why they instinctively feel so strongly about same-sex relationships. The gender-equality paradigm reveals that hostility to gay rights is based upon far more than mere offense to sensibilities. To contend otherwise, even pragmatically, would be to take a step backwards.

Some of Massaro’s conclusions about privacy fare no better. Her solution to the problem that courts have not been receptive to claims of privacy based upon sexual autonomy is for advocates to “rephrase the issue as the right to love, versus a right of sexual freedom If lawyers can demonstrate the connection between ‘homosexual activity’ and ‘family,’ then the internal logic of the privacy case law points toward protecting same-sex relations instead of against it.”³⁴⁹ Again, this approach concedes too much to the natural-law view of sexuality and implies that monogamous marriage-like relationships are the only acceptable way to order one’s intimate life—or at least the only one the state should recognize or protect. It also implicitly accepts the premise that assimilation, rather than transformation, is or should be the goal of the lesbian and gay rights movement. This is not to say that love and

346. *Id.* at 60.

347. See Mello, *supra* note 72, at 188-211 (reproducing letters to the editor that appeared in Vermont newspapers in the wake of *Baker* and the passage of the civil union law that reflect the anti-gay sentiments of average Americans (or at least average Vermonters)). The letters Mello cites include sentiments such as: “two men or two women getting married to each other is sick”; “the proof . . . that woman and man were made for each other is clearly evident in their plumbing connections, which fit perfectly”; and “homosexual men dressed in women’s clothing and make-up, here soliciting . . . I am sickened by this behavior. It is disgusting at best.” *Id.* at 188, 202, 203-04.

348. See *Ex parte* H.H., 830 So. 2d 21, 26-37 (Ala. 2002) (Moore, C.J., concurring).

349. Massaro, *supra* note 323, at 64, 66.

human connection are unimportant or that the law has no reason to promote them, but rather to suggest that limiting the forms that love can legally take (even in order allegedly to promote it) may paradoxically limit the prevalence of love itself.

A central problem with neutrality arguments in any context is that they are devoid of moral content. Thus, they are hollow and unsatisfying for use as a rallying cry or an overarching framework for conducting movements for social change. To argue for freedom as a good in and of itself implicitly denies that freedom can be (and often is) used for evil purposes as well as good—and that the state does and may legitimately infringe upon individual freedom when it prevents harm or in some other way serves the public good.³⁵⁰ What is contested is not liberty, yea or nay, but rather what serves the public good and what does not—questions of morality. To advocate for license alone articulates no moral vision that speaks to the responsibilities that citizens have toward each other. In fact, popular anti-gay discourse evinces an intense fear of too much freedom caused by a relaxation of social norms, and because of this seems to be preoccupied with a sense of dread that takes on nihilistic proportions. This reflects a reliance on social norms to take up the slack that law has relinquished in the context of American democracy. My argument is not that all social norms are invalid, but that old ones must replace new ones in order for society to progress toward equality. Thus, although in some instances it may be appropriate for the state to refrain from taking a position on contested cultural issues, in others it may be an abdication of duty *not* to do so.

In this way, arguments for neutrality as a legal strategy for advancing gay rights are ultimately unpersuasive. As Massaro notes, “a rigorous content-neutral First Amendment and privacy principle could indirectly result in antigay employment policies, housing discrimination, and even public hate speech. . . . [T]he real problem is affirmative bias against gay men and lesbians, not merely a failure of neutrality . . . this bias is so pervasive and deep-seated that . . . traditional neutrality-based theories have been unable to extirpate it.”³⁵¹

350. A classic, perhaps hackneyed, example of this is Justice Holmes’ declaration that one cannot shout “fire!” in a crowded theater, even though she believes she should be free to do so, because the potential for harm is greater than the good of free speech in that instance. *See Schenck v. United States*, 249 U.S. 47, 52 (1919).

