

APA Newsletters

NEWSLETTER ON PHILOSOPHY AND LESBIAN, GAY,
BISEXUAL, and TRANSGENDER ISSUES

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Philosophy and Lesbian, Gay, Bisexual, and Transgender Issues

William S. Wilkerson, Editor

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FROM THE EDITOR

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Two pleas

The bad news is that I missed that last issue of the newsletter altogether. This was due to two factors: (1) there was an almost complete lack of submissions by the new deadlines, and (2) we were already running one issue behind. I regret this lapse and apologize that we've been without a letter for some time. (I also wish to express my appreciation of Katarina Majerhold's long enduring patience, as she was the only author who submitted for the last issue of the letter and has been waiting to see her essay come out.) The good news is that we have a newsletter this term and we are finally on the correct schedule, with one commitment for the fall newsletter already.

As things currently stand, the newsletter of the Society for the Lesbian and Gay Philosophy (SLGP) has no editor and Gary Jaeger is uncertain of its future. Until that newsletter is taken up again, the APA newsletter will be the sole place to try out and publish new ideas, gain updates on recent publications and developments, and hear the latest news that bears on LGBTQ philosophers. (Or, as contributor Richard Nunan puts it, "the latest dish.") So, my first of two pleas: *please send in, not only any features you'd like published, but all the relevant information about your upcoming or recent publications, news items about LGBTQ philosophy or philosophers, and anything else of importance.* Aside from email networks among friends, this newsletter is now our sole means of staying in touch and disseminating information that affects us all.

This edition contains a variety of features on a grab bag of topics. This pleases me as editor, since my approach to this newsletter remains, *let a thousand flowers bloom.* We have essays on pornography and homophobia, trans identity, gay marriage from the perspective of both divorce and law, and the politics and metaphysics of choice in sexuality. This is also a quite international edition, with contributors from both Slovenia and Sweden.

For our next issue, I hope to have a more focused theme. As Richard's article makes clear, the Supremes (the court, not the group) will soon rule on two very significant cases that cover gay marriage. Richard gives us the context for these rulings in this issue, and promises to write about the significance and scope of the rulings when they are handed down in early summer. So, my second plea (which is really just a CFP) is as follows:

The fall issue of the APA LGBT newsletter will cover issues of gay marriage, and the related topics of queer families,

monogamy, polyamory, and the like. Please send in any contributions you might have that relate to this topic. The deadline for submission to the newsletter is July 1, so I'd like everything submitted by June 1 (except for pieces that depend on the actual court ruling, which may come late in June).

Finally, since I've not had the space to do this formally, I'd like to bid "hello" to our new chair, Alastair Norcross, who discusses our struggle to get the APA to enforce its anti-discrimination policy and argues forcefully for their justness.

CHAIR'S CORNER

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First, I would like to thank Talia Betcher for her excellent work as chair of the LGBT committee for the past three years. Of special note is the committee's work, led by Talia, concerning the APA's policy regarding institutions that fail to comply with the APA's nondiscrimination policy. Although I wasn't on the LGBT committee when it worked on this issue, it is one of special concern to me. At the 2009 APA Pacific Division business meeting, I introduced a motion urging the APA board to clarify and strengthen its existing nondiscrimination policy, so as to make clear that it applies to discrimination on the grounds of conduct and not just "orientation." The motion passed unanimously and was brought to the APA board meeting that fall. This resulted in a strengthened and clarified policy, but with a somewhat unsatisfactory enforcement mechanism. In particular, schools that refused to comply with the policy were still allowed to advertise in the JFP (*Jobs for Philosophers*), but were "flagged" as noncompliant (at least, that was the theory). To many, this didn't seem to reflect a strong enough opposition to unjustified discrimination. This committee drafted and unanimously approved a statement regarding this issue, which was also unanimously approved by the Inclusiveness Committee, and presented to the APA board of officers at their November 2011 meeting (for more detailed information about this issue, and the text of the committee's letter to the board, see both the spring 2010 and fall 2011 newsletters). As a result, the board changed the APA policy to disallow schools who refuse to comply with the nondiscrimination policy from advertising in the JFP. This was the result of much hard work and dedication, both by members of this committee and others.

When I discuss this issue with others, philosophers and nonphilosophers alike, I frequently encounter an objection. Why, I am asked, should the APA take a stand on this issue? Surely, they press, shouldn't the APA remain neutral on an issue

that is clearly controversial? The answer is at least two-fold. First, whether the issue of the wrongness of discrimination on the grounds of behavior that is integrally tied to sexual identity is really controversial depends on one's definition of "controversial." If all it takes for a position to be controversial is for there to be some people who disagree with it, then the wrongness of this discrimination is indeed controversial. But so is the wrongness of racial discrimination, gender discrimination, torture, and even slavery! The relevant question for a philosopher is not whether someone disagrees with your position, but whether they have any good reasons for their disagreement. In this case, it is clear that they do not. The most common reason I have heard (and read) in support of this discrimination is that certain religious traditions, associated with the schools in question, require it. I honestly don't know whether that's true. Religious traditions are themselves notoriously subject to differing interpretations. In any case, it is irrelevant. I appreciate the importance that religion plays in the lives of many people, but religion cannot be an excuse for immorality. If your religious tradition *really* demands that you practice such discrimination, so much the worse for your religious tradition (at least that part of it). The second part of the response to the objection that the APA shouldn't take a stand on such issues is simple. Who better than the APA to take a stand? The APA is the largest professional organization for philosophers. Ethics is the largest subfield of philosophy. If the APA cannot take a stand on a clear ethical issue, who can? Should the AMA not take a stand on whether the blood circulates through the body? How about the American Geographical Association (if there is one) taking a stand on whether the earth is flat? Public opinion is, thankfully, changing fast in favor of equality for LGBT persons, including marriage equality. But even if it weren't, the APA would be justified in taking a strong stand against discrimination. I am proud to be a member of an association that is committed to the ethical treatment of all its members, indeed all persons.

In other news, the LGBT Committee held sessions at both the Central and Pacific APA meetings in 2012. The Central session was chaired by Raja Halwani (School of the Art Institute of Chicago), and featured Stephanie Kapusta (University of Western Ontario), "A Philosophical Account of Transgender Narratives of Incongruence," and Cori Wong (Pennsylvania State University), "Where are the Gay Girls? Re-cognizing Homophobia." At the Pacific division we co-sponsored, with the Society for Lesbian and Gay Philosophy, a session titled "Queer and Trans: Issues in Ethics, Politics, and Representation." This was chaired by Cheshire Calhoun (Arizona State University), and featured Carol Quinn (Metropolitan State College of Denver), "Queer Ethics," Alexis Shotwell (Laurentian University), "The Queer Work of Remembering for the Future: Affect, Memory, and Bioethics," Christine Pierce (North Carolina State University), "Why Gay and Feminist Scholars Should Stop Opposing Same-Sex Marriage," and Richard Nunan (College of Charleston), "The Crying Game: Deceptive Transsexuals in Film Criticism." At the 2013 Pacific APA meeting, we have an author-meets-critics session on Mel Chen's *Animacies: Biopolitics, Racial Mattering, and Queer Affect*. Alastair Norcross (University of Colorado, Boulder) will chair the session, Mel Chen (University of California, Berkeley) will be the featured speaker, and Kim Hall (Appalachian State University), Richard Nunan (College of Charleston), and Alexis Shotwell (Carleton University) will serve as commentators.

I hope you enjoy the current issue of the newsletter, and I wish everyone the best for a great year.

ARTICLES

"Born that Way?" The Metaphysics of Queer Liberation

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In a short paper entitled "Identity and Identities," first published in 1995, Bernard Williams wrote:

The self-conscious adoption of a gay or straight life has its significance, surely, because it is not just joining one or another club but counts as a recognition of something. At the same time, that consciousness requires also that being gay or straight should not just be matter of genetic or developmental determinism. There must be space for both nature and the will.¹

Williams is commonly regarded as one of the most influential moral philosophers of the twentieth century, but he was certainly no expert in gender studies or queer theory. This passage, however, is uncanny in its prescient and concise statement of the metaphysical conflict which engulfs the political project of queer liberation. If queerness were strictly a matter of free choice, then it would not seem serious enough to merit an emancipatory political agenda—and the opponents of queer liberation might be justified in telling queers who complain about discrimination and violence to "choose a different lifestyle." If, on the other hand, queerness were strictly determined by biological or social factors, then it would be very difficult to make sense of all the ways in which queers do in fact make choices about their identities, and of the significance these choices have for them. "Coming out" to loved ones or colleagues, seeking friends and partners within the communities one regards as one's own, or, in the case of many transgendered persons, opting for hormone treatment and major surgery, with all their physical and psychological side effects, are neither simply choices, nor are they simply the end result of some causal chain. They belong to the strange class of things one is compelled to do, but must nevertheless freely choose to do. "[In such cases], though I may feel that I have come there voluntarily, what I have come to lies outside my will: something is given, even though I must choose to take it up."²

The matter is complicated by the fact that the concept of "sexual identity" is itself contested by queers. The term "queer" was and is used to cast into doubt the idea that sexual or romantic identifications are stable in the way the word "identity" suggests. "Queer" can refer to a type of person, but it can also refer to a type of act, and it can be used to leave unclear the makeup of a person's sexual behavior and romantic interests.

Even if there are queer identities, what appears to unite them is their opposition to the gender- and sex-dichotomous heterosexual mainstream.³ When we look at the sometimes violent tensions within and between the queer communities,⁴ this unifying principle might seem rather thin and insignificant. But despite the annoying fuzziness of concepts like "sexual identity," "sexual freedom," and "queer," queer liberation as a political project has rather clear aims and strategies: Increase the visibility of LGBTQI-persons and their social and political influence. Defend their rights. Protect them from violence. We know it when we see it happen, and we know it when we see it fail.

If we reflect on the political, legal, and moral progress queers have triggered and witnessed over the past decades,⁵ we may come to think that what matters in queer liberation is the expansion of capabilities: legal rights and protection; safe, welcoming spaces; role-models. In other words, we may come to think that what matters for queers is a *compatibilist freedom to act*. But I will argue here that this is not enough. What queer liberation aspires to also is a—metaphysically, rather strange—freedom to choose one’s sexual character and one’s sexual identity.⁶

I will first consider a popular argument in favor of queer liberation, namely, the idea—made into a catchy pop tune by Lady Gaga—that queers are “born that way,” and should therefore not be subjected to political, legal, or social discrimination and violence. The “born that way” argument is essentially a compatibilist argument—and a utilitarian one, but that is less important for my purposes here. Its philosophical “grandfathers” are Thomas Hobbes and David Hume, and I will use Hobbes here to illustrate the crucial features of the argument and the ways in which it captures important aspects of queer liberation. I will discuss the determinism inherent in this compatibilist argument in both its biological form—the idea that queerness is “in the genes” or “in the hormones”—and its social form—the idea that sexual behavior is gendered behavior and thus socially conditioned, learned behavior. Both of these compatibilist accounts have an important flaw: They cannot explain why there is a loss of freedom and a failure of the project of queer liberation under conditions of hormonal, genetic, or social “re-programming.” In response to this flaw, I very briefly sketch a Kantian account of freedom as the transcendental freedom to choose one’s character.⁷

Born that way

Queer activists and allies often defend themselves by appealing to the naturalness and thus the supposed causal inevitability of queerness. We can paraphrase these appeals as follows:

Premise 1: Queerness is grounded in a bundle of innate qualities that we did not choose and have no control over. We were “born that way.”

Premise 2: People should not be punished, discriminated against, victimized, etc. for innate qualities they did not choose and have no control over.

Conclusion: Therefore, people should not be punished, discriminated against, or victimized for their queerness.

As it stands, this clearly is a bad argument. The most obvious problem with it is that Premise 2 is false.⁸ We judge and punish people and limit their rights, even if their behavior is grounded in a bundle of innate qualities. For instance, someone who had very poor aggression control due to innate factors does not have more of a right to exercise violence, and she will see her rights limited if she acts violently.⁹ But perhaps all we need is an amendment to the second premise.

Premise 2*: People should not be punished, discriminated against, victimized, etc., for qualities they did not choose and have no control over, *as long as acting on these qualities does not do harm to or infringe on the rights of others.*

This is certainly closer to what activists and allies are after when they make “born that way” arguments. They argue not simply that queerness is natural in the sense of “occurring without human influence,” but also that queerness does not harm anyone and should therefore not be sanctioned morally or legally.

But notice how such arguments emphasize the role of features which are unchosen and outside of our control

such as genetic or hormonal predispositions. Proponents of such arguments accept a deterministic view on gender. They emphasize the causal inevitability of queerness in response to those who label it a “lifestyle choice.” But if queerness is causally determined, we should ask whether there is any room left for queer freedom.

For one answer to this question, we can look to Thomas Hobbes, together with David Hume one of the most important compatibilists of early modern philosophy. Hobbes and Hume both argued that the notion of a free will—in the sense of a will that is not determined by anything—is metaphysical nonsense. If our decisions and actions are not caused by anything, then they are random, and randomness is not freedom. The only freedom that mattered for Hobbes was the political and social *freedom to act*. The “*Free-Man*,” in Hobbes’s words, “is he that in those things which by his strength and wit he is able to do is not hindered to do what he has a will to do.”¹⁰

Hobbes’s compatibilism can help us understand the conception of freedom implicit in the “born that way” arguments. In places where homosexual sex is against the law, it will be much harder for queers to act on their sexual desires. In places where partners of the same sex cannot marry, it will be more difficult for them to form stable families. In places where it is very difficult or impossible to legally change one’s sex, it will be much harder for transgendered persons to harmonize their gender identity with their social identity.¹¹ In places where politicians and the police do not care about violence against queers, it will be much harder for queers to move in public spaces *as queers*. And finally, in places which allow cosmetic “reassignment” surgeries on intersexed infants, these infants are being robbed of the opportunity to make their own, informed decision about their bodily identities later in life.

We could suggest then that queer liberation is essentially about giving queers the power to act within their social environments. The thought that queerness itself might be fully causally determined—by genetic or hormonal factors—need not worry us.

Gender as scientific paradigm

Compatibilist accounts of queer liberation are, as the name suggests, fully compatible with scientific accounts of gender. Both gender and sex function as *paradigms* of biology and anthropology.¹² They are fundamental categories on which the actual practice of these sciences relies, and the use of these categories itself is not commonly questioned. The study of the development of sexual characteristics and gendered identities in humans, is based on the assumption that there are two and only two sexes, and that a person’s sex characteristics have a causal influence on their gendered identity and their gender expression. Without such assumptions, it would not make sense, for instance, to do research on the influence of “male” hormones on the development of gender identity and sexual orientation in human “females,” or to go on a scientific quest for the gene(s) which are responsible for erotic desire for the same sex, or to wonder whether there is something about the biological features of “women” that makes them compassionate but bad at math and lateral parking.

The categories of “man” and “woman,” “masculine” and “feminine” are built into the foundation of such research and they are not themselves the object of scientific investigation. Sex research is not asking *what men and women are*; rather, it is trying to find out *how they become what they are*. A currently fashionable instance of this type of research is the theory of “brain sex,” the idea that prenatal hormone levels influence the formation of the brain, which in turn is supposed to explain

certain typical social features of “boys” and “girls,” “men” and “women.”

Scientists realize, of course, that not all human beings fall neatly into the categories of “men” and “women,” or “male” and “female.” But such cases are seen as rare exceptions, and sometimes, they are used to prove the norm.¹³ My biggest concern with pro-queer arguments that appeal to the “naturalness” of queerness is that they align themselves with a science which is not just rigidly sex-dichotomous, but also looks at queerness with pity at best, and in the worst case, treats it as a “fixable” problem. Medical research into intersexuality has triggered the development of surgical techniques to correct the appearance of intersex genitals.¹⁴ Research into possible genetic and hormonal contributions to homosexuality has created the prospect of a “cure” for it. “Gender dysphoria” is still an accepted and widely used pathologizing term for various forms of transgender behavior and transgender identity. This science is not an ally but an institutionalized practice which supports and defends anti-queer norms.

