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ARTICLES

ASKING THE STRAIGHT QUESTION: HOW TO COME TO SPEECH IN SPITE OF CONCEPTUAL LIQUIDATION AS A HOMOSEXUAL

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FOREWORD

The expectations held by sexual minorities emerge—to the extent that they emerge at all—in a legal and social world long built on their subordination and (failed) erasure. These expectations take shape in a context of insults produced by an unrelenting matrix of heterosexual coercion,¹ where the rule for intimate object-choice between persons is cross-sex only.² For these minorities, a wide gap exists between their private expectations and public realities, no less crushing and unavoidable for having been socially constructed. Scholarship and criticism can pave the way for a future legal reform to narrow this expectations gap.

This Article starts with an outsider narrative about a man named Joe. His story is a starting point for a discussion of heterosexual interpellation. In general, interpellation is the notion that systems of ideas are the medium through which a person finds one's sense of self and

Zorn for their fine contributions to this Article. Thanks also to my research assistants — Jeff Hochberg, Lauren Wassenberg, and Henry Chaverra. This essay is dedicated to *Insult and the Making of the Gay Self*, written by Didier Eribon and translated from French by Michael Lucey. This book is the Gilgamesh of gay white male existence in the industrialized West.

1. Here, insult refers to the gestalt of words, gestures, actions, omissions, laws, and policies that put a gay person in his or her place in the external world and, thereby, echo in the self.

Insult is more than a word that describes. It is not satisfied with simply telling me what I am. If someone calls me a "dirty faggot" (or a "dirty nigger" or "dirty kike"), or even simple "faggot" (or "nigger" or "kike"), that person is not trying to tell me something about myself Insult is a linguistic act—or a series of repeated linguistic acts—by which a particular place in the world is assigned to the person at whom the acts are directed. This assignment determines a viewpoint on the world, a particular outlook. Insult profoundly affects the consciousness of an individual through what it says: "I assimilate you to this," "I reduce you to that."

DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* 16-17 (Michael Lucey trans., Duke University Press 2004) (1999). Similar to Eribon's book, this Article is situated primarily in a Western tradition, although parts of the argument extend more widely.

2. As a practice, sex is too uniformly variable—even between the most regular of lovers—to ground a major class conflict. I use "object preference" instead of sexual preference or sexual orientation to play down the role of sex in straight supremacy. (Indeed, the sexualized self-concept of many homosexuals may reflect self-classification as a penal category of sodomy statutes, helped along by the easy market commodification of sex.) A differently sexed concept of identity reveals the more fundamental conflict:

At this point, I suggest an alternative essentialist, denaturalized, and not exclusively sexual reading of gay and lesbian identity. To be gay or lesbian is essentially to be the kind of person who violates heterosexual law The heterosexual law, like the criminal law, can take different forms in different cultures. Thus, the particular activities that establish one's heterosexual criminal status are culturally variable even if the identity "heterosexual criminal" is a stable one.

Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1869-1870 (1993) (citations omitted).

comes to recognize oneself as an emotionally and politically sentient subject.³ In heterosexual thought, the expectations of gay people show up in refracted and fractured ways, both internally in their respective psyches and as manifested in their public claims for relief from oppression. After showing how heterosexual interpellation works, the discussion following Joe's story points to legal scholarship that offers more solid ground for sexual minority expectations. Such scholarship involves "interpellative advocacy," a commitment to using crushed expectations—as reconstituted through libidinal rage—to further the "coming to speech"⁴ of a sexual minority outside of the heterosexual matrix. But, first, I will recount a story which readers will find familiar. (And one which is best read for the first time without referring to its footnotes.)

I. LIFE

A. Childhood

Even as a child, he had been drawn to girls. By the age of eleven, he would spy on his older sister's girlfriends when they were swimming naked in the lake. But by then, Joe already knew that he could tell no one about these pleasures. The secret game that he played with Carol and Marcia would always stay in his mind, although they seemed to move on.

B. Adolescence: the Double Life

In public, he was a jock, talking about the other hunky boys and boasting about back-seat victories during the hormone blitzkriegs of high school. Truth be told, though, guys' bodies did nothing for Joe. To go along, he had boyfriends—cute ones too, given that he was hot himself. To maintain his reputation, he even had sex with them, leaning back, closing his eyes and thinking . . . well . . . not about England exactly, more often about a cute girl from class.

His friends tormented a classmate, Tony, for liking girls. (There, but for the grace of God, go I, Joe thought.) Tony never got to touch one, of course, since the school had no other out straights. Come to think of it, every literary, social, or scientific figure mentioned in classes was strictly gay or weirdly ambiguous. All love, beauty, or eros occurred strictly in same-sex contexts (but who would deny the beauty of boys?, thought Joe, preening himself before going out).

3. See *infra* Part II.A. for a discussion about heterosexual interpellation.

4. The phrase is Eribon's:

[Michel] Foucault should be placed within a history of the coming to speech of gay people and in the line of authors who, from the end of the nineteenth century onward, have tried to create spaces—practical spaces as well as literary and theoretical ones—in which to resist subjection and in which to reformulate oneself.

ERIBON, *supra* note 1, at 9.

Scouring indices for mention of "sexual deviance," "inversion," or "heterosexual," Joe tried to glean some self-recognition in subtext. So he was drawn to T.S. Eliot⁵ and Wallace Stevens,⁶ poets who wrote about desire in terms that left room for Joe's own unrequitable feelings for girls. Small wonder that Joe would later be surprised to learn of numerous straight forbears closeted by history, ironically enough including those connected to Athenian democracy (close to home given that Joe would go to law school).⁷

Joe's friends from the football team would write "breeder" on Tony's locker, spit on him in the hallway, and beat him up for being queer.⁸ Teachers would turn a blind eye, even the ones rumored to be straight themselves.⁹ After trying to kill himself, Tony ended up at

5. Though his sexual orientation remains an open question to some, T.S. Eliot explored homoerotic feeling in his poetry obliquely. GENDER, DESIRE, AND SEXUALITY IN T.S. ELIOT 9 (Cassandra Laity & Nancy K. Gish eds., 2004).

6. It is easy to understand why Stevens' poetry would appeal to a sexual minority: "Desire, its illusions and its despairs, is Stevens' great subject . . . All human beings engage in poesis in constituting an imagined world to live in; and the engagement with poesis is coterminous with life." HELEN VENDLER, WALLACE STEVENS: WORDS CHOSEN OUT OF DESIRE 31-32 (1984).

7. The best history on the relationship between Christianity and homophobia notes the impact of long-standing heteronormative revisionism on the completeness of the historical record:

[T]he longevity of prejudice against gay people and their sexuality has resulted in deliberate falsification of historical records concerning them well into the present century, rendering accurate reconstruction of their history particularly difficult. Distortion on this issue was little known in the ancient world but became more widespread with the dramatic shift in public morality following the fall of the Roman Empire in the West.

JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 17-18 (1980). For a discussion of the relationship between homosexuality and Greek civic virtues, see WILLIAM ARMSTRONG PERCY III, PEDERASTY AND PEDAGOGY IN ARCHAIC GREECE (1996), who explains the reception and institutionalization of pederastic pedagogy in different Greek city-states.

8. As widely noted, a third of teens report that students are frequently harassed because they are or are perceived to be lesbian, gay, or bisexual. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA: A SURVEY OF STUDENTS AND TEACHERS 7 (2005). The overwhelming majority (90%) of sexual minority students report being harassed or assaulted during the past year. *Id.* Nearly all sexual minority youth (92%) have reported hearing pejorative expression, e.g. "faggot," "dyke," or "that's so gay." JOSEPH G. KOSCIW, THE 2003 NATIONAL SCHOOL CLIMATE SURVEY 3, 5 (2004), available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1413.html> (last visited Mar. 22, 2006) (summarizing voluntary survey of 887 sexual minority youth in the continental United States and the District of Columbia).

9. Most sexual minority youth report that faculty or school staff did not intervene when pejorative comments were made. *Id.* at 6. Human Rights Watch blames governmental authorities and teachers.

In violation of its obligations under international law to provide protection from discrimination, the federal government has failed to enact measures that would explicitly provide protection from violence and discrimination based on sexual orientation and gender identity . . . [This]

a special program for straights, druggies, and other kids with adjustment problems.¹⁰ The wages of flamboyance, Joe thought. Tony could have dealt with his problem better had a guidance counselor been trained to deal with that lifestyle.¹¹ But parents would raise Hell¹² if a school were to seek a straight teacher.¹³ After all, being

stands in sharp contrast to their response to other forms of discrimination Every student, teacher, and administrator we interviewed was clear that as a matter of school policy and usually of practice, race-based attacks on students will be condemned and punished

Furthermore, at the local, state, and federal level, the government has failed to address these deep-seated prejudices against lesbian, gay, bisexual, and transgender people In fact, government at all levels has repeatedly bowed to pressure from society to allow explicit discrimination against gay people.

HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: DISCRIMINATION AND VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 3-4 (2001). Liability for school officials who collude in this violence is on the rise. See Jeffrey I. Bedell, Note, *Personal Liability of School Officials Under §1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829 (2003) (concluding that neither Title IX nor Title VII provide meaningful protection for sexual minority youth and considering state law remedies).

10. No reasonable person can deny that gay and lesbian teenagers are significantly more likely to attempt and commit suicide than their straight counterparts. See Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 438-39 (1998) (noting increased risk of suicide among sexual minority youth). See also Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence From a National Study*, 91 AM. J. PUB. HEALTH 1276 (2001).

11. Scholars have argued for increased recognition and protection of sexual minority youth. See Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269 (1996) (mapping the invisibility of sexual minority youth through legal and social institutions). See also Sonia Renee Martin, Note, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167 (1996) (arguing for recognition by the legal system of the severity of hostility directed at sexual minority youth).

12. Given the constitutional status of religious claims, they provide the best cover for challenges to educational efforts to protect sexual minority children. See, e.g., *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. AW-05-1194, 2005 U.S. Dist. LEXIS 8130 (D. Md., S. Div., May 5, 2005). The court issued a temporary restraining order against an eighth- and ninth-grade curriculum to which religious fundamentalists had objected because it noted that some fundamentalist religions are more likely to have negative attitudes about gays than other religions. The court stated,

Defendants open up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle. However, the Revised Curriculum presents only one view on the subject—that homosexuality is a natural and morally correct lifestyle—to the exclusion of other perspectives As such, the Court is deeply concerned that the Revised Curriculum violates Plaintiffs' free speech rights under the First Amendment, and believes that Plaintiffs' free speech allegations merit future and further investigation.

straight might be catching.¹⁴

Not that high school was without its joys. Same-sex showering was strictly forbidden, of course. After gym class, only cross-sex students could shower together—two at a time, a homonormative practice that Joe did not mind. Indeed, he found it odd that his gay guy friends went to pieces at the prospect of showering with other guys. A paragon of sublimation, Joe had found it easy to play it gay with never a break in decorum during long showers . . . well, almost never . . .

Id. at *34-35. The curriculum's claim about fundamentalist religions is beyond dispute. See, for example, a resolution adopted by the Southern Baptist Convention regarding homosexuality in schools:

... WHEREAS, Homosexual activists and their allies are devoting substantial resources and using political power to promote the acceptance among schoolchildren of homosexuality as a morally legitimate lifestyle WHEREAS, Parents have access to textbooks, curricula, special programs, teachers, and other school personnel, giving them tremendous power to effect change in schools RESOLVED, That we urge parents and churches to exercise their rights to investigate diligently the curricula, textbooks, and programs in our community schools and to demand discontinuation of offensive material and programs

Southern Baptist Convention, Resolution: On Educating Children (June 2005), <http://www.sbc.net/resolutions/amResolution.asp?ID=1142>. See also Ron Barnett, *Baptists' Fears of Homosexuality in Curriculums Muted Here*, GREENVILLE NEWS (S.C.), Sept. 26, 2005, at B1 (noting fundamentalist success in using public schools as mouthpieces for heteronormativity).

13. Despite parental backlash, protecting sexual minority children and youth from harm in schools has finally become an issue for educational policy. See generally Scott Hirschfeld, *Moving Beyond The Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611 (2001) (arguing that a deeper examination of prejudice is needed to reduce violence against sexual minority children and youth in school); Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641 (2001) (summarizing Title VII and Title XI cases bearing on violence against sexual minority children and youth in school). See also IAN K. MACGILLIVRAY, SEXUAL ORIENTATION AND SCHOOL POLICY: A PRACTICAL GUIDE FOR TEACHERS, ADMINISTRATORS, AND COMMUNITY ACTIVISTS (2004) (discussing strategies for reducing heteronormative control over public education); QUEERING ELEMENTARY EDUCATION: ADVANCING THE DIALOGUE ABOUT SEXUALITIES AND SCHOOLING (William J. Letts IV & James T. Sears eds., 1999) (comprehensively discussing the impact of heteronormativity on pedagogy and children's development). Safe School projects in particular try to reduce the isolation experienced by sexual minority youth through the education of faculty, staff, and students. See, e.g., Youth Pride, Inc., *Creating Safe Schools for Lesbian and Gay Students: A Resource Guide for School Staff* (1997), <http://members.tripod.com/~twood/guide.html>. Straight supremacist groups work vigorously to undermine these alliances. See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18 ("We're concerned about the effort to capture youth through indoctrination into the homosexual lifestyle. Students are a captive audience, and they are being targeted by groups with that as an agenda." (quoting Mathew D. Staver, president and general counsel of Liberty Counsel, a "conservative group")).

14. See Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOEFSTRA L. REV. 401, 468-482 (2000) (showing how a contagion model of homosexuality articulated in the 1920s continues to inform parental and other efforts to erase homosexuality from the experience of the young).

