



---

Fall 9-1-2008

## Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy

Marc R. Poirier

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 Wash. & Lee J. Civ. Rts. & Soc. Just. 3 (2008).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol15/iss1/3>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy

Marc R. Poirier\*

## *Table of Contents*

I. Sex and Gender and Sexual Orientation: How Visible Same-Sex Couples Disrupt Heteronormative Assumptions.....	9
II. Microperformances of Identity: Dramaturgical, Dialogical, and Dialectical.....	16
A. Erving Goffman on Performances of the Self and the Dynamics of Microinteractions.....	17
B. GLBT Visibility and Microperformances.....	28
C. Covering: And What Lies Underneath?.....	33
III. Regarding Same-Sex Couples: Some Observations.....	41
A. <i>Shahar v. Bowers</i> .....	42
B. Ocean Grove versus Ocean Grove.....	51
C. Make Change, Not Lawsuits: Marriage Equality, "Conversations," and the Lexicon.....	59
IV. Some Further Observations.....	73
A. The Same-Sex Marriage Controversy Is About More than Covering, It Is About Claiming and Transforming Identity.....	73
B. Claiming What?.....	76

*[H]ow and where I play at being one [a lesbian] is the way in which that "being" gets established, instituted, circulated, and confirmed.<sup>1</sup>*

---

\* Professor of Law and Martha Traylor Research Scholar, Seton Hall University School of Law. The author is indebted to Michelle Ghali, Rachel Godsil, Louise Halper, Diane Meier, Frank Pasquale, Clarice Roberts, and Sarah Waldeck for their helpful conversations. Mae Kuykendall and Michael Poreda provided very helpful comments on drafts. I am grateful for the skillful research assistance of John Devendorf, Jacob Hudnut,

*[T]he development of an ideal or inwardly generated identity gives a new and crucial importance to recognition. My own identity crucially depends on my dialogical relations with others.*<sup>2</sup>

We often think of identity as our and ours alone. But in significant measure, individual identity is produced, confirmed, and reproduced in microperformances—individual behaviors, interpretations, and small and large group social processes that are carried out and observed through specific interactions in everyday life. An individual's identity is fundamentally dialogical. As philosopher Charles Taylor argues,

We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression . . . . [W]e learn these modes of expression through exchanges with others . . . . The genesis of the human mind is in this sense not monological, not something each person accomplishes on his or her own, but dialogical.<sup>3</sup>

At the same time, Taylor observes, "a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves."<sup>4</sup> The dialogical process of identity (re)production conveys and (re)creates not only identity but normal or stigmatized status. The good news here is that stigma is therefore no more permanently and irrevocably fixed than is identity itself.

Attention to these ongoing processes of identity formation and reproduction can help us to better understand some aspects of the same-sex marriage controversy. When same-sex couples choose to be visible, their presence challenges a number of social norms, and sometimes legal norms as well, with regard to sex, gender, and sexual orientation, as well as the status of that couple and other same-sex couples. Those norms can shift. Appreciating how the microperformances of identity by same-sex couples

---

Michael Poreda, Kate Riopel, and David Uibelhoer. The opinions expressed herein are those of the author and not of Seton Hall University, the Catholic University of New Jersey. I dedicate this article to the memory of my friend Louise Halper. How often she helped me see more clearly!

1. Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 18 (Diana Fuss ed., 1991).

2. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 47–48 (1991).

3. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Guttmann ed., 1994) (citing GEORGE HERBERT MEAD, *MIND, SELF, AND SOCIETY* (1934)).

4. *Id.*

function in the larger *Kulturkampf* may lead the reader to reflect in a subtler and perhaps fresh way on some of the current dynamics in what Katherine Franke has lately called the politics of same-sex marriage politics.<sup>5</sup>

Part I of this article briefly reviews some familiar identity categories that we use in thinking about marriage in contemporary United States culture—sex, gender, and sexual orientation. Part I also introduces the idea of visible traits and visible performances as markers of these identity categories; for perceptible gender traits are closely associated with quotidian identity performances of sex and sexual orientation as well as of gender. Visible same-sex couples, in their microperformances as couples, challenge a number of normative identity binaries around sex, gender, and sexual orientation.

Part II explores the idea of microperformances of identity more generally. Part II.A considers some of the writings of sociologist Erving Goffman.<sup>6</sup> His work is helpful not only because of his insistent focus on microinteractions, but also because he describes the way in which an individual and those who observe him/her and with whom s/he interacts in everyday performances of self continually and mutually negotiate the system of interpretation according to which the individual and the audience generate and interpret behavioral cues around their mutually performed identities. Goffman's careful descriptions of small interpersonal interactions suggest that such performances always contain the potential not simply for appropriate deployment of an existing verbal and gestural vocabulary but for (as Judith Butler would put it decades later) a misappropriation of that vocabulary.<sup>7</sup> This misappropriation has the potential to shift the significance and therefore the identity-revealing and (re)producing potential of specific behaviors and traits, and thus eventually

---

5. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 237–38 (2006).

6. For this article the author reviewed all or part of: ERVING GOFFMAN, *INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR* (2005); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); ERVING GOFFMAN, *ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION* (1961); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Erving Goffman, *The Interaction Order*, 48 AM SOC. REV. 1 (1983). I also consulted ERVING GOFFMAN: *EXPLORING THE INTERACTION ORDER* (Paul Drew & Anthony Wotton eds., 1988), a collection of scholarly essays in psychology, linguistics, and sociology interpreting Goffman's scholarship in light of modern social theory, symbolic interactionism, and ethnomethodology. This Article's reliance on Goffman is not a full assessment of every aspect of his work.

7. See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 157–58 (1997) (arguing that a dominant discourse can be expropriated or misappropriated to expose prevailing forms of discourse and "resignify" them).

to shift and restructure the larger system of socially-relevant identity categories to which identity-representing and (re)producing behaviors refer.

Part II.B links the theme of microperformances to the idea of visibility as a way of effecting social change for GLBTQ folk.<sup>8</sup> Part II.C discusses Kenji Yoshino's law review article *Covering*<sup>9</sup> and his subsequent book-length version of *COVERING*.<sup>10</sup> Yoshino considers microperformances of identity in a sometimes helpful but sometimes problematic way. To the extent that *COVERING* (the book) may portray covering as a compelled stifling of authentic microperformances of identity, its framework is misleading. It can be read to rely on an underlying authentic, permanent, unproblematized self. To the extent that it does so, it seems at odds with an account of identity that understands identity to be dialectical and dialogical.<sup>11</sup>

8. This article will typically use "GLBTQ folk" or "LGBTQ folk" to refer to gay men, lesbians, bisexuals, transgender folk of various types, and queers. If the context requires something else, or if GLBTQ is anachronistic, I may vary the usage. English seems to steer us towards "homosexuality" as the nominalization.

9. 111 YALE L.J. 769 (2002) [hereinafter *Covering* (the article)].

10. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) [hereinafter *COVERING* (the book)]. The differentiation is necessary because there are notable differences between the *Covering* (the article) and *COVERING* (the book), many of which could be summarized as a shift from a focus on equality in the article towards a focus on liberty and autonomy in the book. See, e.g., Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1298 (2007) (suggesting one of the "most striking aspects" of *COVERING* (the book) as compared to his *Covering* (the article) is that his "depiction of identity and authenticity also calls into question one of his most important motives: his belief that we should reconfigure civil rights as a matter of liberty rather than equality"); Martha Nussbaum, *The Prohibition Era*, THE NEW REPUBLIC, Mar. 20, 2006, at 21 (reviewing *COVERING* (the book)); Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, 1813 (2007) (comparing *Covering* (the article) and *COVERING* (the book) and arguing that "Yoshino moves the normative justification for the concept of covering away from equality to individual liberty").

Yoshino also explicitly explains that *COVERING* (the book) takes on a more personal, indeed confessional, tone. *COVERING* (the book), *supra* note 10, at xii. That is not the only difference. The book is shorter and its personal narrative is eminently more accessible to the intelligent lay reader. See Robinson, *supra*, at 1813 (positing that Yoshino's inclusion of personal narrative in *COVERING* (the book) "bring[s] the covering theory to life in a way that the more legal-historical focus of *Covering* (the article) does not"). *COVERING* (the book) has also lost most of the scholarly apparatus and theoretical argument. *Id.* More importantly for purposes of this article, its theory about identity, visibility, and performance appears to trend in a different direction than the earlier article. See *infra* Parts II.C, IV.

11. See *infra* Part II.C; see also Horwitz, *supra* note 10, at 1289–91 ("Yoshino puts the self at the center of his new civil rights paradigm, and specifically the 'true,' authentic self. But there is no such thing as a project of pure self-elaboration.").

Yoshino also fails to address whether all authentic selves should be equally

Part III applies the idea of microperformances of identity by same-sex couples to three specific examples of legal and cultural battles around same-sex marriage and marriage equality. Part III.A analyzes *Shahar v. Bowers*,<sup>12</sup> a 1997 *en banc* decision of the Eleventh Circuit that turns on interpreting the identity of a same-sex couple, married in a Jewish Reconstructionist ceremony, living together, and holding themselves out for all to see as though married.<sup>13</sup> Part III.B describes an ongoing controversy in Ocean Grove, New Jersey, where two lesbian couples were denied rental of a beachfront Pavilion owned by the Ocean Grove Camp Meeting Association. The Camp Meeting Association, which has a longstanding formal religious affiliation with Methodism, asserts that the Pavilion is a building of religious worship, and that the Association cannot be forced by the public accommodations law of the state of New Jersey to put the pavilion to a use prohibited by the United Methodist Church, viz., the celebration of same-sex civil unions.<sup>14</sup> Part III.C. considers a recent development following the victory for advocates of marriage equality before the California Supreme Court.<sup>15</sup> The LGBTQ advocacy groups that achieved that victory communicated to their collective memberships a Joint Advisory, entitled *Make Change, Not Lawsuits*, that exhorts same-sex couples who might get married in California not to sue to have those marriages recognized in their home states or by their employers or the federal government.<sup>16</sup> Instead, *Make Change* urges same-sex couples married in California to behave as married couples do, and to have

---

protected as a matter of law or principle. There is something amiss in a theory that apparently allows a white racist to claim a right to hurl authentic racist epithets. Robinson, *supra* note 10, at 1848 (suggesting that "there is something amiss in the framework capricious enough to classify the racist's right to use racial epithets alongside the interests of people of color to work in an environment free from discrimination, at least without more explanation than Yoshino provides").

12. 114 F.3d 1097 (11th Cir. 1997) (*en banc*).

13. See *id.* at 1107 (implying that the central conflict was created when Shahar made a "public statement" out of an "intimate relationship").

14. See UNITED METHODIST BOOK OF DISCIPLINE ¶ 341.6 (2004 ed.) (declaring that ceremonies that celebrate homosexual unions shall not be conducted in Methodist churches).

15. See *In re Marriage Cases*, 183 P.3d 384, 384 (Cal. 2008) (holding, in part, that "privacy and due process provisions of the state Constitution guarantee [the] basic civil right of marriage to all individuals and couples, without regard to their sexual orientation").

16. American Civil Liberties Union, Gay and Lesbian Advocates and Defenders, Lambda Legal, National Center for Lesbian Rights, Equality Federation, Freedom to Marry, Gay and Lesbian Alliance Against Defamation, Human Rights Campaign, National Gay and Lesbian Task Force, *Make Change, Not Lawsuits*, June 10, 2008, available at [http://www.nclrights.org/site/DocServer/Joint\\_Advisory\\_-\\_Final.pdf?docID=3241](http://www.nclrights.org/site/DocServer/Joint_Advisory_-_Final.pdf?docID=3241) [hereinafter *Make Change*].

"conversations" with friends, family, neighbors, employers, and so on about what being married means to them.<sup>17</sup>

Part IV pursues further the discussion about identity performance and same-sex marriage. Kenji Yoshino wrote that the contest over same-sex marriage is about covering.<sup>18</sup> This characterization somewhat misdescribes the issue. The marriage equality/same-sex marriage controversy is also, and more centrally, about control of the dramaturgical, dialogical, and dialectical process of identity practices about sex, gender, and sexual orientation, as these become focused through contests over the social and legal recognition of same-sex couples. If you will, the contest over same-sex marriage is about access to an intangible cultural resource, the status and identity of marriage, and about the way in which the meaning of that resource might change as a result of altering access to it.<sup>19</sup> Instead of understanding the issue by relying conceptually on the concept of an underlying authentic self constrained by covering demands, we might want to embrace a theoretical approach that seeks to deessentialize, problematize, and politicize identity performances. Claims of identity, though useful, are problematic because they always and simultaneously rely on preexisting identity categories and put them into question. The politics of managing identity claims are politically necessary but also necessarily incomplete. Judith Butler celebrates this incompleteness.<sup>20</sup> It is with some irony that I

17. See *id.* at 5 (suggesting that "[n]othing moves Americans more on LGBT rights generally and marriage in particular more effectively than conversation that all LGBT people can have with our friends and family members about how it feels to be treated differently and why that is so unfair").

18. See, e.g., *Covering* (the article), *supra* note 9, at 772–74 (suggesting that same-sex couples are required to "cover" their relationships in order to maintain or receive social acceptance).

19. See Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 343 (2008) (arguing that the same-sex marriage/marriage equality controversy can be understood as a contest over an intangible cultural resource that has the value of conferring identity on those allowed to participate in it); see also *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) ("[T]he institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody . . ."). The present article develops some aspects of that earlier *Cultural Property* article, especially implications of the ideas in the section of that article concerning everyday microperformances of identity. Poirier, *supra*, at 383–401.

20. For example, Butler states:

[I]s this infinite postponement of the disclosure of 'gayness' produced by the very act of 'coming out' to be lamented? Or is this very deferral of the signified *to be valued*, a site for the production of values, precisely because the term now takes on a life that cannot be, can never be, permanently controlled?

give Judith Butler the last word here, as she does not believe that there is one.