351. Massaro, *supra* note 323, at 71-72.

C. *Equality: Gender's Answer to the Failure of Neutrality and Suspect Class*

Many gay rights advocates over the years have written in support of the argument that individuals who identify as lesbian, gay, and/or bisexual should qualify for suspect class status under the Equal Protection Clause of the Fourteenth Amendment.³⁵² This argument has been unsuccessful in several circuits³⁵³ and may have been foreclosed by *Romer*.³⁵⁴ The much-discussed shortcomings of equal protection jurisprudence aside,³⁵⁵ there are good reasons that gaining suspect-class status may not be the best long-term approach for gay-rights advocates.

First, because the paradigmatic equal protection case is based on race, other groups vying for suspect-class status must analogize themselves to people of color. As Massaro points out, “[a] central practical problem with [a suspect class] strategy . . . is that race discrimination and sexual orientation discrimination are not identical. . . . No strict constructionist or tightly historical approach to the Fourteenth Amendment will do.”³⁵⁶ Because of the centrality of race to equal protection jurisprudence, a suspect-class strategy for gay rights implicates two controversial questions that have stymied courts and communities: I will call them, respectively, the question of immutability and the question of identity. Because both questions have been examined

352. See sources cited *supra* note 4.

353. See *Holmes v. Cal. Nat'l Guard*, 124 F.3d 1126 (9th Cir. 2000); *Equal Found. of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 927 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); *cf. Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989).

354. See *Romer v. Evans*, 517 U.S. 620 (1996) (applying the rational basis test to invalidate an amendment to the Colorado state constitution prohibiting all governmental action designed to protect gays, lesbians, and bisexuals from discrimination).

355. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323-24 (1997); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Halley, *supra* note 111, at 507-16.

356. Massaro, *supra* note 323, at 74. A complete analysis of the problems with race-gender or race-sexual orientation analogies is beyond the scope of this Article. For more on these issues, see, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1469-1505 (2000); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., 1998); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); and Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”: Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997).

at length by others,³⁵⁷ my inquiry will focus on how the gender-equality paradigm provides a solution to the problems presented by these two questions.

The question of immutability haunted the quest for suspect class from the start and probably helped derail the argument's success. Immutability is a central, though perhaps not a necessary, element of suspect-class status in Equal Protection Clause jurisprudence.³⁵⁸ In part because of its legal relevance, and in part because we live in a culture in which immutability is often seen as the only defense against the claim that individuals create and thus deserve their own misfortunes,³⁵⁹ many LGBT rights advocates have understandably adopted the belief that "homosexuality" is an immutable, biologically-based trait. Others who favor gay rights dispute the immutability argument.³⁶⁰ Though it is admittedly an interesting academic inquiry, from a gender-equality perspective the immutability question is legally irrelevant—both to the *reason* for pursuing legal and social equality and to the ways in which that goal is pursued.

Also, from a gender-equality perspective, the immutability defense is troubling. The premise of the gender-equality argument is that sexual orientation categories originated to serve the needs of maintaining the sex-gender system in our culture, including keeping sex-gender difference salient and preserving social institutions such as marriage and the patriarchal family in their current, gender-unequal form. The argument from immutability, on the other hand, implies that sexual orientation is a natural kind that always existed but was only recently discovered. It also bears a striking resemblance to—indeed, it relies

357. On immutability, see, e.g., Halley, *supra* note 111. On identity, see, e.g., Halley, *supra* note 110.

358. See Ackerman, *supra* note 355 (arguing that *Carolene Products'* prescription of discreteness and insularity as prerequisites for heightened scrutiny are inadequate because political powerlessness is not always dependent on them). Because suspect-class status has not been extended to any classifications that are not considered immutable, it is difficult to say whether immutability is a necessary criterion, or whether discreteness and insularity have simply overlapped with immutability in the protected classes.

359. See Linda Hamilton Krieger, *Afterword: Socio-legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 511-12 & n.133 (2000) (citing social science research indicating that "patterns of causal attribution powerfully affect . . . people's willingness to help a stigmatized other").