C. Family and God

Until his confirmation, Joe had thought about becoming a priest, despite not feeling personally reflected in the same-sex relationships which Jesus had with the Apostles.¹⁵ These same-sex ties are the deep structure of the radical homosexuality advanced by the Church, although some alternative readings of the scriptures are known.¹⁶ Nevertheless, Joe identified with the calling to service that he had come to associate with the Church. While conceding that gays should not beat or harass straights, the Church has passionately opposed straight rights, a distinction understood better by theologians than street gangs.¹⁷ Even the Pope had expressed the gravest disapproval about acting on heterosexual impulses.¹⁸ Although he was not about to im-

15. One of the most interesting blasphemy trials in recent history involved a poem published by a British newspaper describing sexual acts between the body of Jesus and the Roman centurion who removed him from the cross. See LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 534-550 (1993) (describing the 1976 prosecution of the *Gay News*—Britain's first blasphemy prosecution in fifty years).

16. Boswell notes the confusion between religious thought and intolerance of sexual minorities:

As long as the religious beliefs which support a particular prejudice are generally held by a population, it is virtually impossible to separate the two; once the beliefs are abandoned, the separation may be so complete that the original connection becomes all but incomprehensible. For example, it is now as much an article of faith in most European countries that Jews should not be oppressed because of their religious beliefs as it was in the fourteenth century that they should be.

See BOSWELL, *supra* note 7, at 6.

17. Used to construe canon law, the Magisterium (official Roman Catholic doctrine) asserts that homosexual identity is depraved and anomalous: "In Sacred Scripture [homosexual acts] are condemned as a *serious depravity* and even presented as the sad consequence of rejecting God . . . homosexual acts are intrinsically *disordered* and can in no case be approved of." SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS*, § 8 (1975) (restating the Magisterium's axiomatic heteronormativity) (emphasis added). The nerve center of the Vatican's campaign against gender is the Congregation for the Sacred Doctrine of the Faith, headed by Joseph Ratzinger from 1982 until he became Pope in 2005. The Congregation traces back to the Sacred Congregation of the Roman and Universal Inquisition, established by Pope Paul III in 1542. See PAUL COLLINS, *THE MODERN INQUISITION: SEVEN PROMINENT CATHOLICS AND THEIR STRUGGLES WITH THE VATICAN* vii-xi (2002), for the most complete discussion of this secretive unit, explaining the Congregation's role in prosecuting heresy in the context of prominent contemporary heretics. In 1908, Pope Saint Pius X renamed the Vatican unit the "Sacred Congregation of the Holy Office." *Id.* at 14. The unit took its current form after Vatican II. *Id.* at 2. Echoing the Christian distinction between loving sinners while opposing their sin, my targeting of Catholic doctrine attacks an idea, not its adherents.

18. Joseph Ratzinger, as Pope Benedict XVI, has suggested that homosexual acts may be "despicable":

Today, the various forms of the erosion of marriage . . . even pseudo-marriages between people of the same sex, are . . . an expression of anarchic freedom that are wrongly made to pass as true human liberation Licen-

molate himself in protest in front of St. Peter's,¹⁹ Joe nonetheless regretted this. At the Pope's behest, the Church had begun a campaign of purging straight priests from their profession and barring other straights from entering the priesthood.²⁰

Coming from a strict Catholic family, Joe avoided discussing his private life at home. At one point, Joe's older uncle had come out, split up with his male partner of twenty years, and taken up with a woman. His family disowned him and—as he was dying of AIDS—they refused to let her visit him in the hospital. Later, Joe's six-year-old cousin began to show early signs of heterosexuality. To his parents' sorrow, their doctor diagnosed the boy with gender identity disorder, a disease which many feared would lead to heterosexuality. However, not all was lost, noted the doctor, because some clinicians claimed reparative therapy can modify a child's sexual orientation.²¹

tiouness, which passes for the discovery of the body and its value, is actually a dualism that makes the body despicable

Joseph Ratzinger, Pope Benedict XVI, Address of His Holiness Benedict XVI to the Participants in the Ecclesial Diocesan Convention of Rome (June 6, 2005), http://www.vatican.va/holy_father/benedict_xvi/speeches/2005/june/documents/hf_ben-xvi_spe_20050606_convegno-famiglia_en.html.

19. On January 13, 1998, a 39-year-old gay writer, Alfredo Orlando, immolated himself in St. Peter's Square to protest the Catholic Church's policies against gays. See Vera Haller, *Intolerance of Homosexuals in Italy Underscored by Tragedy*, WASH. POST, Feb. 15, 1998, at A28 (quoting police communication that a note in Orlando's bag said, "I am taking my life because my family and society have rejected me because I am homosexual"). The sad note found in Orlando's napsack suggests the risk to gays of internalizing straight-centered discourse: "I ask the entire world forgiveness for my crimes against nature . . . for having dared to think and act as a man, for not having accepted an 'otherness' that I did not feel, for having considered homosexuality natural, for having felt equal to heterosexuals" For the full text of the note, see Soulforce, Soulforce Alert (Jan. 3, 2001), <http://www.soulforce.org/article/340>. Soulforce is a non-governmental organization that advocates nonviolent resistance to protest oppression against sexual minorities asserted on faith-based or religious grounds. See <http://www.soulforce.org/article/7>.

20. In an act of radical integrity inviting the same, the Vatican now excludes most homosexuals from the seminary. "[T]he Church, while profoundly respecting the persons in question, cannot admit to the seminary or to holy orders those who practise homosexuality, present deep-seated homosexual tendencies or support the so-called 'gay culture'" Congregation for Catholic Education, Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in View of Their Admission to the Seminary and to Holy Orders § 2 (Nov. 4, 2005), http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html.

21. Cf. Carolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts To Change A Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505 (1999) (concluding that reparative therapy should be interpreted judicially as child abuse). After the American Psychiatric Association removed homosexuality from its list of pathologies, a new medical diagnosis was officially added in order to track and treat children with observed tendencies toward homosexual object choice or other sex discordant behavior. For an excellent discussion about gender identity disorder, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83

D. *Salad Days*

With college in Boston came urban anonymity and freedom from parents.²² Joe stopped dating guys and got a girlfriend on the sly. One night in Provincetown (a straight haven), an SUV chased them onto the sidewalk and into a doorway. The driver shouted "Die, breeders! Die!" The couple hadn't even been holding hands, which is something that can be done only in a handful of neighborhoods across the country.

Strolling through the Back Bay another night, Joe saw a brick land next to him. Then another one. Were they falling off the John Hancock Tower? No. A gang of angry gay kids was closing in on him. He ran into a taxi. Jeez, Joe thought, it's like the Planet of the Apes around here.²³

Of course, now everyone chirps "That is *so straight!*" to refer to things that are goofy. Joe can't avoid hearing this, but strives to act and dress gay in public so that at least no one would say that about him. To avoid offending even his liberal gay friends, he would *never* comment on a nice-looking woman.²⁴

CAL. L. REV. 3, 84-91 (1995) (parsing the interaction of sex, gender, and sexual orientation as separate categories).

22. Boswell notes the organic relationship between homosexuality and the city:

A salient characteristic of "rural" societies is reliance on the family to administer punishment to persons (within or without the family) who cause harm to family members.

In contrast, "urban" societies are characteristically organized in political units which explicitly transcend kinship ties. Urban communities can afford to effect a transition to a larger realm of moral concern because more sophisticated social organization in cities removes from the family unit much of the burden of social welfare and organization

Homosexuality is usually tolerated and often idealized in highly urban societies At best, it is seen as an expression of precisely that sort of spiritual loyalty, independent of the constraints of blood relation, which creates and maintains municipalities and civilizations, a more intense form of the love and devotion which should exist between citizens regardless of biological accident or particulars of kinship.

BOSWELL, *supra* note 7, at 32-35. Eribon concurs in the common need to flee the family of origin for a more open space, of which the city is emblematic:

Gay lives often begin in a state of deferral. They only really begin when someone reinvents himself, leaving behind, at least partially, his ashamed secrecy and his silence, when he makes choices instead of merely putting up with things—for example, when he assembles a family for himself, made up of friends, former lovers, and friends of former lovers, thereby reconstructing his identity and leaving behind the stifling, narrow field of his family of origin with its tacit or explicit injunctions to be heterosexual.

ERIBON, *supra* note 1, at 29.

23. These are a small fraction of the author's own rich experience with this type of violence.

24. See Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992), for a discussion of reprisals for

Joe has one straight guy friend, Mike. They met in an abnormal psychology class in which Mike challenged the professor for explaining heterosexuality as deviance behavior. The professor bristled, the class laughed, and Joe nearly wet his gay-conforming pants. No one in the class looked at Joe, but he felt like Mike had blown his cover. Shameless Mike even belonged to the university's straight student group, which had to sue the school for equal access to school property for its meetings.²⁵ Oddly enough, the other students liked Mike though they teased him for flaunting his sexuality. True, he had to put up with kidding from boys claiming that they could "turn" him, but sometimes the hot lesbian girls would flirt with him. Of course, even Mike knew where the limits were and never dared to seriously flirt back.

When he was alone with Mike, Joe would let his hair down, but in public he kept his distance. Known as a militant straight, Mike had told his parents and even—gulp—brought a girl home once. Joe did not approve of having to bring one's private life into everything like Mike seemed to do. Flaunting his straightness like this made it worse for everyone, Joe thought, because it offended gay people who might otherwise be allies.

E. Love

Joe once loved a Spanish woman, Caridad. She wanted to leave her native Barcelona to live with him in Florida, where he had moved to practice law after graduation. Until recently, a federal statute prohibited the entry into the United States of heterosexuals as "sex perverts."²⁶ Like many in this situation, Caridad could only stay in

same-sex advances. Mison argues that defending against homosexual advances institutionalizes homophobia by misapplying provocation theory. Id.

25. See, e.g., Gay Rights Coalition of Georgetown U. L. Center v. Georgetown U., 536 A.2d 1 (D.C. 1987) (reversing trial court judgment in favor of Georgetown University for refusing to grant access and recognition to gay and lesbian student group).

26. Repealing the Immigration Act of 1917, the McCarran-Walter Act of 1952 excluded homosexuals from entry to the United States as persons with "psychopathic personality." Immigration and Nationality Act of 1952 § 212(a), Pub. L. No. 414, 66 Stat. 163. (The Immigration and Nationality Act of 1965 added the category of persons afflicted with a "sexual deviation" to the list of persons excludable from entry into the United States. Immigration and Nationality Act of 1965 § 15(b), Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. § 1182(a)(4) (2000))). The so-called "liberal" Warren Court easily concluded that homosexuals were statutory sex perverts in the McCarran-Walter Act of 1952:

The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase "psychopathic personality" to include homosexuals such as petitioner . . . We, therefore, conclude that the Congress used the phrase "psychopathic personality" not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts . . . Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality.

Boutlier v. Immigration and Naturalization Service, 387 U.S. 118, 120, 122-23 (1967). This case is still valid, but the statutory language construed in *Boutlier* has been re-

Florida on a tourist visa. Some otherwise law-abiding straight people end up in same-sex marriages of convenience in order to stay in the country.²⁷ The tourist scam worked until a La Guardia Customs official prodded her about her visits to the United States. A lousy liar, she had blurted out that she was seeing Joe, leading the official to correctly conclude that Caridad improperly wanted to reside in the United States. He jailed her overnight and sent her back to Barcelona the next morning without allowing her to say goodbye to Joe, who had been barred access to her by Customs since they had no legally cognizable relationship.²⁸ Although it was a heart-wrenching decision, Joe was forced to split up with Caridad.²⁹

Ironically enough, Spain later became the fourth country to allow straights to marry.³⁰ Ever vigilant to the risk that heterosexuals would secure the legal right to have a family, the Church asked Catholic civil servants involved in processing marriage licenses to put conscience above legal duty and to refuse to issue licenses to straight couples.³¹

Until recently, straight sex had been criminalized in the United States, making it clear that same-sex penetration by anus or vagina was

moved from the statute. See John Theuman, *Annotation: Rights of, and Validity of Provisions Concerning or Affecting, Homosexuals, Under Federal Constitution—Supreme Court Cases*, 134 L. Ed. 2d 1047 *4 (2006).

27. This information represents the author's anecdotal evidence gained from serving on the board of the Lesbian and Gay Immigration Rights Task Force.

28. Anecdotal experience recounted to the author.

29. Again, the facts are based on the author's relationship with a Spaniard (Jaime Alemán García) and that of a friend whose lover was Swiss. See generally Immigration Equality, Binational Couples, <http://www.immigrationequality.org/template.php?pageid=2> (last visited Mar. 22, 2006).

30. The reform added the following paragraph to Article 44 of the Civil Code: "*El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo.*" ("Marriage shall have the same legal requirements and effects for both same-sex or cross-sex couples.") Ley 13/2005 (B.O.E. 2005, II). For a comprehensive summary of the statutory amendments, see B.O.E. para Notarías, Registros y Sociedades ("Official Gazette for Notaries, Registrars, and Mercantile Associations"), *Resumen de la Reforma del Código Civil Sobre Matrimonio y Adopción*, ("Summary of the Civil Code Reform Regarding Marriage and Adoption") (July 3, 2005), <http://www.notariosyregistradores.com/doctrina/resumenes/codigocivil-matrimonionyadopc%C3%B3n.htm> (last visited Mar. 22, 2006).

31. A senior Vatican official exhorted Spanish civil servants to disobey the Civil Code's provisions on civil marriage:

[A] person can use his or her right to object out of conscience and refuse to comply with this crime [gay marriage] which represents the destruction of the world . . .

All Christians, including state employees, have a duty to avail themselves of conscientious objection because the law of which we are speaking inflicts a deep moral wound on the Christian faith . . . And this law [the Spanish Civil Code reform] is particularly evil and bad and therefore provokes conscientious objection.