Gender as social norm

The scientific paradigm of sex and gender has been roundly criticized, not just by feminists or queer activists, but also by feminist philosophers of science.¹⁵ Feminist critique after de Beauvoir’s *Second Sex* and before its own self-deconstruction had as its mantra that we must decide between “sex”—biological features—and “gender”—social roles. The point of this mantra was to emphasize that while women cannot change their biology, they certainly can change the social roles attributed to them. The sex/gender-distinction was once in the service of autonomy and fundamentally opposed to the idea that *biology is destiny*.

But feminists quickly realized that the sex/gender distinction alone was not enough, since “gender” does not simply describe how people identify themselves. It describes how people are identified by others. Gender is not a personal choice, it is *a set of social norms*.¹⁶ Judith Butler has argued that gender is a constant performance. She called it a “copy without an original,” because gender lacks a biological essence. In Butler’s view, *the constant performance of gender creates the illusion that gender is a natural fact*.¹⁷ But to say that gender is a performance does not mean that its script is within our control. It does not even mean that we are allowed to improvise.

Each individual performance of gender supports the larger social context in which it happens. And the larger social context in turn determines which individual performances are acceptable and intelligible, and which are not. We are clearly not free to perform our gender identity in any way we want. Ask transgendered people who are trying to use their gender’s bathroom. Ask anyone who gets stared at because their gender is not easily discernible. Or consider how much time many of us spend on being able to properly present our gender in public, *queer and straight alike*. If one’s own performance falls outside of the range of the queerly intelligible, or if one simply cannot afford the means necessary to perform a certain way—perhaps because one lacks the information or the money necessary to buy the right brands or the right accessories—one runs the risk of not being recognized as a member of one’s own community.¹⁸

What was once hailed by Butler as a parody of the almighty “heteronormative matrix” has now become a “queer matrix,”¹⁹ with negative consequences for those unwilling or unable to follow its rules. Gender as a norm depends on the constant repetition of the performances it prescribes. But if this is true for the ways in which we perform “woman” and “man,” then it must certainly be true for the way in which queers perform their own takes on masculinity and femininity. Just as there are

recognizable and unrecognizable ways of performing “man,” for instance, there are recognizable and unrecognizable ways of performing “butch.” And these ways must be learned and trained. Gender with all its specificities and permutations is a social script which operates through us. It is not something we can create or destroy at will.

So is there a place for autonomy? Once again, the answer has to be Hobbesian in spirit. When queers demand positive role models on TV, or criticize the existing ones, they implicitly acknowledge the importance of role models for adolescent queers. This is not a trivial matter. Consider the “It gets better” campaign, started by Dan Savage and his husband in response to the suicides of teenagers who had been bullied at school because they were gay or presumed gay.²⁰ “It gets better” essentially aims to tell children and young adults that there are social roles and places to move to where they do not have to worry about “being different,” and are safe from hate and violence. It empowers by suggesting that queerness is something to aspire to, and it offers potential role models. And it can do all this without questioning how gender, queer or straight, operates as a social norm.

Gender and simple compatibilism

Hobbesian compatibilism captures important aspects of queer liberation. But as important as these aspects are, I think explaining queer liberation in terms of simple compatibilism alone is philosophically unsatisfying and politically dangerous. On the compatibilist view, biological or social scripts simply operate through us, we are their stage. But should we not be their director as well? The question whether and to what extent we exercise freedom over these “scripts” never arises. And this should make us uncomfortable. If there are biological and social “scripts” which “determine” our gender identities and gender expressions, then does not autonomy require that we are able to take an effective attitude toward these scripts? That we are able to reject some parts of them and embrace others, and to use them for our own purposes, sort them, separate them, put them back together, and interpret them, the way a director or an actor does with a playwright’s script? In more technical terms, doesn’t autonomy require that we have *second-order volitions* about these gender scripts, that is, that we have the ability to make effective decisions for or against the biological forces and social norms which influence us?²¹

Consider the critical potential that is lost if we accept simple compatibilism. I already mentioned in passing the prospect of medical “cures” for queerness, e.g., genetic manipulation of fertilized eggs before they are implanted in the womb.²² On a compatibilist account of freedom, we could not criticize such a “cure” on grounds that it undermines autonomy. If freedom merely means the freedom to do what you want to do, pre-implantation genetic engineering does not limit the autonomy of the fetus in any way. If the “cure” works, it will simply have different desires, it will be *a different person*, but it will be no less free to do what it wants. As long as we remove or repress any queer traits before the person in question has any attitude about them, there will be no loss of freedom. If we ever acquire the medical knowledge and technology to allow parents to “select” straight (or gay) children by utilizing PGD (pre-implantation genetic diagnostics), we are, according to the compatibilist account, not affecting anyone’s autonomy. We are simply creating a person who is different from the person who would have come into existence without our intervention.

This is true for social interventions as well. If queer traits were “caused” by social scripts (for instance, queer role models), then we could attempt to limit the influence of such role-models without affecting the autonomy of those who might follow them. This notion is behind recent political backlashes

against queers that stop short of criminalizing or re-criminalizing queer sex, e.g., in the Russian Federation. Homosexuality was decriminalized in Russia in 1993, but a number of municipalities, St. Petersburg among them, have enacted laws that punish “homosexual propaganda,” i.e., flying pride flags or just mentioning homosexuality in public.

It is easy to ridicule such laws and the notions behind them. But suppose that censorship of queer-friendly speech *was indeed an effective means of decreasing the number of queers*. Would queer activists have anything to complain about? Not if they are compatibilists. If *becoming* queer was just a matter of having the right role-models, then removing queer role-models would not affect the autonomy of those the censorship is trying to “protect”—instead, it would make people different from what they would have been without it.²³

If there is anything wrong with biological and social interventions of the sort I have just described—other than what we can say about them from the point of view of freedom of speech or the ethics of PGD in general—an account of queer liberation rooted in simple compatibilism does not help to explain what it is. Since these interventions take effect before there is a queer person to speak of, they do not seem to restrict queer agency.²⁴

A Kantian suggestion

How can we clarify in theoretical terms that which is missing in simple compatibilism? I do not have the space here to develop a full-fledged answer, but I want to briefly suggest that the answer could be Kantian in spirit. Kant rejected both simple compatibilism and simple incompatibilism, and he defended what could be called a *sophisticated compatibilism*. He saw clearly that freedom as exemption from causal relations—simply incompatibilist freedom—was no more than random chance. But he also mockingly called simple freedom to act the “freedom of a turnspit.”²⁵

Kant’s entire practical philosophy rests on the premise that true freedom means more than just the ability to act on one’s “inclinations.” True freedom for Kant is the ability to govern oneself in accordance with rules—“maxims” one gives oneself—and ultimately, to follow the moral law out of one’s own free volition. Since the maxims we live by could, from a deterministic perspective, be seen as causal results of the formation of our character, Kant assumes that we must be able to think of ourselves as if we chose our own characters. He does this by relegating our freedom to the realm of *noumena*—of things as they are in themselves. Since *noumena* are not possible objects of experience, they are not subject to causal laws. And thus Kant distinguishes between an “intelligible”—*noumenal*—and an empirical character, the former belonging to the realm of freedom, the latter to the realm of strict causal determination.²⁶

But what does this metaphysical “trick” have to do with queer liberation? One crucial achievement of queer liberation is that it has made queer people visible and acceptable *as queer persons* rather than merely as *people who engage in queer activities*. One indication of this is that “the homosexual” did not exist as a kind of person with a specific character and social identity until early in the twentieth century.²⁷ As William Wilkerson puts it: “Coming out really is not the revealing of the desire, but the interpretation and creation of [gay] experiences in light of available social categories.”²⁸ When these categories are missing, such experience is not possible. It is one of the biggest achievements of queer liberation that it has made such categories widely available. This achievement, in turn, allows queers to subsume their queer acts and desires under an identity.

“Queer liberation” does not stop at enabling “queer acts”—as important as that is. It aims at making queers a visible, recognizable, and accepted type of person. And by doing that, it portrays “being queer” as a kind of self-actualization, or self-authorship. And this is why the attempts at “reprogramming” I described in the previous section seem so insidious, and so fundamentally opposed to the project of queer liberation: They do not delegitimize queer acts, they delegitimize queer persons and queer identities. They aim to make it *unthinkable* to be queer.

In a metaphysical framework in which everything is subject to causal laws, neither moral personhood nor queer personhood matter. Kant saw clearly that morality—as the ability to choose in accordance with the moral law—would be impossible within a compatibilist framework. In this framework, morality would lack the elements of self-governance and self-authorship that is central to Kantian ethics. We can apply a similar reasoning to queer identities. A simple compatibilist framework cannot make sense of the idea that queers could choose to be queer in accordance with the social roles available to them. A Kantian framework could.

I believe that the “choice to be queer,” while metaphysically strange, nevertheless has real significance for queers. To be able to understand oneself as the author of one’s desires, one’s character, and one’s identity is crucial in a world in which queerness is still widely stigmatized and often reduced to raw biological impulses, or failed socialization, or both. Perhaps a world in which sexual identities mattered less, and were less rigidly enforced by social and medical means, would be a better world. But in our world, these identities still matter, and they are enforced, on queers and against queers. And because this is so, it is important to understand queer liberation as a political project that includes the positive valuation of queer characters and queer lives—rather than just resistance against moral criticism of queer acts. It is an essential part of this positive valuation to view queer characters and queer lives as expressions of freedom.

Notes

1. Bernard Williams, “Identity and Identities,” in *Philosophy as a Humanistic Discipline*, ed. A.W. Moore (Princeton University Press, 2006), 64. Williams here seems to echo Claudia Card’s insistence that “a more generous vocabulary is needed than is provided by the dichotomy of ‘freely chosen’ on the one hand and ‘fated’ or ‘determined’ on the other.” See Card, *Lesbian Choices* (Columbia University Press, 1995), 42.
2. Williams, “Identity and Identities,” 63. The context of the quote is a discussion of the experience of joining a religious sect, and it may seem strange to apply it to the experience of embracing one’s sexual identity. I do not argue the point here, but I want to suggest that the similarities between the two are more than superficial. A different way of looking at the “queer intersections” of determinations of choice is to say that nothing is strictly “given,” but that sexual identities are constituted in the mutual shaping of desires and interpretations of these desires. For such a view, see William Wilkerson, “Is It A Choice? Sexual Orientation as Interpretation,” in *Journal of Social Philosophy* 40 (2009): 97–116.
3. This is also the tentative definition of “queer” I will adopt in this paper: acts, practices, and identifications that stand in opposition to the prevailing ideology of sex dichotomy, gender dichotomy, and the primacy of heterosexuality.
4. I am thinking here specifically of violence against transpersons in other queer communities, e.g., by lesbians against lesbian trans-women. But one could also mention animosities between gays and lesbians generally, or the recent heated debates between transgender activists and intersex activists.
5. I do not mean to belittle the discrimination, hate, and violence queers are still subjected to even in “progressive”

countries, but allow me to paint an optimistic picture: since the Stonewall Riots eleven independent countries on three different continents and ten member states of the US have legalized same-sex marriage, and many more have decriminalized homosexuality. Many states, municipalities, and institutions have adopted legally binding rules that prohibit discrimination based on sexual orientation. Many companies grant benefits to the same-sex partners of their employees. Queer characters are featured in movies and popular TV shows. Homosexuality can be openly discussed in many schools and university classes. Hundreds of large and smaller cities across the world host annual gay pride parades. Countries that allow state-sanctioned violence or discrimination against queers are condemned as human rights offenders. Homosexuality is no longer classified as a disorder. If the groundbreaking law Argentina enacted last year—which essentially allows one to define one's legal gender according to one's self-identification—is any indication, trans-identities are eventually bound to follow the same path of depathologization. Even intersexuals, who have only been on the radar of queer politics for a few short years, have scored some impressive victories in the courts and in policy-making circles.

6. I am using the terms compatibilism and incompatibilism here as they are commonly used in contemporary metaphysics. Compatibilists are philosophers who believe that freedom and thoroughgoing determinism are compatible. Incompatibilists believe that freedom and thoroughgoing determinism are incompatible, and they fall into two subcategories, libertarians—who deny that there is thoroughgoing determinism—and hard determinists—who deny that there is freedom. Cf. Michael McKenna, “Compatibilism,” in *The Stanford Encyclopedia of Philosophy (Winter 2009 Edition)*, ed. E.N. Zalta, accessed November 11, 2010. <http://plato.stanford.edu/archives/win2009/entries/compatibilism/>.
7. Kant's account is at least compatible with the account of freedom Bernard Williams hints at in the paper I quoted in the introduction. It might seem strange that I am referring to early modern philosophers who had nothing to say about sexual freedom or “queer liberation”—or if they had anything to say about it, they would have rejected it. The reason for choosing Hobbes, Kant, and Hume over, say, Harry Frankfurt, Peter van Inwagen, Ted Honderich, or Carl Ginet—to name a few important figures in the contemporary debate on compatibilism and free will—is twofold: First, as far as I know, the latter four do not have anything to say about sexual freedom either, and second, especially in the case of Thomas Hobbes, his considerations on freedom are obviously tied to his political theory.
8. If one adopts the view that queer identities are not built on a “given,” but rather emerge through mutual constitution of desires and their cultural and social meaning, then one would also reject Premise 1 of this argument, cf. Wilkerson, “Is It A Choice?” For the sake of brevity, I will not pursue this idea here, but I will return to it in a somewhat different form in the concluding section of this essay.
9. For a discussion of this type of argument in the context of the alleged (un)naturalness of homosexuality, see John Corvino, “In Defense of Homosexuality,” in the *Philosophy of Sex—Contemporary Readings*, 5th ed., eds. A. Soble and N. Power (Lanham, MD: Rowman & Littlefield, 2008), 165–66.
10. Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, IN: Hackett Publishing Company, 1994), ch. XXI, § 2, p. 136. For a concise statement of Hume's compatibilist argument, see *An Enquiry Concerning Human Understanding*, 2nd ed., ed. E. Steinberg (Indianapolis, IN: Hackett Publishing Company, 1993), § 8, 53–69.
11. This is admittedly quite simplistically put. As I emphasize in the next section, gender is a social identity, and not something that we choose at will. So perhaps one could say that a transgendered person aims to bring their de facto social identity in harmony with what they think it ought to be.