### *I. Sex and Gender and Sexual Orientation: How Visible Same-Sex Couples Disrupt Heteronormative Assumptions*

A triad of identity categories is foundational to any discussion of the same-sex marriage controversy or of the problematic visibility of same-sex couples. These are sex, gender, and sexual orientation.<sup>21</sup> This thumbnail discussion is by no means exhaustive, and mostly serves to introduce the idea of the signal importance of visible and otherwise perceptible traits and gestures—typically, then, gender traits and behaviors as identity markers.

By "sex" we might mean the categorization of the physical body as male or female. In olden days this would be determined by ascertaining which set of external sexual organs a baby possessed, though other characteristics would be assumed to follow—internal sexual organs, and secondary sexual characteristics at puberty such as facial hair (male) and breasts (female) and differences in voice timbre and muscle strength. With the advent of modern genetics we might go on to describe the male/female binary dimorphism of the body in terms of XY/XX chromosomes, and endocrinology might contribute oppositions for example between testosterone and estrogen. We might say sex is about the physical body.

Janet Halley uses the term "sex1."<sup>22</sup> She recognizes that we often use the word "sex" in an equally important but somewhat different way in the same discussions.<sup>23</sup> Halley differentiates "sex2," which she defines to mean

Butler, *supra* note 1, at 16; *see infra* Part IV.B.

21. *See, e.g.,* Stevi Jackson, *Sexuality, Heterosexually and Gender Hierarchy: Getting Our Priorities Straight*, in *THINKING STRAIGHT: THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY* 15, 16 (Chrys Ingraham ed., 2005) (surveying some influential accounts of gender and sexuality and exploring their implications for the analysis of heterosexuality and sexual orientation); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 32–33 (1995) (summarizing this lengthy article's argument that sex, gender, and sexual orientation are understood in tight relation to one another and how they are used to maintain a system of male and heterosexual superiority).

22. *See* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 24 (2006) ("By sex1, I will mean the purported bodily difference between men and women.").

23. *See id.* (suggesting that the use of the word "sex" can carry distinct meanings within a given conversation).



that which is concerned with the erotic.<sup>24</sup> Halley writes, "[t]he paradigm image here is 'fucking' . . . ."<sup>25</sup> This distinction will reappear later in the article.

An informed objector might point out a problem with this thumbnail version of "sex1." Some small percent of the population is born intersexed, that is, with one of a number of characteristics that do not line up with our paradigm of the body as an entirely "male" or "female" body.<sup>26</sup> The "natural" male/female dimorphic binary of sex is not inevitable after all.

Next is gender. "Gender" can be understood in its thumbnail form in terms of the opposition of masculine and feminine. Gender is about the way in which the individual appears and behaves—dress, gesture, hairstyle, makeup, speech, appetites, etc. Much of gender is performed, in habitual, everyday interactions.<sup>27</sup> In our culture, the normal male is masculine and the normal female feminine. But this correspondence is not dependable: we know effeminate men and masculine women, not to mention androgynous men and androgynous women. Also, even though we might in one way understand masculine and feminine as polar opposites, there are many gradations and intermediate categories for many gender traits. Nor is it necessarily appropriate to think of gender as a unidimensional scale with masculine on one end and feminine on another. Gender expert Sandra Bem, for example, initially conceived of androgyny as a middle ground for gender, but eventually moved to a system that categorized individuals as high/low on masculinity and also as high/low on femininity.<sup>28</sup>

24. See *id.* ("By sex2, I mean everything that turns us on . . . ."); accord Jackson, *supra* note 21, at 17 (highlighting that "sex" and "sexual" are used in two senses, to refer to men/women and to refer to erotic relations and practices).

25. HALLEY, *supra* note 22, at 24.

26. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, & THE LAW* 209–11 (2d ed. 2004) (discussing that the assumption that there are two sexes each paired up with XX and XY chromosomes, is wrong); see also Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, *THE SCIENCES*, Mar./Apr. 1993, at 20–24 (stating that some people with XX or XY chromosomes do not display male or female sex characteristics unambiguously and calls such people "intersexuals").

27. See Jackson, *supra* note 21, at 16 (arguing that gender is both a structural phenomenon and is "lived out by embodied individuals who 'do gender' in their daily lives, constantly (re)producing it through habitual, everyday interaction").

28. See SANDRA BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE OF SEXUAL INEQUALITY* 124–27 (1993); see also Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 325, 336–37 (Edward Stein ed., 1990) (discussing problems with viewing masculinity and femininity as opposite poles of a unidimensional scale).

We often use the perceptible signs and indicia of gender to draw conclusions about an individual's sex. Sandra Bem tells the story of her own five-year old son, who insisted on going to school one day wearing barrettes. He was teased mercilessly about being a girl. In an effort to defend himself, he pulled down his pants and pointed at his penis: "I'm a boy," he exclaimed. His tormentor replied, "Oh, everybody's got one of those. Only girls wear barrettes."<sup>29</sup>

This wonderful anecdote has several points. It illustrates what we have come to understand, that children from a very early age sort the people around them, and the social categories around them, by gender.<sup>30</sup> It also suggests that the gender binary, and the behaviors that signal and maintain it, could be more important in daily interactions than the underlying dimorphic body itself.<sup>31</sup>

Intersexed individuals do not fit the paradigm of male/female, and yet we typically want to assign them a male or female sex, as well as to address them and interpret them in terms of masculine/feminine. Indeed, with the advent of modern science, surgery and/or hormone treatments may be used to correct a body that does not conform to the male/female binary, thus reasserting the importance both of a visible masculine/feminine binary and of the importance of understanding it to be the reflection of an underlying dimorphism of male/female bodies.<sup>32</sup> Ironically, we correct nature by medical means in order to maintain the sense of a natural male/female dimorphism.

Transsexuals, whose subjectively experienced gender identity does not match the identity assigned to their physical body, represent another gap in the standard alignment of sex1 and gender. Transsexuals may turn to changes in gender behavior or to alteration of the sexed body through hormonal treatments or surgery to bring their sex1 and gender in line with

29. BEM, *supra* note 28, at 149.

30. See, e.g., Jackson, *supra* note 21, at 32 ("Gender difference is one of the first categories a child learns.").

31. See *id.* at 17 (asserting that it is gender that enables us to see biological sex); see also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (arguing that "in every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender roles and rules").

32. As Nancy Knauer writes, understanding the intersexed to "experience incongruence between physical gender and the gender assigned at birth . . . privileges the physical as the true situs of gender." Nancy J. Knauer, *Gender Matters: Making the Case for TransInclusion*, 6 PIERCE L. REV. 1, 25 (2007).

their subjective gender identity. Visible transgendered and other transsexual individuals trouble what often is deep-seated unquestioning reliance on male/female dimorphism and gender polarization.<sup>33</sup>

"Sexual orientation" is a third identity category. It might be expressed in a heterosexual/homosexual binary. Ed Stein recommends an important refinement, conceiving of heterosexual and homosexual as two poles, with many individuals lying somewhere in-between on this one-dimensional scale.<sup>34</sup> If the binaries or poles are presumed to be distinct, sexual orientation could be described as addressing the question of with which sex a particular person wants to have sex. Using Halley's terms, our society until recently assumed that a person of one sex1 would "naturally" desire to have sex2 with a person of the other sex1.<sup>35</sup> Same-sex sexual attraction was viewed as deviant, whether described as unnatural, sin or propensity to sin, or as illness. We can call this outlook heteronormativity. "Heterosexuality is the key site of intersection between gender and sexuality . . ."<sup>36</sup> If bodies are not easily and naturally categorized as men and women (sex1), then we will have trouble applying a binary of heterosexual/homosexual.<sup>37</sup>

33. As Elvia Arriola writes, in the context of a controversy caused by a male-to-female (MTF) transsexual attending a predominantly lesbian support group:

An ingrained belief that all human beings exist only within the framework of sexual dimorphism or gender polarization manifests itself in the social conviction that no one can (or should) ever depart from the roles and cues which accompany each sex/gender. An exclusionist reaction to the MTF transsexual obviously illustrated the pervasiveness of this gender-bipolar belief system. For no matter how an individual might change her/his gender identity, whether through behavior and attire, or through hormones and surgery, or even the consciousness-raising of a women's support group, the transition is viewed as untrustworthy and unacceptable.

Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L. J. 1, 18 (1997). At the same time, as Knauer argues, transgendered insistence on the lived experience of gender troubles the progressive stance that gender is performed and socially constructed and therefore does not matter. Knauer, *supra* note 32, at 3, 6. Thus, transgendered individuals may be unwelcome both because they question traditional sex and gender binaries and because they rely on them.

34. Stein, *supra* note 28, at 334-35.

35. Jackson, *supra* note 21, at 17, 29.

36. *Id.* at 17.

37. Some societies also seek to create a category that recognizes and accommodates sexual orientation minorities through a "third gender" language. See, e.g., Tilak Pokharel, *In Conservative Nepal, a Tribune for the 'Third Gender' Speaks Out*, N.Y. TIMES, Sept. 20, 2008, at A6 (describing approach to homosexuality in Nepal and, to some extent, South Africa). This article will not further explore third-sex and third-gender categorizations, either as an anthropological account of certain non-Western societies or as an alternative approach to describing the identity implications of same-sex couples. It is not an approach

Another issue also disrupts the binary of heterosexual/homosexual: bisexuality. Some folks experience sexual desire for both men and women—for them the question of sex1 is not a necessary prerequisite to a desire for sex2.<sup>38</sup> Accounts also often leave out the possibility that some people are asexual, not interested in sex.

A traditionalist understanding of marriage relies on all these binary categories. Traditional marriage is between a man and a woman, their sex1 presumably ascertained in part by gender and reinforcing our ideas of gender. The couple experience desire for one another (heterosexual sexual orientation), that is, they wish to have socially-approved sex2 with one another, presumably in theory in a monogamous and life-long committed relationship. Opposite sex couples will produce or will have the potential to produce children; indeed heterosexual sex is understood as normatively procreative<sup>39</sup> Those children will already be of one sex or the other, but they must acquire appropriate gender behavior and, to the extent that gender is learned and that sexual orientation is learned or a choice, must also learn gender and sexual orientation, in order to eventually properly undertake

widely adopted in the United States or in Western culture generally.

38. Kenji Yoshino has asked a most interesting question—why bisexual sexual orientation is so often elided or omitted. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). He offers a sophisticated and multipart answer, which cannot be fully summarized here. In part, he posits that a category of bisexual threatens the sense of stability of identity of both heterosexual and homosexual individuals. *Id.* at 388–89. If there are more than two categories, then we don't have a single clear "Other." *Id.* at 400–02. Yoshino also argues that establishing what sexual orientation one has/is is made problematic if we acknowledge bisexuality. *Id.* at 401. Someone of one sex1 who desires and/or has sex2 with someone of the opposite sex1 has only gone part of the way towards establishing by performance that s/he is heterosexual. *Id.* S/he must also establish that s/he has not and will not at some other time desire/have sex2 with someone of the same sex1. This involves proving a negative—which is tough to do. *Id.* at 401. A similar anxiety about inability to establish sexual identity performatively arises from those on the homosexual side of the hetero-homo binary. *Id.* at 404–06.

39. See, e.g., Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1077 (2005) ("An essentialist argument repeatedly advanced by opponents of same-sex marriage is that marriage's chief rationale is the production and nurturing of children.").

To be sure, any particular opposite sex couple may be infertile. And any individual or couple may bring children into the relationship in a way other than procreation between them. Nevertheless, the iconic heterosexual couple at the center of much traditionalist argument is procreative inter se. They are normatively expected to have sex of the reproductive kind. See, e.g., John Finnis, *Law, Morality & "Sexual Orientation,"* in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 31, 34 (John Corvino ed., 1997). For a response to Finnis on the issue of sterile heterosexual couples see for example Andrew Koppelman, *Homosexual Conduct: A Reply to the New Natural Lawyers*, in SAME SEX 44, *supra*, at 46–50.

sex2. The opposite-sex parents provide gender role models and, to the extent sexual orientation is understood to be learned, sexual orientation role models. Traditional marriage is thus laced with the normal versions of all three identity categories.<sup>40</sup>

Visible same-sex couples disrupt this comfortable, self-reproducing, heteronormative binary system.<sup>41</sup> For starters, visible same-sex couples suggest that the couple is having homosexual sex or wants to have homosexual sex, which is troubling to many people all on its own.<sup>42</sup> The visible same-sex couple also calls into question the naturalness and inevitability of the sex1 binary, the corresponding gender polarization, and the way in which normal (heterosexual) sex2 and sexual desire occur within those other binaries. Thus, Mark Fajer famously asked whether two real men could eat quiche together.<sup>43</sup> The mere visible evidence of their close friendship would threaten the background assumption that men are heterosexual, and could deter them.<sup>44</sup> Public behavior as an intimate same-sex couple stands in as a signal for homosexuality even when the pair are not homosexual, and it risks adverse consequences, sometimes extreme

40. For accounts of various aspects of this traditionalist view, see for example: Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147 (1997); William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 266–70 (2007); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 577, 580–89 (2007).

41. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196, 218–21, 232 (1998) (arguing that societal disapprobation of homosexuality is not just about sexual activities, but more importantly about the disruption of gender roles and with them disruption of the traditional family structure).

42. See Nussbaum, *supra* note 10, at 24 (“[A]nti-gay feeling is not just about difference, it is centrally about sex.”). See generally Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL. 127 (2008).