360. See, e.g., Halley, *supra* note 111, at 507-16; STEIN, *supra* note 131, at 31. One factor that complicates discussions of immutability is that anti-gay forces also dispute immutability, insisting that "homosexuals" can be converted to "heterosexuality." See, e.g., <http://www.exodusnorthamerica.org>. However, conservative opposition to immutability stems from hostility to the existence of individuals with nontraditional sexualities, whereas pro-gay commentators who dispute the argument from immutability generally do so to explain the pitfalls of reliance upon it. These thoughtful objections to the immutability defense probably have not filtered down into the popular discourse on the subject of gay rights.

upon—the belief that sex-gender differences are biologically based and thus unchangeable. Thus, if immutability is the basis for acceptance of lesbian and gay existence, we could ironically find ourselves in a world in which same-sex sexuality is accepted but in which male/masculine supremacy is still the dominant ideology.

Another problematic aspect of the argument from immutability is its potential to reify or fix sexual orientation categories in ways that will serve to constrain sexual agency and prevent growth and change in our perceptions about what sexuality is and how it relates to our selves. Many individuals find that their sexualities undergo various changes over the course of a lifetime; for example, some who consider themselves bisexual have relationships with both men and women at the same time or in no fixed pattern. For such individuals, arguing that their behavior is somehow determined by biology seems disingenuous or simply false.

The problem of fixing sexuality with respect to immutability emerges even more strongly in the question of identity, the second challenge inherent in the suspect-class approach. The question is, in essence, whether “homosexuality” is primarily about acts (e.g., sodomy) or primarily about identity (e.g., an essential feature of the self). The necessity of arguing for recognition of lesbian and gay identity by the law came about in part because of *Bowers*, but activism had been centered around identity for many years prior to the 1986 decision. What the *Bowers* decision did was to equate homosexuality one-for-one with sodomy, an equation that Janet Halley has compellingly challenged by reminding us of sodomy’s prior and sometime present status as an act that anyone can commit, as well as how it has been deployed as the embodiment of identity against those who identify as homosexual.³⁶¹

The problem of identity is similar to, but distinct from, the problem of immutability. To posit that essential sexual identities based on the sex-gender of object choice exist does not necessarily entail the argument that such identities are biologically determined. However, the two problems mirror each other. Both concepts serve to constrain agency by requiring fixedness of sexual preferences and essentialize sex differentiation. The concept of sexual orientation as an unchangeable identity has probably remained salient both because of a consensus based upon individual experiences and a strategic attempt to elucidate the harms of discrimination against individuals by analogy to other “isms.” Both of these reasons are problematic—first, not all people who are attracted to members of their own sex perceive this fact as central to their

361. See generally Halley, *supra* note 110.

identity. Second, the analogy strategy has backfired miserably, not only failing to achieve suspect-class status for lesbians and gays, but leading to a backlash in which conservatives have emphasized the differences between “homosexuality” and race.³⁶²

Even if the courts were not hostile to same-sex sexuality (as act *or* identity), there is reason to maintain serious skepticism about the law’s ability to formulate definitions of sexual identity that accurately capture or allow for the tremendous range of possibilities that should be allowed to exist. Though it now seems highly unlikely to occur, if suspect-class status were granted to “homosexuals,” courts would be faced with the task of defining homosexuality. This raises important questions: would “bisexuals” be included? What about individuals who choose not to embrace a sexual orientation label? Nontraditional sexual identities remain contested, in my view rightly and healthily so. It is unfortunate enough that such identities are often policed within the LGBT community;³⁶³ to assign such a task to the courts would be a step backwards.

The gender-equality paradigm offers a solution, albeit an incomplete one, to the problems of immutability and identity because it could potentially elide both questions altogether in terms of legal strategy. If “sexual orientation” is recognized as a gender-based category, the question of whether it is immutable disappears altogether (or at least collapses into the question of whether sex-gender is immutable, itself a crucial, but different, inquiry). Similarly, if a commitment to gender-equality is truly realized, the act versus identity conundrum would recede because the acts would not be proscribed and the identity would no longer exist. That we as a culture are a long way from this conceptual space is undeniable; yet, retaining such aspirations is the only way to begin to get us from here to there.

