

THE UNSCIENTIFIC SCIENCE OF GENDER
JURISPRUDENCE: EVALUATING THE NEGATIVE IMPACT
OF NORMATIVE LEGAL LANGUAGE ON ISSUES OF SEX
AND GENDER

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INTRODUCTION

The recent plethora of legal battles over same-sex marriage reflects the real impact of normative legal language on human lives. The harm claimed by opposing sides in the debate revolves around the use of terms whose normative nature reflects a set of metaphysical propositions; the acceptance or denial of which constitutes a challenge to the public and private perception of individuals. On this account, law acts as a means of defining human beings in a manner that harms one group or the other at all times. The jurisprudential question is whether law can escape this veritable scylla and charybdis.

This paper argues that the problem is avoidable once we understand that anti-same-sex marriage laws and anti-gay legislation are based on a binary sex and gender model that perpetuates an idealized, but unscientific, human anatomy in their normative context. As Julie Greenberg points out, the “law typically has operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.”¹ Greenberg adds,

Implicit in legislation utilizing the terms ‘sex’ and ‘gender’ are the assumptions that only two biological sexes exist and that all people fit neatly into either the category male or female. In other words,

1. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 266-67 (1999), reprinted in *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 125, 126 (William B. Rubenstein et al. eds., Thompson West, 3d ed., 2008).

despite medical and anthropological studies to the contrary, the [American] law presumes a binary sex and gender model.²

The danger in this phenomenon, in the words of Judith Butler, is that “[t]he norms that govern idealized human anatomy work to produce a differential sense of who is human and who is not, which lives are livable, and which are not.”³ Hence, laws that convey sex and gender norms based on the idealized notion of human anatomy are harmful because they: a) deprive people of constitutional rights to fair and equal treatment under the law; and, b) damage people’s identity, dignity, and self-awareness.

The first of these harms is the precise question in the debate over two anti-same sex marriage legislative acts, California’s Proposition 8⁴ and Iowa Code section 595.2⁵, and ultimately will be the subject in question before the United States Supreme Court at some point in time.⁶ Because the United States Supreme Court has not definitively identified the level of scrutiny that applies to legislative classifications based on sexual orientation,⁷ it is likely to apply the four factor analysis for the highest level of scrutiny because Judge Vaughn Walker in *Perry v. Schwarzenegger*⁸ and the Iowa Supreme Court in *Varnum v. Brien* held that the issue demanded “strict scrutiny” analysis.⁹ The four factors of the strict scrutiny standard are: (1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that

2. Greenberg, *supra* note 1, at 275; reprinted in CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 1, at 129.

3. JUDITH BUTLER, UNDOING GENDER 4 (2004).

4. PROPOSITION – MARRIAGE – CALIFORNIA MARRIAGE PROTECTION ACT, 2008 Cal. Legis. Serv. Prop. 8 (West) (effective Nov. 5, 2008, repealed in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal.2010)).

5. IOWA CODE ANN. § 595.2 (1999).

6. The United States Supreme Court has not resolved the question whether a ban on same-sex marriages violates the Equal Protection Clause of the 14th Amendment. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that Texas statute criminalizing same sex sexual conduct violated the Due Process clause).

7. When this issue does reach the high court, one of the first issues will be determining the appropriate level of scrutiny. The lowest level of scrutiny applied to cases that challenge the constitutionality of a statute under the equal protection clause of the 14th Amendment of the United States Constitution is the “rational basis test.” Under the rational basis test the plaintiff has the burden of negating every reasonable basis upon which the classification is sustained. The next level of scrutiny, “intermediate scrutiny,” shifts the burden to the party seeking to uphold the statutory classification as furthering an important governmental interest. The classification under intermediate scrutiny must be genuine and must not depend on broad generalizations. See *United States v. Virginia*, 518 U.S. 515, 533 (1996). The third, and highest level of scrutiny, kicks in when there exist reasons to suspect prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

8. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 995 (N.D. Cal. 2010).

9. *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (“Accordingly, we hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”).

distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4) the political power of the subject class.¹⁰ In light of what other courts have decided in this area of law,¹¹ factors (3) and (4) are likely to receive significant attention since the first two factors are easily answered.

This paper develops a method of hermeneutic analysis that could help determine the appropriate level of scrutiny for the constitutional issue in question and help answer the third and fourth prong of the strict scrutiny analysis. As we shall see, gender and sexual orientation are "socially constructed" and therefore, by definition, "beyond the class members' control" (answering to the third prong of the strict scrutiny test). More importantly, we argue here that legislative acts governing sex and gender are acts of power that play a key role in the social construction of gender and sexual orientation and therefore vitiate the "political power" of the subject class (answering to the fourth prong—hence the need for heightened scrutiny of the issue).

Such [legislative] acts always carry the potential for the second type of harm Butler identifies: damage to people's identity, dignity and self-awareness. As Butler says, "a normative conception of gender can undo one's personhood, undermining the capacity to persevere in a livable life."¹² As we shall see, legislative acts such as the Federal Defense of Marriage Act ("DOMA")¹³, Don't Ask Don't Tell ("DADT")¹⁴, California's Proposition 8¹⁵, and Iowa Code section 595.2¹⁶ reify a heterosexual hierarchy in which sex and gender are [unscientifically and illicitly] conflated and anything other than oppositional [sexual] orientation is illegal, perverse, unnatural, abnormal and immoral. This phenomenon has a specifically negative impact on people's identity formation, dignity, and self-awareness, and it also contributes to an environment that justifies homophobic attitudes and behaviors. Therefore, "[w]hat is most important is to cease legislating for all lives what is livable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some."¹⁷

Butler's goal here captures the essence of the equal protection clause perfectly, but to cease legislating for "all lives what is livable only for some"

10. See generally *Conaway v. Deane*, 932 A.2d 571, 606 (Md. 2007) (discussing the four factors).

11. See Ingrid M. Lofgren, *The Role of Courts vis-à-vis Legislatures in the Same-sex Marriage Context: Sexual Orientation as a Suspect Classification*, 9 U. Md. L.J. Race Religion, Gender & Class 213 (2009), for an excellent analysis of important cases in this area of the law.

12. BUTLER, *supra* note 3, at 1.

13. Defense of Marriage Act, 28 U.S.C. § 1738C (2006).

14. Don't Ask Don't Tell, 10 U.S.C. § 654 (1993) (repealed 2011).

15. PROPOSITION – MARRIAGE – CALIFORNIA MARRIAGE PROTECTION ACT, 2008 Cal. Legis. Serv. Prop. 8 (West) (effective Nov. 5, 2008, repealed in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal.2010)).

16. IOWA CODE ANN. § 595.2 (1999).

17. BUTLER, *supra* note 3, at 8.

seems a lofty goal considering the nature of our political and legal structure as a society. As Butler says,

We have an interesting political predicament, since most of the time when we hear about ‘rights,’ we understand them as pertaining to individuals [but] when we argue for protection against discrimination, we argue as a group or a class . . . and in that context we have to present ourselves as bounded beings . . . but perhaps we make a mistake if we take the definitions of who we are, legally, to be adequate descriptions of what we are about.¹⁸

After all, continues Butler, “we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own.”¹⁹ The body has a political dimension. It is constituted as a social phenomenon in the public sphere, and this is never more true than when our bodies relate us to others.²⁰

The specific problem in these political relations is that sometimes,

. . . the very terms that confer ‘humanness’ on some individuals are those that deprive certain other individuals of the possibility of achieving that status, producing a differential between the human and the less-than-human. These norms have far-reaching consequences for how we understand the model of the human entitled to rights or included in the participatory sphere of political deliberation.²¹

For this reason, Butler’s approach is well-suited to the task, as she suggests that “[t]he critique of gender norms must be situated within the context of lives as they are lived and must be guided by the question of what maximizes the possibilities for a livable life, what minimizes the possibility of unbearable life or, indeed, social or literal death.”²²

This is the basis of the new hermeneutic approach we will use to challenge laws dealing with sex and gender issues. In effect, this particular method of criticism could almost stand in place of the third and fourth prongs of the heightened scrutiny analysis for cases dealing with gender and sexual

18. *Id.* at 20.

19. *Id.* at 21.

20. *See id.*

21. *Id.* at 2.

22. *Id.* This view is also reflected in Judge Walker’s decision in *Perry v. Schwarzenegger* when he addresses the appropriate standard of review for this case. *See Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 995 (N.D. Cal.2010). Judge Walker reiterates that “legislation singling out a class for differential treatment hinges upon a demonstration of ‘real and undeniable differences’ between the class and others,” but the supposed differences between homosexuals and heterosexuals underlying Proposition 8 come down to the simple ability to procreate through sexual union—and “fertility,” avers Judge Walker, is not something the government has an interest in. *See Perry* at 997 (quoting in part *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (1985)).

orientation because “lives as they are lived”²³ will show that gender is a dynamic, socially constructed phenomenon beyond individual control (prong 3); and, where a group is not able to “maximize the possibilities for a livable life and minimize the possibilities of unbearable life,”²⁴ they obviously lack political power as a class (prong 4).