43. Marc A. Fajer, *Can Two Real Men Eat Quiche Together: Storytelling, Gender Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

44. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), *rev’d on reh’g*, 128 F.3d 289 (6th Cir. 1997) (providing the example of public displays of affection as one way of establishing gay or lesbian identity); David Cole & William N. Eskridge, Jr., *From Hand Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 320 (1994) (discussing hand holding, kissing, and other couple behavior as evidence of homosexuality in light of the military’s Don’t Ask, Don’t Tell policy); *Covering* (the article), *supra* note 9, at 843, 847–48 (identifying as among the types of choices whether to cover or flaunt homosexuality matters of private displays of same-sex affection versus public displays of affection, and single or secretly coupled vs. openly coupled).

consequences.<sup>45</sup> In a recent and gruesome example, an Ecuadorian man, José Sucuzhañay, was beaten and subsequently died after he was attacked while walking home from a bar with his brother, their arms around each other.<sup>46</sup> The attackers shouted anti-gay and anti-Latino epithets.<sup>47</sup> The brothers "appear to have been misidentified as gay."<sup>48</sup>

LGBTQ advocates are well aware of the particularly problematic nature of the same-sex couple. Mary Anne Case pointed out that at one point not so long ago, LGBTQ advocates shied away from litigating same-sex couples issues because these couples raised most starkly the transgressive potential of homosexuality, not just as couples but because they might be thought to couple—that is, to have sex.<sup>49</sup> Case explains that visible same-sex couples are problematic because such coupling is "indicative of a homosexual orientation both more firmly established and more public than either an occasional furtive, anonymous encounter or an admission of orientation unaccompanied by demonstrable homosexual acts."<sup>50</sup> Both same sex pair bonding and copulating are "sufficient marker[s] for the evil that is homosexuality . . . ."<sup>51</sup>

45. See Gill Valentine, *(Re)Negotiating the "Heterosexual Street": Lesbian Productions of Space*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY* 146 (Nancy Duncan ed., 1996) (discussing an incident in which a lesbian couple was thrown out of a store in Nottingham, England, for kissing); John Corvino, *Kiss and Tell*, *THE ADVOCATE*, Feb. 1, 2005, at 1 (the author was threatened with arrest by state troopers for "homosexual conduct"—kissing another man in public—on the grounds of the state capitol); Jennifer B. Lee, *What Do You Call Two Straight Men Having Dinner?*, *N.Y. TIMES*, Apr. 10, 2005, at 1 (discussing how two men dining together outside the context of sports or business will lead to questions about their sexual orientation).

46. Editorial, *A Lynching in Brooklyn*, *N.Y. TIMES*, Dec. 17, 2008, at A38; Kareem Fahim, *Family Keeps Vigil for Beaten Brooklyn Man*, *N.Y. TIMES*, Dec. 10, 2008, at A35; Robert McFadden, *Attack on Ecuadorean Brothers Investigated as Hate Crime*, *N.Y. TIMES*, Dec. 11, 2008, at A29.

47. Editorial, *supra* note 46; Fahim, *supra* note 46; McFadden, *supra* note 46.

48. Editorial, *supra* note 46.

49. See Mary Anne Case, *Couples and Couplings in the Public Sphere: A Comment on the Legal History of Litigating for Gay and Lesbian Rights*, 79 *VA. L. REV.* 1643, 1659 (1993) ("[T]he couple may present a double bind for gay and lesbian litigants because it focuses courts on what couples do, that is to say, have sex.").

As far as the predominance of a strategy of avoiding litigation based on same-sex couples, things have changed: "[T]he rights-bearing subject of the lesbian rights movement has become 'the couple'—a We." Franke, *supra* note 5, at 239; cf. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 *CAL. L. REV.* 1271, 1296–97 (2006) (arguing for a separate conceptual protection for same-sex couples qua couples in sexual orientation antidiscrimination law).

50. Case, *supra* note 49, at 1658.

51. *Id.* at 1661.

Fajer, Case, and others discuss the visibility of same-sex couples as a separate matter from the legal recognition of same-sex couples.<sup>52</sup> The two are interrelated. Visibility increases the likelihood of legal recognition; legal recognition increases the likelihood of visibility. Visibility and legal recognition reinforce each other as indicia of a non-stigmatized (normal) status for same-sex couples, that is, social recognition. Same-sex couples' visibility to others encourages others to be similarly visible.<sup>53</sup> And more generally, visibility of GLBT folk creates a feedback loop around this stigmatized identity trait, which will tend to make it more visible and less stigmatized.<sup>54</sup> Choices that favor invisibility will create a contrary and opposite feedback loop, one that tends to perpetuate invisibility and stigma.<sup>55</sup>

## *II. Microperformances of Identity: Dramaturgical, Dialogical, and Dialectical*

The preceding Part describes sex, gender, and sexual orientation identity categories, and raises the question of the relationship of visible appearance and of (presumably) stable underlying identity. This Part provides a more extended discussion of deliberate interaction and identity performance. It relies on some of the work of Erving Goffman<sup>56</sup> to introduce a number of ideas that are still quite important to contemporary LGBT issues, including the issue of same-sex marriage. Subsequent sections of the article apply ideas introduced here. After the discussion of Goffman, this Part discusses briefly the implications of microperformances of visible LGBT couples and then critiques some aspects of Kenji

---

52. See Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 894–904 (2006) (discussing choices by members of same-sex couples about what to reveal about their relationships, as it would affect their identity as perceived by in-groups and out-groups).

53. I'd say "in public" but "public" is a highly problematic term on its own.

54. See, e.g., Kathryn Abrams, *The Supreme Court, Visibility, and the "Politics of Presence"*, 50 VAND. L. REV. 411, 413–15 (1997) (describing an interrelationship of literal visibility, political visibility, and programmatic visibility as a way of describing the mechanism of advancing the interests of stigmatized groups).

55. See, e.g., Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 403 (1997) (describing how coerced gay invisibility limits both the ability to participate in lawmaking processes and the extent of more diffuse social knowledge about gays).

56. See *supra* note 6 and accompanying text (identifying the portions of Goffman's scholarship reviewed).

Yoshino's concept of covering as presented in *Covering* (the article) and *COVERING* (the book).

A. *Erving Goffman on Performances of the Self and the Dynamics of Microinteractions*

Erving Goffman was an important if idiosyncratic sociologist.<sup>57</sup> His work continues to be influential a generation after his death in 1983. Throughout his career, Goffman focused on various aspects of the ways in which the presentation of the self occurred in microinteractions.<sup>58</sup> Goffman conceived of his overall topic of investigation as the small interactions between an individual and his audience, performances of self for an audience, or what he called dramaturgy.

The perspective employed in this report is that of the theatrical performance; the principles derived are dramaturgical ones. I shall consider the way in which the individual in ordinary work situations presents himself and his activity to others, the ways in which he guides and controls the impression they form of him, and the kinds of things he may and may not do while sustaining his performance before them.<sup>59</sup>

An individual will seek to control the behavior of others through the messages conveyed by his own behavior, verbal and non-verbal, which communicates who he or she is for purposes of a particular situation.<sup>60</sup> As Goffman conceives it, there are both verbal and nonverbal aspects of performances of self.<sup>61</sup> He is primarily concerned with "the more theatrical and contextual kind, the non-verbal, presumably unintentional kind, whether this communication be purposely engineered or not."<sup>62</sup> Non-verbal

57. See generally, e.g., ERVING GOFFMAN: EXPLORING THE INTERACTION ORDER, *supra* note 6.

58. See generally, e.g., Erving Goffman, *The Interaction Order*, *supra* note 6; ERVING GOFFMAN, *STIGMA*, *supra* note 6; ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 6. See generally ERVING GOFFMAN: EXPLORING THE INTERACTION ORDER, *supra* note 6.

59. GOFFMAN, *PRESENTATION OF SELF*, *supra* note 6, at xi. Goffman continues the stagecraft metaphor for the presentation of self. *Id.* at 15–16.

60. *Id.* at 3–4. This behavior may involve deceit or feigning, that is, deliberate verbal and nonverbal misinformation. *Id.* at 2. The range of possibilities for interaction, however, is much broader than a simple T/F account of the individual.

61. *Id.* at 2 (distinguishing between the information that the individual gives verbally and a wide variety of actions that are nonverbal and that others "can treat as symptomatic of the actor").

62. *Id.* at 4.



presentation is likely to be less securely in an individual's control, and consequently the others present are likely to rely on it for information about the individual.<sup>63</sup> Goffman also observes that not all aspects of an individual's presentation are conscious: "Sometimes the traditions of an individual's role will lead him to give a well-designed impression of a particular kind and yet he may be neither consciously nor unconsciously disposed to create such an impression."<sup>64</sup> I would say that what Goffman describes here are aspects of identity performance that have become naturalized, so that they no longer are behaviors about which the individual makes conscious choices.<sup>65</sup> They are simply re-enacted without conscious effort.

Goffman points out that his dramaturgical model is inexact in an important way. On stage, one actor presents himself, in interaction with other actors, for the benefit of third party observers, the audience; "[i]n real life, the three parties are compressed into two; the part one individual plays is tailored to the parts played by the others present, and yet these others also constitute the audience."<sup>66</sup> They are not just an audience; they are co-participants.<sup>67</sup> So the process of the presentation of self is interactive. A more accurate description would state that each person who is present in an encounter is involved in the interaction of all participants' mutually constituting selves. Goffman writes:

[W]hen we allow that the individual projects a definition of the situation when he appears before others, we must also see that the others, however passive their role may seem to be, will themselves effectively project a definition of the situation by virtue of their response to the individual and by virtue of any lines of action they initiate to him.<sup>68</sup>

Effectively, each participant is an actor engaged in an ongoing micronegotiation, which is simultaneously about each of them and all of them in the particular situation. In other words,

We have then a kind of interactional *modus vivendi*. Together the participants contribute to a single over-all definition of the situation

63. *Id.* at 7–8 (emphasizing that examples frequently include unintended gestures).

64. *Id.* at 6.

65. Cf. Barbara J. Flagg, *Fashioning a Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (arguing that expectations around workplace behavior are culturally conditioned to express and reproduce white norms in a way that whites are unaware of, that is, transparent to them).

66. GOFFMAN, PRESENTATION OF SELF, *supra* note 6, at xi.

67. *Id.* at 15–16.

68. *Id.* at 9.

which involves not so much a real agreement as to what exists but rather a real agreement as to whose claims concerning what issues will be temporarily honored.<sup>69</sup>

Moreover, "[a]s the interaction among the participant's progresses, additions and modifications in this initial information state will of course occur . . . ."<sup>70</sup> In short, performances of the self in everyday life are not only dramaturgical, they are also what I will call dialogical.

Social psychologists Michael Schwalbe and Douglas Mason-Schrock neatly summarize these aspects of the dramaturgical perspective on identity:

In this view, social life is made up of connected dramatic enactments through which people communicate their dispositions and coordinate action . . . . It is in and through these dramatizations that selves are signified and affirmed, both to others and reflexively to one's self. The goal of dramaturgical analysis is, then, to describe and explain how people construct their performances and thereby create themselves and each other as social objects.<sup>71</sup>

The negotiation of the meaning of microinteractions is not and cannot be solely about verbal and nonverbal behaviors in specific microcontexts. The behaviors we use to manifest aspects of our identities have meaning, and function as signs; they are interpreted through shared systems of signification that we reference when we seek to interpret microperformances. As Goffman points out in *The Interaction Order*, an important professional address at the end of his career summarizing his work,<sup>72</sup> "[e]very culture . . . seems to have a vast lore of fact and fantasy regarding embodied indicators of status and character, thus appearing to render persons readable."<sup>73</sup> Microinteractions in social situations rely on this lore—which I shall refer to as a lexicon (my term, not Goffman's)—to interpret situations and the individual gestures within those situations. There is an "available repertoire" of "culturally standard" displays.<sup>74</sup> "By a

69. *Id.* at 9–10.

70. *Id.* at 10.

71. Michael L. Schwalbe & Douglas Mason-Schrock, *Identity Work as Group Process*, 13 *ADVANCES IN GROUP PROCESSES* 113, 114 (1996) (citation omitted). Schwalbe and Mason-Schrock rely explicitly and extensively on Goffman. *Id.* at 114, 116.

72. Erving Goffman, *The Interaction Order*, *supra* note 6. This was Goffman's inaugural address as president of the American Sociological Association in 1982. *Id.*

73. *Id.* at 8.

74. *Id.* at 11. See also Schwalbe & Mason-Schrock, *supra* note 71, at 115 (explaining the contours of identity). Schwalbe and Mason-Schrock state:

sort of prearrangement . . . social situations seem to be perfectly designed to provide us with evidence of a participant's various attributes . . . ."<sup>75</sup> We rely on this shared and general lexicon to understand the specific situation. Fluency in a particular culture's lexicon of signs for social relationships and identity traits is thus essential for the participants in microinteractions.<sup>76</sup> And as Schwalbe and Mason-Schrock point out, while one kind of "identity work" involves individual uses of signs, rules, and conventions to create images of themselves in interactions, another kind "is necessarily communal: the creation of identities as widely understood signs with a set of rules and conventions for their use."<sup>77</sup>

The relationship of a particular behavior to its meaning as an indicator of some aspect of the self is not fixed. We are here in the domain of the signifier, as sketched out by Saussure.<sup>78</sup> The signifier is, to a very considerable extent, arbitrary in its relationship to any particular significance or meaning. Goffman recognizes this characteristic arbitrariness of gestural behaviors as signifiers, albeit not in Saussure's terms. For one thing, he acknowledges that we must rely on social and historical context to appreciate the meanings of particular behaviors in microinteractions.<sup>79</sup> Moreover, in his discussion on how to approach small, perfunctory "contact rituals,"<sup>80</sup> he writes:

---

Identities . . . are *indexes of the self*. By this we mean that identities are signs that refer to qualities of the identity claimant. An identity . . . is not a meaning but a *sign that evokes meaning*, in the form of a response aroused in the person who interprets it.