12. This is a loose reference to Thomas Kuhn's *The Structure of Scientific Revolutions*. I am not sure that this loose reference adequately captures the narrower sense in which Kuhn uses the term “paradigm,” but in its broader sense it should be clear why I use it here. If I am on to something with this reference, then we may note that neither biology nor anthropology have experienced a paradigm shift in this regard yet, and one may conjecture that we are, perhaps, due for a scientific revolution in these disciplines.
13. Cf., as an example, the studies conducted on girls and women with CAH—a genetic condition in which the adrenal glands of the fetus produce excess testosterone which, among other things, can lead to the virilization of the external genitalia of female fetuses. Scientists have hypothesized that the elevated testosterone levels in these females also lead to increased sexual interest in the same sex. If there is any statistical significance to these “desires”—which is doubtful, since the groups of women investigated were usually very small—then it does not follow directly that this must have hormonal causes. They could also be due to social causes, e.g., shame about their bodies which might prevent these women from pursuing opposite-sex relations. For a critique of these studies, see Rebecca Jordan-Young, *Brainstorm—The Flaws in the Science of Sex Differences* (Cambridge, MA: Harvard University Press, 2010), 70–74.
14. Criticism of intersex surgeries does not extend to surgeries that are medically necessary—e.g., to correct a blocked urethra. It applies to cosmetic surgeries, e.g. “corrections”—i.e., mutilations—of enlarged clitorises. John Money, the doctor who initiated the first organized studies into human intersexuality in the 1950s, was a vehement proponent of such corrective surgeries, to be done as early as possible. The treatment protocol developed by Money went unchallenged for nearly forty years, until the first intersexuals spoke publicly about the traumatizing experiences with early surgeries in the mid-1990s.
15. See, for instance, Rebecca Jordan-Young's recent book *Brainstorm*.
16. Cf. Hilde Lindemann, *An Invitation to Feminist Ethics* (San Francisco: McGraw-Hill, 2004), 6–16.
17. Cf. Judith Butler, “Imitation and Gender Insubordination,” in *The Lesbian and Gay Studies Reader*, ed. H. Abelove, M.A. Barale, D. Halperin (New York: Routledge, 1993), 307–20.
18. On this topic, cf. Samantha Brennan, “Fashion and Sexual Identity, or Why Recognition Matters,” in *Fashion: Philosophy for Everyone*, ed. Jeanette Kennett and Jessica Wolfendale (Malden, MA: Wiley-Blackwell, 2011). <http://works.bepress.com/samanthabrennan/50>.
19. Cf. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), ch. 3-IV and conclusion.
20. See the project's website at <http://www.itgetsbetter.org/>.
21. This terminology is borrowed from Harry Frankfurt, “Freedom of the Will and the Concept of a Person,” in *Journal of Philosophy* 68 (1971): 5–20.
22. In case this prospect seems too far-fetched consider that we already have access to pharmaceuticals that some critics have branded a “cure for homosexuality.” The substance dexamethasone, or “dex” for short, has been given to pregnant mothers who carry the genetic marker for CAH in the hopes that it will prevent the virilization of the genetically female fetuses they are carrying. CAH does not just lead to (medically harmless) virilization, it can, in some cases, have serious and dangerous effects on the salt metabolism of the person living with the condition. So there are, sometimes, medical reasons to apply such cures. But what about cases in which the aim is merely to prevent virilization? Here it might make sense to call “dex” a “cure for homosexuality,” because of the supposed link between elevated androgen levels and erotic desire for the same sex.
23. Such bans, of course, affect the autonomy of the speakers,

but that is not my concern here.

24. One could suggest, of course, that they limit the agency of *other* queer persons indirectly. This might be a good objection to the Russian laws, but it is far less clear that it is a good objection to the kind of pre-natal biological interventions I have invoked here. Even if we could say something about the wrongness of such interventions from other points of view, these points of view would not capture the way in which such intervention affect the freedom of the person(-to-be) who is subjected to them.
25. Immanuel Kant, *Kritik der praktischen Vernunft* (Meiner-Verlag, 2003), V 174 (according to the pagination of the *Akademie-Ausgabe*).
26. The crucial passage in this regard is the Third Antinomy in the *Kritik der reinen Vernunft* (Meiner-Verlag, 1998), A 532/B 560-A 557/B 585, but see especially A 541/B 569 (according to the paginations of the original "A" and "B" edition from 1781 and 1787, respectively).
27. For a critical historical analysis of the history of the terms "homosexual" and "heterosexual," see Jonathan Ned Katz, *The Invention of Heterosexuality* (Chicago: University of Chicago Press, 1995).
28. Wilkerson, "Is It A Choice?," 107.

Pornography and Sexual Objectification

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Some feminist theorists claim that commercial pornography perpetuates the norms of patriarchy and may encourage sexual violence by representing women as objects for consumption by men. However, consider the case of gay male pornography. The representation of men as objects for consumption by other men can sometimes be more objectifying sexually, but it encourages neither straight male domination nor violence against women. There is an important difference in the senses of objectification found in these two kinds of commercial pornography. Since the former is framed by gender inequality while the latter is framed by egalitarian norms, exploring this difference reveals something interesting about the ethical status of objectification.

The question whether objectification in pornography is wrong cannot be answered decisively, considering the different senses of sexual objectification arising in these two kinds of pornography. If objectification in gay male pornography is permissible because it is framed by equality, then what is wrong about commercial pornography is not objectification per se, but the gender inequality that frames it. First, I shall define objectification by incorporating Nussbaum's argument that this concept is capacious and has various meanings. Second, I consider an essentialist argument made by MacKinnon, an influential feminist critique of objectification and pornography, and then identify some of its limitations. Third, I distinguish the relevant agents involved in the production and consumption of pornography in order to determine whether some senses of objectification are morally permissible in this context. Finally, I conclude that if objectification is context-dependent, then it is differences of gender and sexual norms framing such activity that determines whether it is morally permissible.

Objectification

Martha Nussbaum defines "objectification" as "the seeing and/or treating of someone as an object."¹ She claims that no particular definition of the concept supports the strongest conclusion that objectification is always morally wrong.

Nussbaum breaks down the concept by articulating the different senses of objectification:

1. *Instrumentality*: One person treats another as an object or a tool.
2. *Denial of autonomy*: One person treats another as lacking self-determination or autonomy.
3. *Inertness*: One person treats another as lacking agency or activity.
4. *Fungibility*: One person treats another as interchangeable either (a) with other objects of the same type or (b) other objects of different types.
5. *Violability*: One person treats another as lacking boundary-integrity.
6. *Ownership*: One person treats another as something that can be bought, sold, or alienated.
7. *Denial of subjectivity*: One person treats another without regard to their experience or feelings.²

Some of these conceptions are more morally objectionable, while others are not. Some items on this list are also redundant depending on the definition of terms such as autonomy, agency, and subjectivity. In this respect, to treat someone instrumentally as an object in the case of (1) is equivalent to denying their autonomy in that of (2). Violating the integrity of a person's boundaries in the case of (5) is equivalent to treating someone as if she lacked agency in that of (3). The conclusion she draws from this diverse list is that context helps determine the sense of objectification, and therefore whether it is permissible.

With these different conceptions in mind Nussbaum identifies at least some cases of objectification that are compatible with principles respecting consent and personhood. In this context such activity "might be compatible with consent and equality," and she cites as an example the mutual objectification of the married lovers in Henry James's *The Golden Bowl*.³ The semantic and practical diversity of the term "objectification" supports the conclusion that there are some forms of it that are not morally objectionable. "On the whole, it seems to me that 'objectification' is a relatively loose cluster-term, for whose application we sometimes treat any one of these features as sufficient, though more often a plurality of features is present when the term is applied."⁴ Just as this term applies to varieties of sexual activity in which persons are being seen or treated as an object, its sense will also change across different kinds of pornography.

MacKinnon's critique of pornography

Catherine MacKinnon articulates and defends a feminist theory of objectification and pornography in which they are internally connected and mutually supporting features of a system of oppression, domination, and violence.⁵ She argues that "sexuality" broadly conceived is synonymous with patriarchy, and objectification is an essential feature of this male-constituted sexuality. What it means to be a woman under such conditions is to be viewed as an object for the sexual satisfaction of men. Objectification is therefore an expression of inequality.

MacKinnon believes that commercial pornography reflects and perpetuates this gendered conception of social relations in which men view women as objects for the purposes of sexual consumption. This reproduces a system in which the outcome of sexual violence against women is endemic. "Pornography is a means through which sexuality is socially constructed, a site of construction, a domain of exercise . . . love and affection are not what is sexualized in this society's actual sexual paradigm, as pornography testifies to it. Violation of the powerless, intrusion on women, is. The milder forms, possession and use,

the mildest of which is visual objectification, are.”⁶ She claims that women are viewed merely as objects in pornography, in part, because male-driven sexuality constitutes their identity. However, this raises the following question: What is the basis of the problem, objectification or gender inequality?

While MacKinnon holds that objectification in pornography is wrong, this conclusion depends on the difficult to establish claim that gender inequality, objectification, and pornography are intrinsically constituted. MacKinnon argues, “To be sexually objectified means having a social meaning imposed on your being that defines you as to be sexually used, according to your desired uses, and then using you that way.”⁷ However, the fact that meanings are “imposed” indicates that the crucial relationship here is that of hierarchy between superiors and subordinates. The basis of the problem is not objectification *per se*, but gender inequality. This raises doubts that objectification is essentially wrong in the absence of hierarchy.

MacKinnon also relies on this moral and gendered conception of objectification to reach the conclusion that pornography should be legally restricted. Although I shall not consider all the constitutional objections to such restriction, I do believe her conclusion is difficult to support on the following grounds. Suppose that our best social scientific evidence confirms that the production and consumption of commercial pornography plays a role in sexual violence against women. If that by itself justifies restriction, then other kinds of porn that are not framed by gender inequality will not be included under such laws. In that case, prohibiting individuals from making and consuming straight male but not gay male or other permissible forms of pornography leads to mixed results. One reason why is that laws discriminating on the basis of gender typically have to pass the standard of heightened scrutiny in which the state must show a legitimate interest that is achieved by narrow means. The problem with restricting all straight male but not other kinds of pornography is that the law punishes straight men as a class in sweeping terms. Such a law allows some men but not others access to pornography on the differential basis of both gender and sexual orientation, and this might also be viewed as a violation of equal protection. The mixed results of this hypothetical example highlight the different senses of objectification that are context-dependent. Exploring them helps reveal whether some senses of objectification are permissible in the context of pornography, as well as what makes straight male pornography objectionable.

Sexual objectification in pornography

There are different senses of objectification involved in the making and sale of commercial pornography. For example, there is a difference between “seeing” someone as an object, which does not involve direct action with her, and “treating” someone as an object, which does involve physical interaction. The simple definition of “seeing and/or treating someone as an object” conflates this important difference, but it is important to keep in mind that there are a variety of agents involved in producing and consuming pornography. Actors in the porn industry might have very different obligations by participating in *actual* sexual objectification as opposed to consumers at sex shops purchasing its *representation*. The status of persons as participants, producers, and consumers entails different duties respecting objectification but often times these are conflated along with its different senses.

Consider the participants who engage in actual sexual objectification. They provide informed consent to engage in sexual activity for pay, and this reduces them to objects of sexual pleasure. What is objectionable to bystanders is that the sexual objectification of women reproduces patriarchal norms, but that sense of objectification is different from the sense of it that

takes place in making pornography. The harm to bystanders is indirect and takes place only in the context of patriarchal norms of oppression and domination. As long as consent is neither coerced nor assumed, and there are established legal conditions that make that consent legitimate, sexual activity in which one is used for pleasure still respects autonomy and personhood. One obvious violation of this constraint is the clear-cut case of rape, in which someone forcibly uses another as a sexual object without her consent. The sense of objectification taking place in acts of rape is wrong because of that and therefore always impermissible.

There are also different kinds of commercial pornography with different gender and sexual norms informing their context. If there are various senses of objectification as well as different kinds of pornography, this raises the question whether it is morally permissible in some contexts. The example of gay male pornography shows that it is possible for individuals to engage in sexual activity without reproducing norms of gender inequality. Although such representation objectifies their participants in the senses of (1 - instrumentality) and (4 - fungibility), absent unequal relations of power and coercion, it is not clear what, if anything, is wrong with pornography and objectification in this case. Similarly, producers of straight male pornography might be accused of objectifying women as in (4), but the sense of “ownership” here is incomplete because actors cannot alienate their liberty completely and labor contracts define those limits. There are cases that do violate autonomy and personhood—for example, women who are victims of sexual trafficking who are held captive and forced to participate in pornography.

There is a diversity of non-patriarchal and fetish forms of commercial and amateur pornography that may raise further questions about my argument. But consider the case of gay male pornography where only men are objectified. Since the sexual activity involves only members of the same sex, there is no direct or indirect harm against women as a class of persons because women are not objectified. Moreover, the objectification of men takes place in the context of egalitarian gender and social relations among men. Some forms of gay male pornography do depict hierarchical relations that change the sense of the objectification in them, including stereotypical views of racial minorities and violent scenes of domination.⁸ However, what makes these representations substantially different from similar ones in straight male pornography is that actual social relations among men do not necessarily reproduce inequality. If we abstract from other forms of inequality and consider the intersection of gender and sexuality exclusively, the sense of objectification typical for most gay male porn is permissible because it is framed by egalitarian norms. The same cannot be said of straight male pornography and its depiction of sexual objectification because the hierarchies represented in it do reflect gender inequality.⁹

Since there is a sense of objectification in pornography that is framed by gender inequality it is also important to consider the legitimacy of women’s choices with respect to informed consent. There is an important question whether norms of patriarchy determine the “adaptive preferences” of women in ways that make their choices less authentic. For example, a poor black female from Baltimore may choose to sell herself to the porn industry in a far different context than a privileged white female porn star in Los Angeles, even though both are essentially objectifying themselves for money. The former raises far more moral worries than the latter when we factor in hierarchies of race, class, status, and education. Yet, it is extremely difficult to discern why adult women who consent to participation in pornography, despite the existence of systematic patriarchy as a context, are doing something morally

wrong. Sexual objectification may be wrong in that context but since it appears permissible in other non-patriarchal contexts the question arises whether objectification is the source of what is morally objectionable about commercial pornography. Those who criticize individuals for objectifying themselves for commercial gain might offer a perfectionist point about the wisdom of choices or the limits of the market. However, since there is no direct harm to them it is doubtful that a moral wrong is being perpetrated and it certainly lacks the justification for legal restriction.

Conclusion

There are some conditions in which sexual objectification is morally permissible. The most forceful examples where it is morally wrong are those where the participants do not give consent or are otherwise coerced as in cases of sexual assault and rape. However, individuals can give consent to be objectified within limits, so it follows that consenting to be used as an object sexually in pornography is not a case in which objectification is outright impermissible. The most plausible cases in which objectification is permissible are those where the participants have informed consent. When the consent of the individual participant is given, then objectification is less worrisome from the moral point of view. Where inequality is absent or minimized the conditions of consent appear more legitimate. With respect to commercial pornography gender inequality is especially worrisome because it is under these conditions that the question arises whether there is a problem of adaptive preferences and whether consent can be informed. It is precisely for this reason that Kant claims that conditions of external “right” such as marriage are necessary for assuring the moral permissibility of objectifying sexual activity. There are other ways of fulfilling conditions to respect the voluntariness of participants and ensure compliance besides religious sacrament or civil marriage, however. Consider the example of labor contracts that are designed for protecting workers and setting limits to objectification and exploitation. In this case, perhaps women seeking employment in the porn industry might seek this external condition to ensure the limits of objectification are better respected.

Finally, Nussbaum’s conclusion that objectification is context-dependent can be pushed one step further. Since we need context with regard to (a) the agents involved, (b) the specification of the harms, and (c) varieties of pornography, it is doubtful that the objectification of sexual activity in pornography is morally wrong all things considered. The comparison of different forms of pornography changes the parameters of evaluation such that objectification of sexual activity in gay male pornography appears to be morally unproblematic from the viewpoint of gender inequality. Although some forms of objectification are always morally wrong, the representation of women as objects in pornography is objectionable on the grounds that it constituted by gender inequality not that objectification is taking place. In the context of more egalitarian norms the moral permissibility of sexual objectification depends only on the informed consent of its participants.

Notes

1. Martha Nussbaum, “Objectification,” *Philosophy and Public Affairs* 24, no. 4 (Autumn 1995): 251. For the purpose of this paper I take Nussbaum to represent the standard view on sexual objectification.
2. *Ibid.*, 257.
3. *Ibid.*, 256.
4. *Ibid.*, 258.
5. Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

6. Catherine MacKinnon, “Sexuality, Pornography, and Method: ‘Pleasure Under Patriarchy,’” *Ethics* 99 (January 1989): 327.
7. *Ibid.*, 329.
8. I would like to thank William Wilkerson for raising this point of consideration.
9. The problem of inequality here is too complex to address adequately because it intersects with race, gender, class, sexual orientation, disability, status, ethnicity, religious affiliation, and many other social relations. On the topic of egalitarianism in gay male sexual relations, see Richard Mohr, *Gay Ideas: Outing and Other Controversies* (Boston: Beacon Press, 1994).