Moving outside of equal protection jurisprudence demonstrates further how crucial the gender-equality paradigm for reevaluating sexual orientation discrimination is to realizing sex-gender equality for all. As I showed in Parts II and III, the gender-equality perspective illuminates much of what has gone on in employment-discrimination law and family law with respect to “sexual orientation.” Despite the vast differences between the two contexts, with regard to the gender-equality paradigm there is a striking parallel between the cases and doctrines. The

362. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285, 286, 288-90 (1994).

363. See, e.g., Yoshino, *supra* note 65, at 398-99, 407-10 (describing gay investment in erasing bisexuality).

explanation for many of the unsatisfactory outcomes in both areas lies in the lack of judicial recognition of the gender-equality paradigm's expansive view of gender.³⁶⁴

For example, the law's explanation for the rejection of the sex-discrimination argument in the context of same-sex marriage, embodied in DOMA and the many state statutes that define marriage as between a man and a woman,³⁶⁵ is the mirror image of the justifications used for the equally sex-discriminatory outcomes in the dress-code cases. In both instances, the result is justified by the rationalization that because the restriction in question is visited upon both sexes equally—neither men nor women may marry an individual of the same sex, and both men and women are required to wear “gender-appropriate” clothing and adhere to the employer's grooming standards—there is no sex discrimination. As the miscegenation analogy shows, the Supreme Court rejected the same argument in the context of race in *Loving v. Virginia*.³⁶⁶ Because both restrictions have the effect of furthering sex-gender inequality, even if the effect is seen as indirect, both constitute sex discrimination.

There are at least three possible explanations for why the courts have not been willing or able to recognize the miscegenation analogy in the case of same-sex marriage or disparate dress codes in Title VII cases. Either the case has not been made forcefully or convincingly enough that both restrictions help to perpetuate the ideology of male/masculine supremacy; or the courts have not bought the argument; or they do not believe that it is a constitutional imperative to eradicate male/masculine supremacy (or some combination of all three). The result and reasoning in *United States v. Virginia* (the VMI case), in which the Court all but declared that sex-based classifications are subject to strict scrutiny,³⁶⁷ would seem to weigh against the latter. However, there is still a great deal of confusion in the courts as to whether gender-based discrimination is sex discrimination and, if so, how far the prohibition on such discrimination extends. Thus the holding in the VMI case may be more limited than it would appear.

I do not believe that this sex/gender problem is simply a matter of ignorance on the part of the judiciary. Rather, it is part of a process that Reva Siegel refers to as “preservation-through-transformation,” in which the underlying ideology is preserved by transforming the discourse on an

364. Kay, *supra* note 51, at 2019.

365. See sources cited *supra* note 248.

366. 388 U.S. 1 (1967).

367. 518 U.S. 515 (1996).

issue to adapt to changing social norms.³⁶⁸ In this instance, formal sex equality rhetoric and a narrow definition of “sex” has become the vehicle for legally preserving sex-gender inequality even as it remains culturally contested.³⁶⁹

Thus, we see the same phenomenon occurring both in Title VII cases that deal with the gender-based issues of dress and appearance, transsexualism, effeminacy, and “homosexuality,” and in family-law cases that address the gender-based concerns about allowing individuals who identify as lesbian or gay to marry or to be parents. Male/masculine supremacy has been protected by interpreting the law in such a way as to ensure that the sex-gender system is not undermined. The vehemence and success of the opposition to legal rights for those with nontraditional sexualities is a part of this preservation project, but the gender-equality paradigm reveals that it is of a piece with other ways in which gender equality has been hindered in the law.