*Id.*

75. Goffman, *The Interaction Order*, *supra* note 6, at 8.

76. Goffman further explores the centrality of the information each participant in an interaction has about the world and about the information held by the other participants:

At the very center of interaction life is the cognitive relation we have with those present before us, without which relationship our activity, behavioral and verbal, could not be meaningfully organized. And although this cognitive relationship can be modified during a social contact, and typically is, the relationship itself is extrasituational, consisting of the information a pair of persons have about the information each other has of the world, and the information they have (or haven't) concerning the possession of this information.

Goffman, *The Interaction Order*, *supra* note 6, at 4–5.

77. Schwalbe & Mason-Schrock, *supra* note 71, at 115.

78. FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 1907–11 (Charles Bally et al. eds., Wade Baskin trans., Peter Owen Ltd. 1959).

79. See Goffman, *The Interaction Order*, *supra* note 6, at 9. ("All elements of social life have a history and are subject to critical change through time, and none can be fully understood apart from the particular culture in which it occurs.")

80. For example, Goffman explains that "priority in being served, precedence through

At best they are likely to have only loosely coupled relations to anything by way of social structures that might be associated with them. They are sign vehicles fabricated from depictive materials at hand, and what they come to be taken as "reflection" of is necessarily an open question.<sup>81</sup>

This arbitrariness has an extraordinarily important consequence for social relations over time. Ordinarily, to be sure, the repeated interpretation of microperformances will reproduce the pre-existing social order, reinforcing the shared lexicon of identity traits. Goffman writes that normally in applying the "vast lore or fact and fantasy regarding embodied indicators of status and character," we "vividly re-present what we already know."<sup>82</sup> But not necessarily<sup>83</sup>—"[o]ne can point . . . to obvious ways in which social structures are dependent on, and vulnerable to, what occurs in face-to-face contacts."<sup>84</sup> Various social attributes may not be congruent with one another, or may not mesh with salient personal attributes.<sup>85</sup> The evidence provided in face-to-face interactions may be "complex"<sup>86</sup> and it may not all point in the same direction.

Consider (my example, not Goffman's) the argument often made by a same-sex partner in pursuit of a *de facto* parent or psychological parent doctrine and holding, that she or he should be treated as a parent for purposes of custody of a child s/he had helped to raise, in the face of a presumption that a non-biological same-sex partner was not a fit parent.<sup>87</sup> Or consider the point Carlos Ball makes when he describes how marriage

a door, centrality of seating, access to various public places, preferential interruption rights in talk, selection as addressed recipient . . ." *Id.* at 11.

81. *Id.* Goffman explains later in the essay that small interactive gestures are "loosely coupled" in another sense—they may be understood to refer to relationships among different social categories (e.g. young/old, male/female, status). *Id.* at 12. Goffman similarly notes in his consideration of stigma that attributes stigmatizing in one context may not be so in another. GOFFMAN, *STIGMA*, *supra* note 6, at 3–4.

82. *See* Goffman, *The Interaction Order*, *supra* note 6, at 8 (referring generally to Pierre Bourdieu on the concept of reproducing social structure, but providing no specific citations to Bourdieu's work).

83. *See id.* ("But that conservative impact is not, analytically speaking, situational.")

84. *Id.*

85. *See id.* ("Covert value given, say, to race, can be mitigated by covert value given to other structural variables—class, gender, age, comemberships, sponsorship networks—structures which at best are not fully congruent with each other.")

86. *Id.*

87. *See* Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 313–18 (2007) (describing access to the psychological parent doctrine in terms of performance of an idealized parental identity).

equality litigation "has contributed to the gap between the perception of lesbians and gay men as individuals defined exclusively through their sexual conduct and the observable reality of lesbians and gay men as full human beings who, among other traits, care for and love others."<sup>88</sup> Or consider a historical example—the speculation that Supreme Court Justice Lewis Powell might have voted differently in *Bowers v. Hardwick*<sup>89</sup> if his clerk at the time, who was closeted, had come out to him personally instead of making an abstract argument on behalf of gays.<sup>90</sup> In short, although the interpretation of microinteractions "ordinarily allows for the surreptitious consolidation of structural lines, the same arrangement can also serve to loosen them."<sup>91</sup> Let us call this the "complexifying potential" of microinteractions.

We can thus appreciate that Goffman himself eventually discerned in his dramaturgical approach to identity-(re)producing interactions an additional dimension. Not only are they dramaturgical and dialogical, they are also dialectical. That is, the very lexicon upon which all the participants depend can be shifted through microinteractions that present evidence that calls into question the established meanings of the behaviors being interpreted. Moreover, this kind of pressure for reform through the microinteractions can be brought to bear expressly by political groups as well as individuals.<sup>92</sup> It may or may not actually succeed in effecting broader social change. Sometimes, though, a focus on forms of address and politeness and "systematic breaching of standards for seemly public dress" can be effective politically.<sup>93</sup> I cannot resist quoting Goffman's assessment of the early Quakers.

That sturdy band of plain speakers should always stand before us as an example of the wonderfully disruptive power of systematic impoliteness, reminding us once again of the vulnerabilities of the

---

88. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1534 (2006).

89. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

90. See, e.g., COVERING (the book), *supra* note 10, at 62–65 (stating that instead of coming out, when asked his opinion, the clerk stated that the right to choose whom to love was more important than the right to vote).

91. Goffman, *The Interaction Order*, *supra* note 6, at 8.

92. See *id.* at 12 (discussing political interventions in social interactions, from above and below).

93. *Id.* at 13.

interaction order. There is no doubt: Fox's disciples raised to monumental heights the art of becoming a pain in the ass.<sup>94</sup>

Again Schwalbe and Mason-Schrock summarize succinctly: "to understand identity-making it is necessary to examine not only individual self-presentations but the joint creation of the symbolic resources upon which those presentations depend—an activity we refer to as subcultural identity work."<sup>95</sup> Moreover,

while certain kinds of episodes can be routinized, they are never entirely unproblematic. Even when familiar identities are claimed or imposed, there is always room for negotiation . . . . And there is always room for things to go wrong. Discrepant signs can appear and undermine an initial identity claim. Efforts to manage these contingencies . . . are part of the identity work inescapably demanded by social life.<sup>96</sup>

As they summarize, "Because of the possibility of contention, identity codes may never be settled once and for all; they may be negotiated continually as people try to stretch and modify them and as outsiders try to co-opt them."<sup>97</sup>

Sociologist Joseph Gusfield offers some helpful observations on how this kind of face-to-face departure from expected microperformances of identity is related to larger social movements. Gusfield argues that "social movement studies have shown an undue emphasis on the political and have understated the importance of movements that create changes in everyday living outside the institutional structure of modern life."<sup>98</sup> While we typically think of social movements as "seeking, in a more or less deliberate fashion, to produce change in the political or institutional character of society,"<sup>99</sup> movements also usually develop a "cultural meaning" that promises to change our interpretations of everyday life.<sup>100</sup> Using homosexual [sic] visibility as an example, Gusfield writes:

94. *Id.*

95. Schwalbe & Mason-Schrock, *supra* note 71, at 115.

96. *Id.* at 116 (footnote omitted).

97. *Id.* at 116, 125.

98. Joseph R. Gusfield: *The Reflexivity of Social Movements: Collective Behavior and Mass Society Revisited*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 58, 75 (Enrique Laraña, Hank Johnston, & Joseph R. Gusfield eds., 1994). Elsewhere in this essay Gusfield writes, "[A] focus on organizational and associational elements are [sic] insufficient tools for understanding diffuse and often apolitical new social movements." *Id.* at 61.

99. *Id.* at 70.

100. *See id.* at 64 (arguing that social movements typically involve both formal associational structures with specific goals and a more diffuse challenge to cultural

If we imagine the interaction between homosexual and heterosexual persons prior to the emergence of the gay rights movement, we posit a conventionalized set of norms to which people adhere or behave in idiosyncratic, individualistic forms. Once the movement is set in motion, behavior can no longer be conventionalized. Behaviors are undertaken with a recognition that alternatives are both possible and socially legitimated at some level. Homosexuals attempt to change discriminatory laws but also become more open about their identity. Interaction between homosexuals and heterosexuals takes on a new tone . . . . What is happening is that the conventional norms of deviance that have guided both homosexuals and heterosexuals have come to be doubted and their acceptance made problematic. What was 'taken for granted' has become an issue.<sup>101</sup>

Thus, once what Gusfield calls the "gay liberation movement" gets underway, in addition to its "organizational manifestos" the movement "also exists in daily judgments that pose new issues for homosexuals and heterosexual as to how they are to identify themselves and others. Self-conscious and deliberate choice is being made against a background of awareness of the movements."<sup>102</sup> In short, a social movement "represents social relations and culture in possible transition."<sup>103</sup> Notably, Gusfield uses the word introduced by Goffman to describe performances of the self, asserting that modern social movements have a "dramaturgical character".<sup>104</sup> In another essay on new social movements generally, Gusfield and his co-authors similarly observe that "in and through movements that have no clear class or structural base, the movement becomes the focus for the individual's definition of himself or herself, and

---

meanings, including everyday interactions and understandings of identity). The everyday and interactive aspects of social movements are more fluid and may not even have an organizational base. *See id.* at 65 (discussing the hippie movement as an example of fluidity and lack of structure in a social movement that was nevertheless recognizable and important); *id.* at 62 (regarding the women's movement, "Being a member or nonmember is not constituted by a specific act but refers to types of ideational commitment. The action of the movement has its locus in a multiplicity of events, often that of individuals.")

101. *Id.* at 66.

102. *Id.* at 64.

103. *Id.*

104. *Id.* at 74. In exploring the idea that social movements often affect individuals' understanding of events, Gusfield also relies *inter alia* on Goffman's concept of frame analysis. *Id.* at 69 (discussing ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974)). As Gusfield explains it "The concept of framing is a recognition that the meaning of events may make for differing experiences of the 'same' data. What is centrally attended to by one kind of interest or audience may not be attended to at all by another." *Id.*

action within the movement is a complex mix of the collective and individual confirmations of identity."<sup>105</sup> Thus, "many contemporary movements are 'acted out' in individual actions rather than through or among mobilized groups."<sup>106</sup>

In the concluding section of *The Interaction Order*, Goffman turns to a related and pressing matter: interaction processes that concern four critical, widely-shared identity statuses. These statuses are age-grade, gender, class, and race.<sup>107</sup> These attributes share two critical features. First, every individual can be located easily on a cross-cutting grid of these statuses "by virtue of the markers our bodies bring with them into all our social situations, no prior information about us being required."<sup>108</sup> To be sure, we are also socialized "in subtle ways, [to insure] that our placement in these regards will be more evident than might otherwise be."<sup>109</sup> So perceptibility of traits is an important part of the way these diffuse identity statuses function in microinteractions.<sup>110</sup>

Second, these markers are typically used to generate and reproduce status hierarchies. Goffman reflects on the management of undesirable identity traits in his book *Stigma*.<sup>111</sup> By "stigma" he means visible/perceptible attributes of an individual that communicate taint or discredit the individual to strangers.<sup>112</sup> These kinds of attributes or traits are not inevitably related to the stigmatized identities that they are understood to communicate: "A stigma . . . is really a special kind of relationship between attribute and stereotype."<sup>113</sup> We again are in the realm of the arbitrary signifier, relying on specific context and a communally-shared

105. Hank Johnston, Enrique Laraña, & Joseph R. Gusfield, *Identities, Grievances, and New Social Movements*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 3, 8 (Enrique Laraña, Hank Johnston, & Joseph R. Gusfield eds., 1994). Examples of this type of movement include the hippies and the gay rights and women's movements. *Id.* at 7.

106. *Id.* at 7.

107. Goffman, *The Interaction Order*, *supra* note 6, at 14.

108. *Id.*

109. *Id.*

110. *See id.* ("[A]ny trait that is not easily perceptible could hardly acquire the capacity of a diffuse status-determining (or more correctly, status-identifying) trait, at least in modern society."); *see also* GOFFMAN, *STIGMA*, *supra* note 6, at 48 (emphasizing that while identity traits are typically visible, they may also be perceived by other senses (e.g., language) so that the broader category of "perceptible" traits is the more accurate).

111. GOFFMAN, *STIGMA*, *supra* note 6.

112. *Id.* at 3.

113. *Id.* at 4.



lexicon that establishes dominant and subordinate statuses to (re)produce stigma in specific microinteractions.

Because presentations of self are dramaturgical and dialogical, individuals can and will seek to manage the presentations of their stigmatizing traits, deploying various "techniques of information management."<sup>114</sup> Goffman observes that "stigma management is a general feature of society, a process occurring wherever there are identity norms."<sup>115</sup> Where an individual who is stigmatized seeks to be understood as "normal",<sup>116</sup> that individual may seek to pass or to cover. Both passing and covering are "application[s] of the arts of impression management, the arts, basic in social life, through which the individual exerts strategic control over the image of himself and his products that others glean from him."<sup>117</sup>

Goffman devotes a considerable effort to describing the dynamics of passing strategies.<sup>118</sup> From the perspective of accurate description, Goffman points out, it is important to distinguish between situations where "differentness is known about already or is evident on the spot" and situations where it is "neither known about by those present nor immediately perceivable by them."<sup>119</sup> In the first type of situation Goffman calls the individual "discredited," in the second "discreditable."<sup>120</sup> An

114. *Id.* at 91–92.

115. *Id.* at 130.

116. *See id.* at 5 (using "normal" to define people who do not depart negatively from the particular expectations at issue). Elsewhere in the book Goffman stresses that "stigmatized" and "normal" are not so much two separate groups of individuals as "a pervasive two-role social process, in which every individual participates in both roles, at least in some connections and in some phases of life." *Id.* at 138. "Normal" and "stigmatized" "are not persons but rather perspectives." *Id.* "[T]he role of normal and the role of stigmatized are parts of the same complex, cuts from the same standard cloth." *Id.* at 130.