Interview by Agenzia Fides with Cardinal Alfonso López Trujillo, President of the Pontifical Council for the Family (Feb. 5, 2005), http://www.fides.org/eng/news/2005/0505/02_4784.html.

the only constitutionally protected form of sex.³² Fifteen years ago, the Supreme Court affirmed state laws criminalizing cross-sex penetration in a case in which police from a nearby state had entered an apartment and found a man and a woman in flagrante delicto.³³ Bringing chuckles to legal realists everywhere, a Justice who had concurred in the case later recanted after learning that he had a closeted straight clerk at the time.³⁴ By a slim majority, the Supreme Court later reversed this case, making it a constitutionally-protected right for straight people to have sex at home.³⁵ How droll, Joe thought, that the Constitution had finally caught up with the Napoleonic Code.³⁶

After a while, Joe started seeing Susie. They had met one night at the Palms, a straight Miami Beach bar where Joe first saw a man dancing salsa with a *woman*. That night they left the club together, making

32. See John E. Theuman, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R. 4th 1009 (1983).

33. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). "As the Court notes . . . the proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of these practices is firmly rooted in Judeo-Christian moral and ethical standards." 478 U.S. at 196.

34. After Justice Powell learned that his clerk was gay and publicly recanted his decision, another former clerk noted the poignancy of Powell's own belated self-knowledge:

[Powell] took the extraordinary step of going public with the fact that his vote [concurring in *Bowers*] had been a mistake . . . For some of us, *Bowers* was a debacle not merely because we disagreed with Powell's vote, and some of us did passionately disagree. Rather, the experience haunted us because, when all was said and done, Powell discovered that he disagreed with his own vote.

Anne M. Coughlin, *Justice Powell at Peace*, LEGAL TIMES, July 28, 2003, at 58.

35. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). As scholars have noted, the holding protects only private acts:

It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual *lifestyle*. The petitioners are entitled to respect for their *private* lives.

Id. at 578 (emphasis added to reflect value-laden terms which can serve as the textual bases for future closets). To the ears of any self-knowing homosexual who has embraced his or her identity, being referred to as a "lifestyle" is an insult, much as "Negro" or "colored" would seem today to an African-American. A "lifestyle" involves discretionary consumption choices. Of course, the most obvious candidate for a correlation between object choice orientation and lifestyle is the link between heterosexuality and procreation, an indisputably discretionary choice.

36. The Napoleonic Code is sometimes said to have decriminalized sodomy; it was, in fact, the first penal code after the French Revolution which did so, as part of a general revision of criminal offenses based on religion. See Michael David Sibal, *The Regulation of Male Homosexuality in Revolutionary and Napoleonic France, 1789-1815*, in *HOMOSEXUALITY IN MODERN FRANCE* 80, 80-101 (Jeffrey Merrick & Bryant T. Ragan Jr. eds., 1996). The Napoleonic Code continued to decriminalize sodomy when it entered into force in 1804. *Id.*

sure to shake hands amiably to avoid appearing straight. When he came out to his roommate, Carol, she squirmed and said, "It's okay. That's your private life." Joe introduced her to Susie, making sure not to touch her out of respect for Carol. Joe would have loved nothing more than to invite Susie over to his place in order to observe the Supreme Court's recent about-face, but he did not want to offend Carol, who might have considered that to be a moral depravity.³⁷

Besides, it could have been worse. Joe could have lived in a country that put practicing straights to death. Par for the course for "a planetary minority,"³⁸ Joe thought.³⁹ Hamstrung international orga-

37. Consider the following recent judicial holding:

Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one's ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child. To declare that homosexuality is harmful is not to make new law but to reaffirm the old; to say that it is not harmful is to experiment with people's lives, particularly the lives of children.

Ex parte H.H. v. H.H., 830 So.2d 21 (Ala. 2002). The opprobrium is such that even traditional allies join in. See, e.g., *Chicago Black Ministers Attack Gay Marriage*, WINDY CITY TIMES, June 2, 2004, at 8 (quoting African-American Rev. Gregory Daniels saying from his pulpit, "If the KKK opposes gay marriage, I would ride with them.").

38. The phrase belongs to South Asian gay rights activist Ashok Row Kavi. AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY 7 (2001) ("we are truly international and we are truly a planetary minority").

39. Homosexuality is punishable by death in several countries, including Saudi Arabia, Iran, Mauritania, Sudan, Pakistan, and Yemen. Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 803 n.223 (1993). On July 19, 2005, Iran executed Mahmoud Asgari (16 years old) and Ayaz Marhoni (18 years old) after more than a year of captivity after a religious trial in which they were convicted of offenses, including sexual intercourse, against another male minor. *Nobel laureate condemns hanging of 2 teenage boys*, CHICAGO TRIBUNE, July 24, 2005, at 6. The news coverage of the incident is not complete enough to understand the trial or its factual background. For an explicit photo essay on the executions, see Iran Executes 2 Gay Teenagers, http://direland.typepad.com/direland/2005/07/iran_executes_2.html (July 21, 2005). Iran's exiled gay rights group, Homan, claims that the Iranian government has executed several thousand homosexuals since 1979. Jamie Doward, *Outcry at plan to deport gay Iranian*, THE OBSERVER (U.K.), Aug. 21, 2005, at 11. See also *Saudi Arabia Executes Three Homosexual Nationals*, XINHUA GENERAL NEWS SERVICE, Jan. 1, 2002. In addition to the countries which make homosexuality a capital offense, homosexual acts are also criminalized by the laws of eighty other countries. International Gay and Lesbian Human Rights Commission, *Where Having Sex is a Crime: Criminalization and Decriminalization of Homosexual Acts* (2003), <http://iglhrc.org/site/iglhrc/content.php?type=1&id=77>. A recent round-up by Egyptian authorities of gay men attracted international attention. See Elise Ackerman, *Egyptian prosecution of gays angers human rights activists*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, June 8, 2003 (discussing the arrest of approximately fifty men in connection with a gay dance cruise and the subsequent criminal conviction of twenty-one of them for "debauchery," based on the judge's belief that each man had had homosexual intercourse during the prior three years).

nizations could do little about this mistreatment.⁴⁰ Religious opposition from Islamic countries and the Vatican had even kept the United Nations from compensation parity for the few straight staff from countries that offer similar benefits to their national civil servants known to be straight.⁴¹

Sordidly, animals often reproduced through cross-sex intercourse. Given this association, sexual reproduction was viewed as an abomination for human society. Though disputed by mainstream historians and scientists, some oddball academics suggested that before the advent of the gestational surrogates, humans—like the lower species—had actually preferred to reproduce through sex.⁴² In any event, human society had long since evolved out of this questionable practice, thanks to medical technologies that made possible less risky forms of asexual reproduction with gestational surrogates made from human stem-cell tissue.

Given the substantial health risks to women from gestation, most countries forbade the use of the human uterus to carry a fetus, deemed a parasite in medical terms.⁴³ To foster procreation, clinics offered free or subsidized fertilization and gestational services to same-sex couples interested in single gene or dual-parent genetic offspring. Of course, these services were not available to cross-sex couples. Nor could they adopt under state law.⁴⁴ Conceding that pleasure was the only natural function of genitals, Joe and Susie still

40. Amnesty International has published a helpful guide for nongovernmental organizations interested in advocating before United Nations (U.N.) agencies on behalf of sexual minorities. AMNESTY INTERNATIONAL, THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE: A PRIMER TO WORKING WITH THE UNITED NATIONS TREATY MONITORING BODIES AND THE SPECIAL PROCEDURES OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, IOR 40/004/2005 (2005), available at <http://amnestyusa.org/outfront/reports.do>.

41. Religious fundamentalists blocked a proposal to extend limited domestic partnership benefits to U.N. staff from the nine member countries of the U.N. that extended such benefits to their domestic civil servants. Julian Coman, *Vatican Joins Muslims to Fight Homosexual Partnerships Islamic Delegates Have Been Outraged by UN Plans to Give Gay Couples Equal Treatment on Pensions and Travel Expenses*, SUNDAY TELEGRAPH (LONDON), Mar. 21, 2004, at 31. On behalf of the fifty-six-member Organization of the Islamic Conference, the Iranian U.N. delegate promised to challenge any benefits parity in the World Court. *Id.*

42. In fact, animals engage in much nonprocreative sexuality. See, e.g., BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999).

43. See Population Resource Center, World Health Day 2005, <http://www.prcdc.org/holiday/worldhealth.html> (last visited Mar. 23, 2006). Death and disability from pregnancy account for nearly twenty percent of the total burden of disease for women of reproductive age in developing countries. *Id.* Women under the age of fifteen are five times more likely to die from childbirth than older women. *Id.*

44. A plain-speaking law, Florida statute provides that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual." FLA. STAT. ANN. § 63.042(3) (West 2005). See also *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) *cert. denied*, 543 U.S. 1081 (2005) (affirming the legality of the legal disability on adoption by homosexuals).

fantasized, though, about conceiving a baby through sex, so long as Susie could be protected. Joe had heard about places where—with enough cash—one could do this.

F. The Profession

Joe had wanted to go into the service. Except when running short on combat troops, though, the military refused to let straights serve in the armed forces. Why? If straights served with gays, the argument went, morale would break down.⁴⁵ (Maybe they were thinking about the shower thing.) In one notorious conflict, U.S. soldiers had tortured prisoners of war by making them simulate straight intercourse, thereby blaspheming against their religious tradition.⁴⁶ These troops *already* seemed to have straight sex on the brain, Joe thought. Indeed, maybe these gay troops could take a lesson in sublimation from straights, for whom denial had become second nature.

Joe went to law school instead. The fancy law firm where Joe clerked offered him a job, making his classmates envious. The managing partner encouraged him to bring a boy to the summer social events. After pointing out that he was single, Joe watched aghast as the partners began introducing him to their own sons. An older straight partner warned him that the last thing the firm wanted was a reputation as a nest of straights. Preaching to the choir, Joe thought. Risk your future at the firm over your private life? No way, José, given that in most states one could be fired just for being straight. Federal legislation to remedy this had been going nowhere fast since before he was born.⁴⁷ Besides, Joe wanted a federal clerkship.⁴⁸

45. Be it Freudian slip or drafting sabotage, the federal statute on military homosexuality refers to one of the Greek armies which was most famous for the exceptional valor of its homosocial troop formation: Sparta.

The worldwide deployment of United States military forces . . . make[s] it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often *spartan*, primitive, and characterized by forced intimacy with little or no privacy.

.....
The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts 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.

Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654(12), (15) (2000) (emphasis added for irony). For a discussion of the Spartan army, see Percy, *supra* note 7, at 80-84.

46. See GEORGE R. FAY & ANTHONY R. JONES, INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB (2004), available at http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf.

47. Few states have laws barring workplace discrimination based on sexual orientation. See HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES 27 (2001), http://www.hrc.org/Content/ContentGroups/WorkNet/Non_Discrimination_Sexual_Orientation/DocumentingDiscrimination.pdf. For a discussion of resistance to enacting a remedial fed-

After a while, Joe left law practice and started teaching, in part to flee ambient hostility to straight people. Not that he threw caution to the wind, however. Wary of reprisal, he continued to edit himself in the academy, particularly in his scholarship.⁴⁹

G. *The Culture War: Progress Narratives as a Closet*

True enough, some things had gotten better during Joe's lifetime. Some states, cities, and corporations now forbade discrimination against straight people, and a smaller number even offered domestic partnership benefits.⁵⁰ Tooting their own horns, the straight activist groups heralded these developments as epic. Straights even had a cultural niche with their own movies and cable television shows, called "straight" programs, which offered welcome relief from the homosexual grotesque.⁵¹ All other culture—especially sappy romance films—revolved around hermetically gay plots, with the occasional token straight character. Gay people, though, didn't seem to notice that gay movies were *not* labeled as such.

Inciting gays across the country into froth-speckled apoplexy, Massachusetts became the first state to let straights marry.⁵² The mar-

eral statute, see Pat P. Putignano, Note, *Why DOMA and not ENDA?: A Review of Recent Federal Hostility To Expand Employment Rights and Protection Beyond Traditional Notions*, 15 HOFSTRA LAB. & EMP. L.J. 177 (Fall 1997) (arguing that only a federal statute can protect sexual minority employees from discrimination). Bella Abzug and Ed Koch introduced the first bill to extend federal employment discrimination for homosexuals in 1974 titled: "A bill to prohibit discrimination on the basis of sex, marital status, and sexual orientation, and for other purposes." H.R. 15692, 93d Congress (1974), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:HR15692:@@L&summ2=M&>. Thirty years later, no federal law has been enacted.

48. Compare Jennifer Gerarda Brown, *Adjudication According to Codes of Judicial Conduct*, 11 AM. U.J. GENDER SOC. POL'Y & L. 67 (2003) (finding that judges display homophobic bias despite Canon 3 of the American Bar Association's Code of Judicial Conduct, which bars the manifestation of bias on the basis of sexual orientation).

49. In my first law review article, I deleted a parenthetical about the Ulysses myth which had originally read: "To illustrate the self-binding nature of central bank independence, Colares uses the story of Ulysses' ego conflict between libido and thanatos with the female Sirens, whose lovely songs drew male sailors (presumably heterosexual, no?) to reefs that meant certain death."

50. Lambda Legal has the most comprehensive listing of government employers, academic institutions, private employers, and unions that offer some kind of domestic partnership benefits. Lambda Legal, Partial Summary of Domestic Partner Benefits Listings, <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=21> (last visited Mar. 23, 2006).