I. CONTEMPORARY CASE LAW AND THE NEED FOR A NEW HERMENEUTIC

The social landscape regarding sex and gender issues has shifted dramatically in the last few years in the United States. The most profound shifts occurred in the formulation of and reaction to laws that force a specifically normative perspective on sex and gender. This is reflected in the case law and challenges to Federal Policy seen recently. In 2009, the Iowa Supreme Court unanimously decided that Iowa’s Marriage Statute section 595.2, which states, “only a marriage between a male and a female is valid,”²⁵ was unconstitutional.²⁶ The Iowa Court averred that the marriage statute permitted a “classification to be maintained ‘for its own sake’,”²⁷ and this circular logic allows “discrimination to become acceptable as tradition.”²⁸ According to the Iowa Supreme Court in *Varnum*, Iowa Code section 595.2 flies in the face of the Constitution because “equal protection demands that, ‘the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself.’”²⁹ The Iowa Supreme Court found no such state interest in the law, and more importantly, pronounced that “[a] new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”³⁰

In August of 2010, Judge Vaughn Walker of the U.S. District Court for the Northern District of California overturned California’s ban on gay marriage³¹ stating, “Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license.”³² Judge Walker concluded that “Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples” and “moral disapproval

23. BUTLER, *supra* note 3, at 8.

24. *Id.*

25. IOWA CODE ANN. § 595.2 (1999).

26. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

27. *Id.* at 898 (citing *Kerrigan*, 957 A.2d at 478 (quoting *Romer*, 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed. 2d at 868)).

28. *Id.*

29. *Id.* (Kaye, C.J., dissenting) (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 33 (N.Y. 2006)).

30. *Id.* at 906.

31. PROPOSITION – MARRIAGE – CALIFORNIA MARRIAGE PROTECTION ACT, 2008 Cal. Legis. Serv. Prop. 8 (West) (effective Nov. 5, 2008, repealed in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 995 (N.D. Cal.2010)).

32. *Perry v. Schwarzenegger*, 704 F.Supp.2d at 1003.

alone is an improper basis on which to deny rights to gay men and lesbians.”³³ “Proposition 8,” continued Walker, “does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”³⁴

This case demonstrates that the traditional notion of heterosexual unions as superior is premised on bad science, hidden social and religious agendas,³⁵ and a wholly inadequate concept of gender;³⁶ therefore, concludes Judge Walker, proponents’ “asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8.”³⁷ The Proposition 8 movement ignores the social and moral trajectory of marriage as a gender-based institution in the United States. As Judge Walker points out, “[t]he evidence shows that the movement of marriage away from a gendered institution toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage.”³⁸ For Judge Walker, what is at stake with Proposition 8 is nothing less than the right of same-sex couples “to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”³⁹

Judge Walker is certainly not alone on this front. On September 20, 2011, the official United States policy regarding homosexuals serving in the military, DADT, signed into law by President Bill Clinton and in effect since December 21, 1993,⁴⁰ was repealed.⁴¹ The policy prohibited people who “demonstrate a

33. *Id.*

34. *Id.*

35. *See generally Perry*, 704 F.Supp.2d 921. The Iowa Supreme Court in *Varnum v. Brien* also spends several pages of analysis on the hidden social and religious agendas behind the anti-same-sex marriage movement. *See also Varnum v. Brien*, 763 N.W.2d 862, 904-06 (“While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling.”) (noting that the anti-same-sex marriage movement has social and religious agendas).

36. *See Perry* at 1001 (“The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.”).

37. *Id.* at 998.

38. *Id.* at 993; *see generally Perry*, 704 F.Supp.2d 921. (The evidence presented in *Perry v. Schwarzenegger* provides an excellent summary of the various philosophical and social considerations regarding the institution of marriage, not the least of which has to do with the need for recognition of a life choice.)

39. *Id.* at 994 (citing *In re Marriage Cases*, 183 P.3d 384, 434 (Cal 2008)). Judge Walker goes on to state that the option of a “Registered Domestic Partnership,” made available under California law, does not satisfy California’s legal obligation to provide due process because that designation “communicates the official view that same-sex couples’ committed relationships are of lesser stature than the comparable relationships of opposite-sex couples.” And, continues Walker, “proponents [of Proposition 8] do not dispute the ‘significant symbolic disparity between domestic partnership and marriage,’ [Doc #159-2 at 6].” *Id.* at 993-94.

40. Mark Thompson, “Don’t Ask, Don’t Tell” Turns 15, *TIME* U.S. (Jan. 28, 2008) available at <http://www.time.com/time/nation/article/0,8599,1707545,00.html>.

propensity or intent to engage in homosexual acts” from serving in the armed forces of the United States, because their presence “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”⁴²

As with Proposition 8 in California, the evidence did not support the assumptions about gender and sexual orientation that DADT was premised upon. A congressional bill to repeal DADT was enacted in December 2010, specifying that the policy would remain in place until the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certified that repeal would not harm military readiness.⁴³ After prolonged study of the issues, President Barack Obama, Secretary of Defense Leon Panetta, and Chairman of the Joint Chiefs of Staff Admiral Mike Mullen sent that certification to Congress on July 22, 2011, and it was repealed following a 60-day waiting period.⁴⁴

While these cases indicate a shift in the cultural landscape regarding sex and gender issues, the larger problem of our tendency to try and legislate [sexual] morality remains. For four decades after the decriminalization of sodomy under the Model Penal Code in 1962⁴⁵, attempts to legislate sexual morality focused almost exclusively on sex-acts (sodomy and oral sex) associated with gays and lesbians.⁴⁶ Since the United States Supreme Court invalidated all remaining state sodomy laws in *Lawrence v. Texas*⁴⁷, attempts to legislate sexual morality have focused almost exclusively on who can be married and who cannot.⁴⁸ At least 30 states currently have measures similar to

41. *Repeal of “Don’t Ask, Don’t Tell” (DADT): Quick Reference Guide*, U.S. DEPARTMENT OF DEFENSE, (Jan. 28, 2011), http://www.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVED.pdf.

42. Don’t Ask Don’t Tell, 10 U.S.C.S. § 654 (2006) (repealed 2011) (specifically prohibiting any homosexual or bisexual person from disclosing his or her sexual orientation or from speaking about any homosexual relationships, including marriages or other familial attributes, while serving in the United States armed forces).

43. Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), http://www.nytimes.com/2011/07/23/us/23military.html?_r=1&ref=dontaskdonttell. See also Charles Keyes, *In 60 Days, Gays Will be Allowed to Serve Openly in the Military*, CNN (July 22, 2011), <http://www.cnn.com/2011/POLITICS/07/22/dadt.repeal/index.html>.

44. Bumiller, *supra* note 43, at 1.

45. MODEL PENAL CODE § 213.2 cmt. 2 (1962). “Deviate sexual intercourse” as the ALI defined it, included all forms of anal and oral intercourse as well as “digital penetration of a female by another female and penetration by inanimate objects.” MODEL PENALCODE § 207.5(6) (1962).

46. See A.G. Sulzberger, *Kansas Law on Sodomy Stays on Books Despite a Cull*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/us/sodomy-law-remains-official-in-kansas.html> (for an example of current anti-sodomy legislation).

47. 539 U.S. 558 (2003).