117. *Id.* at 130.

118. *Id.* at 73–91.

119. *Id.* at 4. Elsewhere in *Stigma*, Goffman explores the idea of "known-about-ness." *Id.* at 49. In contrast to visibility or perceptibility, known-about-ness refers to previous knowledge, which may come from previous contacts or gossip or (though Goffman does not mention this specifically here) declarations by the individual himself. *Id.* at 49. One might say that "known-about-ness" has a temporally extensive dimension different from the immediate signification processes of visible/perceptible traits that are in play when individuals are co-present in microinteractions of identity. To be sure, immediately visible/perceptible traits are only interpretable because of a lexicon acquired over time, so they too have a temporal dimension, but of a different kind.

120. *Id.* at 4.

individual who is "discredited"—that is, whose stigmatizing trait is either already known or immediately apparent—cannot pass.

Goffman also introduces another important concept: "covering."<sup>121</sup>

[P]ersons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large. The individual's object is to reduce tension, that is, to make it easier for himself and the others to withdraw covert attention from the stigma, and to sustain spontaneous involvement in the official content of the interaction.<sup>122</sup>

This concept has been subsequently developed in the legal academic literature with regard to race, sex/gender, and sexual orientation.<sup>123</sup> Some aspects of Kenji Yoshino's important contribution, entitled *Covering* (the article) and *COVERING* (the book), are discussed in Part I.C. *infra*. Inasmuch as covering involves the manipulation of perceptible traits, it often uses the same signifiers as passing, and "what will conceal a stigma from unknowing persons may also ease matters for those in the know."<sup>124</sup> The difference between the two is sometimes, perhaps often, not about the stigmatized performer at all but about the audience and what it already knows about the performer.

The whole system of performances around various normal/stigmatized characteristics can serve to shore up and reproduce status divisions. This includes passing and covering, which, Goffman argues, involve

a form of tacit cooperation between normals and the stigmatized: the deviator can afford to remain attached to the norm because others are careful to respect his secret, pass lightly over its disclosure, or disattend evidence which prevents a secret from being made of it; these others, in turn, can afford to extend this tactfulness because the stigmatized will voluntarily refrain from pushing claims for acceptance much past the point normals find comfortable.<sup>125</sup>

121. *Id.* at 102–04.

122. *Id.* at 102.

123. See generally, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Onwuachi-Willig, *supra* note 52. Carbado & Gulati call this type of activity "comforting", as it provides comfort to insiders about the visible presence of outsiders. Carbado & Gulati, *supra*, at 1301–04 (naming this type of activity "comforting," as it provides comfort to insiders about the presence of outsiders).

124. GOFFMAN, *STIGMA*, *supra* note 6, at 102.

125. *Id.* at 130.

And yet Goffman's analysis provides a dialectical element to his description of stigma. If specific performances involving passing and covering serve to reproduce the basic lexical meanings of traits and the basic social structures that are signified by them, the same microinteractions may, by complexifying those interactions, destabilize the lexicon.

### *B. GLBT Visibility and Microperformances*

Carlos Ball recently observed that "[i]n many ways, overcoming invisibility is the first step in successfully demanding basic civil rights."<sup>126</sup> With regard to GLBTQ issues, Danaya Wright writes, "[t]he history of the gay rights movement . . . has been a history of making homosexuality visible."<sup>127</sup> This is not new news, and a number of scholars have explored this idea.<sup>128</sup> In a recent article about marriage equality in New Jersey, I showed how visibility led to piecemeal acceptance of GLBTQ folk, which in turn made it possible to claim plausibly, within the last fifteen years, that same sex couples should be recognized as full citizens and should therefore, as committed and loving couples, have access to the benefits, status, and kinship identity conferred by marriage.<sup>129</sup> As Danaya Wright commented about a recent event in the history of claims to marriage equality, the wildcat marriages of early 2004, "[i]t may be that the visibility of over four thousand gay couples getting married in San Francisco will be more

126. Ball, *supra* note 88, at 1534.

127. Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FL. J. L. & PUB. POL'Y. 403, 408 (2004). See generally SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* (2001) (describing the increase in gay visibility in America).

128. See Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 401 (2001) (providing a helpful survey of the history of the interrelated expectations that homosexuals should remain invisible or else be ashamed of their visibility); see also Abrams, *supra* note 54, at 413–15 (describing an interrelationship of literal visibility, political visibility, and programmatic visibility as a way of describing the mechanism of advancing the interests of stigmatized groups); Schacter, *supra* note 55, at 403 (describing how coerced gay invisibility limits both the ability to participate in lawmaking processes and the extent of more diffuse social knowledge about gays).

129. See Poirier, *supra* note 87, at 313–18 (describing access to the psychological parent doctrine in terms of a specific individual's performance of an acceptable idealized parental identity).

effective in eradicating discrimination that the legal changes required by *Lawrence [v. Texas.]*<sup>130</sup>

This visibility is not simply a matter of discovering something previously hidden, though that is in part how it may be experienced by those who choose to be visible. GLBT visibility without shame can lead to a dialogical and dialectical renegotiation of the interpretation of key social structures, including the status of same-sex couples and of homosexuality and heterosexuality generally, as well as of the meaning of marriage. This is a helpful point to keep in mind in considering the larger dynamics of *Kulturkampf* around same-sex couples. Much of the offense to traditionalists by same-sex couples claiming access to marriage lies in their visible daily performances without shame of the small rituals and interactions that signal the presence of a married couple.<sup>131</sup> This set of unauthorized, visible microperformances is every bit as troublesome to the traditionalist as opening the legal definition of marriage to same-sex couples.<sup>132</sup> Both visible microperformances and legal challenges are claims of access to normal status, though in different ways, and both threaten to destabilize the traditionalists' understanding of the shared understanding of marriage.<sup>133</sup> They might disrupt the transmission of important cultural practices, intergenerationally as well as among members of the same generation, that through the institution of marriage reaffirm traditional identity characteristics and kinship status around sex, gender, and sexual orientation.<sup>134</sup>

---

130. Wright, *supra* note 127, at 408 (referring to *Lawrence v. Texas*, 539 U.S. 558 (2003), which decided that sodomy laws are unconstitutional as a matter of constitutionally-guaranteed liberty). The so-called wildcat marriages in California that Wright referred to were invalidated in *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004). The principle behind them was vindicated in the California Supreme Court's 2008 decision finding a state constitutional right to marriage equality. *In re Marriage Cases*, 183 P.3d 384 (Cal 2008). A November 2008 referendum raised the issue yet again, adopting Proposition 8, which provides that only a marriage between a man and a woman, will be valid and recognized in California. A lawsuit has now been filed challenging the underlying validity of Proposition 8. See *California Voters Overrule State Supreme Court on Marriage; Supreme Court Agrees to Hear Legal Challenges*, LESBIAN/GAY LAW NOTES, Dec. 2008, at 1 (summarizing the referendum and subsequent court suits and putting them in political and legal context). Clearly, the struggle on this issue in California is not over.

131. Poirier, *supra* note 19, at 383–401.

132. *Id.*

133. *Id.*

134. *Id.*; see Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 354 (1999) (stating that "[s]ame-gender marriage is about people searching for integrated identities and others jealously and fearfully guarding their own"). I made similar arguments in another article,

Curiously, when I went to prepare a footnote on the usages of the term "microperformance" in the legal literature, it turns out that there aren't any in the law review articles searchable on Westlaw, other than my own.<sup>135</sup> This is not to say that the concept isn't out there, in fact well-entrenched in a couple of legal academic fields, including antidiscrimination law<sup>136</sup> and other contexts.<sup>137</sup> It is also related to the more familiar concept of "microaggression" relied on in some of the critical race literature.<sup>138</sup>

---

whose basic point was that the key arenas of engagement in the *Kulturkampf* over sex and gender, of which the marriage equality controversy is a part, occur on the one hand locally and on the other in territorial discursive spaces such as media accounts, in which a broad and anonymous public encounters images and descriptions of marriage. Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 *TEMPLE POL. & CIV. RTS L. REV.* 387, 390–92 (2008). A third article, not yet in print, explores the various arenas where same-sex marriage is understood to occur and be understood; the article includes a section on daily microperformances of married status, as well as a section on battles over the location of same-sex weddings. Marc R. Poirier, *Gender, Place, Discursive Space: Where Is Same-Sex Marriage?*, 3 *FLA. INT'L. U. L. REV.* (forthcoming 2008).

135. Search for "microperformance!" in the Westlaw journals database, Sept. 1, 2008. A similar search turns up precious little on Google.

136. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L.J.* 365 (1991) (discussing *Rogers v. American Airlines*, 527 F.Supp. 229 (S.D.N.Y. 1981), a Title VII case about a black woman's cornrow hair styling); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. CONTEMP. LEGAL ISS.* 701, 701–04 (2001) (discussing identity performance theory); Carbado & Gulati, *Working Identity*, *supra* note 123, at 1267–70 (discussing the relationship between identity performance and workplace discrimination); Flagg, *supra* note 65, at 2011–12 (discussing identity performance and its potential impact on career advancement); Tristin K. Green, *Discomfort at Work: Assimilation Demands and the Contact Hypothesis*, 86 *N.C. L. REV.* 379 (2008); Harvard Law Review, Notes, *Lessons in Transcendence, Forced Associations and the Military*, 117 *HARV. L. REV.* 1981 (2004); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and why Title VII Should apply Even if Lakisha and Jamal are White*, 2005 *WIS. L. REV.* 1283, 1325–34 (2005) (stating various shortcomings of antidiscrimination law including taking into account adjustment of identity performance); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. REV.* 1134 (2006); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 *TEX. L. REV.* 167 (2006).

137. See Onwuachi-Willig, *supra* note 52 (discussing choices by members of interracial and same-sex couples about revealing this aspect of their identity through visibility of their relationships); Frank Rudy Cooper, "Who's The Man?": Masculinities and Police Stops, 18 *COLUM. J. GENDER & L.* (forthcoming 2009), available at <http://ssrn.com/abstract=1257183> (discussing police performance in terms of microperformances of masculinity).

138. See, e.g., John O. Calmore, *Displacing the Commonplace Intrusion of Whiteness From Within and Without: The Chicano Fight for Justice in East L.A.*, 92 *CAL. L. REV.* 1517, 1524–26 (2004) (discussing how racism is perpetuated in everyday life through routine practices); Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559, 1565 (1989) (describing an example of microaggression in a workplace environment); Daniel Solórzano,

Timothy Zick's exploration of "spatial tactics" in First Amendment law invokes "microgeographic principles" to manage one type of what I would call microinteractions.<sup>139</sup> In exploring how far beyond the confines of the home *Lawrence's*<sup>140</sup> protection of sexual activities extends, both Carlos Ball and Lior Strahilovitz turn to the management of visible microinteractions as a way of describing a category of privatized yet public space.<sup>141</sup>

Accounts of microaggressions and microinteractions vary in the attention they pay to a crucial aspect of these interactions. They sometimes leave unexamined where the identities that individuals bring to microinteractions come from; and while they may well examine the effects on individuals of problematic and stigmatizing microinteractions, they may or may not attend to the dialectical possibilities of using microinteractions to shift the shared frame within which microinteractions are understood to take place.

Some years ago, I suggested that exploring how we acquire and use social categories in our thinking might help to explain systemic resistance to altering gender schemas, and could suggest avenues for creating change.<sup>142</sup> Many occupational, familial, and social categories are tagged cognitively as prototypically male or female. Those tags are acquired from experience as part of the traits associated with the social categories. We do not reason down from a superordinal category about the traits of women, but up from the traits of basic level social categories that happen to be

Walter R. Allen & Grace Carroll, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 15–17 (2002) (discussing Dr. Charles Pierce's psychological theories of race and microaggression).

139. See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 452, 493–94, 498–99, 501 (2006) (discussing microgeography, spatial tactics, and the concept of "place" in First Amendment rights).

140. 539 U.S. 558 (2003).

141. Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. (forthcoming 2009); Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy after Lawrence v. Texas*, 54 DEPAUL L. REV. 671 (2005); see also John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001) (discussing spatial separation solutions to moral offenses).

142. Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOKLYN L. REV. 1073, 1076 (1999). This argument also appears in a short section of Marc R. Poirier, *Is Cognitive Bias A Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 492 (2003). A related argument about the perpetuation of a particular version of masculinity (one excluding sissies as positive role models for boys) was used to explain the cultural stakes in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003).

gendered as we encounter them in everyday life. For example, if we see only female nurses, nurses will be understood as prototypically female. Ongoing performances of these gender-tagged categories in real life, as well as correspondences among various gender-tagged social categories, constitute processes of homeostasis that make the gender tags difficult to eliminate. I suggested that disrupting the (re)production of the gender tags through counterexamples or counter images of the categories might help to reduce the resistance to a stereotypical person appearing in gender-tagged occupational and social roles, and might even eliminate the stereotypical gender associations altogether.

Applying the increasingly sophisticated social science understanding of cognitive bias and stereotyping processes, academics are now applying these principles to recommend approaches to the reduction of bias in various situations. Tristin Green, for example, adapts principles of workplace appearance discrimination law to her understanding of the way in which stereotypes are perpetuated in workplace microinteractions.<sup>143</sup> Jerry Kang, attuned to the way in which images of race perpetuate stereotypes, explores possibilities of manipulating the images in our cultural environment in order to reduce racial bias.<sup>144</sup>

Microperformances of marriage, including those of same-sex marriage, whether legally authorized or not, are likewise part of a "diffuse, collective practice of signification."<sup>145</sup> I believe that the possibility of social change in such a practice, whether viewed as a culture, a ritual, a language, or a gender role, "vitaly depends on shifts in individual performances, and eventually on larger-scale systematic and formal amendments of these cultural practices in the course of reproducing them."<sup>146</sup>

143. Green, *supra* note 136.

144. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

145. Poirier, *supra* note 19, at 384.

146. *Id.*; see also BUTLER, *EXCITABLE SPEECH*, *supra* note 7, at 127–63; David Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. L. REV. 894, 904–09 (1987) (arguing that theories of social change through law must be grounded in an understanding of diffuse social practices and the ways in which they both facilitate and hinder change); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 996–99 (1991) (describing the ever-present process of disintegration and recuperation of shared understandings among members of a community in terms of "slippage"); *supra* note 7 and accompanying text.