51. See generally KATHERINE SENDER, BUSINESS, NOT POLITICS: THE MAKING OF THE GAY MARKET (2004) (describing the impact on gay and lesbian politics of the rise of niche marketing to the gay community). The gay market is often put in the context of other niche diversity markets. See, e.g., Gay Market Express, Marketing to Reach the Gay and Lesbian Community, <http://www.gaymarketexpress.com>, (last visited Mar. 23, 2006) (comparing African Americans, Gay Americans, Hispanic Americans, and Asian Americans in terms of population, aggregate buying power, and per capita buying power).

52. See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

riage panic was odd, given how few people were straight. To be on the safe side, a skittish federal Congress passed a statute—the Defense of Marriage Act—ensuring that only gay married couples could enjoy the bundle of special rights afforded to married couples under federal law.⁵³ Like reaching legal majority, acquiring citizenship, or being adjudged incompetent, marriage is a fundamental determinant of one's legal personality because of the breadth of economic and reputational rights involved, many of which cannot be replicated through private ordering in contract even by persons with means.⁵⁴ With a legislative agility that the National Conference of Commissioners on Uniform State Laws should envy, the states responded to the squeals of gay indignation by refusing to give full faith and credit to sister states' same sex marriages.⁵⁵ Massachusetts marriages were mostly local affairs, Joe thought, but they are sweet nonetheless.

Other things had not changed at all. Demonizing straights paid off for the candidates in the most recent presidential election. Although both candidates opposed letting straights marry, the winner had upped the ante by proposing an amendment to the U.S. Constitution that would memorialize the legal disability that keeps straights from marrying.⁵⁶

53. The U.S. House of Representatives Report introducing the bill that became the Defense of Marriage Act put the claim of straight supremacy in no uncertain terms:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996), codified as amended at 28 U.S.C. 1738 C (2000).

54. See Meghan M. Gavin, *The Domestic Partners Rights and Responsibilities Act of 2003: California Extends Significant Protections to Registered Domestic Partners and Their Families*, 35 McGEORGE L. REV. 482, 489-90 (2004) (citing a study by the State of California Legislative Counsel that disaggregated the bundle of 1049 rights afforded by marriage only to heterosexuals).

55. Thirty-eight state legislatures have recently passed laws banning marriage between same-sex couples. See Lambda Legal Defense Fund, States with Laws Banning Marriage Between Same-Sex Couples, <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1427> (last visited Mar. 23, 2006). Ballot initiatives for similar laws are pending in five states. *Id.*

56. When calling for a constitutional amendment to limit marriage to heterosexuals, U.S. President George W. Bush noted that if a federal court found the Defense of Marriage Act unconstitutional, then perhaps "every state would be forced to recognize any relationship that judges in Boston or officials in San Francisco choose to call a marriage . . ." Press Release, U.S. President George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (emphasis added). For the text of the bills, see H.J. Res. 39, 109th Cong. (2005), introduced originally in

H. *The Golden Years*

After getting tenure, Joe came out to his colleagues, who had long hoped that tenure would have this effect on him and had established betting pools on the issue. As he became comfortable with his sexual orientation, he even formed a straight Republican group, which sparred with the Federalist Society. The university did have a militant straight faculty and staff association that whined about compensation and benefits parity for heterosexual employees. Joe shunned this type of special interest lobbying. Indeed, it seemed tasteless and disrespectful to attack a system that had given him so much.

Happily, his relationship with Susie blossomed. Several years and tens of thousands of dollars later, though, the couple gave up on trying to adopt a baby. Susie wanted them to reproduce sexually but—even after tenure—Joe could never stomach violating a federal statute in that way. He was, after all, a law professor and a state employee, sworn to uphold the federal and state constitutions. Joe's position upset Susie, but the fights lessened with age, as companionable silence and affection soothed their common pain.

Ensclosed in a happy retirement, Joe died eventually from complications caused by smoking, a nasty habit picked up in the subculture of straight bars.⁵⁷ Unfortunately, Susie was away when he died. Adding insult to loss, no airline would give her a bereavement fare for her return home because Susie's relationship with Joe had never been legally sanctioned. Joe's faculty friends held a touching memorial service and showered Susie with condolences and support.

Legally forbidden from marrying, Joe had been unable to transfer his university pension and survivor benefits to Susie. Of course, she had no right to his Social Security retirement benefits either.⁵⁸ To

the Senate as S.J. Res. 1; 109th Cong. (2005) (proposing an amendment to the Constitution of the United States relating to marriage).

57. Public health research suggests that gay men have a higher rate of smoking than other sectors of the population, a factor that has not gone unnoticed by the tobacco industry. See, e.g., Press Release, Cal. Dep't of Health Servs., New Data Show California Military, Korean Men and LGBT Populations Smoke Much More than Others in the State (Sept. 9, 2005), http://www.dhs.ca.gov/tobacco/documents/press/PressReleaseSept6_05.pdf (summarizing population-based studies showing that in contrast with the state average smoking rate of fifteen percent, members of the LGBT community have a thirty percent rate, active Marines a twenty-seven percent rate, and Korean men a fifteen percent rate, which is significant because Chinese and other Asian populations tend to have significantly lower rates of smoking than the general population). In the 1990s, R.J. Reynolds targeted gay male and homeless communities in San Francisco's Tenderloin District with the charmingly named Project Sub-Culture Urban Marketing (SCUM) to develop culturally appealing cigarette brands. Project SCUM: How a Tobacco Company Targeted Gay and Homeless Communities, <http://www.projectscum.org/site/home.asp?mode=0> (last visited Mar. 22, 2006).

58. Only a federally recognized widow may have an interest in a decedent's Social Security benefits. See 42 U.S.C. §§ 402(e), 416(c) (2000).

help cover costs, Susie got a part-time job, which at least got her out of the house. Joe had feared such an outcome, but what else could either of them have done under the circumstances?

II. COMING TO SPEECH

As is clear by now, the story of Joe is the outsider narrative of a heterosexual male, situated as a sexual minority in a fictional world of gay supremacy—a homonormative world.⁵⁹ Joe's gay dystopia is just the inverse of straight supremacy, with some artistic license taken when flipping the current to the imaginary is clumsy. This way, the narrative and supporting counter-citation mirror by implication the expectations gap faced by sexual minorities in fact. To me, as a person in a sexual minority, life as it is seems no less surreally barbaric than—I would hope—Joe's imaginary world seems to other readers. As genre, Joe's story forms part of the homosexual grotesque and invites the reader to view straight supremacy as the heterosexual grotesque.⁶⁰

Shifting from this inductive use of social facts in the previous Part to demonstrate the obvious, Part II operates deductively by putting Joe's story in a theoretical context that generates wider implications about the current nature of straight supremacy. The first section examines how heterosexual ideology interpellates sexual minorities as existentially disabled beings. Inviting a tactical deployment of ideology, the next section suggests that interrupting heterosexual ideology is possible through a conscious rhetoric of speech and silence. Gay intellectuals have a special role in this project as the trustees of counter-ideological narratives. Through writing, they can convert the libidinal rage which is a well-adjusted reaction to daily life as a sexual

59. Although I join Lisa Duggan's critique, I use the word "homonormativity" differently than she does:

The new neoliberal sexual politics of the IGF [the Independent Gay Forum, an on-line writers' group] might be termed *the new homonormativity*—it is a politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.

LISA DUGGAN, *THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS AND THE ATTACK ON DEMOCRACY* 50 (2003). Indeed, these writers are the organic intellectuals of the gay Right. See *infra* notes 113-119 and accompanying text on the organic intellectual.

60. The precise contours of the grotesque as a genre of cultural production and criticism vary, but its main elements include a monstrous deviation from the natural, extravagance, and caricatured personal qualities, typically invisible to the person in question. Taken together, these elements evoke a structural estrangement from established aesthetic or cultural values. See Philip Thomson, *The Grotesque*, <http://mtsu32.mtsu.edu:11090/Grotesque/Major%20Practitioners/Theorists/Thomson/thomson.html> (last visited on May 23, 2006). What makes the grotesque possible, of course, is a consensus on these values. In a heteronormative consensus, the heterosexual grotesque remains invisible and only latent as an analytic category.

minority into useful mental products—ideology. The point of this ideology is to create foundational texts in which the reader can recognize oneself—regardless of one's object choice preference—outside of heterosexual ideology. (Deciding whether or not a text has succeeded in doing so may not be possible in the heterosexual present.) The final section offers some educational tools for exploring the dynamics of heterosexual interpellation in the context of a classroom discussion.

A. Heterosexual Interpellation

Louis Althusser coined the idea of "interpellation" to describe what he saw as the mutually constitutive relationship between systems of ideas—"ideology"—and the person, as framed, evoked, or erased by the ideology in question.⁶¹ That is, a person comes to recognize oneself as a politically and emotionally sentient being through the sieve of ideology.⁶² To illustrate interpellation, Althusser uses the example of recognition felt by a person walking down the street and being hailed by a police officer with a "Hey! You there!"⁶³

61. Ideology and subjects coexist only with respect to each other: "I say: the category of the subject is constitutive of all ideology, but at the same time and immediately I add that the category of the subject is only constitutive of all ideology insofar as all ideology has the function (which defines it) of 'constituting' concrete individuals as subjects." LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 160 (Ben Brewster trans., 1971) [hereinafter ALTHUSSER, *Ideology*]. A manic-depressive, Althusser strangled his wife and, a better academic than he was a husband, wrote about it: LOUIS ALTHUSSER, *THE FUTURE LASTS FOREVER* (Olivier Corpet & Yann Moulier Boutang eds., Richard Veasey trans., 1992).

62. The person-subject comes to recognize herself only in the terms made possible by the ideology:

Althusser's interesting analysis of what he calls "interpellation" demonstrates more specifically the relationship between ideology and the subject We are constituted as subjects through a process of recognition. The use of the term "interpellation" is an allusion to the theological concept of call, of being called by God. In its ability to interpellate subjects, ideology also constitutes them. To be hailed is to become a subject.

Paul Ricoeur, *Althusser's Theory of Ideology*, in ALTHUSSER: A CRITICAL READER 44, 64 (Gregory Elliott ed., 1994).

63. Althusser uses the example of a police officer calling a passerby to illustrate how interpellation works:

[I]deology "acts" or "functions" in such a way that it "recruits" subjects among the individuals (it recruits them all), or "transforms" the individuals into subjects (it transforms them all) by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: "Hey, you there!"

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a *subject*. Why? Because he has recognized that the hail was "really" addressed to him, and that "it was really him who was hailed" (and not someone else). Experience shows that

Interpellation theory is particularly relevant to the analysis of legal personality, a metaphor which recognizes that law creates the features of the personhood in question. Heterosexual ideology interpellates gays through legal disabilities and other limits on freedom.⁶⁴ After documenting the scope of straight supremacy in his book, Didier Eribon emphasizes that insult is the main vehicle for this type of self-recognition by the gay subject:

Thus do gay people live in a world of insults. They are surrounded by a language that hems them in and points them out. The world insults them; it speaks of them and of what is said about them. The words of day-to-day life as well as of psychiatric, political, and juridical discourse assign each of them individually and all of them collectively to an inferior place within the social order. And yet this language preceded them: the world of insults preexisted them, and it takes hold of them even before they know what they are.⁶⁵

As Anygay or Everygay, Joe endures these familiar insults. They include overt acts like physical harassment and ridicule, as well as the strategic omissions of straight supremacy: the shameful excitement of early sexual interest,⁶⁶ the siege during adolescence,⁶⁷ the search for self in literary and historical subtext,⁶⁸ parental opprobrium and the resulting splitting of the self,⁶⁹ institutionalized religious hostility,⁷⁰ hostility from peers,⁷¹ one's own hostility towards "militant" gays who implicate one's own internalized repudiation,⁷² the risk that a national border will come between one and the object of one's affection,⁷³ heightened management of the quite real risks to career,⁷⁴ frustrated family formation,⁷⁵ deflationary progress narratives,⁷⁶ ego

the practical telecommunication of hailings is such that they hardly ever miss their man: verbal call or whistle, the one hailed always recognizes that it is really him who is being hailed. And yet it is a strange phenomenon, and one which cannot be explained solely by "guilt feelings," despite the large numbers who "have something on their consciences."

See ALTHUSSER, *Ideology*, *supra* note 61, at 174 (citation omitted).

64. Some social science research recognizes this explicitly. See, e.g., GLENDA M. RUSSELL, *VOTED OUT: THE PSYCHOLOGICAL CONSEQUENCES OF ANTI-GAY POLITICS* (2000) (analyzing the psychological impact on gay people of an amendment to the Colorado Constitution that made it unconstitutional to protect gay people from discrimination).

65. ERIBON, *supra* note 1, at 56. See also *id.* at 56-63 (using Judith Butler's approach to language and Louis Althusser's arguments about ideology to explain how heterosexual interpellation works).

66. See *supra* Part I.A.

67. See *supra* Part I.B.

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

69. See *supra* note 22 and accompanying text.

70. See *supra* Part I.C.

71. See *supra* notes 8, 24, 37 and accompanying text.

72. See *supra* note 25 and accompanying text.

73. See *supra* notes 26-29 and accompanying text.

74. See *supra* Part I.F.

75. See *supra* notes 44, 71 and accompanying text; *supra* Part I.H.

conflicts from reconciling self to professional commitments,⁷⁷ and, although only anticipated during life, the final insults at death.⁷⁸ A complete taxonomy of insult is impossible because its genius lies in its ability to turn any social moment into a theater for stigma.⁷⁹

Granted, the lot of some homosexuals in heterosexual ideology has gotten better.⁸⁰ However, both reactionary critics and progressive allies reimpose the same ideology by taking these marginal gains out of the context of the expectations gap. Consider the backlash claims made by the former that homosexuals have caused a tectonic shift in social values.⁸¹ Like Chicken Little, these critics fear that gays have swamped the social order and "taken over." Joe's story responds to this heterosexual panic by suggesting what a *real* gay takeover would look like—at least if gay supremacists were to behave as the current authorities do now. Not that gay supremacy could ever emerge as retaliation. Survivors of conceptual liquidation are too sensitive to normative abuse to ever wish it on someone else, even one's former jailors.⁸²

76. See *supra* Part I.G.

77. See *supra* Part I.H.

78. See *supra* Part I.H.

79. Indeed, although his arguments about the microphysics of power are used widely, Michel Foucault might very well have been thinking about the dynamics of gay insult when explaining how individuals can channel social power.