The Stakes of the Real: Queer Feminism and the Challenge of Critical Trans Politics

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In recent years, many scholars have noted the fraught history of feminist, queer, and transgender theory. In this essay, I focus on one strand of this relationship, which centers on the claim to a “real” body or a “real” identity. The use of the language of the real in trans accounts of embodiment and identity has been known to raise the hackles of some queers and feminists (and yes, queer feminists) who focus on the constructedness of bodies and identities. My aim here is not to rehash these debates, but to discuss how recent work in transgender studies challenges the linkage between queer feminist accounts of embodiment and Michel Foucault’s account of disciplinary power. Within this dual framework, a claim to a real identity or a real body usually appears misguided at best and is often replaced by the language of play and self-creation. Below, I argue that this view of such claims often stems from an overreliance on Foucault’s claims about disciplinary power (directed at individual bodies) at the expense of his discussion of biopolitics (directed at population management). I am interested in how the turn to Foucault’s account of biopolitical population management in transgender studies, particularly in Dean Spade’s *Normal Life*, allows us to hear these claims to the real differently by directing our attention to the complex, and yet often stunningly mundane, process by which sex is made real by the state. It is this process that the privileging of cisgender experience tends to ignore. I also find in this move a connection to Jasbir Puar’s observation, in *Terrrorist Assemblages*, that there has tended to be a “splitting” in the reception of Foucault’s *History of Sexuality*, wherein scholars of race and postcoloniality have tended to take up biopolitics and questions of population management and queer scholars have tended to focus on dismantling the repressive hypothesis and critiquing the production of naturalized identities.¹ In this way, turning to biopower as population management may also reveal the whiteness of theorizing about embodiment and identity that does not take into account the role of the state in allocating realness at the level of the body and the population.²

One element of the tension between queer feminism and transgender studies can be glimpsed in Vivian Namaste’s *Invisible Lives*. Namaste claims that queer theory has made it difficult for trans people to self-define or lay claim to an authentic identity or real embodiment, displaying “a remarkable insensitivity to the substantive issues of transgendered people’s everyday lives.”³ Insofar as queer theory is aligned with anti-normativity, or has critiqued claims to a natural or real identity as normalizing and often ahistorical, Namaste argues that some trans identity claims are not heard and taken seriously.

This view is both echoed and coupled with feminism in many other places, as we can see in the history of feminists who have fixated on the question of whether transsexuality merely reinforces gender norms. Consider, only briefly, Jamison Green's comment that "[t]hanks to the feminist critique, we can now say 'gender is a social construction,' as if we are above it all, and we rail against the very creation of gender as a system of oppression."⁴ Indeed, throughout his memoir, *Becoming a Visible Man*, Green relates the difficulty he experiences trying to narrate a deep, immutable sense of gender in the face of an emphasis on construction and fluidity.⁵

Similarly, in *Second Skins*, Jay Prosser points out that certain signifiers of transgender bodies and experience *have* actually been extensively used and celebrated in Butlerian and Foucaultian queer feminist theory. Transsexuality, however, is often cast as too problematically essentialist. Prosser argues that transgender phenomena are celebrated, even fetishized, insofar as they signify gender trouble and the illusion of the natural. They become a privileged example of the destabilization of the sex/gender system, in which there is a psycho-social gender that originates in the biological substance of sex. Insofar as transgender figures reveal the radical possibilities for rifts between signifier and signified, they have been deployed to illustrate points about performativity, or transgressive gender more generally. Amidst this love fest, however, Prosser and others argue that the experiences and identity claims of many trans people are ignored. The moment these experiences and identity claims hint at foundational claims about gender, especially when accompanied by a desire to change one's body, these claims are no longer seen as fruitfully queer and are subsequently jettisoned from the theory. Prosser shows a line of queer feminist thinking that is comfortable with trans experience as long as there is no insistence on bodily alteration and "gendered realness."⁶ This criticism, and the larger history that it speaks to, takes on particular weight given all of the ways in which claims of identity and "realness" have indeed been criticized, following Foucault, Butler, and others, for their disciplinary, naturalizing, and normalizing dimensions.

For Foucault, to cut to the chase, even if my presentation here is a bit reductive, bodies are not naturally occurring phenomena. To the contrary, that which occurs to us as natural about the body is created and made legible through historically contingent frames. The most dramatic example of this appears in *Discipline and Punish*. Foucault moves from the surface of the body, on which sovereign power might be displayed, to the various ways in which disciplinary practices influence the body internally, making it work in certain ways, cajoling it into particular kinds of existences. We transition from the opening "body of the condemned" to "docile bodies" trained and developed in and through various institutions. Foucault cautions us, however, that disciplinary power cannot be reduced to these institutions. To the contrary, we must understand it as "comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a 'physics' or an 'anatomy' of power, a technology."⁷ To think that it resides in any one place would be to miss something fundamental about its functioning.

Gendered restrooms, for example, are certainly manifestations of the binary gender system. And yet, while gendered restrooms are often a place where the gender binary is enforced in ways that deeply impact the experiences of non-normatively gendered people on an individual, bodily, personal level, the power behind this enforcement cannot be identified in any easy way. It cannot be pinned to any particular sidelong shaming glance, act of violence, or scream of surprise. There is no one central restroom command center from which all

other restrooms receive their orders for the day. In a manifesto titled "Calling All Restroom Revolutionaries," a coalition called People in Search of Safe and Accessible Restrooms (PISSAR) puts the issue as follows:

Whose bodies are excluded from the typical restroom? More important, what kinds of bodies are assumed in the design of these bathrooms? Who has the privilege (we call it the pee-privilege) of never needing to think about these issues, of always knowing that any given bathroom will meet one's needs? Everyone needs to use the bathroom. But not all of us can.⁸

Without using this specific language, PISSAR describes how restrooms become sites of disciplinary normalization. By calling attention to the "bodies that are assumed in the design of these bathrooms," they emphasize that there is a wide range of techniques and procedures through which these norms are established and exercised.

Here we see what Foucault means when he speaks of the entire matrix through which disciplinary power moves. This matrix, for Foucault, targets bodies "as the bearer of forces and the seat of duration."⁹ The body here is "directly involved in a political field."¹⁰ In other words, the effects of this disciplinary power can be seen in and through bodies, as they learn how to comport themselves, how to fit into prevailing norms, and how to "emit signs."¹¹ Such a body is peculiarly plastic; it is shapeable, moldable, and constituted in and through its exercise in various disciplinary mechanisms. The body is manipulated as we learn exactly how to reform ourselves in all sorts of minute, everyday ways toward various endlessly deferred ideals that ensure a lifetime of self- and external policing. Through such bodily targeting, discipline makes individuals and this discipline is not a restriction or ordering of nature, but a production of the very identities to be managed and controlled.

This account of the body has, of course, been taken up by queer and feminist theory as a weapon in the struggle for the *denaturalization* of precisely those identities that have come, through disciplinary power, to masquerade as natural. It is also an account of the body that *some* trans theorists find unsatisfying. Prosser's critique, in particular, concerns the way the body is continually figured as a stop on the way to somewhere else. We turn to the body so that we can understand power, or criticize institutions, but the body (particularly the question of why reconfiguring bodily materiality is so significant for some trans people) continues to slip away. For Prosser, something about lived experience—and specifically a tension between lived experience and discursive formations—is lost.

From within this brief sketch of disciplinary power, we might redeploy Prosser's concern that trans people are often read as either the literalization or deliteralization of the discursive effects of power. If the body is understood as a discursive effect, as a result of power, then transsexuals are often seen as either literalizing discursive effects (i.e., mistaking an effect for the literal body part) or failing to literalize them (i.e., something went wrong in the interpellation, and so trans people can show us how we all might "go wrong" or fail in interesting and subversive ways).¹² The concern, one that resonates deeply with other critiques of Foucault, seems to be that we cannot find a place from which to make claims to the real.¹³ Within this framework, it is difficult to understand how certain people are granted "realness" in ways that others are not, and how this registers at the level of the body. Prosser's account of transphobia illuminates this tension over the claim to the real in a different way:

"Transphobia" (literally, the fear of the subject in transition), the stigmatization of transsexuals as "not

real men” and “real women,” turns on this conception of transsexuals as *constructed in some more literal way* than nontranssexuals—the Franksteins of modern technology’s experiments with sexual difference.¹⁴

By focusing on the particular ways in which trans people are constructed as constructions, Prosser asks us to consider the different impact that strategies of denaturalization have when one is already coming from a position that is charged with being fake, deceptive, and delusional.¹⁵ By postulating a “we” grateful for the denaturalization of the body, or a critique of the supposed truth of the body, “we” might overlook not only the differential effects of that denaturalization, but also the specific strategies of resistance offered by trans claims to authenticity. In other words, a focus on denaturalizing the body, or challenging certain bodily norms, all too easily ignores the way the real and the natural are constructed. If we rush too quickly past these claims to the real in an effort to destabilize them, we will naturalize the very arrangements of gender that we are ostensibly trying to understand. As I will argue below, we also run the risk of too easily ignoring the role of the state in that construction.

As Talia Mae Bettcher notes, the relationship of feminist, queer, and transgender theory is often staged as a battle between postmodern or poststructural conceptions of the self and a “politics of authenticity.”¹⁶ Along these lines, there have been many compelling responses to Prosser’s critique of a “certain poststructuralist legacy,”¹⁷ particularly on the problems with his claim to the real and the accuracy of his readings of Butler.¹⁸ My motivation here is indebted to these responses but develops more directly out of a belief that the turn to Foucault’s account of biopolitical population management in transgender studies might provide us with another lens through which to revisit Prosser’s critique. The framework of biopower allows the significance of these claims to realness, and the role of embodiment, to resonate on a different level.

Dean Spade’s recent book, *Normal Life*, exemplifies the kind of paradigm shift involved here. Spade draws on Foucault’s theories of power to examine the relationship between populations and administrative systems. He focuses on how such systems support certain ways of life and disallow others, all the while working within legal regimes that claim to be neutral and espouse universal equality. Here, we see a different version of Foucault than the one that has been stomping in the halls of much queer feminist theory.

In *The History of Sexuality* and in *Society Must Be Defended*, Foucault describes biopower as taking hold of human life. Biopower is concerned with all of those realms of daily bodily life in which one might think oneself free from law and sovereign swords; it is a power “bent on generating forces, making them grow, and ordering them [through norms], rather than one dedicated to impeding them, making them submit, or destroying them.”¹⁹ By moving from disciplinary power to biopower, I do not mean to imply that they are disconnected in any simple way. Although at times Foucault describes them as distinct, especially in *Security, Territory, Population*, he also repeatedly notes the way they overlap. In general, he tends to either fold discipline into biopower or depict discipline as one of the levels at which biopower works. In *The History of Sexuality*, he describes disciplinary power and biopower as “two poles of development linked together by a whole intermediary cluster of relations”: he calls the first pole the “anatomy-politics of the human body” and the second pole the “regulatory controls: a bio-politics of the population.”²⁰ Disciplinary norms are certainly mobilized in the regulation of populations (one example that Spade draws on in this regard is the historical use of racialized and gendered ideas to dissolve public assistance programs).

And yet, we are just beginning to understand the significance of the relationship between the two and of the framework of population management more broadly, for theories of non-normative embodiment and identity. Significantly more attention has been paid to disciplinary gender norms, especially within queer and feminist theory. Complementing this focus on discipline at the level of individual bodies with an understanding of the regulatory controls that work on the level of populations is not only crucial for theorizing power and resistance, it also allows us to better understand the relationship between the body and the state.

For example, identity documentation programs (driver’s licenses, passports, birth certificates, etc.) are one of many areas of population regulation we might turn to for this analysis. While such programs operate through supposedly neutral criteria, aimed at creating “order” and “security” (and, of course, children and puppies and the future) they also create clear ideas about who the population is and is not. Importantly for my purposes, such programs have a devastating impact on *trans* populations. The role of gender data collection in such programs has so deeply infiltrated our lives, has become such a part of our everyday lives, that it is difficult to even turn such practices into a question. To not make a choice, to not mark a box, to question why, exactly, such a choice is relevant to a particular form, or to live in ways that contradict the checked box is to expose yourself to very high risks that have only begun to be fully documented. Such risks also take on heightened meaning in a post-9/11 world of ever increased surveillance, in which having documents that do not match your lived social identity takes on newly insidious meanings.

In general, the consequences of this kind of classification at the level of population are extremely high; not fitting into the logic of an existing administrative system can have serious effects on one’s exposure to insecurity, violence, and discrimination. As Spade writes, people’s “lives and identities are made illegible or impossible by government classification schemes.”²¹ As becomes especially clear when this analysis is coupled with the history of state racism more broadly, an account of this illegibility or impossibility at the level of the population must be thoroughly intersectional. Turning to the biopolitical in this way demands attention to what Spade calls “intersecting vectors of control,” vectors that mediate the impact of systems of violence.²² The effects of administrative rules governing gender, for example, will vary depending on class status, race, ability, and so on: “[t]he most marginalized trans people experience more extreme vulnerability, in part because more aspects of their lives are directly controlled by legal and administrative systems of domination—prisons, welfare programs, foster care, drug treatment centers, homeless shelters, job training centers—that employ rigid gender binaries.”²³ Higher class status, as pointed out by Bettcher, Spade, and many others, might allow for the bypassing of the health care system or easier access to hormones and surgery, while gender is racialized in ways that might legitimate certain gender expressions while criminalizing others.

The difference between disciplinary and population-level control is central to Spade’s analysis. With disciplinary power, one succeeds or fails to meet certain norms at the level of the individual body. Population control, however, requires us to consider the real limits of individual behavior in terms of altering one’s location. If you are classified as part of a certain group—in a certain neighborhood or a particular economic bracket—you will be acted on as part of these population management strategies regardless of how you do or do not manifest certain disciplinary norms at the level of the body. There is an important shift of emphasis here; this is not about

the extent to which people take up or resist disciplinary norms, but the extent to which various administrative functions of the state—“arrangements,” to use Foucault’s word, or “conditions,” to use Spade’s—decide which kinds of lives are acceptable and which are not. The limits of individual behavior and of the framework of disciplinary normalization more broadly become stunningly clear when one considers the insane contortions that the state makes around issues of gender. Indeed, this line of thinking about identity documents (in the context of the relationship between the body and the state) might lead us to some rather disorienting places. Consider, for example, that the requirements for changing one’s gender on identity documents vary dramatically from state to state, as well as between city and state. The DMV might want one kind of surgery, while the SSA wants another. Or we might even think briefly about the fact that, even when such a change is granted based on an arbitrary standard set by the state, a requirement of the “management” of transsexuality for many years was the sealing of all past records. Sandy Stone reads this as the way trans people are required to “[construct] a plausible history” and “programmed to disappear.”²⁴ I read this, following Spade, as one of the ways in which the *movement* between individual bodies and larger biopolitical bodies is erased. Insofar as our analyses privilege cisgender experience and disciplinary power, this movement, or the ways in which the state controls the terms of the real at the level of the population, is often naturalized. Indeed, while we often think of “trans” as a movement between gender categories, these sorts of consideration might lead us to posit it instead as illuminating this movement between individual bodies and larger political bodies. To map trans experience in this way might mean to better understand the relationship between micro- and macro- political registers, or to better understand how the lives of bodies are entangled in the lives of states.