*C. Covering: And What Lies Underneath?*

Kenji Yoshino's scholarship often addresses themes of visibility and invisibility, identity and stigma, and identity performance.<sup>147</sup> Here, I focus on *Covering* (the article) and *COVERING* (the book). Yoshino follows a similar structure in both versions, identifying three successive stages in the legal stigmatization of gay and lesbian identity, which correspond to demands to convert,<sup>148</sup> to pass,<sup>149</sup> and to cover.<sup>150</sup> He then compares the existence of covering demands for gays and lesbians to covering demands in other areas of antidiscrimination law—race<sup>151</sup> and sex.<sup>152</sup> In the introductions and in theoretical discussions throughout both versions of his work, but especially towards the conclusions, Yoshino considers implications of his observations. Here however the two efforts differ

147. In addition to *Covering* (the article) and *COVERING* (the book), principal works involving visibility and identity include Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 *YALE L.J.* 485 (1998) and Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *COLUM. L. REV.* 1755 (1996).

148. See *COVERING* (the book), *supra* note 10, at 31–49 (discussing the means and methods used to attempt conversion of gay individuals and the pressure for gay individuals to convert); *Covering* (the article), *supra* note 9, at 784–811 (discussing attempts to convert gay individuals and the pressure for gay individuals to convert).

149. See *COVERING* (the book), *supra* note 10, at 50–74 (discussing the phenomenon of gay individuals passing as heterosexual); *Covering* (the article), *supra* note 9, at 811–36 (discussing the author's own experience with attempting to pass and feeling pressure to pass as heterosexual in a work environment, as well as the historical context of passing, and the legal contexts of passing).

150. See *COVERING* (the book), *supra* note 10, at 74–107 (discussing what Yoshino considers the final phase, covering, wherein openly gay individuals struggle about whether and how much to assimilate to mainstream culture through their appearance, affiliation, activism, and association); *Covering* (the article), *supra* note 9, at 836–64 (discussing covering in the cultural contexts and tensions that exist between gay culture and mainstream culture).

151. See *COVERING* (the book), *supra* note 10, at 111–41 (discussing the concept of covering as it relates to racial minorities and the author's own experiences as a racial minority faced with choices about covering); *Covering* (the article), *supra* note 9, at 875–900 (discussing covering behavior in racial minorities as well as the "antidiscrimination schism" existing between the gay community and racial minorities, the former of which often has a more difficult time passing and covering).

152. See *COVERING* (the book), *supra* note 10, at 142–64 (discussing the concept of covering and explaining that females feel pressure to cover by acting more like their male counterparts and also feel pressure to reverse-cover by submitting to participation in stereotypical female behaviors); *Covering* (the article), *supra* note 9, at 905–19 (discussing ways that race-based and sexual orientation-based covering both converge with and diverge from sex-based covering and discussing the reverse-covering expected from women).



considerably. COVERING (the book) "reframes Yoshino's argument in a way that seems simultaneously to expand and to undermine the central idea of [*Covering* (the article)]."<sup>153</sup> It moves from an exploration of a complexified equality rationale for protecting certain groups to a liberty rationale that apparently can be applied to any demand that an individual behave in a way that is not authentic to her/him.<sup>154</sup>

In *Covering* (the article), Yoshino presents a classical model of identity, which he then critiques. Yoshino provides a graphic representation of this classical mode: it looks like a target, with concentric circles around a bull's eye—"being" is at the center, the bull's eye.<sup>155</sup> This diagram suggests that an individual's being is both real and central. To be sure, Yoshino points out that some activities denominated covering are often experienced as deeply constitutive of identity, not as relatively superficial.<sup>156</sup> The classical model that conceives of a "being" at the center is already problematic.<sup>157</sup>

Indeed, at the end of *Covering* (the article), Yoshino explores the argument that "the concept of covering essentializes identity in a way that is ultimately damaging to its possessor."<sup>158</sup> The idea that there is underlying identity being covered "may misdescribe the way in which identities are experienced."<sup>159</sup> Yoshino provides the example of Ann Hopkins, the plaintiff in *Price Waterhouse v. Hopkins*,<sup>160</sup> a celebrated employment

153. Robinson, *Uncovering Covering*, *supra* note 10, at 1812.

154. *See id.* at 1818 (pointing out that authenticity lies at the center of the new form of civil rights Yoshino declares, but that Yoshino fails to define authenticity).

155. *See Covering* (the article), *supra* note 9, at 774 (depicting graphically the three assimilationist demands of conversion, passing, and covering).

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

157. *See id.* (presenting other theoretical constructs, which he calls the strong and weak performative models of identity); *see also id.* at 865–75 (suggesting that a weak performative model, in which covering sometimes is constitutive of identity, is probably accurate, though Yoshino stops short of elaborating in any detail).

158. *Id.* at 933.

159. *Id.*

160. 490 U.S. 228 (1989), *superseded in part by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000(e)–2(m). The Court held that (1) when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid finding liability by proving by a preponderance of the evidence that it would have made the same decision if it had not taken plaintiff's gender into account; and (2) that evidence was sufficient to establish that sexual stereotyping played a part in evaluating the plaintiff's candidacy. *Id.*; *see Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–102 (2003) (interpreting the evidentiary standard of the Civil Rights Act of 1991 in mixed-motive Title VII cases).

discrimination case that turned, *inter alia*, on holdings about sex stereotyping of an employee by the employer.<sup>161</sup> Hopkins prevailed on an argument that if she could show that she had been denied partnership in an accounting firm in part because she did not conform to stereotypes of female behavior, such a motive would constitute prohibited sex discrimination under Title VII, unless the employer could show that the same decision would have been made without regard to her gender.<sup>162</sup> Yoshino argues, "[w]e can easily imagine Hopkins taking umbrage at the allegation that she was covering some deeper womanhood in being an aggressive, intelligent, high-power manager. She might say that she was just being herself."<sup>163</sup> Yoshino thus posits a hypothetical individual's experience of non-stereotypical but authentic traits against a legal theory that requires us first to identify certain characteristic traits of our legally protected categories in order to ascertain when impermissible coerced covering has occurred. "If feminine behavior is protected because it is constitutive of being a woman, then nonfeminine women like Hopkins will be told that they are covering simply because they do not conform to that stereotype."<sup>164</sup> More generally, if we identify particular traits as constitutive of identities, we unfortunately "essentializ[e] those identities as always embodying those traits."<sup>165</sup> Then "[t]he real question will arise of how to determine which traits will 'count' as traits that ought to be protected against covering demands."<sup>166</sup>

Some individuals will experience their covering behavior as compelled, that is, modulated systematically in order to assimilate.<sup>167</sup> Others may experience the same behavior as not an accession to others'

---

161. See *Covering* (the article), *supra* note 9, at 905–13, 933 (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and elaborating on the identity of the plaintiff, Ann Hopkins).

162. See *Hopkins*, 490 U.S. at 258 (plurality opinion) (establishing that gender played a motivating part shifts burden of proof to defendant); *id.* at 255–58 (upholding finding that sex stereotyping played a part in the employment decision); *id.* at 272 (O'Connor, J., concurring) ("She [Ann Hopkins] had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision.").

163. *Covering* (the article), *supra* note 9, at 933.

164. *Id.*

165. *Id.*

166. *Id.* at 937.

167. See Horwitz, *Uncovering Identity*, *supra* note 10, at 1292–94 (stating that sometimes the covering performance is compelled).

norms, but as their own individual authentic expression of their identity.<sup>168</sup> Yoshino briefly explores an approach to describing the harm of covering by letting the individual determine whether s/he feels s/he is being forced to cover.<sup>169</sup> But Yoshino points out that this places the burden on minority groups to justify their own behavior, which he finds unacceptable.<sup>170</sup>

I mention in passing another difficulty with an authenticity-based account of covering. When we protect only certain aspects of identity—race, gender, and to some extent sexual orientation—why those? An approach offered by others to this question involves protecting traits that correspond historically to subordinated identities.<sup>171</sup> Of course, then we have to sort out what those are or ought to be.

Yoshino ultimately turns to one of Goffman's ideas as a way of accounting for the harm of coerced covering.<sup>172</sup> Yoshino reminds us that Goffman views social presentations not as an activity of a performer standing alone but as "a gesture between a performer and a highly particularized audience."<sup>173</sup> One therefore has to take account of "not only covering performances made by the performer, but of the covering demands made by the audience."<sup>174</sup> Shifting the focus from the performer to the

168. *See id.* (arguing that Yoshino has not sufficiently explored the question of when an individual's covering or flaunting behavior is just strategic, as opposed to problematically coerced).

169. *Covering* (the article), *supra* note 9, at 936

170. *See id.* ("In such circumstances, leaving it to the individual to determine whether she is covering or not risks blaming the victim. It smacks yet again of placing the responsibility for identity on the individual who is being disadvantaged on the basis of that identity.").

171. *See* RICHARD R. FORD, RACIAL CULTURE: A CRITIQUE 123 (2005):

Anti-discrimination law should be refined so as to recognize only those differences attributable to the production of formal status hierarchy, for the purpose of eliminating or reducing the ill effects of such hierarchies. Difference discourse, by metastasizing status in a thick social identity, distracts from and confuses the vital task of correcting status hierarchy.

*Id.*; *see also* Richard Ford, *Race As Culture? Why Not?*, 47 UCLA L. REV. 1803, 1803 (2000) (challenging the attempt to expand civil rights by protecting cultural differences and identity correlated traits, and arguing that "antiracism . . . is best understood as a response to a specific history of subordination"). *See generally* Green, *supra* note 136; Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2006).

172. *See Covering* (the article), *supra* note 9, at 936–37.

173. *Id.* at 937.

174. *Id.*

audience, Yoshino argues that we should be asking whether covering demands are being made, not whether the agent is being forced to cover.<sup>175</sup>

Russell Robinson points out one problem with this proposed focus on covering demands: we often cannot tell what would constitute a covering demand.<sup>176</sup> He observes, "Rarely does covering stem from something clean and unyielding enough to be called a 'demand.'"<sup>177</sup> Often, "it is perceived by the individual based on her prior experience, interpretations of ambiguous statements, and readings of body language, silences and gestures, among other things."<sup>178</sup> Overall, Robinson argues, the psychology of covering is complex, especially once we think of it as an interactive process.<sup>179</sup> I agree with Robinson's view that Yoshino has not provided a particularly nuanced or realistic account of covering demands.<sup>180</sup>

Yoshino's proposal to focus on covering demands has intuitive appeal, in that it is congruent with our notion of discrimination and stigmatic stereotyping and wrongful action, as a harm imposed by others on individuals who are entitled to pursue their own chosen identity performances. Perhaps this very intuitive appeal is unfortunate, for it leads us to focus on the stereotypers as wrongful actors upon innocent and passive victims, and to overlook the dynamic potential that always is present in microperformances of identity. The individual to whom a covering demand is addressed is always engaged in a dramaturgical, diachronic, dialectic process, as Goffman's careful descriptions suggest. S/he can in fact her/himself sometimes play some role in shifting the (re)production of stigmatized identity. So we must approach Yoshino's notion of covering demands as the source of the problem with caution.

At least, though, in *Covering* (the article), Yoshino arrives at the point of problematizing covering as an ongoing, iterative identity process. In *COVERING* (the book) he appears to take a step backwards into the classical model. He "argue[s] for a new civil rights paradigm that moves away from

175. See *id.* ("Asking whether *B* is covering seems much less relevant to an anti-homophobic project than asking whether *B*'s audience is demanding that he cover.").

176. Robinson, *Uncovering Covering*, *supra* note 10, at 1836–38

177. *Id.* at 1836.

178. *Id.* at 1835.

179. See *id.* at 1838 (discussing the complex internal and external variables involved in covering).

180. See *id.* (arguing that if Yoshino had developed an account of the internal psychological dynamics of covering, his account would have been "more realistic and nuanced").

group-based equality rights toward universal liberty rights . . . ."<sup>181</sup> The new model is all about a "quest of authenticity."<sup>182</sup> Yoshino seeks to found his new paradigm on a universal "desire for authenticity, our common human wish to express ourselves without being impeded by unreasoning demands for conformity."<sup>183</sup> At the end of *COVERING* (the book) Yoshino goes full throttle into authenticity, invoking a distinction between the True Self and the False Self of psychoanalyst D.W. Winnicott.<sup>184</sup> He writes, "Winnicott posits that each of us has a True Self that must be expressed for us to have the feeling of being switched on, of being alive."<sup>185</sup> The False Self "embodies our ambivalence about assimilation, which is both necessary to survival and obstructive of life."<sup>186</sup> The goal, therefore, is to keep assimilation to a minimum. Yoshino argues that people respond intuitively to Winnicott's terms, thus establishing the universality of a desire for authenticity.<sup>187</sup>

First of all, it is not clear to me that everyone shares a desire for authenticity. Some folks have a desire for power, and authenticity would only get in the way.<sup>188</sup> Some folks may understand that there is no self to

181. *COVERING* (the book) *supra* note 10, at 27.