D. Truth and Consequences: Challenging the Sex-Gender System

When I presented an unfinished version of this Article, some concerns were raised about the consequences—political, theoretical, and legal—of accepting the gender-equality paradigm for thinking about lesbian and gay rights. What I found most intriguing was the resistance to seeing “sexual orientation” as a part of the larger structure of gender differentiation and hierarchy. I knew that the sexual orientation paradigm was deeply entrenched in our cultural consciousness, but I had not foreseen such hostility to the suggestion that “we’re all in this together.”

A central aspect of the resistance to recognizing sexual orientation as an integral part of the sex-gender system comes from the inability to recognize the former category as derivative of the latter. Some commentators have called the gender-equality paradigm a “dodge” or “sleight of hand”³⁷⁰—in other words, dishonest. But as I have attempted to demonstrate above, the connection between sexuality and gender is too

368. Siegel, *supra* note 262, at 1113. See generally Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178-87 (1996).

369. See generally Krieger, *supra* note 359, at 477 (offering an account of backlash and arguing that “backlash is about the relationship between the legal regime enacted to effect social change and the system of existing norms and institutionalized practices into which it is introduced”).

370. See, e.g., Eskridge, *supra* note 101, at 1104 (noting that “once they grasp the sex discrimination argument for homo equality, the immediate reaction of lawyers is: This is a trick argument! It has to be wrong!”); Hunter, *supra* note 52, at 409 (noting that “[t]o many people, including many feminists, the sex discrimination argument in gay rights cases seems too clever by half . . . it seems to be a dodge around what they sense is really going on, which is the subordination of homosexuality”).

central a part of our culture to be ignored or to allow us to reify sexual orientation categories whose existence can be traced to the maintenance of gender inequality. This is why I believe it is important to directly address accusations of “piggybacking” or “bootstrapping”³⁷¹ gay rights onto women’s rights. The dictionary defines “bootstrap” as “to help oneself without the aid of others; use one’s own resources”³⁷² and “piggyback” as “added or tacked on; supplementary,” “to attach or ally to as or as if a part of the same thing,” and “to use, appropriate, or exploit the availability, services, or facilities of another.”³⁷³ These definitions, when applied to the topic at hand, imply that advocates of the gender-equality paradigm are using whatever resources they feel are at hand and taking something essentially separate, and perhaps smaller, and attempting to hitch it to something different, and perhaps larger. This is a gross mischaracterization of what the gender-equality paradigm does. Rather than tying together two disparate concepts, it illuminates the ways in which two concepts, thought of as separate, are actually part and parcel of the same ideological and social structure.

It is likely that some of the resistance to including sexual orientation in discussions of gender comes from the misperception of gender issues as women’s issues (i.e., only women are gendered as only people of color are raced), as I noted in Part I.B. In this view, gender issues are things like equal pay, child care, abortion, and so on—ones that are thought of as primarily affecting women. But just as white people are raced, men are gendered, and illuminating and opposing the ways in which men are gendered is integral to the liberation of all people—not just women.³⁷⁴

Edward Stein has arguably been the most enthusiastic critic of the gender-equality perspective as a litigation strategy. In his article, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, he mostly attacks the formal sex-discrimination argument using

371. See *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (noting that the sex-stereotyping theory suggested by *Price Waterhouse* “would not bootstrap protection for sexual orientation into Title VII as discrimination because [of sex]”); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979) (“We must again reject appellants’ efforts to ‘bootstrap’ Title VII protection for homosexuals.”).

372. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 241 (1996).

373. *Id.* at 1467.