48. Currently, Iowa, Massachusetts, Connecticut, New Hampshire, Vermont, New York and Washington D.C., all have laws allowing for same-sex marriage (in spite of the Federal Defense of Marriage Act), and with the passage of Senate Bill 6239 by the Washington State Senate on February 1, 2012, it looks as though Washington will also allow

California's Proposition 8 that seek to outlaw same-sex marriage.⁴⁹ While military personnel are now free to claim their sexual status and orientation they are not yet free to marry the person of their choice. In fact, it is difficult to see progress in Iowa, California, or the United States military, when DOMA⁵⁰ is still in place. The very existence of DOMA points to an ongoing struggle in American jurisprudence regarding the projection and perpetuation of sex and gender bias through normative legal language.⁵¹ Asserting that marriage needs to be "defended" presupposes it is "under attack"—which for those interested in having their family relationships accorded the same level of dignity and respect as others is insulting; they are not trying to destroy "marriage," they are trying to share in it. As the Iowa Supreme Court put it: "'the marriage state is not one entered into for the purpose of labor and support alone,' but also includes 'the comfort and happiness of the parties to the marriage contract.'"⁵²

As for the argument by proponents of anti-same-sex marriage legislation that they are somehow harmed and the institution of marriage is impacted negatively when same-sex marriages are allowed, neither Judge Walker nor the Iowa Supreme Court found any merit in that claim. As the Iowa Supreme Court stated,

... A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by

for same-sex marriage as the bill is likely to pass the House and the Governor has already stated his support. William Yardley, *Washington State Senate Passes Gay Marriage Bill*, N.Y. TIMES (Feb. 1, 2012), http://www.nytimes.com/2012/02/02/us/washington-state-senate-passes-gay-marriage-bill.html?_r=0. California, Colorado, Hawaii, Maine, Maryland, Nevada, Oregon, Rhode Island, Wisconsin, Illinois, and Washington allow some form of "legal union" that offers only a sub-set of the full rights that marriage affords. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES (June 10, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html?scp=1-spot&sq=same%20sex%20marriage&st=cse. Meanwhile, there are more than thirty states with measures similar to California's Proposition 8 that seek to outlaw same-sex marriage. The inevitable legal confrontation to be decided by the United States Supreme Court reiterates the need identified in this project for a complete hermeneutic analysis of the normative content of the legal language regarding sex and gender especially in the context of the word "marriage," and there is none better suited for the task than Judith Butler.

49. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES (June 10, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/c/californias_proposition_8_samesex_marriage/index.html.

50. Defense of Marriage Act, 28 U.S.C. § 1738C (2006). 1 U.S.C. § 7 (2006) defines marriage as a legal union between one man and one woman as husband and wife, and 28 U.S.C. §1738(c) exempts states, territories or possessions of the United States, or Indian tribe from having to recognize any public act or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex).

51. See generally WILLIAM RUBENSTEIN, CARLOS BALL & JANE SCHACTER, *SEXUAL ORIENTATION AND THE LAW* (3d ed. 2008) (detailed account of this ongoing struggle in American jurisprudence).

52. *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (quoting *Price v. Price*, 60 N.W. 202, 203 (Iowa 1894)).

a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past.⁵³

Similarly, Judge Walker pointed out that "proponents [of California's Proposition 8 banning same-sex marriage] presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or the institutions of marriage."⁵⁴ "The evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8," stated Judge Walker.⁵⁵

The California and Iowa cases are reactions to attempts to legislate a specific moral view of relationships, but such attempts to use the law to exclude individuals or groups, or to accommodate identity, begs the question as to why some people feel the need to control the moral character of relationships and individuals.⁵⁶ This phenomenon points to the need for a broader social inquiry into how public declaration of particular relationships and sexual orientation contribute to the identity formation process of others. If true progress is to be gained, we need to understand all facets of this phenomenon, and that requires a rigorous hermeneutic process. What is marriage and what does it mean for it to be restricted to "one man and one woman?" For this analysis we turn to the work of Judith Butler.

II. DEFINING BUTLER'S NEW HERMENEUTIC METHOD

Though Butler's approach is well-suited to the task of rethinking how and why we legislate sex and gender issues, it is by no means easy. "The first move," says Butler, "is to separate sexuality from gender, so that to have a gender does not presuppose that one engages sexual practice in any particular way, and to engage in a given sexual practice, anal sex for instance, does not presuppose that one is a given gender."⁵⁷ Butler's second [move] is to argue that "gender is not reducible to hierarchical heterosexuality . . . that gender itself is internally unstable."⁵⁸ In applying this hermeneutic process, Butler says we must remember that "regulations that seek merely to curb certain specified

53. *Id.* at 906.

54. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 999 (N.D.Cal. 2010).

55. *Id.*

56. *See Varnum*, 763 N.W.2d at 904-05. The Iowa Supreme Court indicates a possible motive when it states, "whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief." *Id.* It is fairly obvious that people do not like to have such beliefs challenged. However, the law's concern is upholding values such as fairness and equal protection, not safeguarding individuals from having religious beliefs challenged. More to the point, the law cannot lend itself to the purpose of targeting specific people whose beliefs differ.

57. BUTLER, *supra* note 3, at 54.

58. *Id.*

activities . . . [lead to] the production of the parameters of personhood, that is, making persons according to abstract norms that at once condition and exceed the lives they make—and break.”⁵⁹ Again, our critique of such norms must, according to Butler, be “situated within the context of lives as they are lived and must be guided by the question of what maximizes the possibilities for a livable life, what minimizes the possibility of unbearable life or, indeed, social or literal death.”⁶⁰

It is fairly clear that laws such as Californian’s Proposition 8, Iowa Code section 595.2, DOMA, and DADT subscribe to a notion of gender that follows from an idealized anatomy (as in the phrase “one man, one woman”),⁶¹ which leads to a binary system in which the heterosexual arrangement is the only legitimate option morally, socially, and legally.⁶² But this idealized notion of anatomy, which leads to a binary social construct for the legitimation of relationships, is based on some dubious ontological and teleological assumptions that must be clarified: and hence the reason for the first step in Butler’s approach which is to separate sexuality from gender.

In her book, *Undoing Gender*, Butler points out that gender is assumed to be “natural,” or to put it philosophically, “ontological.”⁶³ That is to say, it is assumed that gender identity “could and should be derived unequivocally from presumed anatomy,”⁶⁴ and that this signifies an “essential self.” This “anatomical essentialism,”⁶⁵ as Butler calls it, follows the ontological view that “matter determines mode.” This view leads to a heterosexual hierarchy in which there are only two sexes and oppositional [sexual] orientation is the norm and anything else is abnormal. This paradigm conflates sex and gender in

59. *Id.* at 56.

60. *Id.* at 8.

61. One need only consider the hypothetical scenario of two hermaphrodites applying for a marriage license in order to have some sense of the unscientific basis of this idealized anatomy. Butler devotes special attention in her book, *Undoing Gender*, to the case of hermaphrodites and inter-gender and trans-gender individuals precisely because it emphasizes the very unscientific nature of basing gender on genitalia. Butler concludes, “transgendered lives are evidence of the breakdown of any lines of causal determinism between sexuality and gender.” *Id.* at 54. *See also id.* at 57-64.

62. *See generally id.* at 104. (According to Butler, the state’s “normalizing powers” regarding gender are especially clear in/through the institution of marriage. So much so, that “variations on kinship that depart from normative, dyadic heterosexually based family forms secured through the marriage vow are figured not only as dangerous for the child but perilous to the putative natural and cultural laws said to sustain human intelligibility.” The state in this instance becomes not only the harbinger of moral and religious signification, but a determining factor in one’s public and recognizable sense of personhood—which leads to the second harm Butler referred to and a reason to reject hierarchic heterosexuality.)

63. *Id.* at 10, 16. (Butler avers “We try to speak in ordinary ways about these matters, stating our gender, disclosing our sexuality, but we are, quite inadvertently, caught up in ontological thickets and epistemological quandaries.”)

64. *Id.* at 9.

65. *Id.* at 8.

a most unscientific manner,⁶⁶ and American law has adopted this paradigm (as evidenced in DOMA, DADT, Proposition 8, and Iowa Code section 595.2). The binary, heterosexual hierarchy ignores what the legal scholars and legislatures of ancient cultures knew and made provisions for in their laws. In her article, Greenberg highlights the legal considerations for inter-sexed people (hermaphrodites, androgynous individuals) made by the Ancient Greeks, the Ancient Jews, and even in the Common Law of 16th Century England (citing Lord Coke's provisions for inheritance by hermaphrodites).⁶⁷

For Butler, the heterosexual hierarchy is a substantialist notion of the subject which completely ignores the fact that “‘anatomy’ and ‘sex’ are not without cultural framing [and]...[t]erms such as ‘masculine’ and ‘feminine’ are notoriously changeable . . . [and] constantly in the process of being remade.”⁶⁸ Thus, “to a certain extent sexuality establishes us as outside of ourselves” and “it emerges precisely as an improvisational possibility within a field of constraints,” and when “[w]e try to speak in ordinary ways about these matters, stating our gender, disclosing our sexuality . . . we are, quite inadvertently, caught up in the ontological thickets and epistemological quandaries.”⁶⁹ Our empirical knowledge of inter-sexed individuals challenges the ontological idea that there is a normal/natural order to all things; it begs the question on Aristotle's [ontological] position that “nature does nothing in vain.”⁷⁰

66. Greenberg, *supra* note 1, at 274. We shall also discuss Butler's use of the “Herculine Barbin” (the hermaphroditic character used by Foucault to challenge the unscientific categorization of people into two genders based on sex as manifest in external genitalia). *Infra* pp. 23-24.