We see so clearly, even in these brief snapshots, the extent to which sex is owned and deployed by the state. It is done so in a way that *radically* undercuts self-determination at the level of gender. There are many questions that open here, questions that point beyond the scope of this essay. What are the implications of preserving this record of “sex” at the level of the state?²⁵ Gender, when considered through the biopolitics of the population, is no longer about how an individual feels, or even how an individual is recognized in the world. It is not even really about the body, as we see in the shifting administrative rules governing the designation of an “M” or an “F” on a document. The state is preserving at the level of the population that which might appear to be destabilized at the level of the individual body. The state says sure, gender may change—individual, disciplinary norms might be challenged—but we will keep it grounded. *We will preserve the real*. And it is precisely the effects of this grounding, this attempt to keep sex pinned down, which is indeed a matter of life and death for many people who find themselves on the wrong side of such biopolitical maneuverings.

In conclusion, we have seen that Prosser, and other thinkers of transgender experience, critique a certain line of queer feminism for its inability to account for ongoing significance and power of claims to the real. While Prosser repeatedly acknowledges the critical terrain opened by queer feminism for explorations of trans experience, he and others point out that this relationship has also been fraught. At stake is the extent to which accounts of disciplinary normalization leads us to posit the body as a discursive effect, and how such an understanding of the body seeks to make sex seem “unreal,” or a fantasy that simply masquerades as the real through the ongoing performance of gender. I have shown that some of these historical tensions among queer, feminist, and trans studies

might be productively traced by thinking about the different versions of Foucault beginning to show up in trans scholarship. Such versions show us how deeply our own choices—of texts, of frameworks, of theories—are shaped by our sense of what needs to be explained.

While Spade implicitly sympathizes with the concerns of Prosser and others, his focus on biopolitical population management suggests the way that our analysis shifts when we prioritize the relationship between gender and the state. Prosser’s desire for an uncomplicated *ground*, or for access to the real, is surely understandable, especially given all of the ways in which trans people have been constructed as fakes and frauds. Spade cautions us, however, against locating the real purely on the side of the body, without attention to the role of the state. Struggles for the real do not only take place on the level of the body, but also on the level of the arrangements or conditions that grant realness in various ways. Resistance to such bio-political regulation cannot simply be about the extent to which an individual decides to make or break norms at the level of the body. In other words, a clichéd (and yet all too real) queer feminist response to trans claims, a response which in its broadest strokes tends to ask why trans people cannot just “resignify” their bodies or perhaps “just be queer” and resist “rigid categories” is stuck in thinking about resistance to disciplinary normalization without attention to other levels of power. This does not mean that we cannot continue to hold onto the insights of queer feminism about the dangers of appealing to reductive and ahistorical identities. But it does allow us to think about how resistance to the kind of biopolitical violence that doles out realness may require us to think about the body and power in radically different ways, as well as to be careful about our selective use (and abuse) of Foucault.

Notes

1. Puar emphasizes that these are tendencies, not absolutes, and provides examples of works that goes against this general trend. See Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (North Carolina: Duke University Press, 2007), 34.
2. Throughout, I follow Susan Stryker in using the terms “transgender” and “trans” as political terms that have emerged in recent years to indicate a wide variety of ways in which people move away from the gender they were assigned at birth. I also draw on texts that use the term “transsexuality” to describe people who change their sexual morphology through surgery or hormone therapy. Historically, such medical procedures then become the ground for legal changes in gender designation. While these basic distinctions are helpful to acknowledge, I want to emphasize that these terms are subject to constant and ongoing negotiation and transformation. See Susan Stryker, *Transgender History* (New York: Seal Press, 2008).
3. Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000), 23.
4. Jamison Green, “The Art and Nature of Gender,” *Unseen Genders: Beyond the Binaries*, edited by Felicity Hayes and Tarquam McKenna (New York: Peter Lang, 2001), 59.
5. Jamison Green, *Becoming a Visible Man* (Nashville: Vanderbilt University Press, 2004), esp. 184–87.
6. Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (New York: Columbia University Press, 1998), 11.
7. Michel Foucault, *Discipline & Punish: The Birth of the Modern Prison*, translated by Alan Sheridan (New York: Random House, 1977), 215.
8. Simone Chess, Alison Kafer, Jessi Quizar, and Mattie Udora Richardson, “Calling All Restroom Revolutionaries,” *That’s Revolting: Queer Strategies for Resisting Assimilation*, ed.

Mattilda, AKA Matt Bernstein Sycamore (New York: Soft Skull Press, 2004), 189–90.

9. Foucault, *Discipline and Punish*, 155.
10. *Ibid.*, 25.
11. *Ibid.*
12. Prosser, *Second Skins*, 13.
13. In this gesture to other critiques of Foucault, I am especially thinking of Linda Alcoff's critique of Foucault's account of sexual violence in *The History of Sexuality*. See Linda Alcoff, "Dangerous Pleasures: Foucault and the Politics of Pedophilia" in *Feminist Interpretations of Foucault*, edited by Susan Hekman (Pennsylvania: Pennsylvania University Press, 1996) and "Phenomenology, Post-structuralism, and Feminist Theory on the Concept of Experience" in *Feminist Phenomenology*, eds. Linda Fisher and Lester Embree (The Netherlands: Kluwer Academic Publishers, 2000).
14. Prosser, *Second Skins*, 8, emphasis added.
15. I am relying on Talia Mae Bettcher's work to elucidate Prosser's definition of transphobia here. For more on the ways in which trans people are constructed as constructions, see Talia Mae Bettcher, "Appearance, Reality, and Gender Deception: Reflections on Transphobic Violence and the Politics of Pretense," in *Violence, Victims, and Justifications*, edited by Felix Ó Murchadha (New York: Peter Lang Press, 2006) and "Evil Deceivers and Make-believers: On Transphobic Violence and the Politics of Illusion," *Hypatia: A Journal of Feminist Philosophy* 22 no. 3 (2007): 43–65.
16. Bettcher, "Appearance, Reality, and Gender Deception," 194.
17. Prosser, *Second Skins*, 13.
18. See Judith Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York: New York University Press, 2005) and Gayle Salamon, *Assuming a Body: Transgender and Rhetorics of Materiality* (New York: Columbia University Press, 2010).
19. Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction*, translated by Alan Sheridan (New York: Vintage), 136.
20. Foucault, *History of Sexuality*, 139.
21. Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (New York: South End Press, 2011), 142.
22. Spade, *Normal Life*, 13.
23. *Ibid.*
24. Sandy Stone, "The Empire Strikes Back: A Posttranssexual Manifesto," *The Transgender Studies Reader*, edited by Susan Stryker and Stephen Whittle (New York: Routledge, 2006), 230.
25. In using the language of ownership in relation to the "preservation of the record of the sex," I am drawing on the final chapter of *Assuming a Body*, where Salamon argues for an understanding of sex as state property through an exploration of the relationship between trans experience of identity documents and Lacan's "The Agency of the Letter in the Unconscious or Reason Since Freud." Although I am more focused here on the framework of Foucault and biopower as offered by Spade, and how to read this shift to population management back into debates on embodiment and claims to the real, I agree with the analysis of how sex is literally turned into a "matter of paperwork" and believe there is much more work to be done about the relationship between the frameworks of Lacan, Salamon, Foucault, and Spade on these questions.

The Philosophy of Clowning as a Technique to Fight Homophobia

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In this essay I discuss a Neostoic notion of human emotions in connection to homophobia, linking homophobia to an emotion of disgust and shame that is socially constructed: that is, learned and culturally enforced. In order to change and modify these negative emotions to positive human relations, I propose an equally Neostoic notion of understanding of emotions and how to alter them. Different attitude-awarenesses, values, and judgments produce different, more positive, and pro-social emotions. I would like to propose we accomplish this with a new philosophical technique I call philosophical clowning, which may lead to a more peaceful, democratic, loving, and compassionate society.

In the Neostoic view held by Martha Nussbaum and Carl Ratner, emotions comprise the other side of the coin to our rational and moral selves that together compose our worldview as a set of concepts, values, beliefs, and emotions. This worldview can change due to new insights and experiences because this Neostoic view of the emotions as cognitive and evaluative personal judgments claims they connect to cultural attitudes, beliefs, and social relations.

Nussbaum thus claims that it is as important to nourish and cultivate prosocial emotions (love, compassion, peace, goodness) as it is to create proper institutions of justice. She presents this Neostoic view of emotions as originating from the stoic philosopher Hrisip. Hrisip inherited from Plato, and Aristotle in Epicur, an outlook of emotions as being true or false in regard to our rational and proper judgment of the present situation. If we attribute a high value to someone then (s)he gives a great pleasure and joy by his or her presence or sadness and anger with her or his absence. This means that emotions, such as joy, sadness, or anger are based on judgments that attribute a high value to people and things that mean a lot to us. Although we cannot totally control everything, we can cooperate together to reach a certain common agreement. In this way, emotions connect us with people and things and encourage cooperation—if we wish to have a peaceful, justified, and good society we need to foster peaceful, loving, kind, happy, and compassionate relations. Until this point Hrisip followed his philosophical ancestors, but he was the first to claim that emotions are identical or equal with judgment, value, and belief. Hrisip acknowledged that each emotion contains a judgment of the context (person and situation) as true or false regarding our perception and knowledge of the context or situation we are part of. To accept or reject a certain emotion as true or false requires a certain element of judgment, i.e., of acknowledgement, recognition, selection, and categorization. For instance, when we finally meet the loved one who feels right for us, we might feel tremendous happiness, joy, and enthusiasm because this feeling of love contains a judgment that this person is a very important and valuable part of our scheme of a good and happy life. Conversely, we feel a deep grief and sadness when we face the loss of this person who we value and evaluate very highly. If we lost some distant colleague we would not feel half as much pain because we simply do not judge or value her or him that highly. If we learn that the beloved person was taken from us by some manipulation and lies then we would feel additional anger, because anger contains a belief that injustice was done to us. In these ways, emotions carry

different judgments, attitudes, and beliefs, including beliefs about which events happened and who caused them (and with which intention, positive or destructive), and special beliefs about the value of a certain object or subject for us. Therefore, emotions are cognitive and subjective evaluations that include a large amount of attention to ourselves, the people around us, and our surroundings.

As Martha Nussbaum shows in *Upheavals of Thought*, emotions reveal to a person the deepest wishes (s)he has in relation to him/herself—and all these to an attentive observer. An emotional reaction tells us about a certain important valuable person, object, or goal that might be cherished, damaged, or exposed to some sort of risk or manipulation or affected in any way. From an emotional reaction we can learn what a person values in his/her life, how a person interprets him/herself and how (s)he deals with damages, challenges, and danger. And above all, emotions speak also about our connection to the people, things, and animals that are important for our happiness, goodness, and success, yet we do not have full control over them, and thus we need to cooperate with them and take them into account. But our emotions are not only personal and not only about the present. Nussbaum claims “that in a deep sense all human emotions are in part about the past, and bear the traces of a history that is at once commonly human, socially constructed, and idiosyncratic.”¹ So emotions are not just ours, but are also connected with the values, beliefs, and judgments of a certain society and historical situation. Thus, Carl Ratner claims that “emotions animate and sustain cultural behavior. Their passion animates and sustains long-range, persistent behavior that is necessary for forming and sustaining complex macro cultural factors that extend over time and space and encompass millions of individuals—e.g., a nation, government, society.”² According to this view, articulated by Ratner and Nussbaum, emotions are shaped and learned from our experience with macro factors. In this sense, human emotions include also a consciousness of macro cultural factors and include love for one’s country, anger at injustice, love of art, national shame, dejection about political trends, and so forth. Culturally conscious emotions enable people to develop and respond to social institutions, artefacts, and cultural concepts.

Similar to Nussbaum’s claim that our emotions contain judgments, Ratner also claims we are conscious of our emotions: “We not only become angry, we know that we are angry. Human emotions are conceptualized, or intellectualized, emotions.”³ Reflecting on our emotions enables us to analyze and reflect them, evaluate and alter them. This allows individual behavior to be altered so that more supportive, richer, collective cultural behavior can be coordinated. It is also vital to animating new macro cultural factors that can improve problematical ones because emotions *facilitate* social life and deliberate behavior. The emotions we employ in face-to-face interactions similarly originate at the macro, social level. Anger and guilt are based upon ethical and legal values and judgments. Ratner proposes the following example:

if a neighbour crashes into your car and causes damage, she feels guilty. If she caused injury to people in the car she feels sad, guilty and compassion for the victims as well. The reason is that guilt is instigated by personal responsibility for a misdeed. If we are not responsible for the misdeed, we do not feel guilty over it. We must (implicitly) know the cultural concept of personal responsibility in order to feel guilt. Personal responsibility is also the conceptual basis of anger. If Bob injures Tim by mistake, Tim has “no right to get angry” because it was a mistake. But if Bob deliberately injures him, he legitimately becomes incensed. The

reason is that anger is triggered by the ethical and legal principle that deliberate, wilful injury is wrong. Western legal principle distinguishes between wilful and accidental injury, and dispenses very different punishments for them. This legal distinction is the basis of anger. People must know this cultural concept in order to become angry.⁴

And what about homophobia? Nussbaum argues that homophobia has to do with a feeling of disgust taught by society and certainly not innate in people:

disgust appears not to be present in the first three years of life. It is taught by parents and society. . . . Disgust is an especially powerful vehicle for social teaching. Through teaching regarding disgust and its objects, societies potently convey attitudes toward animality, mortality, and related aspects of gender and sexuality. Disgust is often connected with the “vile” substances within our bodies, and then this disgust is transferred to other groups who are seen as sources of contamination that we must keep at bay. Misogyny has been an especially potent instance of these projections, as have Anti-Semitism and loathing of homosexuals.⁵

And if the real issue underlying disgust is loathing people for their animal bodies and their own mortality, then a society that wants to counteract this damage must address the body itself and our “anxieties”⁶ about it. Similarly, shame involves the realization that one is vulnerable and imperfect in some ways. “Shame, of course comes in many ways. What I have termed primitive shame—the demand for perfection and the consequent inability to tolerate any lack of control or imperfection—is a specific type of shame, closely connected with narcissism or infantile omnipotence . . . and is deepened by awareness of one’s own mortality. . . . All human bodies are limited, and all give rise, in that sense, to some shame. More general, in a world made for the ‘normal’, anyone who is different . . . is at risk for shame.”⁷ Thus, regardless of having healthy, young, old, ill, or disabled bodies, and also regardless of race, sexual orientation, or adornment, young people should be urged to see their bodies and the bodies of the others with respect, compassion, and friendship and even more “to take a positive delight in the playful and creative ‘subtle interplay’ of two imperfect beings.”⁸ So, according to this view of the emotions, put forth by Ratner and Nussbaum, what a person usually feels as his or her own personal emotions are just as much a socially and historically constructed set of beliefs, judgments, and attitudes producing certain emotions that are then fostered through institutions and schools of thought or spirituality and can be changed through people’s and societies attitudes, belief concepts, and even laws.⁹

So what can philosophers do about this situation? The philosopher king might be able to know and research how people think and compose arguments or sometimes even order his “subjects,” but the philosopher clown may have the last laugh. What is a philosopher clown? Philosophers in general deal with cultural and universal concepts, attitudes, values, beliefs, and emotions and are trained to provide a new and different perception of things, looking at them from different angles. Philosopher clowns make people realize that both what they do and how they act derive from the concepts, judgments, beliefs, values, and attitudes that they hold as true and which are therefore the basis of their emotions and ensuing actions. Thus, emotions can be cultivated and aroused to stimulate pro-social (peaceful, loving, compassionate, kind) behavior. Clowning and philosopher clowns can be understood as

loosening up and neutralizing or changing negative personal and cultural attitudes or blocks and through playful, open, and gentle dialogue fostering love in which again people feel safe to open about who they really are, how they really feel, and what they really wish.