80. For example, four countries—Spain, the Netherlands, Belgium, and Canada—now allow same-sex marriage.

81. See, e.g., Gerald Schoenewolf, *Gay Rights and Political Correctness: A Brief History*, NATIONAL ASSOCIATION FOR THE RESEARCH AND TREATMENT OF HOMOSEXUALITY, Apr. 4, 2005, <http://www.narth.com/docs/schoenewolf2.html> ("At present, the Gay Rights Movement has taken over nearly all professional organizations not only in America but also in the U.N. and throughout the world."). See also American Family Association, Homosexual Agenda Main Page, http://www.afa.net/homosexual_agenda/Default.asp (last visited Apr. 7, 2006). Another example is Justice Scalia's dissent in *Lawrence v. Texas*.

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. . . . [I]n most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.

539 U. S. 558, 602-03 (2003).

82. Heteronormativity is organized around the conceptual liquidation of homosexuals and other sexual minorities:

[A] group is conceptually liquidated—or demolished in a culture's thoughts—when its members are seen as less than human, as massively confused about the right order of things, and as lost in a hopeless cognitive and spiritual morass. . . . [There are] four steps in the process of the conceptual liquidation of LGBs [lesbians, gays, and bisexuals] by anti-gay campaigns. The first step involves portraying LGB people as a threat. Step two focuses on equating LGB orientation with pathology. The third step is the construc-

The euphoric views of some allies are not much better. Consider, for example, the hyperbole of legal commentators who characterized *Lawrence v. Texas* as some kind of fundamental transformation in the social order.⁸³ The ground of being implied in these celebrationist accounts also stunts gay expectations, perhaps, in fact, more seductively than do the heterosexual panic arguments. Decriminalizing gay sex certainly reflects a move up the brain stem, but this marginal victory seems radical only as part of a homely progress narrative built on backward-looking historical arguments. Much as some psychoanalysis aims for a better unhappy person, at peace with the world's limits on one's wish fulfillment, progress narratives of this sort deal with the expectations gap by denying it.

Heterosexual interpellation—whether at the hands of friends or Lilliputian foes—renders the homosexual a legal person only in the subjunctive, the grammatical mood for the unreal. Notwithstanding its other virtues, the practice of "coming out" as a sexual minority merely confirms one's lack of agency as a fleck of marginalia. What is left for such a compromised person is the inner world of expectations, whether or not those expectations are realizable as a legal matter. Because the content of ideology is subject to change, my point in the following section is to suggest that self-hailing may be possible through the tactical use of ideology.

B. *Ideology by Bootstrap*

Some theoretical approaches in legal scholarship dignify the expectations of sexual minorities which remain (and will continue to remain) vitally unrealizable in the heterosexual present. In this sense, these writings function as interpellative advocacy by calling into being—if only in theory—a ground of existence for gay people. Below, I

tion of an explanation for their orientations [The] final step is the social construction of a cure for the presumed pathology of LBG orientations.

RUSSELL, *supra* note 64, at 5.

83. Katherine Franke gives examples of some of the irrational exuberance produced by the case:

Gay rights activists and scholars have rejoiced at these victories. Indeed, some have gone so far as to label the decision in *Lawrence v. Texas* "our *Brown*." Immediately after the decision was announced, Lambda Legal's legal director delighted in a press release: "[This] landmark victory . . . recognizes that love, sexuality and family play the same role in gay people's lives as they do for everyone else." The ACLU proclaimed: "It gave us the constitutional right to form intimate relationships and to sexual expression. For that, *Lawrence* changes everything." *Everything*? That may overstate the significance of the case somewhat.

Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399-1400 (2004) (citations omitted). See also Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1240-1250 (2004) (noting the heteronormative limits of the privacy and equality rationales advanced by *Lawrence*).

emphasize some feminist contributions in particular because they use a structural approach that remains relevant to understanding heterosexual ideology.⁸⁴ Inviting a tactical use of interpellation, I also suggest some approaches which yield better expectations for and by sexual minorities. Related to this project, I explore the relationship between a gay intellectual's ground of existence and the interpellative quality of that person's intellectual work in the context of Antonio Gramsci's idea of the "organic intellectual."

Feminist thought in the late 1970s began to challenge the primacy of heterosexuality as the deep structure of human thought, although these insights would not be internalized into legal scholarship for more than a decade (a lag explained later). The idea that mental life was suspiciously structured around heterosexuality took root in the writing of Monique Wittig and Adrienne Rich. Speaking as a structural anthropologist, Wittig suggested in a 1978 address to the Modern Language Association that the straight mind was a "conglomerate" composed of primitive categories.⁸⁵ Raising eyebrows, she asserted that lesbians are not women because "woman" is a category of heterosexual patriarchy.⁸⁶ Importantly, she warned of the risk that

84. Structuralism refers to the simultaneous emergence in a variety of disciplines during the 20th century of an intellectual framework which expresses causation in social, psychic, and economic life in terms of recurring, patterned dynamics, e.g. structures. Although significant variations exist between major structuralists such as Karl Marx (political economy), Sigmund Freud (psychoanalysis), and Ferdinand de Saussure (linguistics), they share an archaeological method of social science:

What Marx, Freud, and Saussure have in common, and what they share with present day structuralists, is a conviction that surface events and phenomena are to be explained by structures, data, and phenomena below the surface. . . . The attempt to uncover deep structures, unconscious motivations, and underlying causes which account for human actions at a more basic and profound level than do individual conscious decisions, and which shape and influence and structure these decisions, is an enterprise which unites Marx, Freud, Saussure, and modern structuralists.

THE STRUCTURALISTS: FROM MARX TO LEVI-STRAUSS xii (Richard T. De George & Fernando M. De George eds., 1972). Social constructionist arguments tend to reject self-styled structural approaches. This Article does suggest that constructionist arguments should pay more attention to the bounded and, indeed, qualified nature of the contingency which is a hallmark of constructionist arguments.

85. Wittig's definition focuses on the symbolic composition of the straight mind: In spite of the historic advent of the lesbian, feminist, and gay liberation movements, whose proceedings have already upset the philosophical and political categories of the discourses of the social sciences, their categories (thus brutally put into question) are nevertheless utilized without examination by contemporary science. They function like primitive concepts in a conglomerate of all kinds of disciplines, theories, and current ideas that I will call the straight mind.

MONIQUE WITTIG, *The Straight Mind*, in *THE STRAIGHT MIND AND OTHER ESSAYS* 27 (1992).

86. While rejecting "woman" as an essentialized category, Wittig did not necessarily suggest an essentialized lesbian identity:

arguments based on "difference" could reaffirm subordination.⁸⁷ Seemingly few legal scholars have developed a sustained analysis based on her trenchant metaphor.⁸⁸ At about the same time, Adrienne Rich named an important core operation of the straight mind: compulsory heterosexuality.⁸⁹ Thankfully, this idea has been widely cited in legal scholarship.⁹⁰ The study of heterosexual dominance owes much to these two women, although Michel Foucault's historical deconstruction of the category of the "homosexual" is often viewed as the beginning of queer theory.⁹¹ Foucault's historical approach revived

What is woman? Panic, general alarm for an active defense. Frankly, it is a problem that lesbians do not have because of a change of perspective, and it would be incorrect to say that lesbians associate, make love, live with women, for "woman" has meaning only in heterosexual systems of thought and heterosexual economic systems. Lesbians are not women.

Id. at 32. For a good summary and juxtaposition of liberal, radical, socialist, and postmodern feminist approaches, see MARYSIA ZALEWSKI, *FEMINISM AFTER POSTMODERNISM: THEORISING THROUGH PRACTICE* (2000).

87. Foreshadowing the discussion later in this essay about using Marx analogically to model the straight question as a class conflict, Wittig uses a dialectical approach to the straight mind:

[T]he concept of difference between the sexes ontologically constitutes women into different/others. Men are not different, whites are not different, nor are the masters. But the blacks, as well as the slaves, are. . . . "Man" and "woman" are political concepts of opposition, and the copula which dialectically unites them is, at the same time, the one which abolishes them. It is the class struggle between men and women which will abolish men and women.

WITTIG, *supra* note 85, at 29 (citation omitted).

88. *But see generally* Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998) (an analysis of pre-Lawrence sodomy laws using Wittig's concept of the straight mind); Susan Ayres, *The Hand that Rocks the Cradle: How Children's Literature Reflects Motherhood, Identity, and International Adoption*, 10 TEX. WESLEYAN L. REV. 315 (2004) (analyzing kinship narratives in children's literature using the metaphor of the straight mind).

89. Adrienne Rich's original text is always worth reproducing, especially for new readers:

[L]esbian existence has been written out of history or catalogued under disease. . . . To take the step of questioning heterosexuality as a "preference" or "choice" for women—and to do the intellectual and emotional work that follows—will call for a special quality of courage in heterosexually identified feminists but I think the rewards will be great: a freeing-up of thinking, the exploring of new paths, the shattering of another great silence, new clarity in personal relationships.

Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS J. OF WOMEN IN CULTURE 631-660 (1980).

90. The phrase has not become a household word because few people routinely distinguish between heterosexuality and heteronormativity and, hence, have provided the rationale for my writing this Article.

91. *See* ERIBON, *supra* note 1, at 117-119 (discussing Foucault's historical work on the category of "homosexual").

classical studies and contributed to the foundation of critical heterosexual studies.⁹²

This incipient scholarly skepticism about heterosexual normativity incubated for a decade before its reception into legal scholarship, with the notable exception of the work of Catherine MacKinnon.⁹³ During this decade, the urgency of the AIDS crisis absorbed much of the emotional, financial, and intellectual resources of the gay civil rights movement, which might otherwise have focused on being rather than dying.⁹⁴ This began to change in the 1990s, when, for example, Michael Warner coined and popularized the term "heteronormativity."⁹⁵ This period also saw the first generation of law review articles that targeted heteronormative dominance, including a seminal article by Frank Valdés on the conflation of sex, gender, and sexual orientation in the West.⁹⁶

A second generation of law review articles framed heterosexual dominance as part of a subordination matrix showing the linkages between different bases of subordination through intersectional and

92. A building block of this Greek revival, Dover observed one example of how tolerance for sexual minorities falls short, a pervasive theme in critical heterosexuality studies:

The long-standing Western European assumption that homosexual eros is essentially diabolical may be responsible for a certain reluctance, even on the part of those who would immediately reject moral condemnation of homosexuality *per se*, to recognise [sic] that homosexual eros can inspire as much unselfish devotion as heterosexual. It [homosexual eros] was certainly exploited for military purposes, and to good military effect . . .

K.J. DOVER, GREEK HOMOSEXUALITY 50-51 (1978) (citation omitted).

93. See generally Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).

94. Foucault died in 1984, before finishing his *HISTORY OF SEXUALITY*. See ERIBON, *supra* note 1, at 319.

95. Warner notes that it takes an act of imagination to leave the straight mind: "Even when coupled with a toleration of minority sexualities, heteronormativity can be overcome only by actively imagining a necessarily and desirably queer world . . . any imagination of desirable queerness is conspicuously absent in the psychoanalytic and psychiatric literature about child-rearing . . ." FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xvi (Michael Warner ed., 1993).

96. See Valdés, *supra* note 21. See also Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994) (examining the relationships between essentialism, feminism, and lesbian existence). Nancy Knauer noted the analytical possibilities opened up by anti-essentialism: "Queer theory seeks to destabilize the hetero-homo opposition without offering an alternative fixed identity. . . . This unique perspective is one of the most promising aspects of queer theory, at least with regard to its applicability to legal analysis. . . ." Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 140 (1998) (citations omitted). Knauer also discusses how the discourse of the "marriage penalty" reinscribes heteronormativity by understating the tax value of marriage as a special right and ignores the legal disability that keeps gays from marrying. *Id.* at 139-42. Recent scholarship in federal taxation continues to interrogate this issue. See, e.g., Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004) (further documenting the scope of the federal tax disability on gays and lesbians).

multidimensional analyses. Darren Hutchinson's work, for example, documents heteronormative bias in anti-racist scholarship regarding violence against sexual minorities.⁹⁷ Complementing this approach, Devon Carbado enumerated some of the special rights and privileges which heterosexuals enjoy.⁹⁸ Matrix approaches enrich the self-governance of critical communities by creating the (ideological) expectation that members of these communities must become aware of how identity-based externalities subordinate others. Matrix approaches also hold out the possibility of wider dissemination outside of the legal academy. The basic approach is to insist on understanding how a person's subject position combines privilege and subordination.⁹⁹ This involves mapping the relationships between different vectors of subor-

97. See, e.g., Darren Lenard Hutchinson, *Beyond the Rhetoric of "Dirty Laundry": Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185, 185-99 (1999); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (analyzing the heteronormative nature of antiracist legal theory).

98. Although having to select from Professor Carbado's privilege list is difficult, here are a few of the compelling special rights:

2. Without making a special effort, heterosexuals are surrounded by other heterosexuals every day. . . .

3. A husband and wife can comfortably express affection in any social setting, even a predominantly gay one. . . .

14. White heterosexuals do not have to worry about whether a fictional film villain who is heterosexual will reflect negatively on their heterosexuality. . . .

31. Heterosexual couples do not have to worry about whether kissing each other in public or holding hands in public will render them vulnerable to violence. . . .