67. Greenberg, *supra* note 1, at 296-328. Perhaps what is most interesting about this anthropological perspective is that those writing and enforcing the laws in these ancient cultures deferred to the inter-sexed individuals' sexual desires and choice in partners in stating how the law would apply to them rather than forcing an unscientific and uninformed legal paradigm on them. Lord Coke held that “an hermaphrodite shall be heire, either as male or female, according to that kind of the sexe which doth prevail.” J.H. THOMAS, ESQ., A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND, 156 (Vol. II, Alexander Towar, Book-Buildings, 1836), available at <http://books.google.com/books?id=oeoyAAAIAAJ&pg=PA156&dq=lord+coke+on+inheritance+for+hermaphrodites&hl=en&sa=X&ei=mUkoT5iSJqOq2gXEoIjrAg&ved=0CEIQ6AEwAQ#v=onepage&q&f=false>. In the original Latin, Lord Coke's choice of words to describe which kind of sex prevails, says: “*secundum praevalentiam sexus incalescentis*.” The word *incalescentis* is from the verb *incalescere* which literally means to “grow hotter” or “more ardent” for the subject. What Lord Coke is saying is that the gender for hermaphrodites is to be determined in part by what other sex they are attracted to. So, the law was to pay deference to one's “desire,” [presumably on a case-by-case basis] which is exactly what Foucault and Butler suggest it should do. *See id.*

68. BUTLER, *supra* note 3, at 9-10.

69. *Id.* at 15-16.

70. It is difficult to understate the impact that Aristotle had on Western science. In particular, his ontology and teleology form the backbone of the Judeo-Christian philosophy and moral theology that shaped so much of Western civilization and especially its views on human sexuality and the laws needed to guide it to its “appropriate end.” As we have seen, Judeo-Christian religious agendas may be at the heart of anti-gay-marriage movement. Therefore, it is important to properly scrutinize the philosophy of Aristotle, especially since

The “ontological thicket” that results from anatomical essentialism is further complicated by the teleological assumption that all beings have an appropriate “end” or “goal,” and each being’s activities should be “directed” to its proper end.⁷¹ In the case of sexual expression for volitional beings (i.e., humans), under the ontological/teleological model, the mode should be consistent with the natural (ontological) goal or end of the being given its matter, which has always been assumed to be procreation—at least as determined by Aristotelian (Western) science.⁷² Where proponents of anti-same-sex marriage have asserted the argument that the sanctity of marriage is connected to procreation and child-rearing, and therefore must be protected as a matter of State interest, the courts have been quick to exploit the contradictory nature of this position. “Never has the state inquired into procreative capacity or intent before issuing a marriage license[.]” said Judge Walker.⁷³ And the Iowa Supreme Court held, “the objective of increasing procreation . . . does not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice.”⁷⁴

The ontological/teleological paradigm ignores the complexities of gender scientifically and the depth of sexual expression psychologically. More

his views on sexuality and gender have been controverted by contemporary science. That analysis is, however, beyond the scope of this paper.

71. The teleological assumption follows from the philosophy of Aristotle who held that all living beings have a proper “end” or “goal,” and therefore a proper function. Activities not consistent with the “end” or “goal” of the being are “unnatural,” and therefore inappropriate. St. Thomas Aquinas developed a moral paradigm based on Aristotle’s ontology/teleology, and Western/Judeo-Christian culture has labored under it ever since.

72. While the ontological/teleological view recognizes a relatively narrow range of sexual activity as being morally permissible, the opposite is true of what we could call the “liberal view” of sexual morality. This view emphasizes that what is “natural” is not procreation, but happiness—which sexual expression seems geared for. It is assumed in utilitarian moral theory that the purpose of the human being is to achieve the highest degree of happiness possible. That is not to say that it espouses a hedonistic or narcissistic view, but rather a view of the human person as naturally inclined toward the fulfillment of its potentials. One of the human potentials is, of course, sexual gratification. However, that potential, like most human potentials, is always to be taken in the context of the human as a “social” being—and therefore ethics is involved. In other words, the view does not allow for the unfettered pursuit of personal gratification to the exclusion of the interests of the other members of society. But rather, it promotes a reasoned approach to the attainment of happiness. This finds no more apt expression than in the mutual and consensual sexual gratification between two consenting adult members of society. Accordingly, sexual morality is not directly linked to particular forms of sexual expression or activity, but to the human context within which such activities have a meaningful place. Following the ideas of John Stuart Mill, sexual activity is moral if it is perceived to contribute to one’s well-being as an individual, and if whoever is involved has freely consented to that activity. While few forms of sexual conduct would always be immoral from this particular viewpoint, such as rape or sex with non-competent persons, most would not—most definitely not “homo-sexual” sexual activity. The essence of this paradigm lies in the activity being “consensual.” A strong argument can be made for the appropriateness of this paradigm over and against the ontological/teleological model.

73. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

74. *Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009).

importantly, it ignores gender's social construction and public function. Butler argues that ideology produces identity and that gender is therefore the cumulative effect of gender norms produced by various social power structures.⁷⁵ As she says in *Undoing Gender*, "[t]he norms that govern idealized human anatomy thus work to produce a differential sense of who is human and who is not, which lives are livable, and which are not."⁷⁶ The result, as Butler sees it, is that "[s]ometimes a normative conception of gender can undo one's personhood, undermining the capacity to persevere in a livable life."⁷⁷

Following the philosopher Hegel on this account, Butler contends that people are constituted as social beings only to the extent that they experience recognition.⁷⁸ Our fundamental desire is to be recognized, but the language by which we are recognizable is socially constructed. Therefore, our autonomy, if we may call it that, is constituted by a social order not of our choosing. As Butler says,

... Not only does one need the social world to be a certain way in order to lay claim to what is one's own, but it turns out that what is one's own is always from the start dependent upon what is not one's own, the social conditions by which autonomy is, strangely, dispossessed and undone.⁷⁹

III. ANALYSIS OF THE NEW APPROACH

Because the language of our identity is socially constructed, there is always the inherent risk of its being altered. Thus, we are trapped in the paradox of autonomy: desiring norms that help us survive and maintaining a critical distance from these norms.⁸⁰ "[I]ndividuals rely on institutions of social support in order to exercise self-determination ... One is dependent on this 'outside' to lay claim to what is one's own."⁸¹ Nowhere is this process more evident than in the formulation of laws that govern sex and gender. This begins to explain the need some people have to seek control of gender and sexuality through normative legal language, but more importantly, it demonstrates the need to argue that gender is internally unstable and therefore is not reducible to hierarchical heterosexuality—the second prong of Butler's method.⁸²

The instability of gender is due in part to its having become a subject of study. "Since the nineteenth century," says historian of sexuality, Jeffrey Weeks, the West has treated sex—our gendered desire—as the "cause and

75. BUTLER, *supra* note 3, at 9-10.

76. *Id.* at 4.

77. *Id.* at 1.

78. *Id.* at 2.

79. *Id.* at 100.

80. *See id.* at 3.

81. *Id.* at 7.

82. *See id.* at 27. (Butler states that we risk a certain security in abandoning the established ontology.)

'truth' of our being [which] defines us socially and morally; . . . its frustration is a cause of ill health, social unorthodoxy, even madness."⁸³ Such an identification of the self is one that occurs within the context of the medicalization of scientific discourse, according to the philosopher Michel Foucault.⁸⁴ Foucault's work shows that the pair sex/sexuality has a history, and that the 18th and 19th century social sciences created sexuality discourse that constructed new subjects such as the Malthusian couple, masturbating children, hysterical women, homosexuals, and other deviants.⁸⁵

Defining oneself as having some essential, internal identity for which the primary feature is one's gendered, sexual desire is a peculiar development of modern discourses, argues Foucault, and Butler follows that insight.⁸⁶ The modern subject is defined fundamentally by her sexual identity or, more to the point, by the desire that emerges from being male or being female. This way of identifying human subjecthood produces the notion that one's sex/gender coincides with one's essential self. As Weeks puts it, sex becomes "the supreme secret (the 'mystery of sex') and the general substratum of our existence[.]"⁸⁷ and one's object of desire becomes a crucial link in identifying one's gender.⁸⁸

This anatomy of the modern sexed subject exposes a fallacious relationship of reciprocity between body, gender, and desire in which desire expresses gender and gender expresses desire. This modern view of the sexed self conflates sex and gender, and all that is needed to complete the analysis of modern sexuality are the conditions under which gender identity emerges. Butler answers that the "metaphysical unity of the three is assumed to be truly known and expressed in a differentiating desire for an oppositional gender—that is, in a form of oppositional heterosexuality."⁸⁹

The clarity of gender identity is supposedly discerned by one's difference from the other (opposing) gender, as assumed under the binary heterosexual model discussed earlier. This might explain, in part, the need for some to try to legislate a specific view of sex and gender, and it might also explain why some are so adamant and vitriolic about defending "traditional notions" of sex and gender. We cannot know who we are unless there is an "other" who is opposite (or at least "opposite" in our view). In the absence of an "opposite," my identity comes into question. Yet, if I fail to subjugate the "other" I run the risk of the other's behavior being perceived as normal, and then where would I be?