According to Bakhtin, it was in fact Socrates who first discovered playful, open, dialogue and a clowning basis for philosophy, and, not only this, he found it through love: “Socrates’s discovery of the dialogical nature of thought and truth presupposes a carnival (clowning), a proximity of people who chose to get closer with each other and thus lowered the barriers between them.”¹⁰ Philosopher clowns let people see the common truth, and their emotions, in a light and positive way through playful, sincere, and joyful dialogue in which there are no strict rules and boundaries—for clowns reveal a possibly exploitative and abusive relationship of different hierarchies, superiorities, and imposed roles of one over another, for instance, between a parent and child, teacher and student, doctor and patient, CEO and employee, government and citizen. (This is not to say that people sometimes have the right to exercise their knowledge and authority, but rather to emphasize that the clown exposes when one trespasses the boundaries and hurts others intentionally.) Philosopher clowns sincerely work toward finding the truth together with the people and let truth shine through all of them. In this way truth, love, goodness, and beauty are a common decision, not imposed from outside by some pre-set conditions (truths) and emotions of some (known and established) cultural macro “authority.”

So a philosopher clown does not assume any preconceived role of teacher, but understands that any true self-exploration occurs through the pure love of sincere play. In this way, philosopher clowns establish a free, loving, and playful understanding of the relationship among people.¹¹ This is an important aspect of clowning philosophy—people who are usually set apart by different beliefs or worldviews get closer, and in friendly contact freely discover each other. They are emphatically willing to listen and understand each other—for clown philosophers dare to open everything that was closed before by standard notions of what is right and wrong, big and small, sacred and profane, wise and ignorant, for they talk and discuss important issues with everyone regardless of the rank, race, gender, sexual orientation, profession, education, or background (in the same way as, for instance, Socrates did). Philosopher clowns understand that truth and love flows and shines through and among everyone and, most importantly, truth shines through playful and sincere dialogue.

This sounds ideal, but how exactly do philosopher clowns alter or modify people’s usual emotions—especially perceptions of the “heavy” emotions such as the anger, disgust, shame, and guilt that connect to homophobia (and other forms of prejudice)? Epicurus said “empty is that philosopher’s thought by which no human suffering is treated.”¹² According to Epicurus the task of the philosopher is to “throw out suffering from the soul”¹³ and the only proper task for philosophical argument is the relief of human misery. And even Socrates claimed that there is a therapy of the soul that is analogous to the doctor’s therapy of the body. In the *Protagoras*, Socrates even argues with Hippocrates for the need for circumspection before a person turns over his or her soul to an expert. Since the treatment will change the soul for better or worse, it is important to ask about the knowledge and the healing he promises. For if we can be clear about the *dialogue’s* depiction of human problems we will be better able to assess the solutions. And Plato later on claimed that blessed life is also blessedly happy. It is not best because it is happy; it would be best quite apart from its happiness: “but

how wonderful it is that we pursue the best with such joy and happiness.”¹⁴

Since its early beginnings, philosophy has tried to answer the question, how can humans live a good and happy life in which to flourish in peace and love? The main aim of philosopher clowns is then to produce arguments and emotions that would decrease human suffering, and create a more democratic, loving, justified, compassionate, and peaceful society. They do this by exposing and dissolving the old hierarchies that impose conflicts and sufferings, inequalities, exploitations, and divisions (which produce emotions of shame and disgust) among people by allowing us to question and ponder everything through joyful, honest, playful dialogue and thus enable the creation of new sets of beliefs, values, and attitudes. Since emotions, on the Neostoic understanding, connect with macro-factors and arise from beliefs, the clowning activity that opens and transforms these beliefs and macro-factors can lead toward more free, loving, joyful, and peaceful individuals, pairs, and communities.

Aristotle also argues that people who love one another’s character have a strong influence over one another’s moral development in several ways: “The friendship of good men is good, being augmented by their companionship; and they are thought to become better too by their activities and improving each other . . . whence the saying ‘noble deeds from noble men.’”¹⁵ In this sense, philosopher clowns are the same as doctor-clowns and other clowns: they let people question the old conflicting presuppositions and then feel and see a new awareness, which brings play, compassion and goodness by being positive and constructive, and using respectful attitudes toward yourself and others. We can thus restore the good and healing love and friendly relationships among people feeling, using Stoic phrase, being citizens of the world. Philosopher clowns simply allow people to see things in a new light perspective and with this enable them new positive beginnings and ensuing actions and life.

Notes

1. Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), 177.
2. Carl Ratner, “A Cultural-Psychological Analysis of Emotions,” *Culture & Psychology* 6, no. 1 (March 2000): 6.
3. Carl Ratner, “A Macro Cultural-Psychological Theory of Emotions,” *Emotion in Education*, ed. Paul A. Schutz and Reinhard Pekrun (Boston, MA: Academic Press, 2007), 94.
4. Ratner, “Cultural-Psychological Analysis,” 7.
5. Nussbaum, *Upheavals*, 204–05.
6. I believe anxieties regarding bodies may derive philosophically from Platonic and Christian and, later on, Cartesian privileging of the soul and immaterial over the body.
7. Nussbaum, *Upheavals*, 197–98.
8. *Ibid.*, 196.
9. “As Rousseau and Tocqueville insisted, a regime that makes people equal before the law and that empowers all citizens in certain basic ways will encourage compassion to turn its sights outward. By situating people close to one another, the regime makes it easier to see one’s plight in the plight of another. Affirmative measures designed to empower a previously oppressed group may be important devices in breaking down an old barrier. At the same time laws and institutions shape our sense of the more intimate attachments, and their proper relation to those that are more distant. Legal definitions of family and laws regulating family life, shape in many ways our perception of what those attachments are, and how the concern we have there is related to broader concern for fellow citizens of our nation and the world.” *Ibid.*, 421.
10. M. Bakhtin, *Problemi poetike Dostojevskoga (Problems of Dostoevsky’s Poetics)* (Belgrade: Nolit, 1967), 197.

11. Cf. Bakhtin, *Problemi poetike Dostojevskoga*, 68.
12. Quoted in Martha Nussbaum, *Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton: Princeton University Press, 1994), 102.
13. *Ibid.*
14. Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986), 162.
15. See Aristotle, *Nicomachean Ethics*, in *Basic Works of Aristotle*, ed. Richard McKeon (New York: Random House, 1941), 1172a10–14. Aristotle thinks that we can positively influence each other by the direct mechanism of advice and correction. His point here is that the advice of those we closely love has a special power for good or bad; this power is clearly bound up with the pleasure of affection, its shared feelings of concern and affection. The second mechanism is the levelling or assimilating influence of shared activity: if the person you love loves and values a certain pursuit, you will be inclined to try spending time sharing in that. This is a good thing if the pursuit is a good one but bad if it is a bad one. Again, this mechanism operates only on an affectionate personal or interpersonal love, not in a Kantian duty-based relationship. The third and final mechanism is one of emulation and imitation. The strong emotions of respect and esteem generate more positive interpersonal relationships and also a desire to be more like the other person or group.

Agency, Identity, and Narrative: Making Sense of the Self in Same-Sex Divorce

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Philosophy, at its best, helps us make sense of our world by providing a language to articulate our being in it. I am one of the many Americans whose marriage has ended in divorce. Yet, my divorce was not like many others. As my marriage was to someone of the same sex, my state of residence (Florida) classified me as single. I constituted myself as single. I moved on with my life, went on dates, eventually moved in with another partner; all the conventional things single life entails. Well, that depiction is too simplistic. I found myself in a kind of married-yet-not state of limbo. My marital status would change depending on the state or country I was in and, as an academic, would be subject to change several times each year (e.g., as I traveled for conferences, job interviews, or professional meetings). These facts about my marriage, or my then-not-divorce, were not only legal inconveniences. The generative power of the state also made me come to terms with the ineffectiveness of the counterstory I had pieced together to deal with the agency-thwarting situation I found myself in (and as a feminist theorist, I assure you this was no easy task). At the same time, this same counterstory, something only possible with the help of those who make up my personal community, enabled me to persist in my continual reconstitution of this part of my personal identity.

In this paper, I elucidate how the complications arising from same-sex divorce present a different kind of harm to the agency of persons pursuing the dissolution of their marriage contract. The dialectic within the paper mirrors the movements that I have made as I have sought to constitute and reconstitute myself throughout my (very long) divorce process. Beginning with a legal viewpoint, I explain how the constraints on same-sex divorce present limitations to one's agency that are antithetical to the spirit of a liberal democratic

conception of freedom of movement and freedom to contract. I then describe how this view from the law ignores the ways in which the marriage contract is not like many other contracts; it is a contract that determines how a community interprets aspects of your presented identity. When this point is taken against the backdrop of a relationally constituted self, this entails that the marriage contract and the ability to exit it directly informs whether and how one might efficaciously exhibit her agency within a broader social context. I elucidate this point by exploring the role and limits of narrative in my self-(re) constitution. Finally, I sketch out the space between these two positions; what I call the space of (im)possibility.

The problem: agency, the law, and same-sex divorce

Regardless of how one feels about the legitimacy of the institution of marriage or whether those in same-sex relationships ought to be pursuing marriage,¹ same-sex marriage, for better or worse, comes with legal recognition. Others might want to return the conversation to whether and how “the problem” of same-sex divorce mirrors the theoretical concerns about whether or how queer identities ought to adopt or appropriate the institution of marriage. While such a conversation would be interesting in its own right, it does not touch on my primary concern: how my recognized legal status has constrained my possibilities for self-constitution.

The legal recognition, sought and achieved by my former partner and I, allowed us to enter into a public sphere of possibilities granted by the liberal democratic institution of the state. Even as the marriage contract was an extension of our rights, the benefits are deemed portable (i.e., able to move across jurisdictions). Where our marriage was recognized, we now had grounds to claim a host of legal benefits available to married couples, not to mention having the privilege of being recognized by our friends and family as such. These options were granted as possibilities in virtue of our *rights* as agents in the eyes of the law. The right to choose one's marital partner, even as there have been significant restrictions on who may marry whom and when, has long been recognized as a fundamental civil right.² However, the voluntariness of this right is not only about the right to choose one's legally recognized partner; voluntariness in contracts entails the right to exit or dissolve the marriage. As historian Nancy Cott puts the point, “how could consent in marriage . . . be considered fully voluntary, if it could not be withdrawn by an injured party.”³ Yet, when my partner and I no longer desired to be legally associated, our *rights* failed to gain traction; we were denied the *right to exit* our marriage contract.

One might wonder why this poses a significant threat to my (or anyone else's) agency. As we lived in a jurisdiction that did not recognize our union, could not we simply move on with the knowledge that the state would treat us as single individuals without claims on the other? Unfortunately, it is not that simple. First, I was well aware of the many ramifications of this lingering contract. Let me further elucidate this point with an example. Suppose I married my current (cross-sexed) partner in the state of Florida; would jurisdictions that recognize my first marriage consider me a bigamist, or not recognize the validity of my second marriage? What would happen when DOMA is repealed and my still-valid marriage is suddenly recognized by all fifty states? What if this is ten years after we separated? By considering these broader reaching consequences, we can begin to sketch out how these legal constraints act as constraints on my right to contract and significantly constrain my freedom of movement.

Freedom of movement is a kind of bridging right, one that, while not expressly stated in the Bill of Rights, is necessary for the protection and enablement of other fundamental rights and

liberties. Moreover, it is not only about the right to enter and exit states at will, but also about not being treated with hostility and being given equal consideration across jurisdictions.⁴ In this regard, the state has two corresponding duties derived from the general citizen's freedom of movement. First, the freedom of movement guarantees that the state will protect my right to travel across city and state lines. Second, the freedom of movement entails a right to be treated equally to those who are already residing in the area, which means that I will not have to face unduly burdensome restrictions placed on my right to vote, freedom of expression and association, and that the public acts of one state will be recognized and upheld in other jurisdictions. This last duty, in the case of marriages performed in other jurisdictions, falls under the Comity Clause of the Constitution.⁵ It is worth noting that such public acts concerns two sets of persons: the rights bearing individuals who entered into the marriage contract and the community of citizens more generally.

The Comity Clause, as Janet Halley points out, justifies recognition of public acts because such acts determine the community standards applicable to all citizens. In other words, the right to enter into, and just as importantly to *exit*, the marriage contract is fundamental because it “promotes a way of life.”⁶ What this means is that the right to marry, unlike other fundamental freedoms, such as the freedom of speech, is not an individual right; it cannot be exercised by an individual. Rather, the right to marry is a collective right that can only be exercised in association with another.⁷ Furthermore, as Halley argues, this right is fundamental, “in the sense that everyone has an interest in its nondiscriminatory availability.”⁸ In other words, the regulations governing who may marry whom is explicitly recognized by the United States Supreme Court as a mechanism by which communities treat newcomers and determine the standards of equal treatment. What Halley is touching upon, but does not make explicit, is that while marriage could be understood to be an extension of individual's unadulterated autonomy or an extension of community standards, it resists the mutual exclusivity of these labels. The right to enter into a marriage contract is, as Halley emphasizes, not a right to be free from state regulation (as with freedom of association or the freedom of speech).⁹ Rather, it is a contract that is co-constitutive and interactive in kind, perpetuated by the standards of normalization (something subject to interpretation and change), the individuals who exercise their voluntary participation in the system of contracts, and the generative force of the state regulatory system. Similarly, the right to exit this contract is co-constituted, perpetuated, and reified through the interactions between individual persons, the couple, and external others in the broader community.

Yet, what happens when this portability fails to obtain? That is to say, what happens when states do not adhere to the Comity Clause? On the one hand, we can turn to case precedent and clearly demonstrate that the refusal to recognize the public acts of another state is antithetical to the spirit of a citizen's constitutional rights. In particular, the state that fails to act in accordance with the Comity Clause is depriving citizens of their right of the due process of law and equality. On the other hand, what this interpretation of the right to marry and divorce has not touched upon is the intimate nature of what the marriage contract *is* for the persons entering into it; something made salient when we examine the case of one bound by the contract and yet not free to exit. In other words, the abstract analytic framework of the rights discourse fails to capture how marriage, once entered into and unable to be terminated, binds the ways in which a person is able to make sense of her practical identity. This is, in fact, the situation I found myself in: struggling to constitute myself for *myself* in the face of a

social institution that constituted me in a manner that was *fundamentally incompatible with how I constituted myself*. To come to grips with what this juridical view overlooks, I turn to the role of narrative in the construction of the self.

The role of narrative in (re)constituting identity

The role of narrative in organizing our lives is paramount in that it provides a structure for interpreting major events that, to a significant extent, define who we are or how we take ourselves to be. As Catriona Mackenzie explains, “[N]arrative is an organizing principle or a structure for interpreting the events and characters that makes sense of what happens, and makes the sayings and doings of the characters intelligible.”¹⁰ The narrative process is not one constituted solely by the individual agent herself.¹¹ Rather, the manner in which the agent interprets events in her life and her own possibilities for action are, as Hilde Lindemann states, “a complex interaction between a person's self-conception and others' understanding of who the person is.”¹² When we understand external others to have a constitutive role in our narrative's construction, this opens up the possibility that the narratives others construct of us can damage our identities and constrict our agency.

When others' understanding of a person or group of persons misrepresents or suppresses morally relevant details of an agent's identity, the person's agency is constrained or thwarted *not* because the individual is lacking a particular (internal) capacity, but because the individual's identity is not given uptake by external others. Lindemann discusses how this lack of opportunity has a direct bearing on how freely a person might exercise one's agency, and this opens up the possibility that others can inflict damage to the identity of another. This, of course, is not to say that those who occupy such marginalized positions lose their agency; the damaged identity (sometimes and to differing degrees) can be repaired through the construction of counterstories. In counterstories, we find a site of resistance and repair; resistance against oppressive master narratives and repair of the damaged identity.