182. *Id.*

183. *Id.* at xii; *see also* Horwitz, *Uncovering Identity*, *supra* note 10, at 1292 ("[T]he unmistakable image at the core of [Yoshino's] book is that of a literally self-centered quest for individual authenticity.").

184. *See COVERING* (the book), *supra* note 10, at 184–86. *But cf.* Nussbaum, *supra* note 10, at 25 (arguing that Yoshino has not given a sufficiently subtle account of Winnicott, who uses True Self/False Self in different ways in different parts of his work). It may well be accurate to say that many people think of themselves as having a separate, stable core identity, and that Winnicott at times refers to the longing after a better expression of that supposed authentic core. That is a different matter altogether from saying that there really *is* a stable and authentic core identity outside of ongoing social processes of mutual interaction and performance. Yoshino's invocation of the quest for authenticity occupies only a few pages of *COVERING* (the book) though they are strategically placed in introductory and concluding sections, and commentators have correctly noted their importance to his revised account of the process of covering. All the same, perhaps Yoshino could clarify in the future, locating the individual sense of authenticity he relies on within an ongoing process of negotiating the self over time.

185. *COVERING* (the book), *supra* note 10, at 186.

186. *Id.*

187. *See id.* ("When I describe the uncovered self in Winnicott's terms, many people respond immediately with stories that attest to the concept's universality.").

188. *See* ROBERT GREENE, *THE 48 LAWS OF POWER* xvii–xxii (1998) (providing a modern day version of principles to guide a Machiavellian approach to one's life); *see also* ELEANOR D. PAYSON, *THE WIZARD OF OZ AND OTHER NARCISSISTS: COPING WITH THE ONE-WAY RELATIONSHIP IN WORK, LOVE, AND FAMILY* 1–34 (2002) (describing a narcissistic personality type concerned excessively with self).

hold an identity, and that that position need not lead to an unprincipled relativism but can form the basis of a clear and ethical life.<sup>189</sup> For instance, Paul Horwitz, in critiquing Yoshino, invokes Charles Taylor's account of human identity as fundamentally dialogical.<sup>190</sup> Horwitz argues that "Yoshino's treatment of authenticity and identity leaves much to be desired."<sup>191</sup> He points out that elaboration of authentic identity is not necessarily the most important work we can do, and that "[o]ur truest, most authentic selves are often those we form in moments of dialogue and interaction with others."<sup>192</sup> For Horwitz, the self is fluid, complex, and irreducibly social.<sup>193</sup> Moreover, "identity, whatever its sources, is not simply a thing we possess; it is a thing we use."<sup>194</sup> We may ethically choose to highlight or submerge one aspect or another of our self; and it is not clear which of these is our true self.<sup>195</sup>

---

189. See BARRY MAGID, *ENDING THE PURSUIT OF HAPPINESS: A ZEN GUIDE* 22–27 (2008) (presenting the Buddhist teaching that the self is defined by others and one's relation to them, that the self is actually the "thousand guises" of the self, and that an attempt to grasp the essence of the self is misguided). This principle of no separate self, fundamental to Buddhist teachings, need not lead to a relativistic and unethical life. See NORMAN FISCHER, *TAKING OUR PLACES: THE BUDDHIST PATH TO TRULY GROWING UP* 141–84 (2003) (setting forth the principles of ethical conduct in a Buddhist system of ethics); JOHN DAIDO LOORI, *THE HEART OF BEING: THE MORAL AND ETHICAL TEACHINGS OF BUDDHISM* 50–116, 132–65, 169–250 (1996) (describing the Buddhist Precepts, the vows taken at initiation, their ethical significance, and a modern interpretation of these precepts).

One can also develop an ethics within postmodernism. See, e.g., Gowri Ramachandran, *Book Review: Manliness by Harvey Mansfield*, 19 *YALE J. L. & FEMINISM* 201, 217–18 (2007) (presenting an ethical postmodernism). Ramachandran writes:

Firm opposition to a rigid role or identity may not necessarily equate to extreme forms of individualistic libertarianism and anarchism, or even nihilism. Postmodern theorists are not inspired by Nietzsche and Foucault alone . . . . A better reading perhaps is that postmodernists and queer theorists are in favor of ethics or morals, but have the humility to realize that an appropriate ethics and morality is contingent on the society we currently inhabit . . . . So they limit themselves to exposing the fact that these social roles, moralities, and ethical rules are ones we choose, that we bear responsibility for, and that are therefore always subject to contest.

*Id.*

190. Horwitz, *Uncovering Identity*, *supra* note 10, at 1290–92 (discussing CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1992)).

191. *Id.* at 1284.

192. *Id.*

193. *Id.*

194. *Id.* at 1292. As Martha Nussbaum points out, covering can sometimes be no more than an exercise of discretion, and discretion is often a social good. Nussbaum, *supra* note 10, at 25.

195. Horwitz, *Uncovering Identity*, *supra* note 10, at 1294.

Identity performance may be modulated depending not only on the immediate audience, but also on the place in which microperformances occur. Of relevance here is a fascinating sociological study of gay male identity in a New Jersey suburb, *Peacocks, Chameleons, Centaurs: Gay Suburbia and the Grammar of Social Identity*.<sup>196</sup> Author Wayne Brekhuis discerns three approaches to being gay in a city an hour from New York City. One group, whom he dubs "peacocks," are visibly gay all the time.<sup>197</sup> Another, the "centaurs," have integrated their gayness into their suburban lives.<sup>198</sup> A third, the "chameleons," vary their identity performance around their gay identity depending on their location at the time.<sup>199</sup> In the suburbs, they are much less visible than in gay neighborhoods of New York City.<sup>200</sup> Brekhuis seeks to develop from his study a more general theory of differential identity performance, to develop "a grammar of the microecology of identity."<sup>201</sup> The more theoretical aspects of Brekhuis' work take us too far afield of this article, but they are notable as a contemporary and non-deconstructionist approach to describing identity processes that rejects the kind of essentializing that Yoshino has included in *COVERING* (the book).

Brekhuis takes his ethnographic observations in the direction of a theory of socially-situated identity. I would like to take them in a slightly different direction, albeit one that is largely beyond the scope of this article. Clearly at least some folks modulate their microperformances of identity depending on place, and GLBTQ folks are no exception. For the same reasons, GLBTQ folks have sometimes physically relocated themselves to communities where their everyday performances of identity will be more in sync with those of their neighbors.<sup>202</sup> The interactional and dialogical

---

196. WAYNE K. BREKHUIS, *PEACOCKS, CHAMELEONS, CENTAURS: GAY SUBURBIA AND THE GRAMMAR OF SOCIAL IDENTITY* (2003).

197. *Id.* at 35–47.

198. *Id.* at 74–94.

199. *Id.* at 48–73.

200. *See id.* at 50 (describing chameleons as individuals who "live in heterosexual space and commute to gay space to 'turn on' their gay selves").

201. *Id.* at 1. In fact, Brekhuis consciously models on Goffman his attempt to generalize from specific observations of highly local performances to a more general theory of identity. *Id.* at 9.

202. *See id.* at 10 (exploring differences between urban and suburban environments influence on gay identity); *see also* Lauren Berlant & Michael Warner, Sex in Public, in *PUBLICS AND COUNTERPUBLICS* 187, 191–92, 203–04 (Michael Warner ed., 2002) (describing how public sex shops and other visible places of sexually-charged encounters helped to create urban neighborhoods hospitable to open GLBT identity); MANUEL CASTELLS, *Cultural Identity, Sexual Liberation and Urban Structure: The Gay Community*

aspects of microperformances of identity thus generate interjurisdictional movement. This in turn can eventually create communities that are locally differentiated around identity performance and become differentiated around the lexicons with which these performances are interpreted. These jurisdictions may then generate different local politics.<sup>203</sup> If this sounds too theoretical, we can appreciate the evolution of gay neighborhoods in San Francisco (the Castro) and New York City (the West Village and then Chelsea) and the cultural differentiation of various localities in Colorado<sup>204</sup> as such phenomena. The current controversy in Ocean Grove, New Jersey, over civil unions in its beachfront Pavilion<sup>205</sup> is the result of migration by gay and lesbian couples in an attempt to secure a welcoming place to live, against a reassertion by a major real estate owner and manager of that place's traditional strict Methodist identity.

### III. Regarding Same-Sex Couples: Some Observations

Three specific examples show some of the ways microperformances by same-sex couples are implicated in legal disputes over the recognition of

---

*in San Francisco*, in *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 138–70 (1983) (studying the concentration of gay populations in certain neighborhoods in San Francisco); CARL F. STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* 94–95 (2003) (discussing gay and lesbian migrations); Kenneth L. Karst, *Local Discourse and the Social Issues*, 12 *CARDOZO STUD. L. & LIT.* 1, 21–22 (2000) (discussing how public places such as gay bars created a sense of community and shared identity); Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf*, *supra* note 134, at 406 (describing the importance of visibility in public places to GLBT identity); *id.* at 415–17 (describing gay and lesbian migrations to local neighborhoods and communities); Robert R.M. Verchick, *Same-Sex and the City*, 37 *URB. LAW.* 191, 192–94 (2004) (noting and exploring consequences of the migration of GLBT folk to certain urban centers). *See generally* GARY J. GATES & JASON OST, *THE GAY & LESBIAN ATLAS* (2004) (using 2000 census data to demonstrate in detail the spatial distribution of gay and lesbian couples).

203. *See, e.g.*, Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 *HOW. L. J.* 149, 169–94 (1995) (describing the clustering of gay and lesbian residents in specific urban neighborhoods and consequent eventual local political power). *See generally* BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 6 (2008) (discerning an increasing trend for Americans to move to communities full of like-minded neighbors, and decrying the effects of this ideological sorting on national politics).

204. *See* William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011, 1042–45 (2005) (noting that the politics of this differentiation of culture led to Colorado's constitutional Amendment 2, which was successfully challenged in *Romer v. Evans*, 517 U.S. 620 (1996)).

205. *See infra* Part III.B.



same-sex marriage. The first is an Eleventh Circuit case, *Shahar v. Bowers*,<sup>206</sup> in which public employment with the Georgia State Attorney General's Office was denied to a lesbian because she would appear to the public to be married to her same-sex partner. The second is an ongoing controversy in Ocean Grove, New Jersey, over whether New Jersey's Law Against Discrimination requires a religiously-affiliated corporation to rent a beachfront Pavilion, often used for weddings, to same-sex couples who live in the community, so that they may celebrate civil union ceremonies there. The third example is a mass communication, a cautionary "Joint Advisory" e-letter issued jointly by LGBT advocacy groups on the occasion of the momentous 2008 California Supreme Court decision on marriage equality.<sup>207</sup>

#### A. *Shahar v. Bowers*<sup>208</sup>

Robin Shahar (née Brown),<sup>209</sup> while a law student at Emory, received an offer of employment from the State of Georgia's Department of the Attorney General.<sup>210</sup> During the summer before her employment was to begin, she married her female partner in a Jewish Reconstructionist ceremony, in a public park in South Carolina, with some 250 guests attending.<sup>211</sup> She invited two of her future work colleagues to the wedding

206. 114 F.3d 1097 (11th Cir. 1997) (en banc).

207. *Make Change*, *supra* note 16 (providing guidance to the GBLT community following *In re Marriage Cases*, 183 P.2d 384 (Cal. 2008)).

208. 114 F.3d 1097 (11th Cir. 1997) (en banc).

209. Robin Brown and her partner Francine Greenfield both changed their last name to Shahar after they were married. *Shahar*, 114 F.3d at 1100 & n.4. They understood "Shahar" to mean in Hebrew "the act of seeking God." *Shahar v. Bowers*, 70 F.3d 1218, 1128 n.1 (11th Cir.) (Kravitch, J., dissenting), *rev'd*, 114 F.3d 1097 (11th Cir. 1997) (en banc).

210. 114 F.3d at 1100.

211. *Id.* Yoshino provides a description of the facts in *Shahar* derived from several sources that differs in some respects from the court's description. COVERING (the book), *supra* note 10, at 93–101. Mary Anne Case considers an earlier round of the *Shahar* case in her discussion of visible pair bonds in public employment discrimination. Case, *supra* note 49, at 1669–71. For an analysis of *Shahar* in terms of whether its application of First Amendment free speech in the public employment context is correct, see generally Bryan H. Wildenthal, To Say "I Do": *Shahar v. Bowers*, Same-Sex Marriage, and Public Employee Free Speech Rights, 15 GA. ST. U. L. REV. 381 (1998). For a critique of the *Shahar* court's excessive reliance on discriminatory public opinion, see generally Michele L. Booth, Comment, *Shahar v. Bowers: Is Public Opinion Transformed into a Legitimate Government Interest when Government Acts as Employer?*, 78 B.U. L. REV. 1235 (1998).

and spoke openly about the future wedding and her marriage.<sup>212</sup> In various other ways she held herself out to be married.<sup>213</sup> The Department revoked her employment offer.<sup>214</sup> Shahar then challenged the revocation on various federal constitutional grounds.<sup>215</sup>

In affirming the government's motion for summary judgment and dismissing Shahar's motion for summary judgment, the Eleventh Circuit *en banc* majority focused on Shahar's claims of intimate association and expressive association.<sup>216</sup> Assuming *arguendo* that these claims were valid,<sup>217</sup> it held that they were, nevertheless, outweighed by the government's interest in the effective operation of the Attorney General's Office.<sup>218</sup> Shahar's behavior, according to the Attorney General, was characterized by the following: it had a realistic likelihood of affecting her credibility and the Department's credibility; it might affect the Department's ability to handle certain controversial matters, including claims to same-sex marriage licenses, homosexual parental rights, employment-based insurance coverage of domestic partners, and enforcement of Georgia's sodomy statute; and it might harm public perception of the Department.<sup>219</sup> In addition, the court observed, Shahar's failure to appreciate the importance of appearances and the need to avoid

212. *Shahar*, 114 F.3d at 1100.