83. JEFFREY WEEKS, *SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* 12 (1981).

84. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. 1, AN INTRODUCTION* 44-45 (1980).

85. *Id.* at 105.

86. *See* BUTLER, *supra* note 3, at 55; *see generally id.* at 41-56.

87. WEEKS, *supra* note 83, at 12.

88. *See id.*

89. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 22 (1990).

Perhaps the most troubling aspect of these realities, as William Eskridge contends, is that “[t]he law both reflected and contributed to these systems of knowledge.”⁹⁰ The laws that resulted had the double effect of both suppressing the identifiable “menace” to the moral fabric of society, and normalizing what they did not prohibit.⁹¹ And, as Foucault points out, “[p]rohibitions bearing on sex were essentially of a juridical nature. The ‘nature’ on which they were based was still a kind of law.”⁹² Out of this context, heterosexism was born, and “[o]nce heterosexuality became compulsory, the homosexual became a universal scapegoat.”⁹³

This view finds support in Mary McIntosh’s article, *The Homosexual Role*, in which she contends that “[t]he creation of a specialized, despised and punished role of homosexual keeps the bulk of society pure in rather the same way that the similar treatment of some kinds of criminals helps keep the rest of society law-abiding.”⁹⁴ McIntosh continues along this line by arguing that the very practice of social labeling of persons as deviant operates as an important mechanism of social control.⁹⁵ In the first place, it provides a clearly delineated threshold between permissible and impermissible behavior.⁹⁶ This is important in a society such as the United States since evermore individuals take their moral cue from the law. McIntosh states, “[t]his means that people cannot so easily drift into deviant behavior. Their first moves in a deviant direction immediately raise the question of a total move into a deviant role with all the sanctions that this is likely to elicit.”⁹⁷ Secondly, the labeling provides a mode of segregation that satisfies people’s ontological dilemmas: it completes the dialectic with regard to their own preferences.⁹⁸

Hence, gender and sex function as “mechanisms with double impetus: pleasure and power.”⁹⁹ Foucault says of these entities,

...In point of fact, this power had neither the form of the law, nor the effects of the taboo. On the contrary, it acted by multiplication of singular sexualities. It did not set boundaries for sexuality; it

90. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 3 (1999).

91. *Id.* at 3-4.

92. MICHAEL FOUCAULT, *The Perverse Implantation*, in *THE HISTORY OF SEXUALITY: VOL. 1, AN INTRODUCTION*, *supra* note 84, *reprinted in* *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 13 (Edward Stein ed., 1990).

93. ESKRIDGE, *supra* note 90, at 4.

94. Mary McIntosh, *The Homosexual Role*, 16 *SOCIAL PROBS.* 182 (Fall 1968), *reprinted in* *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 27 (Edward Stein ed., 1990).

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.*

99. FOUCAULT, *supra* note 84, at 136, *reprinted in* *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY*, *supra* note 92, at 19.

extended the various forms of sexuality, pursuing them according to lines of indefinite penetration. It did not exclude sexuality, but included it in the body as a mode of specification of individuals. It did not seek to avoid it; it attracted its varieties by means of spirals in which pleasure and power reinforced one another.¹⁰⁰

As the dialectic has played itself out, the emergence of the concept of the “closet” has occurred. Eskridge concludes, “[t]he idea of the closet, therefore, is not just the idea that deviant gender or sexuality must be secret . . . but is more centrally a complex product of society and the law, which in the 1950s sought to enforce compulsory heterosexuality as a pervasive public policy.”¹⁰¹ An identity prison for gays and a refuge for predatory and subversive criminal deviants, the closet has always been a very unstable construct. The law

. . . contributed to the instability of the closet, at first by empowering homophobes to throw open the closet doors in antihomosexual witch-hunts, and then by empowering gay people not only to resist the witch-hunts but also to express nonconforming ideas through publication, association, and speech and even to aspire . . . to formal equality.¹⁰²

Yet, each advance is not without its cost. As Eve Sedgwick contends, “[w]hen gay people in a homophobic society come out . . . it is with the consciousness of a potential for serious injury. . . .”¹⁰³ Partly, this is due to the fact that “gay identity is a convoluted and off-centering possession; . . . even to come out does not end anyone’s relation to the closet, including turbulently the closet of the other.”¹⁰⁴ Gender identity can never be circumscribed in-and-of itself because it is always relational. Thus, concludes Sedgwick, the “incoherences and contradictions of homosexual identity in the 20th century culture are responsive to and hence evocative of the incoherences and contradictions of compulsory heterosexuality.”¹⁰⁵ In the language of the aforementioned dialectic, if either the thesis position or the anti-thesis position modifies its identity, the other is obliged to change.¹⁰⁶ In the language of the aforementioned dialectic, if either the thesis position or the anti-thesis position modifies its identity, the other is obliged to change.¹⁰⁷ If one category changes too radically, the dialectic can be broken and the offended position must locate its identity by shifting the opposition label to another entity. For the individual

100. FOUCAULT, *supra* note 84, at 137, *reprinted in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY, *supra* note 92, at 21.

101. ESKRIDGE, *supra* note 90, at 7.

102. *Id.* at 7-8.

103. EVE SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 80 (1990).

104. *Id.* at 81.

105. *Id.*

106. *See* BUTLER, *supra* note 89, at 23-24.

107. *See id.*

who “comes out,” there will necessarily be a period of time in which that person’s identity is devoid of sense or order. This “problem of the closet” is inevitable, according to Butler, and here again we see the influence of Foucault.¹⁰⁸

Foucault’s description of the Herculine Barbin assists Butler in confounding the modern sexualized subject in a graphic way.¹⁰⁹ Foucault’s analysis of the 19th century hermaphrodite is a poignant display of the case that sex is not the inner truth of a subject, her intractable depth and inner substance, but a construction of bodies, various pleasures and affectivities and body parts.¹¹⁰ Herculine has a hermaphroditic or “inter-sexed” body, though she is legally defined as female in her early life and subsequently as a male in her adult life.¹¹¹ Her journals provide access to Herculine’s pleasures, which defy easy categorization.¹¹² Butler points out that the temptation to explain her desire for girls by appeal to the “male” parts of her anatomy (and vice versa), is confuted by her body, which refuses to be unified.¹¹³ The very temptation to unify this person as a sexual subject is a manifestation of the normalizing heterosexual regime of knowledge/power that we bring to her body. If we are to take Herculine seriously without “explaining” her with the discourse of pathology or subhumanity, we must question the notion that desire is “caused” by an essentially unified gendered body.¹¹⁴

It is just this configuration of sex, gender, and desire that (re-)introduces “power” as an element of Butler’s analysis. The extrinsic unintelligibility of Herculine’s personage is not the result of her intrinsic unintelligibility. Rather, it is the consequence of a specific regime of truth about the subject—not a necessary, or natural, fact. A regime of truth is the set of norms that define the “expressible,” in any particular social order. Such a regime determines what kinds of statements and inquiries will be taken seriously. The regulating regime at stake here is compulsory heterosexuality, and it defines the truth about subjects. As a dominant ordering of reality, compulsory heterosexuality regulates pleasure and bodies; it divides up reality into two human identities and defines how they may legitimately experience.

This process of regulating identities means that certain kinds of identity simply cannot exist—those in which gender does not follow from sex and

108. *See id.*

109. *Id.*

110. FOUCAULT, *supra* note 92, at 96.

111. BUTLER, *supra* note 89, at 94.

112. *Id.* at 23-24.

113. *Id.*

114. *See id.* at 93-99. Foucault’s work is designed to point to the regime or rules operating in a social order that define reality. My point here is that from such a perspective as Foucault’s the regime of heterosexuality and the causal relation it posits between sexed identity and proper desire bring the discourses of abnormality and deviance into existence. The set of rules requires that a body be unifiable as a sex. And even though her body qualifies as abnormal according to the rules, it also subverts the rule about unity. Thus, to take her seriously as a subject necessarily commits us to question the rules rather than choosing the discourse of abnormality or deviance.

those in which the practices of desire do not follow from either sex or gender.”¹¹⁵ The normalized relating of sex, gender, and desire is predicated upon the heterosexual difference. Object choice is defined in relation to the sexed body; desire is channeled and defined by the sexes it connects; and those sexes are two: male and female. Any thinking about desire and human relations is locked into this grid; any subject that does not conform is disciplined.