The story of my marriage was in part an example of a counterstory. The social and legal hoops that my ex-partner and I had to jump through to become legally married would not have been possible without the production of a counterstory. This counterstory was constructed in the face of a master narrative each of us (my ex-partner and I) encountered on a regular basis. The simplest form of the master narrative was that our sexual identities were sub- or abnormal, and as such, we were not a couple worthy of recognition or entitled to marry each other. Our counterstory, both independently and jointly constructed, worked on a small scale to demonstrate to others that the master narrative they used to understand our identities was a misperception that covered over the fact that we were worthy of respect. We were privileged in that we had friends and family that became supportive of our identities and our relationship, we lived in a community with a strong LGBT presence, and we worked at places that offered partner benefits. We eventually exercised our agency and, like thousands of other couples, were married in the Ontario province of Canada. When this relationship ended, the counterstory became the very thing that needed to be countered. The recognition we had fought so hard to achieve quickly became a source of damage to an identity I was attempting to construct, and this previous counterstory acted as a constraint upon my agency.

The process of going through any significant separation can be quite draining, emotionally and economically. Mine was no exception to this rule, aside from the fact that the end of my marriage did not receive the closure that comes with a divorce decree. Unless I moved to one of a few places in the country that offered same-sex divorce and lived there for at least six

months or more, I had no way of filing for divorce. Moreover, as a graduate student, I was a person tied to a university and limited by severe economic constraints; to move, at that point, was out of the question. However, several family law attorneys told me that the state of Florida would treat me as if my marriage had never taken place. Furthermore, each assured me that my ex-partner would not be able to make any claims against my estate or act as a proxy, and there would be no restrictions upon my ability to enter into a new marriage contract with a cross-sexed partner. Therefore, I started the next chapter of my narrative. I moved on with my life, and the others I met gave uptake and recognition of my unmarried identity. Then I went to Waterloo, Canada, for a conference. As I drove across the Canadian border, it occurred to me for the first time that *I was not single*. If I needed to go to an emergency room, I would have to report my marital status. If I were to be in a car accident, or worse, there was a legal record on file that allowed my ex-partner to act as a proxy, to make end of life decisions, to take possession of my body.

Whether she would have is largely beside the point. The point is that I was not who I had constructed myself to be. Then, I went to visit New York, went to a conference in the District of Columbia, and drove through Maryland. Each of these movements and professional events made me come to terms with the fact that I was not, no matter how hard I tried, no matter what the people around me said, including the family law attorneys in Florida, free from this contract. Even as no one in particular treated me differently, the external other, the state, forced a narrative upon me: my own (previously endorsed) counterstory. I was not an efficacious agent in the eyes of the law. In the face of continual confrontation with the socially instituted facts about my marital status, I could not move past my own counterstory; I could not reconstruct my identity. Here, we begin to get at the harms of not having finality: the lack of closure leaves open the possibility that the reconstructed identity will be resisted, and the agent is left attempting to cope with the damaged identity compounded by having to confront repeatedly this lack of closure.

The space of (im)possibilities

This continual awareness of the deprivation of opportunity to legally exit the relationship resulted in what Lindemann calls an infiltrated consciousness—a state in which an agent doubts her own sense of moral responsibility resulting in a damaged identity and a constriction of agency.¹³ There did not seem to be much I could do to compel the state to recognize my new counterstory. Moreover, I was not in the position to have immediate access to the means by which I could relocate. The harm, the one that undermined my sense of self, was not a mere legal deprivation. It was not merely that the state was placing unduly burdensome barriers in my path. The burdens of time and money could be said to be the result of dissolving any contract.

We need to recognize that the marriage contract is not like, for example, a contract to supply a restaurant with goods. Rather, one's marital status defines how others in society treat you. There is a difference not only in address (Miss/Mrs.), but also in the normative expectations and judgments made about one's behavior (such as whether or not one is have a socially acceptable night on the town or being an adulterer). One's marital status, like one's sexual identity, is a constitutive part of our lives and determines how we constitute our practical identity. Hence, when the right to exit *this* contract is thwarted by unduly burdensome legal requirements we should see this as an injustice. Through the resistance of the dominant narrative, counterstories represent a moral shift that allows moral agency and freedom even as opportunities are limited.

In my case, the continual efforts of others around me to assist me in the reconstruction of my new counterstory and my own feminist conceptual toolbox enabled me to find an outlet for my agency. This outlet eventually allowed me to circumvent the deprivation of opportunity, but not without having to come to terms with my own cognitive dissonance.

Through my narrative, I have aimed to elucidate how the moral harms arising from same-sex divorce, as presently constructed, occupies a conceptual space between the *rights I have* and the *person I am*. What the abstract generalizations of portable contract rights miss is the harms done to particular bodies—the harm at the intersection of social identity and self-constituted identity. This harm is compounding the vulnerabilities already present in persons who identify with a marginalized group. Moreover, the fact remains that those whose counterstories are least likely to receive uptake, the economically, politically, and epistemically disenfranchised, are also those who are not able to circumvent the legal barriers preventing them from exiting such contracts. In this regard, I count myself among the privileged few.

Even as local others, those who make up my comforting inner circle of friends, family, and my professional colleagues, gave uptake to my reconstructed identity, I could not escape the generative institutional pressure that followed me. The responsibilities that the marriage contract carries are ties that I have not easily been able to shirk. Even as I have resided in a jurisdiction where my obligations were nullified, the tenuous nature of this nullification showed itself repeatedly as I exercised my “freedom” of movement. Only through exercising my economic and professional privilege have I been able to obtain a divorce, which also is something I would not have been able to do without others giving uptake to my reconstructed identity. My hope in giving voice to my own narrative is to challenge the reasoning given in defense of denying divorce to those in similar situations. As I have moved geographically and through this narrative, the generative constructions of my identity have me again reconstituting myself at each turn. I cannot, or rather do not, have the privilege to ignore these generative constructions of myself and neither should you.

Notes

1. Cf. Judith Butler, *Undoing Gender* (New York: Routledge, 2004); Claudia Card, “Gay Divorce: Thoughts on the Legal Regulation of Marriage,” *Hypatia* 22, no. 1 (2007): 24–38; George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004); E. Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (New York: Simon and Schuster, 2004).
2. Chauncey, *Why Marriage*, 60–66.
3. Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000), 47–52.
4. *Sáenz v. Roe*, 526 U.W. 489 (United States Supreme Court May 17, 1999).
5. Laid out in Article 4, Section 1, the Comity Clause states, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”
6. Janet Halley, “Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate,” in *Legal Recognition of Same-Sex Partnerships*, eds. Robert Wintemute and Mads Andenas (Portland: Hart Publishing, 2001), 107.
7. R. Williams, “Same-Sex Marriage and Equality,” *Ethical Theory and Moral Practice* 14, no. 5 (2011): 590.
8. This, at any rate, is the interpretation set by case precedent,

- such as *Loving v. Virginia*, 388 US 1 at 12 (United States Supreme Court, 1967). See also Halley, "Recognition," 106.
9. Halley, "Recognition," 110–11.
 10. C. Mackenzie, "Personal Identity, Narrative Integration, and Embodiment," in *Embodiment and Agency*, eds. Sue Campbell, Letitia Meynell, and Susan Sherwin (University Park: Pennsylvania State University Press, 2009), 107.
 11. The process of self-constitution advocated by theorists such as Christine Korsgaard defends a radical internalism of the constitution of personal identities in *Self-Constitution: Agency, Identity, and Integrity* (2009).
 12. Nelson H. Lindemann, "Identity and Free Agency," in *Feminists Doing Ethics*, eds. Peggy DesAutels and Joanne Waugh (Lanham: Rowman & Littlefield, 2001), 51.
 13. *Ibid.*

Same-Sex Marriage: Spring 2013 Update on the Story So Far

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During the summer of 2009 I wrote an overview for this newsletter on the legal status of same-sex marriage to that point, dating back to *Baehr v. Levin*, the Hawaii Supreme Court's equal protection ruling on the subject that initiated the DOMA (Defense of Marriage Act) era at both state and federal levels.¹ A lot has changed over the sixteen years since that ruling—thirty-seven state DOMA statutes, augmented then by a rash of thirty state-level constitutional amendments,² passed in reaction to Vermont's legislative enactment of civil unions in 2000, and the 2003 Massachusetts State Supreme Court ruling that prohibition of same-sex marriages violated both equal protection rights and the dignity of persons protected under the state constitution without any rational basis.³ Congress enacted the federal DOMA relatively early during this backlash, in 1996, when just four states had thus far implemented their own DOMAs.⁴

On the other side of the ledger, through the summer of 2009 six states had already implemented same-sex marriage licensing, or were in the process of doing so: Massachusetts (2004); Connecticut (2008); Iowa (April 2009); Vermont (September 2009); Maine (September 2009), and New Hampshire (January 2010). Four more, plus the District of Columbia, had enacted civil unions or robust domestic partnerships: California (1999, strengthened periodically since); New Jersey (2006), Oregon (2007), and Washington (2007, strengthened in 2008).

But even more dramatic developments have ensued since, some negative, but most positive. The high water mark for the anti-gay marriage forces probably came in November 2009, when 53 percent of Maine's voters repudiated the state legislature's same-sex marriage initiative (implementation of which had been put on hold pending the outcome of the referendum), thereby temporarily reducing the number of pro-same-sex marriage states to five. And in May 2012, one more state, North Carolina, enacted an anti-same-sex marriage constitutional amendment via popular referendum (61 percent to 39 percent, conveniently scheduled on the same day as NC's Republican presidential primary), bringing that total to thirty plus Hawaii (see note 2).

In the meantime, however, the District of Columbia ratified same-sex marriage in December 2009. New York's legislature did so in 2011, and both Washington's and New Jersey's legislatures early in 2012. Implementation of the Washington

initiative was delayed pending a scheduled voter referendum on the law, and the New Jersey bill was vetoed by Governor Chris Christie, citing the absence of any scheduled provision for a popular vote on the subject. But during the 2012 general election, not only Washington but also Maryland and Maine implemented same-sex marriage by popular referendum—Washington voters thereby ratifying the legislation passed earlier in the year, and Maine voters reversing their 2009 decision. In addition, Minnesota voters rejected an anti-same-sex marriage constitutional amendment. Pro-same-sex-marriage popular votes had been virtually unprecedented prior to these four referenda.⁵ These developments raise the total number of states with legalized same-sex marriage to nine plus the District of Columbia, and the four November 2012 state marriage referenda reflect a trend evident in polling since August 2010, when same-sex marriage first achieved majority support nationally.

And finally, in May 2012, Barack Obama became the first sitting president to endorse same-sex marriage—notably in the middle of a reelection campaign.⁶

Potentially the most dramatic development, however, is the US Supreme Court decision in December 2012 to grant *certiorari* (consent to hear the cases) for two same-sex marriage cases: *Hollingsworth v. Perry* and *US v. Windsor*.⁷ Oral arguments will be heard probably in March 2013, and we can expect the opinions to be handed down, like most controversial Supreme Court cases, in late June.

Looking forward from 2009, I suggested that two important same-sex marriage cases might find their way to the Supreme Court. One of these, *Perry v. Schwarzenegger*, the case devised by Ted Olson (Republican) and David Boies (Democrat)⁸ to challenge the federal constitutionality of California's 2008 anti-same-sex marriage referendum (Proposition 8, which reversed the California Supreme Court's previous endorsement of same-sex marriage on state equal protection grounds), has now changed into *Hollingsworth v. Perry*. The original plaintiffs (now appellees), with Kristin Perry listed first, are a lesbian couple and a gay male couple, California residents denied California marriage licenses subsequent to the passage of Proposition 8. The current batch of appellants, with Dennis Hollingsworth listed first, are intervener-defendants granted official status by the Ninth Circuit to defend Proposition 8 on behalf of ProtectMarriage.com, an anti-gay marriage group involved in organizing the Proposition 8 initiative for the 2008 general election. The federal court took this unusual measure after Arnold Schwarzenegger and Jerry Brown (first in his capacity as Attorney General, and subsequently as Schwarzenegger's successor as governor) both refused to defend Proposition 8 on behalf of the state of California, on the grounds that its passage was unconstitutional on both state and federal equal protection grounds (the California Supreme Court decision to the contrary⁹ notwithstanding).

The other case I suggested as an even more likely candidate for review by the Supreme Court, *Gill v. Office of Personnel Management, United States Postal Service*,¹⁰ a Massachusetts case decided in favor of the plaintiffs in the First Circuit Court of Appeals in Boston (covering most of New England, plus Puerto Rico), has effectively been supplanted by *Windsor*, a more recent variant on the same theme—the constitutionality of Section 3 of the 1996 federal Defense of Marriage Act, which denies federal benefits to same-sex couples regardless of marital status—although *Windsor* was decided in the Second Circuit (covering New York, Connecticut, and Vermont).

Gill was initiated *privately* in March 2009,¹¹ by the gay rights political action group GLAD (Gay & Lesbian Advocates & Defenders), on behalf of eight same-sex couples possessing

Massachusetts marriage licenses, plus three more surviving spouses of such couples, challenging the constitutionality of the US DOMA's Section 3's denial of a potpourri of federal benefits to same-sex married couples or surviving spouses: availability of federal income tax benefits offered to married heterosexual couples; ability to have one's spouse added to family health insurance coverage as a post office employee; ability to have one's name changed to a new married name on one's passport; ability to secure survivor benefits under social security, or a survivor annuity as the spouse of a deceased former member of Congress.¹²

Windsor concerns a different aspect of federal benefits denied same-sex married couples under US DOMA Section 3: protection of inheritance benefits of widowed spouses. Edith Windsor and Thea Spyer, romantic partners in New York City for forty years, availed themselves of Canada's more inclusive marriage laws to wed in Toronto in 2007. That marriage came to be recognized by New York in the wake of a 2008 state court case, *Martinez v. County of Monroe*, requiring New York recognition of marriage licenses issued out-of-state. When Spyer subsequently died (2009), Windsor was denied IRS surviving spouse estate tax benefits, and billed over \$360,000 on the property she inherited, a tax liability that no spouse in an opposite-sex marriage would ever have to pay.

The underlying issue in *Windsor* and *Gill* is essentially the same: does the "no federal benefits" provision of the federal DOMA violate the constitutional principle of equal protection, as applied to the federal government through the Fifth Amendment's due process clause?¹³

Typically, the earliest case through the federal appellate process gets the Supreme Court's attention first. That would be *Gill*, unanimously upheld by a three-judge First Circuit panel in May 2012. *Windsor*, unanimously upheld by a Second Circuit panel the following October, effectively "jumped the queue" over *Gill* because of Justice Department and Supreme Court concerns over Elena Kagan's ability to rule on *Gill*, which came through the federal appellate pipeline at the same time as *Smelt v. US*, a badly flawed case¹⁴ that was subsequently dismissed on technical grounds, but which concerned some of the same issues raised in *Gill* and *Massachusetts v. HSS*. In one of her Senate interviews as a Supreme Court nominee, Kagan acknowledged that during her tenure as President Obama's solicitor general she had reviewed some briefs in the *Smelt* case, and that her involvement was sufficiently substantial that she would feel obliged to recuse herself in a Supreme Court decision on *Smelt*. That discussion raised the possibility that she might also feel obliged to recuse herself from a Supreme Court review of *Gill*, concerning which she conceded in Senate testimony that she thought Justice Department discussion of *Gill* had overlapped with discussion of *Smelt*.