374. See, e.g., SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* (1999); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 502-09 (1991) (describing the ideology of masculinity and the impossibility of fully achieving it); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996) (exploring the ways in which men are harmed by gender stereotypes and how men have been treated in feminist legal theory).

the miscegenation analogy as his reference point.³⁷⁵ He claims that because of the fact that anti-miscegenation laws were intended to keep white women from marrying men of color, one could hypothetically argue that such laws were based on sexism in the same way that the sex-discrimination argument for gay rights argues that laws prohibiting same-sex marriage are.³⁷⁶ This type of analogy, he posits, mischaracterizes the class harmed by the laws. Just as women were not the group primarily disadvantaged by anti-miscegenation laws, neither are women the group that is primarily disadvantaged by laws prohibiting same-sex marriage.³⁷⁷ Stein goes on to argue that laws that discriminate against lesbians and gay men should not be overturned on “other grounds” because this would “mischaracterize[] the core wrong of these laws.”³⁷⁸

Once again, Stein’s objections to the gender-equality perspective, like those discussed in Part I.B.2, evince a very limited view of gender and the goals of feminism. In adhering to neatly-drawn charts with their rows and cells, he has utterly missed the point of the argument that “homosexuality” is a form of gender nonconformity and is despised for that reason. In my view, it is not women who are primarily harmed by anti-gay laws—it is all people, men, women, children, despite their sexual self-identification.³⁷⁹

Indeed, it may be that men are actually more constrained by contemporary gender roles than are women. Reflecting changes that have occurred in gender norms for women in the past century in particular, it is now acceptable, and in some cases even desirable, for women to display traditionally masculine traits in certain contexts. The historical emphasis on the absolute separation of and gender-role polarity between men and women has been replaced by a regime in which women may now work outside the home, obtain higher education, and possess some degree of sexual and reproductive autonomy, although they do none of these things without opposition. Men, as Mary Anne Case has compellingly demonstrated, are not allowed similar flexibility in displaying qualities traditionally denoted feminine.³⁸⁰ Thus, women’s

375. 49 UCLA L. REV. 471 (2001).

376. *Id.* at 496-97.

377. *Id.* at 497-502.

378. *Id.* at 503.

379. Stein’s most persuasive argument against the use of the gender-equality or sex-discrimination arguments, ironically, is that any success these arguments experience will put sex-discrimination law at risk of being weakened by a backlash. *Id.* at 513-14. Given the tenor of the times at present, I cannot argue with his contention. But I reiterate my view that any legal victory not based on truth will fail to endure through the backlash that is the inevitable product of social change. See *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (J.M. Balkin, ed., 2001).

380. See Case, *supra* note 32, at 13.

broader range of gender choices relative to men actually underscores and reinforces the bottom line: the “sexual hierarchy in which women are regarded as inferior to men, and femininity is regarded as inferior to masculinity.”³⁸¹

To say that men and masculinity are valued over women and femininity, however, is not to say that men are not victimized by gender roles or that feminists should only be concerned with helping women. In the long run, feminism will fail to help anyone unless its objective is to disestablish sex-based gender roles altogether. This struggle must involve men and show that the interests of all are served by the eradication of the sex-gender system. When individuals are free to develop their personalities, character traits, personal appearances, and sexualities free from the stifling influence of gender norms, only then will feminism have made meaningful and lasting change.

VI. CONCLUSION

The strength of the voices arguing that gender and sexual orientation are integrally related to each other has grown steadily over the years since the idea was first articulated. As the history and contemporary construction of sexual orientation categories demonstrates, gender is too fundamental a part of such categories to be ignored or glossed over—not the least reason for this being that sexuality and gender are so intimately enmeshed. Because the gender-equality perspective explains sexual orientation discrimination in a way that other approaches have failed to, it is only appropriate that gay rights advocates have utilized its logic in the struggle for legal rights and recognition.

The gender-equality paradigm has been gaining ground with gay rights advocates and in the courts in the past few years. Though its immediate future in the law is uncertain, it is starting to take hold in the public imagination. These are welcome developments. Acceptance of the gender-equality paradigm and a commitment to radical and lasting change are the only answers to the question of how to avoid dismantling or undercutting the fragile structures built in the twentieth century to further equality and end subordination—and to bring us closer to a world in which all those who wear dresses have nothing to fear.

381. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762 (1997).