Compulsory heterosexuality is a structure reflected in definitions of homosexuality as well as from accounts of homosexuality as an “inversion” of heterosexuality to definitions of the homosexual that rely upon the frame where desire mediates between fixed gendered subjects. Compulsory heterosexuality problematizes the categories. As Butler puts it, “the construction of the category . . . as a stable and coherent subject [is] an unwitting regulation and reification of gender relations.”¹¹⁶ It reinforces an identity for which the only legitimate clues are its inner sexed consciousness expressed as desire for the opposite sex.

This issue was brought to the fore like never before when Judge Walker overturned California’s Proposition 8 ban on gay marriage in *Perry v. Schwarzenegger* for violating the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution, because he did so as someone who was in a gay relationship.¹¹⁷ Proponents of Proposition 8 challenged Judge Walker’s ability to decide the case fairly and impartially given that he had a vested interest in the outcome.¹¹⁸ This position assumes *prima facie* that one’s rational capacity to decide a case fairly and justly as a matter of law based on metaphysical (legal) principles such as due process and equal protection is compromised by the person’s awareness of the personal impact of the possible political outcome of the decision. Basing the compromise of one’s rational integrity on identification with sexual orientation or gender as manifest in legislation serves to undermine the case for volition.¹¹⁹ Yet if this is true, then no judge can be free in matters involving sexual orientation or gender, especially because of our “paradox of our autonomy” as Butler contends.¹²⁰

Ultimately, the conflict of interest claim in this case will dissolve because Judge Walker’s decision will stand or fall in the broader context of how the Supreme Court of the United States decides the issue of same-sex marriage in light of DOMA. In the meantime, Judge Walker’s ruling “moves the debate away from deliberately distracting questions about how gay relationships

115. *Id.* at 17.

116. *Id.* at 5.

117. Maura Dolan, *Prop. 8: Gay Judge’s Relationship Not a Factor, Court Rules*, LOS ANGELES TIMES: LA NOW (Feb. 7, 2012, 11:45 AM), <http://latimesblogs.latimes.com/lanow/2012/02/prop-8-gay-judges-relationship-not-a-factor-court-rules.html>.

118. *Id.*

119. Judge Walker was careful to point out that, “Proponents [of Proposition 8] admit that ‘same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities’ [PX0707 at RFA No. 21],” *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 997 (N.D. Cal. 2010).

120. BUTLER, *supra* note 3, at 3, 21.

impact everyone else and toward questions about how bigotry impacts gay relationships.”¹²¹ His decision referred to the absence of any tangible harm done to anyone since California issued approximately 18,000 marriage licenses to same-sex couples.¹²² But his decision did make clear that Proposition 8 failed to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. “Indeed,” said Judge Walker, “the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”¹²³ This moves us closer to the specific issue at hand, which is the problem of biased gender norms as manifest in law and the harm they cause.

The Supreme Court of Iowa, in its unanimous rejection of Iowa’s anti-same-sex marriage statute as unconstitutional in *Varnum v. Brien*, provides a more poignant example of Butler’s view that personal gender is determined to the extent that social norms support and enable acts of claiming. In its decision, the Court held, the current Iowa law

permits a classification to be maintained “ ‘for its own sake.’ ” Kerrigan, 957 A2d at 478 (quoting Romer, 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed. 2d at 868). Moreover, it can allow discrimination to become acceptable as tradition and helps to explain how discrimination can exist for such a long time. . .[E]qual protection demands that “ ‘the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself.’ ” *Id.* (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 33 (N.Y. 2006)(Kaye, C.J., dissenting)); see also *Romer*, 517 U.S. at 635, 116 S.Ct. at 1629, 134 L.Ed. 2d at 868 (rejecting “classification of persons undertaken for its own sake.”).¹²⁴

This particular decision is an excellent example of Butler’s method of analysis. The Court rightly points out that the phenomenon of classification, if given credence in the law, results in ensconcing discrimination as tradition.¹²⁵ Just as Butler writes in *Undoing Gender*, when the normative [heterosexual]

121. Kai Wright, *Prop 8 Judge Raises a Glass to Love*, NPR: TELL ME MORE (Aug. 5, 2010, at 6:18 PM), <http://www.npr.org/blogs/tellmemore/2010/08/05/129010995/judge-overturns-prop-8-raises-a-glass-to-love>.

122. It is important to note that on Thursday November 17, 2011, the California Supreme Court ruled that opponents of same-sex marriage were legally entitled to defend Proposition 8 and appeal Judge Walker’s decision but not because they had been caused harm, but rather because under Article II, Section 8 of the California Constitution the proponents of an initiative measure possess a particularized interest in the initiative’s validity or the authority to assert the State’s interest. . .when public officials charged with that duty refuse to do so. In this case, then Governor Schwarzenegger and then State’s Attorney General Jerry Brown both refused to assert the State’s interest and appeal Walker’s decision. The California Supreme Court did not consider the legal question of Proposition 8’s Constitutionality. See *Perry v. Brown*, 134 Cal.Rptr.3d 499, 536-37 (Cal. 2011).

123. *Perry*, 704 F.Supp.2d at 1003.

124. *Varnum v. Brien* 763 N.W.2d 862, 898.

125. *Id.*

family form is predicated upon recognition from the state, it becomes a site for the articulation of normativity and legitimacy that results in unfounded and unjustifiable discrimination.¹²⁶ This is particularly problematic for those trying to rethink a legislative process that can accommodate dynamic concepts such as gender because “juridical power becomes productive; it transforms the negative restraints of the juridical into the more positive controls of normalization; thus the norm performs this transformative function. The norm thus marks and effects the shift from thinking power as juridical constraint to thinking power as (a) an organized set of constraints, and (b) as a regulatory mechanism.”¹²⁷

In this way, law as a social institution provides its own support and the norms it conveys become “truths.” As Butler says, “[i]nsofar as regulations operate by way of norms, they become key moments in which the ideality of the norm is reconstituted, its historicity and vulnerability temporarily put out of play. As an operation of power, regulation can take a legal form, but its legal dimension does not exhaust the sphere of its efficaciousness. As that which relies on categories that render individuals socially interchangeable with one another, regulation is thus bound up with the process of normalization.”¹²⁸

The specific position of this project is that legislation based on the conflated ideas of sex and gender ignores the socially constructed nature of gender and will necessarily result in the projection of sex and gender bias through normative legal language. “That human actions are regulated by such laws but do not have the power to transform the substance and aim of their laws appears to be the consequence of a conception of law that is indifferent to the content that it regulates,” concludes Butler.¹²⁹ This reality further exacerbates the defective (future) construction of sex and gender. As Butler reminds us in *Undoing Gender*, one does not author one’s gender, for “the terms that make up one’s own gender are, from the start, outside oneself, beyond oneself in a sociality that has no single author (and that radically contests the notion of authorship itself) for its terms are always negotiated within the collective social contexts.”¹³⁰ In this way, “[s]exuality and gender are like heads of a hydra: the more the law cuts against them, the more multifarious they become,” concludes Eskridge.¹³¹ Yet, this puts people’s identity at play all the time and creates for some a “no-win” situation.

126. See generally BUTLER, *supra* note 3, at 40. Butler concludes, “the conflation of gender with masculine/feminine, man/woman, male/female, thus performs the very naturalization that the notion of gender is meant to forestall. Thus, a restrictive discourse on gender that insists on the binary of man and woman as the exclusive way to understand the gender field performs a regulatory operation of power that naturalizes the hegemonic instance and forecloses the thinkability of its disruption.” *Id.* at 43.

127. *Id.* at 49-50.

128. *Id.* at 55.

129. *Id.* at 48. This being the case, we might argue that anti-same-sex marriages laws have no merit since no homosexual person will be less homosexual because of the law; and no heterosexual person will be more heterosexual because of the law.

130. *Id.* at 1.

131. ESKRIDGE, *supra* note 90, at 2.

Butler specifically explores this “no-win” situation when she claims that “[c]ompulsory heterosexuality sets itself up as the original, the true, the authentic” position.¹³² This is problematic specifically because we are never able to remove ourselves from such ideology. That ideology is socially constructed and some of its elements appear to be part and parcel of American life. Foucault goes so far as to identify an economic connection to compulsory heterosexuality.¹³³ Foucault posits,

[f]or was this transformation of sex into discourse not governed by the endeavor to expel from reality the forms of sexuality that were not amenable to the strict economy of reproduction: to say no to unproductive activities, to banish casual pleasures, to reduce or exclude practices whose object was not procreation? Through the various discourses, legal sanctions against minor perversions were multiplied; sexual irregularity was annexed to mental illness; from childhood to old age, a norm of sexual development was defined and all the possible deviations were carefully described; pedagogical controls and medical treatments were organized; around the least fantasies, moralists, but especially doctors, brandished the whole emphatic vocabulary of abomination ... All this garrulous attention which has us in a stew over sexuality, is it not motivated by one basic concern: to ensure population, to reproduce labor capacity, to perpetuate the form of social relations: in short, to constitute a sexuality that is economically useful and politically conservative?¹³⁴

John D’Emilio takes Foucault’s point to the next level when he espouses the view that the existence of categories of people in relation to their sexual orientation is a by-product of the economics of our nation.¹³⁵ In other words, the economics of capitalism have made necessary the “demonization” of various aspects of human nature as a means of purging the ill-feelings that result from having sacrificed the security of pre-capitalist community for the sake of material gain. Certain socio-economic groups, women, racial and religious minorities, and gays and lesbians have borne the brunt of this neurosis.¹³⁶ D’Emilio concludes that

... materially, capitalism weakens the bonds that once kept families together so that their members experience a growing instability in the place they have come to expect happiness and emotional security.

132. Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed., 1991), reprinted in *SEXUAL ORIENTATION AND THE LAW* 97, 102 (W.B. Rubenstein ed., 3rd ed. 1997). See also BUTLER, *supra* note 89.

133. FOUCAULT, *supra* note 84, at 89-90.

134. *Id.*

135. John D’Emilio, *Capitalism and Gay Identity*, *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 100, 100-05 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983).

136. *Id.* at 108-09.

Thus, while capitalism has knocked the material foundation away from family life, lesbians, gays and heterosexual feminists have become the scapegoats for the social instability of the system.¹³⁷

D'Emilio and Foucault are not alone on this front. William Eskridge also reiterates this view in his book, *Gaylaw: Challenging the Apartheid of the Closet*:

[H]omosexuality at the beginning of the twentieth century was not just a scientific classification but was also a 'social dividing practice' embedded in a web of particular anxieties ... Many of those anxieties arose out of increased social and economic opportunities for women outside the home ... [M]iddle class men grew obsessed with cultural reinforcements for manliness. Concepts of gender inversion and sexual perversion were part of a medicalized discourse that responded to men's, and often women's, concerns about the loss of stable expectations about male and female roles. The new discourse was a system of knowledge that gave men a new venue for masculinity.¹³⁸

IV. THE NEGATIVE POTENTIAL OF THE NEW HERMENEUTIC

Butler's poststructuralist method challenges the political complication of gender identity found in the tension between "maintaining a critical perspective and making a politically legible claim."¹³⁹ In the context we have provided, achieving gay-civil rights legislation might very well be the most virulent form of psychic complication. She hedges at the very notion of "coming out" as it necessarily entails a void of uncertainty that constitutes a risk to the individual identity of the participants. Seeking recognition from the State "can lead to new and invidious forms of social hierarchy," and even to a "precipitous foreclosure of the sexual field, and to new ways of supporting and extending state power."¹⁴⁰ As she says, "Is the 'subject' who is 'out' free of its subjection and finally in the clear? Or could it be that the subjection that subjectivates the gay or lesbian subject, in some ways continues to oppress, or oppresses most insidiously, once 'outness' is claimed?"¹⁴¹ In which case, we must ask, as Butler has, what are the risks?

The risks are not, as we have alluded to, completely individual or personal. There is a social risk involved in the whole movement. We might ask whether achieving legislation to protect gay/lesbian rights might "out" everyone in one fell swoop? And if so, might such positive advances send the

137. *Id.* at 109.

138. ESKRIDGE, *supra* note 90, at 2-3.

139. BUTLER, *supra* note 3, at 108.

140. *Id.* at 115.

141. BUTLER, *supra* note 132, at 97-98.

dialectic into shock, thereby causing members of the heterosexism group to find another scapegoat?

Shocking the dialectic is a serious problem that Butler acknowledges when she says “there is no question that gays and lesbians are threatened by the violence of public erasure, but the decision to counter that violence must be careful not to reinstall another in its place.”¹⁴² In Foucault’s terms, the power and the pleasure are mutually dependent: and if one side is erased, then the other side necessarily loses its capacity for the pleasure that resulted from the exercise of power over the other.¹⁴³ He claims,

The pleasure that comes of exercising a power that questions, monitors, watches, spies, searches out, palpates, brings to light; and on the other hand, the pleasure that kindles at having to evade this power, flee from it, fool it, or travesty it. The power that lets itself be invaded by the pleasure it is pursuing; and opposite it, power asserting itself in the pleasure of showing off, scandalizing, or resisting ... These attractions, these evasions, these circular incitements have traced around bodies and sexes, not boundaries not to be crossed, but perpetual spirals of power and pleasure.¹⁴⁴

Yet, understanding the historic dialectic and the imperative of the interplay between pleasure and power for human sexuality does little for the oppressed person. It is doubtful that individuals suffering from discrimination would rationally opt to preserve the paradigm in order to protect the socially constructed identity of their selves. Though American society succeeded in “giving rise to a whole perverse outbreak and a long pathology of the sexual instinct,”¹⁴⁵ as Foucault points out, we cannot wholly control how the “will to power” will manifest next if the paradigm is lost.¹⁴⁶ For the time being, the complete loss of the paradigm not being imminent in any clear way, we must consider the ramifications of the ongoing paradigm shift that is occurring for the subjects involved.

The destruction of the “closet” (or the socially constructed dialectic, if you will) will undoubtedly have a negative impact on individual gays and lesbians. As Butler sees it, the “I” (gay or lesbian self) is a site of repetition, and as such, has significance only within the context of its (sexual) behavior.¹⁴⁷ She says,

... it is through the repeated play of this sexuality that the ‘I’ is insistently reconstituted as a lesbian ‘I’; paradoxically, it is precisely the repetition of that play that establishes as well the instability of the very category that it constitutes ... if the ‘I’ only achieves the

142. *Id.* at 101.

143. FOUCAULT, *supra* note 84, at 45.

144. *Id.*

145. *Id.* at 47.

146. *See id.*

147. BUTLER, *supra* note 132, at 100.

semblance of identity through a certain repetition of itself, then the 'I' is always displaced by the very repetition that sustains it.¹⁴⁸

The problematic nature of this phenomenon is made clear when Butler concludes,

... if the 'I' is the effect of a certain repetition, one which produces the semblance of a continuity or coherence, then there is no 'I' that precedes the gender that it is said to perform; the repetition, and the failure to repeat, produce a string of performances that constitute and contest the coherence of that 'I'... That any consolidation of identity requires some set of differentiations and exclusions seems clear¹⁴⁹

Thus, in attacking the "subject" of the "gender" distinction, the one which is "coming out," Butler simultaneously challenges the idea of making gender identity a political strategy. She asks, "if the rendering visible of lesbian/gay identity now presupposes a set of exclusions, then perhaps part of what is necessarily excluded is *the future uses of the sign*."¹⁵⁰ If that were to become the case, the dialectic would be compromised. The danger in this is three-fold. First, gays and lesbians would lose the "closet" and that would cause a significant existential crisis—as defining oneself would become problematic, as we have seen.

Secondly, the ontologically consolidated phantasms of "man" and "woman" would be forever challenged. Since these, too, are "theatrically produced effects that posture as grounds, origins, and the normative measure of the real,"¹⁵¹ it follows that some group other than gays and lesbians would have to be branded by the "majority." As Butler says, "the recent efforts to promote lesbian and gay marriage also promote a norm that threatens to render illegitimate and abject those sexual arrangements that do not comply with the marriage norm in either its existing or its revisable form."¹⁵² What group that would be or how that would play itself out remains to be seen. But the question for the gay and lesbian community is whether or not their efforts to escape the social constructs are worth it.

Third, though living without norms of recognition results in significant suffering and forms of disenfranchisement, pursuing recognition through state legitimization of one's identity as it is bound in relationship to others can lead to invidious forms of social hierarchy and a precipitous foreclosure of the sexual field, thus fortifying the state as the source for norms of recognition and eclipsing other possibilities in civil society and cultural life.¹⁵³ As Butler concludes, "that the identity-sign. . .now has its purposes seems right, but there

148. *Id.*

149. *Id.* at 100-101.

150. *Id.* at 100.

151. *Id.* at 103.