33. The parents of heterosexuals do not love them "in spite of" their sexual orientation, and parents do not blame themselves for their children's heterosexuality. . . .

35. Heterosexuals can introduce their spouses to colleagues and not worry about whether the decision will have a detrimental impact on their careers. . . .

43. Heterosexuals do not have to worry about being "bashed" after leaving a social event with other heterosexuals. . . .

44. Every day is (white) "Heterosexual Pride Day."

Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 117-22 (2000) (citations omitted).

99. Yielding on one front of discrimination may make it easier to withstand hostility coming from another front:

[A]s Barbara Smith once noted, "heterosexual privilege is usually the only privilege that black women have". . . . Our protection as black people under fire has always been our families in the extended sense, and our race in general. At some level, homophobia from white people is just more hatred from white people. But, homophobia from black people leaves you feeling truly isolated. . . . It is the feeling of being a motherless child.

Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 143, 147 (1995) (citations omitted) (discussing why black lesbians may react to homophobia from white and black communities differently).

dination.¹⁰⁰ In general, these approaches involve transformations of a basic model with respect to anti-subordination. For that reason, despite their ties to postmodern theory, matrix approaches seem very structural, as the term "structure" was understood by anthropologist Claude Lévi-Strauss.¹⁰¹

However, various forms of insult at the hands of parents, the bench, and the pulpit that would be unthinkable for other minorities are calmly tolerated against gays.¹⁰² Despite the virtues of matrix approaches, a closer look at insult against gay persons is in order, without insisting that this analysis be relevant to the study of how other minorities are subordinated.¹⁰³ A more targeted application of queer

100. See, e.g., Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. Rev. 251, 251-58 (2002) (analyzing the linkages between systems of subordination and offering a taxonomy of symbiotic features and working vocabulary to better understand these risks to progressive coalition-building); Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital—An Exercise in Praxis*, 35 SETON HALL L. REV. 1201, 1206-07 (2005) (arguing that as an antisubordination strategy, progressive academics should consciously redistribute academic capital to members of other subordinated groups); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1263-64 (1996-97) (arguing that apparently autonomous categories should be viewed in cosynthetic dialectic).

101. A structural approach is a formal system of interdependent parts, which behave in predictable and recurrent ways. Structural anthropology offers a good definition of a structural approach:

The term "social structure" has nothing to do with empirical reality but with [analytic] models which are built up after it. . . . Keeping this in mind, we can say that a structure consists of a model meeting with several requirements.

First, the structure exhibits the characteristics of a system. It is made up of several elements, none of which can undergo a change without effecting changes in all the other elements.

Second, for any given model there should be a possibility of ordering a series of transformations resulting in a group of models of the same type.

Third, the above properties make it possible to predict how the model will react if one or more of its elements are submitted to certain modifications.

CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 279 (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963).

102. Consider as a tiny sample the ambivalence in 2005 from the U.S. District Court for the District of Maryland about whether homosexuality is a "morally correct lifestyle," *supra* note 12, the Southern Baptist Convention's opposition to "the acceptance among schoolchildren of homosexuality," *id.*, the Catholic Magisterium's assertion that homosexuality is depraved and disordered, *supra* note 17, the Pope's suggestion in 2005 that homosexuality makes the body "despicable," *supra* note 18, the U.S. Supreme Court's view from 2003 that homosexuality is a "lifestyle," *supra* note 35, President Bush's putdown in 2004 of Boston and San Francisco because of their support for gay rights, *supra* note 56, and Justice Scalia's sunny endorsement of majoritarian prejudice, *supra* note 81. It is inconceivable that authorities would openly opine (in concert, no less) about any other identity.

103. Nancy Ehrenreich has criticized a "discourse of distinctness" that includes potentially invidious distinctions made between subordinated groups vying for recognition. See Ehrenreich, *supra* note 100, at 258-263. My argument advances no conclu-

theory, the point of critical heterosexual studies is to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality.¹⁰⁴ The two are different, but until heterosexuality internalizes and sustains a distinction between itself and heteronormativity, collapsing the two as a rhetorical matter helps to draw attention to straight supremacy, by putting the burden of disassociation from the norm on heterosexuality.

As a threshold step in this Article, I propose calling this endeavor "the straight question," in conscious opposition to gay and lesbian studies.¹⁰⁵ This phrasing instantiates a conscious power relationship

sions about the relative disutilities or claims to restitution arising from the subordination of minority groups which sometimes act collectively and, at other times, compete for equitable resources. My point in arguing for the distinctiveness of straight supremacy through conceptual liquidation is solely to describe how it operates. Cf. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875-924 (2002) (analogizing from the dynamics of gay self-effacement through "covering" to other forms of subordination through assimilation based on sex and race). I have two main objections to Yoshino's covering argument, both of which reflect my sympathy for it and, at the same time, my concern that the argument is itself a form of covering. First, by targeting the symptomology of sexual minorities, the argument "covers" by challenging straight supremacy only obliquely through its victims, rather than frontally through its perpetrators. Relatedly, by situating gay covering in the wider covering practices of minorities with respect to whom discrimination is legally forbidden and roundly condemned, this move—though deeply reassuring to liberals—deemphasizes the special animus against the homosexual. See *supra* notes 66-79 and 102 and accompanying text. In other words, this strategic contextualization "covers" the straight question by wrapping it in analogies to those victims who are already officially recognized (and protected) as such.

104. Critical heterosexual studies aims for a ground of existence outside of heterosexual interpellation:

[T]he project of shifting the discursive position of homosexuality from that of object to subject does not constitute a mere attempt to reform sexual discourses. It is not an exercise in restraining the supposed "excesses" of homophobic bigotry, . . . [nor] to constitute homosexuality as a real object to be studied and understood, definitively if sympathetically, by those in a legitimate position to know. The aim, rather, is to treat homosexuality as a position from which one *can* know, to treat it as a legitimate condition of knowledge.

DAVID M. HALPERIN, SAINT-FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 60 (1995) (citation omitted). The shift on the part of some from queer theory to critical heterosexuality studies is currently underway in the humanities and social sciences. To read one of the best anthologies in critical heterosexuality studies, see THINKING STRAIGHT: THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY (Chrys Ingraham ed., 2005).

105. The title of my Article uses a construction more familiar to readers through the phrase "the Jewish question," used by anti-Semites to refer to the need to manage Jewish populations. In general, the phrase suggests the stance of a dominant authority with respect to a vexatious issue needing resolution. In this Article, "the straight question" has two meanings. First, the gay supremacists who rule Joe's fictional world could see lingering straight resistance to them in such terms. Second, this Article suggests that refocusing intellectual attention on the operation of straight power rather than on its victims is a step toward re-interpellating one's self in a more suitable

which focuses on the dominant power in question rather than on the symptomology of its victims.¹⁰⁶ Such a sustained reversal of scrutiny would build an ethnography of the straight question.¹⁰⁷ As a living history of animus, straight supremacy permits an ongoing study of the robust production of legal rules organized around the conceptual liquidation of a minority, for example the Christian Legal Society's national campaign against non-discrimination policies at educational institutions which protect some sexual minorities from discrimination.¹⁰⁸ Importantly, heterosexuals also stand to gain from more

framework. The implications of Edward Said's observations on the related phrase "the question of" apply as well here to both the fictional and the suggested uses of my phrase:

When we refer to a subject, place, or person in the phrase "the question of," we imply a number of different things. For example, one concludes a survey of current affairs by saying, "And now I come to the question of X." The point here is that X is a matter apart from all the others, and must be dealt with apart. Secondly, "the question of" is used to refer to some long-standing, particularly intractable and insistent problem: the question of rights, the Eastern question, the question of free speech. Thirdly, and most uncommonly, "the question of" can be used in a way as to suggest that the status of the thing referred to in the phrase is uncertain, questionable, unstable

EDWARD W. SAID, *THE QUESTION OF PALESTINE* 4 (Vintage Books 1982) (1980).

106. See, e.g., Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U.L. REV. 1215, 1215 n.2 (1998) ("The danger of queer theorists applying constructionist analysis only to discuss gay and lesbian issues is that doing so deconstructs homosexuality, leaving heterosexuality in its naturalized, superior position.").

107. From the point of view of critical heterosexual studies, straight society becomes an Other, whose totems are subject to ethnographic methods and analysis.

108. See, e.g., *Christian Legal Soc'y v. Ariz. State Univ.*, U.S. Dist. LEXIS 25579 (D. Ariz. 2006) (awarding attorneys' fees to Christian Legal Society (CLS) for costs of bringing action for declaratory judgment). Lacking an actual case or controversy, CLS brought the action to establish a legal principle:

When CLS filed this action, the University had not denied CLS registration as a student organization and CLS had not applied for it. Rather, CLS attempted to craft exactly the legal question it wished to litigate by writing a letter to the University stating what the University's policies meant, proclaiming them unlawful, and demanding an exemption from them. Though the University withdrew the objectionable language from the application form, CLS filed this action, asserting that the [Arizona State University] Student Code of Conduct also required CLS to accept homosexuals.

Id. at 4. Significantly, the district court's opinion illustrates how the negotiation process between the CLS and Arizona State University allowed the CLS to reframe its narrow objection to inclusion of homosexuals into a wider claim of religious freedom that was doctrinally acceptable. *Id.* Understandably, CLS officials worry that anti-gay animus may come to be viewed as seriously as racism is, as noted in a recent article explaining the CLS' rationale for its litigation strategy. "Think how marginalized racists are," said [Christian activist Gregory] Baylor, who directs the Christian Legal Society's Center for Law and Religious Freedom. "If we don't address this now, it will only get worse." Stephanie Simon, *Christians Sue for Right Not to Tolerate Policies: Many Codes Intended to Protect Gays from Harassment are Illegal, Conservatives Argue*, LOS ANGELES TIMES (April 10, 2006), at A1. The CLS wants very much to avoid the shifting

serious study of their social conditions.¹⁰⁹

Learning to respond to (and, hence, survive) heterosexual interpellation is a key objective of a critical heterosexuality studies in the law. The practical challenge lies in figuring out how to intervene real-time in adverse interpellation through rhetoric, a natural tool for deploying language. What does such interpellative advocacy require? Most importantly, this type of advocacy considers whether well-theorized rage can rehabilitate the expectations crushed by the status quo.¹¹⁰ The aim is to convert sublime rage into a counter-ideology, circulated through constitutive texts and practices which say, "Hey! You there!" to sexual minority readers. An exercise in re-inscribing oneself, this project, regrettably, becomes a persistently Oedipal practice of standing up to the usual authorities whose actions reproduce straight supremacy. Otherwise, waiving one's anger to the types of serial insult discussed above works a kind of estoppel over time and produces only mealy expectations. For example, consider the reception of the straight inquiry into the causes of homosexuality. Framed from the beginning in the terms of straight panic, any resolution of this debate can only lead to a repositioning in the straight mind,

relationship between prejudice and faith alluded to by Boswell in *supra* note 16, with respect to anti-Semitism. Baylor takes pains to reassure members of other minorities that the CLS' litigation campaign targets only homosexuals and not racial minorities or women. *Id.* See *supra* note 82 for a definition of "conceptual liquidation."

109. Pouny notes how queer culture is a preserve for a more authentic form of multiculturalism:

Queer cultures and communities by their mere existence challenge convention and tradition and encourage creativity and innovation At their best, queer cultures and communities may be the only genuine example of multiculturalism in contemporary American society. The "main-streaming" of queer culture has diminished its multiculturalism as heterosexual society chooses leaders for queer communities who most closely resemble themselves.

Charles R.P. Pouny, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 375 (1998).

110. A good example of critical heterosexuality studies showing the constructive sublimation of anger is found in LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* 21 (2004), where Edelman states that the figure of the Child is a stalking horse for a heteronormative organization of a future which queers threaten. The text often reflects well-theorized anger that informs the clarity of his critique that the adult projection of childhood may be antithetical to queer interests:

On every side, our enjoyment of liberty is eclipsed by the lengthening shadow of a Child whose freedom to develop undisturbed by encounters, or even by the threat of potential encounters, with an "otherness" of which its parents, its church, or the state do not approve . . . terroristically holds us all in check and determines that political discourse conform to the logic of a narrative wherein history unfolds as the future The Child, that is, marks the fetishistic fixation of heteronormativity: an erotically charged investment in the rigid sameness of identity that is central to compulsory narrative of reproductive futurism.

Id.

much like changing deck chairs on the Titanic.¹¹¹ Better to deflect the blow from the question by flipping the scrutiny onto the underlying panic which gave rise to the question in the first place.¹¹² Silence in the face of this question is also a tool of self-hailing.

Another tool of self-hailing is skepticism about progress narratives that characterize marginal gains as milestones when compared to the past. This historical move may work against the self. Given the expectations gap, admitting to the breadth of straight insult means experiencing the cognitive dissonance between felt expectations and the wish fulfillment afforded by a straight supremacist world. One may need to look no further than one's own experience for benchmark expectations. Such an existential discipline may require a willingness to recede from conventional (straight) society and to develop an appetite for the rigor of individuation and the pleasure of political fantasy.

Sexual minority intellectuals, in particular, can give substance to these expectation-based entitlements by creating interpretive frameworks through which group members can make internal meaning out of their legal and social disabilities. However, the project of personal liberation involves ambivalence about the conditions of one's gender origins, including the risk of finding an individual solution to an ongoing collective problem. On this point, Antonio Gramsci's ideas about the "organic intellectual" suggest how a sexual minority intellectual can fuse theory with practice.¹¹³ Growing out of Gramsci's efforts to organize the Italian Communist Party, the idea of

111. Entering this debate is like getting one's bearings in quicksand:

By premising their rights claims and related appeals to equality principles on assertions of immutable status, pro-gay advocates have entrusted the success of a major social and political movement to the reliability of a few inconclusive studies concerning, inter alia, the size of the hypothalamus in the cadavers of gay men and the inner ears of lesbians.

Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 5 (2003) (showing the political and existential futility of basing challenges to straight supremacy on causation arguments about sexual orientation) (citation omitted).

112. A feminist psychoanalytic approach may be helpful in understanding how legal and scholarly discourses impact the inner subjecthood of sexual minorities:

Unconscious fantasies expressed in transference processes of projective and introjective identification are the way we give meaning to our lives and experiences in general. The capacity for transference (in this sense subsuming countertransference) is thus one of the great abilities and defining capacities of the human mind. . . . These processes are an active and ongoing fact of life . . . they may also come from or be expressed in a person's current situation or in any important relationship or experience.

NANCY J. CHODOROW, *THE POWER OF FEELINGS: PERSONAL MEANING IN PSYCHOANALYSIS, GENDER, AND CULTURE* 21 (1999). Chodorow argues that transference, projection, and fantasy are the rule and not the exception of the psyche, whether on or off the couch. *Id.*

113. Much of what Gramsci wrote is in the form of short fragments, which others have used as a jumping off point.

a socially committed intellectual fits well with the situation of sexual minorities and their intellectual classes.¹¹⁴ As the trustee of a community narrative, it is this organic intellectual who helps the members of his subordinated class make meaning out of trying circumstances.¹¹⁵ Gramsci's expansive definition of "intellectual" captures not only legal academics but also activists, advocacy organizations, writers, and others who traffic in ideas and claims based on the interests of sexual minorities.¹¹⁶ The essential quality of all of these different types of

114. He makes being a low-class intellectual the punctilio of an honor the most sensitive:

To see how Gramsci conceived the former task [of education], we must introduce his concept of the intellectual and, in particular, his distinction between "traditional" and "organic" intellectuals. As a new class develops within the world of economic production, it tends to create "organically, one or more strata of intellectuals which give it homogeneity and an awareness of its own function" These are "organic" intellectuals. . . . [a definition] broader . . . than the one in current everyday usage. For while Gramsci certainly meant to include the scholar, the writer, and other men of letters, he was referring generally to anyone whose social function is to serve as a transmitter of ideas within civil society and between government and civil society.

WALTER L. ADAMSON, *HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI'S POLITICAL AND CULTURAL THEORY* 143 (1980) (citation omitted). Some scholars of race or critical praxis have used the idea of the organic intellectual. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1012-15 (1990) (arguing that Dr. King was an organic intellectual).

115. As noted:

In the case of a subaltern class like the proletariat, organic intellectuals seek to inspire its self-confidence as an historical actor and to provide it with social, cultural, and political leadership. Until this process reaches an advanced stage, however, "traditional intellectuals" are likely to fill the leadership vacuum. . . . Some of those serving the proletariat are likely to be former "organic" bourgeois intellectuals who defected.

ADAMSON, *supra* note 114, at 143-44. Duncan Kennedy's idea of a "knowledge class" targets organic intellectuals:

By an intelligentsia, I mean a "knowledge class" working in education, the arts, social work, the law, religion, the media, therapy, consulting, and myriad spin-offs Intelligentsia members perform multiple functions beyond their formal job descriptions. In self-organizing groups or as individuals, some of them work at defining their community's identity (its cultural distinctiveness) or lack thereof

Duncan Kennedy, *Political Power and Cultural Subordination: A Case for Affirmative Action in Legal Academia*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 83, 93 (Dan Danielsen & Karen Engle eds., 1995).

116. Ahmad Sadri would classify the organic intellectual as a "practical agent of ideas" in his taxonomy of intellectuals. AHMAD SADRI, *MAX WEBER'S SOCIOLOGY OF INTELLECTUALS* 109 (1992). He classifies conceptions of the intellectual along two dimensions. First, he distinguishes between seekers of "pure knowledge" and intellectuals who commit to social reform movements. *Id.* at 111-16. Second, he arranges intellectuals vertically according to their role in the creation, distribution, or consumption of ideas. *Id.* at 116-19. As an overlay to the current distinction in the legal academy between "doctrinal" and "theoretical" approaches to scholarship, this classification is a helpful way to map the structure of legal scholarship.

organic intellectuals is that they remain connected to their original class positions.¹¹⁷

The question arises, though, whether the current batch of sexual minority intellectuals belongs to the same "strata" or whether they represent distinct economic classes within a sexual minority, each one of which generates organically-based claims. To consider the most extreme case, consider how the *nouveau* out advocates of the gay Right have deployed an agenda of prudence and denial of rage, quite at odds with the historic understanding of the sexual minority community.¹¹⁸ These organic intellectuals of the Right work to "resecure" the consent of subordinated gays to the straight order.¹¹⁹

Some features of the academy may also insulate sexual minority academics from an experience of subordination. Academics free themselves from straight supremacy by writing and teaching, privileged acts of self-interpellation at a deep level. Like the chambered nautilus, they dwell in these discourses, which shield us from the wider animus to which others are routinely subject. Intensifying this trend towards an individual solution to a collective problem, fierce competition between educational institutions and individual academics leads to preoccupation with rank over impact. Particular conceptions of scholarship may also hinder an organic relationship to original subordination. For example, the expectation that scholarship must "add knowledge" may discourage writing that stays close to simple truths about the straight mind.¹²⁰

117. These intellectuals are organic because they remain linked to the original condition of subordination:

[The Gramscian "organic intellectual"] took a collective character within a working-class formation in which the role of theory was organically linked with the ebb and flow of daily proletarian life. In this view, intellectuals should become an elaborate, historical expression of traditions, culture, values, and social relations. . . . In this regard, intellectuals would be organic to that milieu only if they were fully immersed in its culture and language.

Peter McLaren et al., *The Specter of Gramsci: Revolutionary Praxis and the Committed Intellectual*, in GRAMSCI AND EDUCATION 147, 162-63 (Carmel Borg et al. eds., 2002).

118. The gay conservative movement is notably lacking in women or feminist values:

Significantly, gay conservatism has been a largely male affair [Gay] [c]onservatives like to present themselves as hard-headed realists who have overcome the fatal sentimentality of liberals The great conservative virtue, in this view, is prudence, which urges tolerating the imperfections of the existing order rather than risking even greater depredations.

PAUL ROBINSON, QUEER WARS: THE NEW GAY RIGHT AND ITS CRITICS 3, 7 (2005).

119. In the context of economic relations, retaining a sense of class contradictions helps us resist the formation of the "comprador intellectual, who simply (and often unwittingly) resecures the consent of the subaltern classes for the relations of domination that structure and exploit them." McLaren et al., *supra* note 117, at 160.

120. Emma Goldman noted the law's fundamental inability to accommodate the new (neophobia) to the jury that would send her to prison during the Palmer period's Red scare:

One area for theoretical improvement is a more nuanced use of social constructionist arguments by progressives. To their credit, social constructionist arguments have hitherto deprived straight supremacy of normative power by showing the variability and contingency of the very questions, e.g. sexual orientation, asserted as natural or universal. However, something may be no less permanent for having been socially constructed.¹²¹ The recognition that straight supremacy need not be always already there in some other state of the world may be of small consolation to those stuck in the current state of the world. Therefore, social constructionist arguments that avoid the grittiness of how social realities are already bounded may do little in the way of evoking crushed expectations.¹²²

Not that theory should abandon unrealizable expectations—quite the contrary, as argued in the previous section. But moving from political fantasy to engagement with the heterosexual present and then back again calls for a map that charts the respective psychic and social possibilities. Part of this involves clearly understanding the current state of the world. So when dealing with expectations it is important to distinguish between a closed-out contingency in the short run (something in the present which might have turned out oth-

Never can a new idea move within the law. It matters not whether that idea pertains to political or social changes or to any other domain of human thought and expression — to science, literature, music; in fact, everything that makes for freedom and joy and beauty must refuse to move within the law. How can it be otherwise? The law is stationary, fixed, mechanical

Progress knows nothing of fixity. . . . It cannot bow to the dictum "I have ruled" Progress is ever renewing, ever becoming, ever changing — never is it within the law.

THE PENGUIN BOOK OF HISTORIC SPEECHES 449 (Brian MacArthur ed., 1995).

121. Consider language learning. During infancy and childhood, the neural possibilities are such that a child can learn any language, or a combination of them. The particular language to be acquired will depend on the social construction of the child's environment. The window of language learning contingency closes quickly, however. By young adulthood, acquiring another language that would have been possible at an earlier stage of development becomes difficult. In other words, the choice of language was contingent. Indeed, the choice of language is aleatory. But once learned, unlearning it becomes as unlikely as undoing a genetic trait.

122. But see how Poirier describes gender performativity in bounded terms:

The concept of gender performance does not mean that we are absolutely free to choose to be otherwise, for gender is prior to and constitutive of our individual essence. . . . Yet because gender operates through the temporal process of reiteration of norms on a piecemeal and individual basis, it does not necessarily remain intact over time. . . . The fact that each of us is engaged in many tiny performances that add up to gender means that it is possible to shift the contents of gender categories, although bit by bit and not always predictably.

Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271, 305-06 (2003) (citations omitted).

erwise although it is too late now) and an open contingency about an outcome that still hangs in the balance.¹²³

My approach to this problem in this Article has been to combine the social facts in Part I with a theoretical context for them in Part II. I tried to fuse experience with a theoretical perspective that would acknowledge the injury from insult and point towards a more forward, existential posture. In general, the approach to contingency which informs the economic distinction, with respect to the time between the short run and the long run, would make social constructionist arguments better by linking them more closely to the daily experience of the gay-at-large.¹²⁴

C. Pedagogical Tools

Although colloquial English does not favor words of eight or more syllables, "heteronormativity" ought to be more popular given its ongoing relevance. The main pedagogical purpose of Joe's story is to invite the reader to sustain and internalize a working distinction between heterosexuality and heteronormativity. Jurists (law students, lawyers, law professors, judges, and other legal professionals) transmit legal and social culture. Given the role of law in perpetuating and legitimating the straight order, a legal classroom is a good place to distinguish between a "reproductive" approach that automatically continues unreasoned biases and a "critical" approach that considers the dynamics of heterosexual interpellation.¹²⁵ Learning to detect heteronormativity would help law students spot the idea when expressed in

123. For example, Judith Butler has noted the bounded and—if you will—contingent nature of identity contingency as expressed in gender. Responding to interpretations of her earlier work, Butler notes that in the short run, gender-shifting may not be possible at all:

For if I were to argue that genders are performative, that could mean that I thought that one woke in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night. Such a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start and fails to realize that its existence is already decided by gender.

JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"*, at x (1993).

124. In economic terms, the short run refers to that period of time during which no factors of production may be redeployed because they already have been. The long run is the first moment in time at which factors of production may be redeployed.

125. On this point, analogizing class conflict over economic production, exchange, and ownership with class conflict over the regulation of desire renders Marxian thought useful, regardless of one's views on the ownership of the means of production. The way that Marxian theory locates the process of theory itself in social conditions complements the attempt to link political aspirations with the everyday experience of sexual minorities. See, e.g., *KNOWLEDGE AND CLASS: A MARXIAN CRITIQUE OF POLITICAL ECONOMY 2* (Stephen A. Resnick & Richard D. Wolff eds., 1987) ("Marxian theory has a distinctive concept of what theory is . . . Theory is a process in society. It comprises the production, deployment, and organization of concepts.").

a legal rule or in law-related communication with clients, judges, or other legal professionals. The Appendix to this Article is an educational survey which can be used to illustrate the difference between heterosexuality and heteronormativity in the context of a structured discussion.¹²⁶ Although designed for use in a class covering gender and the law, such tools have wider applications, too.

III. CONCLUSION: TOWARDS A NEW HETEROSEXUALITY

Straight supremacy spans race, class, religion, and country.¹²⁷ Tackling this collective action problem calls for the right tools for the

The distinction between reproductive and critical approaches bears directly on knowledge production:

Although Marx never used these terms, he discussed two very different forms of praxis. One could be called limited or reproductive praxis People engaged in reproductive praxis are born into certain social relations, modes of existence, which they accept as natural, even inevitable. They fail to question these and, therefore, reproduce the type of consciousness and conditions of social being that are already in existence [i.e. compulsory heterosexuality]. Minor changes or reforms may be attained [e.g. domestic partnership benefits], but these are not of a type that challenges or threatens the fundamental social relations Critical/revolutionary praxis involves becoming critically aware of these fundamental social relations and actively planning and engaging in the various forms of action that could lead to their abolition.

Paula Allman, *Antonio Gramsci's Contributions to Radical Adult Education*, in *GRAMSCI AND EDUCATION* 201, 203 (Carmel Borg et al. eds., 2002) (citation omitted). I accept the critiques from colleagues and friends who may object to a use of Marx that delinks the analysis from economic subordination and (a different set of critics) who reject the apparent essentialism of the dialectic. But Marxian thinking about class consciousness maps the straight-gay dialectic well: according to Marx, the proletariat and capital are two opposites united in an antagonistic dialectical contradiction. *Id.* at 202. Capital is the "positive," in that it is self-interested in maintaining the arrangement, while the proletariat is the "negative" in that its interests are opposed to the arrangement. *Id.* In other words, "[i]t is in the interest of this class to abolish the relation, and in so doing to *abolish itself as a separate and oppressed class*, to create a classless and totally nonoppressive social formation." *Id.* (emphasis added to highlight the analogy of the homosexual's inherent interest in abolishing heteronormativity). See Borg et al., *supra* note 117, for a compilation of fifteen essays on the relationship between pedagogy and Gramscian theory.

126. See Appendix A for a sample survey and discussion guidelines. The sample survey is intended for males. The female version of the sample survey uses female rather than male pronouns. The author will gladly share these and other related educational materials upon request.