Windsor, having come through the Justice Department subsequent to Kagan's departure for the Supreme Court, presented a neat solution to this dilemma. Donald Verrilli, Kagan's successor as solicitor general, fast-tracked *Windsor* (before the Second Circuit had even ruled) as a possible alternative for the Supreme Court to review instead of *Gill*. The Court opted to accept the invitation, presumably in order to avoid the possible non-outcome of a 4-4 split vote.

Assessment of the current legal landscape in light of the Supreme Court's decision to review both *Perry* and *Windsor* is unavoidably speculative until next fall's issue of this newsletter, when the court's rulings have been handed down and we can revisit these cases. But it is interesting nonetheless to reflect on what the court's *certiorari* invitations *might* mean.

In 2009 I argued, with respect to *Windsor*'s predecessor *Gill*, that the only significant question in that case was whether

Congress would eliminate Section 3 of its DOMA before the Supreme Court did, in order to save itself the embarrassment of being ruled contemptuous of the equal protection principle in its 1996 legislation. I thought there was no doubt that the Supreme Court would grant *certiorari* in *Gill* or (as it has turned out) a *Gill* clone. I also suggested that the outcome of such a review was foreordained: while it is conceivable that some of the more conservative justices might disgrace themselves by arguing that the federal government's treatment of Edith Windsor (and the litigants in *Gill*, *Pederson*, and *Golinski*, and thousands of others, similarly situated) somehow doesn't violate equal protection, or that there is a sufficiently compelling reason for such violations, Section 3 is nonetheless doomed. For it seems quite unlikely that Anthony Kennedy would go along with such arguments, given his previous votes in *Laurence v. Texas* (the Court's 2003 reversal of its 1986 *Bowers v. Hardwick* precedent on the constitutionality of anti-sodomy laws) and *Romer v. Evans* (striking down Colorado's 1992 anti-gay rights referendum in 1996). In light of John Roberts's apparent concern for his own historical legacy as guardian of the court's reputation for judicial integrity, as revealed in his majority opinion in *National Federation of Independent Business v. Sebelius*, the June 2012 ruling on the *Patient Protection and Affordable Care Act* (Obamacare), it seems likely that he too will vote to strike down Section 3. A Supreme Court vote of at least 6-3 in Windsor's favor seems highly probable.

Compounding the equal protection issue, for the court's conservatives at least, is the issue of respect for state autonomy. How would the court justify telling the state of New York that, while marriage licensing has historically been regarded as a state prerogative, that prerogative no longer applies where federal marriage benefits are concerned? Why should Congress be entitled to preempt traditionally respected state authority on grounds of social animus (which clearly motivated the federal DOMA's passage in 1996)?

Perhaps the court will nonetheless prove me wrong on this analysis in the coming months. I have, after all, already been wrong about one prediction: Congress has become so dysfunctional since 2009 that it now neither notices nor cares that it is likely to be subjected to a public scolding by a pretty conservative court for its hostility to the doctrine of equal protection under the law. For the moment though, I think the real interest in the pending *Windsor* ruling is not the broad outcome, but the details. In particular, how portable will federal benefits be after *Windsor*? If a same-sex couple married in New York or Massachusetts should subsequently move to South Carolina, where same-sex marriage will be recognized when hell freezes over or (only slightly more probable) if the court rules broadly in *Perry*, will such couples be able to retain the federal benefits they will soon come to enjoy as New York or Massachusetts residents? What if they were South Carolina residents traveling to New York for a "destination wedding" (ostensibly)? What if they married, and resided, in Toronto, and emigrated from Canada straight to South Carolina, claiming federal marriage benefits for the first time as South Carolina residents, even though married under foreign licensing practices?

I suspect the answer to the first and second questions would be "yes," if only for practical reasons (although it may require further litigation, depending on how broadly the court rules in *Windsor*). The third question is much trickier, though, thanks to the judicial history of the public policy exception to the US Constitution's Full Faith and Credit Clause.¹⁵

Concerning *Perry*, there is much more mystery surrounding the court's decision to grant *cert*. In my 2009 speculation on the fate of *Perry v. Schwarzenegger*, the original incarnation of *Hollingsworth v. Perry*, I suggested that a US Supreme Court

repudiation of Proposition 8 could have major implications for both provisions of the federal DOMA, as well as for every state DOMA and at least twenty-eight of the twenty-nine other anti-same-sex state constitutional amendments.¹⁶ If the US Supreme Court were to rule, unqualifiedly, that Proposition 8 violated the federal equal protection clause, the same would surely be true of all the other state DOMA and amendment actions, and of both substantive provisions of the federal DOMA.¹⁷ Consequently, I argued that the court was unlikely to rule so broadly, and might not accept the case at all. While not entirely unwilling to defend constitutional principles in the face of popular opposition, the Supreme Court is mindful of the limits to public tolerance of its rulings. (I think John Roberts is especially sensitive to this constraint in the wake of popular outrage over the court's 2010 *Citizen's United* decision, and his subsequent personal odyssey that led to his majority opinion endorsing the constitutionality of Obamacare in 2012.¹⁸) Judicial repudiation of direct democratic action in twenty-nine states, frequently by very large majorities, may not be a risk that Roberts cares to take, and one which, in any case, would be offensive to his conservative sensibilities about judicial restraint (which move him at least some of the time, although obviously not in *Citizens United*).

Nor is it likely that Anthony Kennedy will take that risk, now that he has been handed a ruling tailor-made for his vote by the Ninth Circuit. In 2009 I suggested that the Ninth Circuit might see fit to protect the Supreme Court by devising an argument to let Proposition 8 stand, in which case the Supreme Court would probably gratefully deny *cert*, regardless of the merits of the Ninth Circuit argument. What has actually happened instead is that the Ninth Circuit has endeavored to protect the Supreme Court by striking down Proposition 8 on narrow constitutional grounds applicable (at present) only in California.

Vaughn Walker's 2010 federal district court ruling in *Perry v. Brown* held Proposition 8 violative of the plaintiffs' Fourteenth Amendment due process and equal protection rights because it constrained their fundamental right to marry without meeting even a rational basis test for such a constraint on individual liberty, let alone the strict scrutiny test that might be applicable if marriage is a *fundamental* right.¹⁹ (And since Proposition 8 failed the rational basis test, Walker did not formally address the question whether marriage *was* a fundamental right.)

The potential for a broad appellate court reading of Walker's ruling was there. Rational basis testing could be applied against DOMA initiatives and anti-same-sex marriage amendments throughout the reach of the Ninth Circuit. Instead, the two-judge majority on the Ninth Circuit panel affirmed Walker's ruling much more narrowly by focusing on the fact that Proposition 8 was *withdrawing* a right to marry previously enjoyed by same-sex California couples in the wake of the California Supreme Court's original 2008 pro-same-sex marriage ruling (*In re Marriage Cases*). In this regard, the Ninth Circuit was following Anthony Kennedy's reasoning in *Romer v. Evans*, striking down Colorado voters' 1992 passage of Amendment 2, a "no special rights for gays" state constitutional provision that not only revoked existing state and local laws prohibiting sexual orientation discrimination, but, even more incredibly, prohibited all future democratic initiatives to enact such legislation.²⁰

This is a nice example of how the road to hell might (at least temporarily) be paved with good intentions—those of David Boies and Ted Olsen for affording the Ninth Circuit this opportunity in the first place, and those of Stephen Reinhardt for crafting a majority opinion designed to appeal to the perceived swing vote on the US Supreme Court. For if the Supreme Court does endorse Reinhardt's reasoning, thereby confining the reach of *Perry* to the state of California (which is otherwise likely to reverse Proposition 8 in another referendum in the

near future anyway), the result will be a very odd one: same-sex marriage rights can only be upheld against hostile legislation or popular referenda when they have been revoked, but not in a jurisdiction where they were never enjoyed in the first place.

Kennedy's reasoning in *Romer* always was pretty convoluted, though it, too, was well-intentioned: How do you strike down a popular initiative that is both anti-democratic and clearly motivated by social animus against a despised minority when your own court's ten-year-old precedent (in *Bowers v. Hardwick*) clearly permits legislation motivated by social animus specifically against that very same group? Answer: draw a distinction between *Romer* and the *Hardwick* precedent by pointing out that the Colorado action constituted a *revocation* of existing rights (whereas the state of Georgia, the legislative forum for the anti-sodomy law at issue in *Hardwick*, could never have been accused in 1986 of being kind to homosexuals).

Scalia, in his *Romer* dissent, accused the majority of reversing *Hardwick*. He wasn't quite right, but only at the expense of Kennedy's illogical analysis of the nature of social animus. In the wake of *Lawrence v. Texas*, *Hardwick* is no longer sound precedent. Is Kennedy's convoluted *Romer* reasoning about the proper scope of prohibitable social animus going to be retained by the Supreme Court in its impending *Perry* ruling?²¹

The mysterious thing is why the Supreme Court has chosen to step into this quagmire at all. It could have simply let this sleeping dog lie, conceding same-sex marriage in California, which, from the Supreme Court conservatives' perspective, is probably soon going to be reinstated by popular referendum anyway. They could have thus avoided the awkward dilemma of choosing between Kennedy's tortured logic in *Romer*, and now Reinhardt's in *Perry*, or a repudiation of that logic in order to reverse the Ninth Circuit, but to what purpose is unclear—perhaps preservation of majoritarian democratic exercise of social animus in other more conservative states? That's a goal dear to Antonin Scalia's heart, but one which requires Kennedy's cooperation. And that is hard to imagine in light of his reasoning in *Romer*.

Of course, we don't really know which four votes (minimally) were cast to grant certiorari in *Perry*. Perhaps some of the more "liberal" members of the court weighed in to review the case. But their reasoning would be equally unclear at this stage, since the risk of a reversal of the Ninth Circuit's twisted logic, *and the resulting opinion*, is surely not negligible. Who knows what argument might persuade Kennedy that *this* case can be distinguished yet again from the *Romer* precedent? A resolution of this mystery will probably have to wait until the end of June 2013.

Notes

1. Nunan, "Constitutional Rights versus State Autonomy and Direct Democracy: The Story so far on Same-Sex Marriage," *APA Newsletter on Philosophy & Lesbian, Gay, Bisexual, & Transgender Issues* 09, no. 1 (Fall 2009): 1–14; 852 P.2d 44 (HA 1993).
2. Strictly speaking, only twenty-nine: Hawaii's constitutional amendment permits the state legislature to ignore the state constitution's equal protection provision where marriage law was concerned, rather than explicitly prohibiting same-sex marriage.
3. *VT Statutes Annotated*, Title 15, Chapter 23; *Goodridge v. Massachusetts Department of Public Health*, 798 NE2d 941 (MA 2003).
4. Utah, Idaho, South Carolina, and (oddly) Illinois.
5. There had been one previous exception: an Arizona constitutional referendum designed to ban same-sex marriage in 2006 lost narrowly (52 percent to 48 percent) because it was correctly perceived to prohibit not just same-sex marriage but also any future recognition of civil unions in

Arizona, a state known for its libertarian proclivities. Having once overreached themselves, Arizona's same-sex marriage opponents regrouped for the 2008 general election and successfully (56 percent to 44 percent) negotiated passage of a constitutional amendment prohibiting only same-sex marriage.

6. Obama's position stands in stark contrast to Bill Clinton's behavior during *his* reelection campaign in 1996, when he cravenly signed the Congressional DOMA into law. But the difference reflects the distance we have come with respect to public sentiment about same-sex marriage far more than it reflects any fundamental difference between the characters of the two politicians. For Obama's embrace of same-sex marriage itself reflects something of a conversion on *his* four-year road to Damascus. Compare his Justice Department's homophobic 2009 brief in *Smelt v. US*, discussed in Nunan 2009, 7–9. I suggested there that the brief, which defended DOMA Section 3 as consistent with equal protection law, was simply an inattentive mistake that slipped through, authored by a holdover Bush Justice Department staffer. But in September of that year (shortly after I wrote Nunan 2009), the Obama Justice Department executed a repeat performance in a brief defending DOMA in *Gill v. Office of Personnel Management* (discussed further below). Late in his first term, Obama's Justice Department announced that it would cease defending such cases on the ground that the Obama Administration had come to regard both state and federal anti-same-sex marriage laws as unconstitutional.
7. *Cert* granted, 184 L. Ed. 2d 526 (Dec 7, 2012), from *Perry v. Brown*, 667 F.3d 1052 (9th Circuit, Feb 7, 2012); *Cert* granted, 184 L. Ed. 2d 527 (Dec 7, 2012), from *Windsor v. US*, 699 F.3d 169 (2nd Circuit, Oct 18, 2012).
8. Both of *Bush v. Gore* fame, in which they were opposing lead attorneys.
9. *Strauss v. Horton*, 46 Cal.4th 364 (May 26, 2009).
10. 682 F.3d 1 (1st Circuit, May 31, 2012).
11. On July 8, 2009, Massachusetts Attorney General Martha Coakley filed a *state* action challenging Section 3 on much the same grounds as *Gill*. Because the complaints were so similar, *Massachusetts v. US Dept. of Health and Human Services* was ultimately decided jointly with *Gill* in 682 F.3d 1. The chief significance of *Massachusetts v. HSS* was that it added more force to the argument that Congress unconstitutionally violated state autonomy in Section 3, insofar as marriage licensing has historically been regarded as a state prerogative.
12. Two more cases were filed in 2010, one on behalf of similarly situated plaintiffs in Connecticut, Vermont, and New Hampshire, after those three states had enacted same-sex marriage licensing—*Pederson v. Office of Personnel Management*, also initiated by GLAD—and the other in California (*Golinski v. Office of Personnel Management*). Golinski, a government employee (ironically, of the Ninth Circuit Court of Appeals), was denied health benefits for her same-sex spouse on US DOMA Section 3 grounds. (Same-sex marriage licenses issued in California *prior* to the passage of Proposition 8 were ruled valid in the California Supreme Court's *Strauss v. Horton* opinion, otherwise upholding the constitutionality of Proposition 8.) Both cases were decided in favor of the plaintiffs at the federal district court level in 2012, and subsequently appealed. But the Second Circuit has yet to rule in *Pederson*, and the Ninth Circuit has not yet ruled in *Golinski*.
13. The Equal Protection Clause appears only in the Fourteenth Amendment, along with the Due Process Clause. The Fourteenth Amendment constrains *state* action, not *federal* action. But the federal courts have, since early in the twentieth century, routinely applied the Equal Protection Clause to legal challenges of *federal* laws via a substantive interpretation of the Due Process Clause that appears also in the Fifth Amendment, which was clearly intended to target *federal* overreach with respect to individual liberty.
14. Nunan, "Constitutional Rights," 7–9.
15. For a brief explanation of this issue's significance, I refer again to "Constitutional Rights versus State Autonomy" in the Fall 2009 APA newsletter, 1, notes 3 & 4.
16. Hawaii's amendment (although not its DOMA) might once again prove an exception, since the amendment itself does not prohibit same-sex marriages.
17. The other "substantive" provision of the US DOMA, not previously discussed, is Congress's assertion that states desiring to prohibit same-sex marriage are entitled to ignore the licensing practices of those that do not. In one sense, this provision is not substantive, since it simply reasserts a practice long recognized by the courts: the public policy exception to the Full Faith and Credit Clause. (See note 17 above.) In another sense, this legislated public policy exception has also become problematic, now that there are *actual* states permitting same-sex marriage (starting with Massachusetts in 2004).
18. On this particular issue, see Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (New York: Doubleday, 2012).
19. 704 F. Supp.2d 921.
20. 517 US 620 (1996).
21. For a lucid (brief) discussion of this particular issue, see Susannah W. Pollvogt, "Forgetting *Romer*," *Stanford Law Review Online*, December 14, 2012. <http://www.stanfordlawreview.org/online/forgetting-romer>.