152. BUTLER, *supra* note 3, at 5.

153. *Id.* at 115.

is no way to predict or control the political uses to which that sign will be put in the future.”¹⁵⁴

Yet, it may not come to pass at all, since, as Butler says, the gender identification process is not wholly insubordinate insofar as it is complicitous with those political forces that have helped create the closet.¹⁵⁵ “It is crucial,” she posits, “to insist on lesbian and gay identities”¹⁵⁶ for political reasons. “To be prohibited explicitly is to occupy a discursive site from which something like a reverse-discourse can be articulated; to be implicitly proscribed is not even to qualify as an object of prohibition,” concludes Butler.¹⁵⁷ But if the hard-fought battle over acceptance of gender identities is won, will the identities then be lost? As Butler queries, “can sexuality even remain sexuality once it submits to a criterion of transparency and disclosure, or does it perhaps cease to be sexuality precisely when the semblance of full explicitness is achieved? Is sexuality of any kind even possible without that opacity designated by the unconscious, which means simply that the conscious “I” who would reveal its sexuality is perhaps the last to know the meaning of what it says?”¹⁵⁸

As Butler sees it, the entire enterprise of legitimation is a double-edged sword.¹⁵⁹ She concludes that, “it is crucial that, politically, we lay claim to intelligibility and recognizability; and it is crucial, politically, that we maintain a critical and transformative relation to the norms that govern what will and will not count as an intelligible and recognizable alliance... [It is] also crucial that we question the assumption that the state furnish these norms, and that we come to think critically about what the state has become during these times.”¹⁶⁰ Butler summarizes the situation this way: “so there are reasons to worry about requesting state recognition for intimate alliances, and so becoming part of an extension of state power into the *socius* [sic]. But do these reasons outweigh those we might have for seeking recognition and entitlement through entering legal contract?”¹⁶¹

CONCLUSION

Butler’s question reminds us exactly where we are as a culture in this minefield of sex and gender legislation. In the year after the Iowa Supreme Court’s unanimous ruling in *Varnum v. Brien* (holding that anti-same-sex legislation was unconstitutional), Justices David Baker, Michael Streit, and Marsha Ternus all lost their seats on the Iowa Supreme Court in the judicial retention elections of 2010—a definite indication of the social backlash from

154. BUTLER, *supra* note 132, at 101.

155. *Id.*

156. *Id.*

157. *Id.* at 102.

158. *Id.* at 98.

159. BUTLER, *supra* note 3, at 117.

160. *Id.*

161. *Id.* at 116.

this one decision.¹⁶² A further indication of the social backlash in Iowa occurred in February 2011, when Iowa bill HJR 6, a proposed amendment to the Iowa Constitution defining marriage as between one man and one woman, passed the Iowa House of Representatives.¹⁶³ Similarly, as Senate Bill 6239 passed in the Washington State Senate on February 1, 2012, opponents of same-sex marriage were already gearing up to challenge it.¹⁶⁴

Though the Iowa bill to kill same-sex marriage stalled after the House vote and the Washington bill was signed into law by Governor Chris Gregoire, the legislative tug-of-war continues.¹⁶⁵ Minnesota and North Carolina will hold public votes for anti-same-sex marriage amendments to their constitutions this year,¹⁶⁶ and New Jersey and Maryland are scheduled to debate the issue as well.¹⁶⁷ Even New Hampshire, which was one of the first states to allow same-sex marriage, now has a bill pending that would repeal its same-sex marriage law.¹⁶⁸ It is obvious that the constitutionality of anti-same-sex marriage legislation will continue to be tested until the United States Supreme Court makes a definitive ruling on DOMA. Such a ruling necessitates an hermeneutic method of legal analysis precisely because of the normative nature of the anti-same-sex legislation.

As we have shown here, the nature of legislation that seeks to limit marriage [to one man and one woman] is normative and it conveys a definite set of values. It ignores the fact that gender identity is a dynamic, socially constructed phenomenon, and that science and legal history contravene the heterosexual hierarchy that such laws reify. It is also blind to the fact that the laws themselves, because of their [fallacious] normative character, have a negative impact on the formation of sexual identity for many people. For these reasons, the analysis of laws, which are premised on incomplete notions of gender and follow a false ontological hierarchy, demands a more complete hermeneutic for which we have offered Judith Butler's as the most salient alternative.

162. *Iowans Dismiss Three Justices*, DESMOINESREGISTER.COM (Nov. 3, 2010), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

163. Jason Hancock, *Iowa House Passes Constitutional Ban on Same-Sex Marriage*, THE WASHINGTON INDEPENDENT (Feb. 1, 2011), <http://washingtonindependent.com/105273/iowa-house-passes-constitutional-ban-on-same-sex-marriage>.

164. William Yardley, *Washington State Senate Passes Gay Marriage Bill*, NY TIMES (Feb. 2, 2012), http://www.nytimes.com/2012/02/02/us/washington-state-senate-passes-gay-marriage-bill.html?_r=0

165. As we pointed out earlier, opposition to same-sex marriage continues to gain traction as more than thirty states have anti-same-sex marriage laws pending. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, TIMES TOPICS (June 10, 2012), topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html.

166. *Id.*

167. *Id.*

168. *Id.*

Butler rightly points out that the heterosexual hierarchy is based on bad science that bases gender on genitalia (sex).¹⁶⁹ The ontological assumptions are off-base and contradict the metaphysics of relationships in the first instance—which connects to the claim that same-sex couples who are denied the right to marry have their constitutional rights violated. Therefore, the first task is to separate sex and gender. As Butler says, “[our] critique of [such] norms must be situated within the context of lives as they are lived and must be guided by the question of what maximizes the possibilities for a livable life, what minimizes the possibility of unbearable life or, indeed, social or literal death.”¹⁷⁰ As we stated previously, this approach could almost stand in place of the third and fourth prongs of the heightened scrutiny analysis for cases dealing with gender and sexual orientation. The legal outcome of such a method would be far more consistent with the metaphysics of the 14th Amendment right to fair and equal treatment under the law, and would go a long way toward achieving a greater social good in stabilizing the formation of sexual identity—Butler’s other concern.¹⁷¹

Butler’s second step is to establish that gender is an internally unstable phenomenon.¹⁷² This reiterates the notion that it is a socially constructed reality, and law plays an important role in that process of identity formation. Laws that proscribe the heterosexual hierarchy, aside from being based on false premises, also harm the dignity and self-awareness of individuals. As Butler says, “regulations that seek to curb certain activities lead to the production of the parameters of personhood, that is, making persons according to abstract norms that at once condition and exceed the lives they make—and break.”¹⁷³

On this point, Butler follows Foucault, who held that the social sciences made sex and gender objects of study. This new language crept into the public discourse and became an element that shapes perceptions about personhood to the point that the modern subject is defined by his/her sexual identity in spite of the fallacious relationship between body-gender-desire that the sciences perpetuated.¹⁷⁴ Sexual identity thus became a manifestation of the “will to power” and a “no win” situation for anyone outside the heterosexual hierarchy.¹⁷⁵ Law became a primary means of exercising the will to power, as evidenced by the current legislative tug-of-war over same-sex marriage. In spite of the historical and scientific shortcomings of laws that perpetuate the heterosexual hierarchy, the battle rages on.

To understand why the battle rages on in spite of the bad science and poor logic, we look to Mary McIntosh and Eve Sedgwick, who develop the relational aspect of gender identity and the need for labeling, and John D’Emilio and William Eskridge, who contend that the homo-hetero dichotomy

169. BUTLER, *supra* note 3, at 9-10.

170. *Id.* at 8.

171. *Id.* at 114-15.

172. *Id.* at 54.

173. *Id.* at 56.

174. See BUTLER, *supra* note 89, at 22-24.

175. MCINTOSH, *supra* note 94, at 12.

has an important economic component. On this account, we could wait for the scientific community's voice to be heard regarding the internal instability of gender, or we could force the broader and more accurate perspective through the legislative process. In short, advocates of same-sex marriage need to win the legal tug-of-war in the United States Supreme Court through the elimination of DOMA.

The process will not be without pain, and even political victory can constitute a great loss. "To be prohibited explicitly is to occupy a discursive site from which something like a reverse-discourse can be articulated," says Butler.¹⁷⁶ But "to be implicitly proscribed is not even to qualify as an object of prohibition," concludes Butler.¹⁷⁷ So winning the fight over same-sex marriage may or may not gain proponents any measure of metaphysical satisfaction, but it will likely cost them the discursive political site for arguing such issues. As Butler concludes, "[t]hat the identity-sign I use now has its purposes seems right, but there is no way to predict or control the political uses to which that sign will be put in the future."¹⁷⁸ These are the inherent risks in whole scenario. In spite of Judge Vaughn Walker's efforts to move the debate away from deliberately distracting questions about how gay relationships impact everyone else and toward questions about how bigotry impacts gay relationships, the legal ruling will stand or fall with the United States Supreme Court on broader grounds. According to Kai Wright, "that means *Perry v. Schwarzenegger* is a dangerous gamble for the LGBT community."¹⁷⁹ As Butler says, we risk "a certain security through departing from an established ontology."¹⁸⁰ This, however, is absolutely necessary, for "to persist in one's own being is only possible on the condition that we are engaged in receiving and offering recognition."¹⁸¹

176. BUTLER, *supra* note 132, at 102.

177. *Id.*

178. *Id.* at 101.

179. Wright, *supra* note 121, at 2.

180. BUTLER, *supra* note 3, at 27.

181. *Id.* at 31.