127. Given the social and psychic pressure to hide one's homosexuality, it is methodologically impossible to accurately estimate the incidence of homosexuality in a global population. Early research on the question suggested that 1 in 10 persons is primarily homosexual. ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 651 (1948). Adopting a moderate assumption that 4% of the world's roughly 6,500,000,000 persons are homosexual produces a conservative underestimate of about 260,000,000 such persons worldwide, a number just shy of the population of the United States. U.S. and World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Apr. 22, 2006). Even assuming that homosexuals make up only one percent of the population—an absurd

trenches (both psychic and social) where the insults continue to occur. Echoing Audre Lord's warning about the danger of using the master's tools for such an undertaking, Foucault described his writing as a "tool box."¹²⁸ In this spirit, I have set forth some tools and proposed others. Formed in insult and remade in generative anger, rising expectations are one important tool in particular. My hope is that we can build a common rhetoric of self-hailing so that others can come to speech as well, both sexual minorities and heterosexuals.

underestimation—would generate a collective action problem of over 65,000,000 people worldwide.

128. As Foucault pointed out in an interview:

I would like my books to be a kind of tool-box which others can rummage through to find a tool which they can use however they wish in their own area I would like the little volume that I want to write on disciplinary systems to be useful to an educator, a warden, a magistrate, a conscientious objector. I don't write for an audience, I write for users, not for readers.

MICHEL FOUCAULT, *Prisons et asiles dans le mécanisme du pouvoir*, in *DITS ET ÉCRITS* 521, 523-24 (Gallimard, 1994) (1971).

APPENDIX A

HETERONORMATIVITY EDUCATIONAL MATERIALS

This Appendix contains ten survey questions in Section A, followed by discussion guidelines in Section B.

A. Male Survey

- 1) Walking into classroom 166, you spot two young men—a blond and a brunette—who greet each other in the Green Library lobby. They kiss on the lips and sit down on the sofa. The brunette sits on the blonde's lap while he playfully strokes the brunette's hair. Which of the following is your most likely reaction?
 - A. You like gay people, but what they're doing might make people uncomfortable.
 - B. You make a mental note to move to Macon, Georgia immediately upon graduating.
 - C. Professor Baker is calling on you today and you just realized that you have read the wrong case.
 - D. You think it is sweet when people show affection.
- 2) In *Bowers v. Hardwick* (1986), the U.S. Supreme Court held that state laws criminalizing homosexual sodomy were constitutionally valid. In *Lawrence v. Texas* (2003), the Supreme Court reversed *Bowers*. In your opinion, *Lawrence* is:
 - A. A mistake.
 - B. Pretty good, as far as gay rights should go.
 - C. For many, too little, too late.
 - D. Whatever.
- 3) Your doctor tells you that you and your partner are expecting a baby boy. A friend of yours jokingly tells you that your son is going to be gay.
 - A. You find the remark insulting.
 - B. You remind your friend that at least you have found someone to reproduce with.
 - C. You are grateful to have gay friends who can fill you in on being gay.
 - D. You know that you will love your son if he is gay, but all the same you would feel more comfortable having a straight son.
- 4) You have just finished getting dressed after working out. A young, nice looking man approaches you in the locker room and you strike up a conversation. You leave together and, while exchanging pleasantries, he says, "Please don't take this the wrong way but you're really a hottie. Do you want to get a smoothie?" Pick a statement expressing something that you might feel.

- A. Whatever.
 - B. Hey! Who needs Queer Eye for the Straight Guy after all!
 - C. I would be angry for being put in that position.
 - D. Is homosexual panic a defense to assault in Florida?
- 5) Your best friend has just come out. He invites you to march with him at Florida International University's first ever gay pride march. Which of the following would be true for you?
- A. Nervous because members of the Florida International University community might think that you are gay, you decline, telling a little white lie.
 - B. You swallow hard, promise to be there, and pray for a short-term disabling condition.
 - C. You wonder what you should wear.
 - D. You would rather that he not have asked.
- 6) As part of a child custody proceeding involving a straight woman and a recently open gay man, the court rejects the father's application for custody of his twelve-year-old son on the stated ground that it would be in the best interests of the boy to grow up in a more conventional household. Which of the following statements might reflect your views?
- A. I would not have wanted to grow up in a gay household.
 - B. What does it matter what the father's sexual orientation is?
 - C. It's too bad for the father, but this seems reasonable given that what matters here is what is best for the child.
 - D. Who wants kids anyway?
- 7) The College of Law plans a symposium on the legalization of marriage for gay people. Some students insist that—in the interests of balance—the symposium should include certain religious speakers noted for their opposition to marriage by gay people. With which of the following do you agree?
- A. Given the importance of balance, the point made by the students makes sense.
 - B. Why would anyone want to get married?
 - C. The students' position makes no sense at all.
 - D. As a compromise, the symposium should consider the feasibility of civil unions.
- 8) Your best friend tells you that he has an enormous crush on you. You do not feel the same way. In the past, you two had always enjoyed comparing notes on heterosexual sex. Which of the following would be true for you?
- A. You will think twice now before sharing details about your own sex life because you are uncomfortable with his thinking about you in that way.
 - B. You hope that the crush will not threaten the friendship.

- C. You will think twice now before sharing details about your own sex life because you do not want to hurt his feelings.
 - D. You are a little uncomfortable at the prospect of hearing about your friend's future sex life.
- 9) Your best friend comes out to you. Six months later while strolling through South Beach, you see him and your twenty-one-year-old little brother kissing on a bench. Which of the following is your most likely response?
- A. You don't like the idea of your friend dating your brother and decide to talk to them about it.
 - B. You are hurt that your little brother did not tell you about this.
 - C. You are embarrassed to see them carrying on like this.
 - D. You wish that your brother had better taste in men.
- 10) Completing this survey has been:
- A. Interesting.
 - B. Like being prosecuted by the Spanish Inquisition's Grand Inquisitor himself.
 - C. Way too gay for my taste.
 - D. Ho-hum.

B. Discussion Guidelines

The following notes are suggested as possible guidelines for a conversation about the survey questions introduced in the previous section.

- 1) Walking into classroom 166, you spot two young women/men—a blond and a brunette—who greet each other in the Green Library lobby. They kiss on the lips and sit down on the sofa. The brunette sits on the blonde's lap while s/he playfully strokes the brunette's hair. Which of the following is your most likely reaction?
- A. *You like gay people, but what they're doing might make people uncomfortable.*
Would you have felt the same about a male and a female touching? (The cross-sex encounters happen in the Green Lobby all the time.)¹²⁹ If not, why the differential reaction to cross-sex affection versus same-sex affection?
 - B. *You make a mental note to move to Macon, Georgia immediately upon graduating.*
Perhaps you hate all displays of physical affection equally. If you react differentially to same-sex displays, consider why.

129. Although perhaps not typical of all university settings, the Florida International University undergraduates seem to be an affectionate group by nature.

- C. *Professor Baker is calling on you today and you just realized that you have read the wrong case.*

Just another frame in your cognitive processing. You barely notice. Indifference is better than tolerance.

- D. *You think it is sweet when people show affection.*

Failing to distinguish between the activities of same-sex or cross-sex couples suggests a mind free from heteronormativity.

* * *

- 2) In *Bowers v. Hardwick* (1986), the U.S. Supreme Court held that state laws criminalizing homosexual sodomy were constitutionally valid. In *Lawrence v. Texas* (2003), the Supreme Court reversed *Bowers*. In your opinion, *Lawrence* is:

- A. *A mistake.*

Resting on the Old Testament as a source of law, *Bowers* is a heteronormative anthem, like the Defense of Marriage Act. Speaking from inside the heteronormative system, however, the judges do not use the term. Expect more mistakes like this given that younger people seem less heteronormative than their parents.

- B. *Pretty good, as far as gay rights should go.*

In other words, you may oppose a federal employment non-discrimination law or repeal of the legal disability on marriage.

- C. *For many, too little, too late.*

You have high expectations.

- D. *Whatever.*

Existential indifference to object choice differs from toleration because the latter presupposes that one has moral standing to judge in the first place.

* * *

- 3) Your doctor tells you that you and your partner are expecting a baby boy. A friend of yours jokingly tells you that your son is going to be gay.

- A. *You find the remark insulting.*

You seem to attach some negative value to having a gay son. Would such a son impugn your masculinity, femininity, or procreative value?

- B. *You remind your friend that at least you have found someone to reproduce with.*

Humor can be an effective educational tool.

- C. *You are grateful to have gay friends who can fill you in on being gay.*

You seem not to value a gay son less than a straight son.

- D. *You know that you will love your son if he is gay, but all the same you would feel more comfortable having a straight son.*

This response is open to many readings. Do you generally conceptualize your children in terms of optimal happiness or performance? Tall, good-looking people enjoy advantages over the average-looking. Would you fear an ugly child?

* * *

- 4) You have just finished getting dressed after working out. A young, nice looking woman/man approaches you in the locker room and you strike up a conversation. You leave together and, while exchanging pleasantries, s/he says, "Please don't take this the wrong way . . . but you're really a hottie. Do you want to get a smoothie?" Pick a statement expressing something that you might feel.

- A. *Whatever.*

Long live existential indifference.

- B. *How flattering! or Hey! Who needs Queer Eye for the Straight Guy after all!*

You seem not to care whether a male or a female delivers the compliment and come-on.

- C. *I would be angry for being put in that position.*

Would you have reacted the same way to a compliment made by the opposite sex?

- D. *Is homosexual panic a defense to assault in Florida?*

See Matthew Shepard et al.

* * *

- 5) Your best friend has just come out. He invites you to march with him at Florida International University's first ever gay pride march. Which of the following would be true for you?

- A. *Nervous because members of the FIU community might think that you are gay, you decline, telling a little white lie.*

Maybe you just do not want to deal with the discrimination that you may suffer if people identify you as gay. Maybe you think that what people do in their private life is not worth marching about.

- B. *You swallow hard, promise to be there, and pray for a short-term disabling condition.*

Maybe you are an extremely private person uncomfortable in parades. Maybe you are afraid that someone will think that you are gay.

- C. *You wonder what you should wear.*

Fashion stops for no one.

- D. *You would rather that s/he not have asked.*

You are a little offended and disapprove of having to deal with this request.

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- 6) As part of a child custody proceeding involving a straight woman and a recently open gay man, the court rejects the father's appli-

cation for custody of his 12-year-old son on the stated ground that it would be in the best interests of the boy to grow up in a more conventional household. Which of the following statements might reflect your views?

- A. *I would not have wanted to grow up in a gay household.*
Why?
- B. *What does it matter what the father's sexual orientation is?*
This is existential indifference—and formal equality—applied in a legal context.
- C. *It's too bad for the father, but this seems reasonable given that what matters here is what is best for the child.*
Why do you presume harm to the child from a gay household?
- D. *Who wants kids anyway?*
Would you have reacted more empathetically to a straight father's custody claim?

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- 7) The College of Law plans a symposium on eliminating discrimination against gay people. Some students insist that — in the interests of balance — the symposium should include certain religious speakers noted for their opposition to marriage by gay people. With which of the following do you agree?
- A. *Given the importance of balance, the point made by the students makes sense.*
Should a conference on Title VII civil rights legislation have included segregationists?
 - B. *Why would anyone want to get married?*
How delightfully blasé. Become a judge.
 - C. *The students' position makes no sense at all.*
You recognize that the conference organizers have their own agenda, which need not accommodate a view that is antithetical to the symposium's goal of eliminating discrimination.
 - D. *As a compromise, the symposium should consider the feasibility of civil unions.*
Often, a liberal position does nothing more than plot the midpoint between two substantively antithetical positions instead of considering their relative merits. Remember Dante Alighieri's observation: "The hottest places in hell are reserved for those who maintained their neutrality in times of moral crisis."

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- 8) Your best friend tells you that s/he has an enormous crush on you. You do not feel the same way. In the past, you two had always enjoyed comparing notes on heterosexual sex. Which of the following would be true for you?

- A. *You will think twice now before sharing details about your own sex life because you are uncomfortable with her/his thinking about you in that way.*
Would you feel uncomfortable if your friend had been of the opposite sex? Maybe you want no friend thinking of you in these terms.
- B. *You hope that the crush will not threaten the friendship.*
And who wouldn't worry, human frailty being what it is?
- C. *You will think twice now before sharing details about your own sex life because you do not want to hurt her/his feelings.*
You understand the agony of an unrequited crush on a best friend.
- D. *You are a little uncomfortable at the prospect of hearing about your friend's future sex life.*
Now you are reacting differently to your friend's sex life. When the stories were about heterosexual sex, you were game. What has changed?

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- 9) Your best friend comes out to you. Six months later strolling in South Beach, you see her/him making out on a bench with your 21-year-old little sister/brother. Which of the following is your most likely response?
- A. *You don't like the idea of your friend dating your sister/brother and decide to talk to them about it.*
You are attached to both, so you might very well react emotionally to this situation.
 - B. *You are hurt that your sister/brother did not tell you about this.*
As above, you do not seem to react differently based on whether your sibling is with a male or a female.
 - C. *You are embarrassed to see them carrying on like this.*
"Carrying on," huh? The phrase carries strong disapproval. Would you have reacted the same way if your sibling and best friend were of different sexes?
 - D. *You wish that your sister/brother had better taste in women/ men.*
Knowing your friend, you worry about your sibling.
- 10) Completing this survey has been:
- A. *Interesting.*
Decolonization can be fun.
 - B. *Like being prosecuted by the Spanish Inquisition's Grand Inquisitor himself.*
Did you have something to hide? ☺
 - C. *Way too gay for my taste.*
Sorry.
 - D. *Ho-hum.*
Again, indifference may be a higher space than tolerance.