213. *Id.* at 1100–01, 1105 n.17, 1107 (explaining that Shahar likely engaged in sexual activity with her partner, used the words "marriage" and "wedding," exchanged and wore a wedding ring, listed herself as engaged on her job application, changed her surname, obtained a married rate for insurance, jointly owned a house, and cohabitated).

214. *Id.* at 1101.

215. *Id.* (grounding the challenge in free exercise of religion, freedom of association, equal protection, and substantive due process).

216. *Id.* at 1099, 1102 (noting quickly that "even when we assume, for argument's sake, that either the right to intimate association or the right to expressive association or both are present, we know they are not absolute").

217. *Id.* at 1100, 1102, 1106.

218. The majority analyzed the case as a government employment case, in which the government interest in its operations must be balanced against the employee's interest in free speech. *Id.* at 1102 (citing Board of County Commr's, Wabaunsee Cy., Kan. v. Umbehr, 518 U.S. 668 (1996); Connick v. Myers, 461 U.S. (1983); Pickering v. Board of Education of Township High School District, 391 U.S. 563 (1968)).

219. *Shahar*, 114 F.3d at 1104–05, 1105 n.16. In its more extended discussion of the propriety of allowing public perception to influence the employment of public officials, the court relied principally on a case upholding the firing of a sheriff's clerical employee after he made an off-duty statement that he participated in recruiting activities of the Ku Klux Klan. *Id.* at 1108–11 (discussing McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985)).

bringing controversy caused the Attorney General to lose confidence in her judgment.<sup>220</sup>

This case is all about appearances, the public appearances of being a same-sex couple, and a married one at that.<sup>221</sup>

Even if Shahar is not married to another woman, she, for appearance purposes, might as well be. We suppose that Shahar could have done more to "transform" her intimate relationship into a public statement. But after (as she says) "sanctifying" the relationship with a large "wedding" ceremony by which she became—and remains for all to see—"married," she has done enough to warrant the Attorney General's concern. He could conclude that her acts could give rise to a likelihood of confusion in the minds of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues.<sup>222</sup>

This central passage is in important measure about to whom the law assigns authoritative control over the interpretation of Robin Shahar's behavior, by herself and with her partner Francine. The court implied that Shahar created the conflict by making a "public statement" out of an "intimate relationship."<sup>223</sup> Shahar pointed out that her wedding and marriage occurred in a non-employment-related context and that "she took no action to transform her intimate association into a public or political statement."<sup>224</sup> Moreover, Shahar never claimed that any civil or legal consequence would or should follow from her religious marriage.<sup>225</sup>

220. *Id.* at 1105–06.

221. There's that troubling word "public" again.

222. *Id.* at 1107.

223. *Id.*

224. *Id.* at 1106 (quoting *Shahar*).

225. *Id.* Nor did she ever seek a civil marriage in Georgia or claim another of the benefits of civil marriage. *Shahar*, 114 F.3d at 1118 (Godbold, J., dissenting); *id.* at 1127 n.3 (Birch, J., dissenting).

Shahar did however invite future work colleagues to the wedding, describe herself as "engaged" on an employment form, and talk about the marriage. *Id.* at 1105–18. She was not so silent about her non-work related performance as James Dale. Dale, it may be recalled, came out in the context of his life as a Rutgers University student, which was reported in the newspapers. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45 (2000). But he never came out or in any way indicated homosexuality in the places and spaces controlled by the Boy Scouts of America (BSA). *Id.* Nevertheless, the Supreme Court interpreted Dale's membership and (tellingly) his physical presence in a Boy Scout uniform as sufficiently problematic, in terms of the message the BSA wished to convey, to allow the BSA claim of expressive association to trump Dale's argument that he had confined his visible identity as a gay man to a sphere other than that of the BSA. *Id.* at 644. See Christopher S. Hargis, Note, *The Scarlet Letter "H": The Brand Left after Dale*, 11 *LAW & SEXUALITY* 209, 224–40 (2002) (arguing that Dale treats homosexuals as branded, making

Given this article's discussion of the way in which identity involves microperformances and recognition by others, it is hard to accept altogether Shahar's account of her actions, if she means to say that her actions were not intended to be available to the public as an interpretive audience to whom and for whom she was offering microperformances of the identity she claimed. Of course her actions were public. Her wedding was public, and her life with her partner, although intimate, was also in many ways public. Wedding ceremonies connect the couple both to whatever public attends the ceremony or is aware of it, and to whatever tradition the ceremony invokes and (re)produces.<sup>226</sup> Afterwards, many of the small microperformances of married life reinforce the kinship categories (re)produced by marriage, and make them normal and natural.<sup>227</sup> Shahar surely intended to "transform" her relationship and her identity through the wedding as well as through the prior and subsequent microperformances that she and Francine engaged in as part of taking on the lived role of a couple.

---

their very existence an expressive activity); Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1016–20 (2000–2001) (discussing the impact of Dale's mere presence on the Boy Scouts, according to the analysis in *Boy Scouts of America*); Poirier, *Gender, Place, Discursive Space*, *supra* note 134 (discussing the Court's description of Mr. Dale as a disruptive presence in *Boy Scouts of America*).

226. See Mae Kuykendall, *Emersonian Family Values: Claims to Duration and Renewal in American Narratives of Divorce, Love and Marriage*, 18 HASTINGS WOMEN'S L.J. 69, 94 (2007) ("[T]he practice of wedding vows is a cultural rehearsal of an embedded way of reading and reciting the moral aspirations of marriage."). This is so even when the participants in the wedding are not especially religious. Kuykendall notes:

The use of religious ritual, often by those who borrow religion for the day, is not, in the common hold of Americans on the format of wedding days of different traditions, about religious faith. It is more correctly a borrowed language for a densely packed set of aspirations that contain within them a form of claims to duration and to happiness.

*Id.* at 101.

227. See Leslie A. Baxter & Dawn O. Braithwaite, *Performing Marriage: Marriage Renewal Rituals as Cultural Performance*, 67 SOUTHERN COMMUNICATIONS J. 94, 94–95 (2002) (describing marriage as an ongoing discursive accomplishment achieved through a myriad of interaction practices); Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. CIV. R.-CIV. LIB. L. REV. 385, 416–19 (1999) (describing three ways in which interactions with others deepen the sense of the reality and validity of the marriage—conversations with others, interactions with strangers, and encounters with printed forms); see also Poirier, *Cultural Property*, *supra* note 19, at 398–400 (discussing Kuykendall, *Resistance to Same-Sex Marriage*).

This does not mean that Shahar would lack a plausible argument, if only it were framed a bit differently. It will help if we notice that the court's majority approached the issue of interpretive community in terms of a blunt private/public dichotomy ("intimate association"/"public statement"), with any significant publicity resulting in the loss by the one who went public of control over the consequences.<sup>228</sup> We might instead ask for which publics—in Goffman's terms, in what contexts, on what stages—should we understand Shahar's identity performances as part of a married couple to be permissibly legible.<sup>229</sup> What Shahar could plausibly argue is that she did not mean for her public performances of identity as a Jewish lesbian in a committed relationship to be available to the interpretive community delimited by times and places when she was "at work," nor for it to be a statement about the matters that she would be engaged in "at work." The contexts in which they could be misunderstood to be claims about legal relationship were "limited," as Judge Kravitch noted in dissent in the panel opinion.<sup>230</sup> The court's en banc majority opinion, thus,

228. See *Shahar*, 114 F.3d at 1107 (explaining that Shahar's actions allowed the Attorney General to "conclude that her acts would give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues").

229. It will be helpful here to introduce the concept of counterpublics, and perhaps especially of "subaltern counterpublics," as first articulated by feminist philosopher Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 107, 123–24 (Craig Calhoun ed., 1992). Fraser critiques as insufficient the theory of a bourgeois public sphere separate from the state but engaging in important, formative, politically determinative civic discourse, a theory set out in JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger with Frederick Lawrence trans., 1989). Fraser argues that such a supposedly uniform and unified public inevitably excludes subaltern identities such as gender, often in a way that remains unacknowledged and therefore cannot even be addressed. Fraser, *supra*, at 117–21. Separate groups, with their own public civic discourse, can help individuals to engage in a civic discourse informed by their own experience as subordinated groups. This discourse will be relatively undistorted by the unacknowledged pressure of the overarching dominant public sphere. There "subaltern counterpublics," as Fraser names them, are "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests, and needs." *Id.* at 123 (footnote omitted). Subaltern counterpublics "emerge in response to exclusions within dominant publics" and "help to expand discursive space." *Id.* at 124. In the long run, despite their separateness, subaltern counterpublics militate against separatism, precisely because they are public. *Id.* We will return to the idea of the politics of subaltern counterpublics in our examination of *Make Change* in Part III.C *infra*, and of Judith Butler on identity performance, in Part IV.B *infra*.

230. *Shahar*, 70 F.3d 1218, 1230 (11th Cir. 1995) (Kravitch, J., dissenting); see also Booth, *supra* note 211, at 1258 (contrasting the level of publicity involved in *Shahar* with

undermines Shahar's ability to control the consequences of her choice to be visible as part of a same-sex couple, once she is public about it anywhere at all. She is not allowed to cover at work, to use Yoshino's term. Or, as I have described the issue elsewhere, she is not allowed to use a zoning strategy to control the consequences of her microperformances of lesbian identity by delimiting separate discursive spaces that are not in communication with one another.<sup>231</sup>

The court's refusal to accord Shahar control over the interpretation of her microperformances is reflected in its decision, in writing the opinion, to use scare quotes throughout to refer to Shahar's "wedding" and "marriage" and to use wedding and marriage without the scare quotes only to refer to legally-sanctioned (and therefore, given the state of the law in Georgia, opposite-sex) marriages.<sup>232</sup> The court graphically distances itself from the possibility that a same-sex marriage recognized by a religious entity ought to be given some weight as a constitutional matter, even when not legally recognized by the civil law.

In dissent, Judge Godbold argues that the Shahars were validly married in the Jewish Reconstructionist tradition, even if not under the civil law of Georgia.<sup>233</sup> There was a "duality of meaning" as to "marriage" and "wedding" as well as "spouse."<sup>234</sup> In Judge Godbold's view the Attorney General acted in serious ignorance of Shahar's religious tradition, without

the much broader publicity at issue in one of the supposedly controlling precedents, *McMullen v. Carson*, 754 F.2d 936 (5th Cir. 1985)).

231. See Poirier, *Cultural Property*, supra note 19, at 407–08 (discussing spatial separation as a way of managing signal congestion).

232. *Shahar*, 114 F.3d at 1099 n.1 ("For clarity's sake, we use the words 'marriage' and 'wedding' (in quotation marks) to refer to Shahar's relationship with her partner; we use the word marriage (absent quotation marks) to indicate legally recognized heterosexual marriage."). Note that the court refers here to legally sanctioned marriage as "heterosexual marriage." *Id.* To be technically precise, Georgia did not limit marriage to heterosexuals, but to opposite sex couples (assuming the male/female binary to be a universal description of human bodies). *Id.* Thus, the court could be said to be using sexual orientation language ("heterosexual," presuming sex2 sexual activity between married partners) when a more accurate choice of language would have used terms for sex1 (a male and a female) to describe the requirements of Georgia's marriage law.

233. *Id.* at 1118–21 (Godbold, J., dissenting) (giving consideration to the specifics of the religious nature of the Shahars' marriage as articulated at greater length in the panel opinion below). Judge Godbold concludes that "the critical facts are that Shahar and her partner are lifelong adherents to Judaism and good-faith, dedicated participants in the Reconstructionist Movement; the Reconstructionist Movement is a significant movement within American Judaism; and it regards same-sex marriage as acceptable and desirable in preference to couples living together without marriage." *Id.* at 1120.

234. *Id.* at 1121, 1122 n.3.

even trying to find out more about it.<sup>235</sup> Thus, the Attorney General could not properly carry out the constitutionally required balancing test.<sup>236</sup> According to Godbold, the *en banc* majority erred in upholding the Attorney General's uninformed interpretation and excluding Shahar's interpretation "as though it did not exist for Shahar and others of her faith."<sup>237</sup>

The controversy here concerns not simply the acts of the Shahars but the words and lexicon used to describe and interpret them and the broader claims ascribed to that choice of words. Judge Kravitch in her dissent in the panel opinion even explored the possibility that there might be a translation issue: that the controversy might be the result of a choice of using the language of civil marriage to describe in English a fundamentally Jewish ritual and status.<sup>238</sup> Judge Kravitch also pointed out that "marriage" can mean merely "an intimate or close union," without the connotations of legal status ascribed to it by the putative interpreting public in the mind of the Attorney General.<sup>239</sup> The judge noted, moreover, that there may be no better English term to express the nature of the relationship, as Robin Shahar's partner stated in deposition about the use of the term "engaged."<sup>240</sup> We can, thus, understand the Attorney General's claim as based in a specific anxiety about the control of the public interpretations of publicly visible identity performances by a same-sex couple. It asserts control over these performances (and the labels that generate them and that they may generate) because Robin Shahar was to become a public employee. Judge

235. *See id.* at 1122 ("The Attorney General and his staff acted in ignorance of the religious roots of the association that Shahar planned, the centrality of it to her faith, and the recognition of it by the religion to which she was committed . . .").

236. *See id.* ("The actions by the Attorney General do not meet the constitutional requirements of reasonableness.").

237. *Id.* at 1121.

238. *Shahar*, 70 F.3d at 1230 n.7 (Kravitch, J., concurring in part and dissenting in part) (discussing deposition testimony of Rabbi Friedlander, who officiated at the Shahars' wedding, about the translation of the Hebrew terms).

239. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

240. *Id.* In response to a question about the use of the word "engaged," Ms. Greenfield stated:

We are limited by language. It is sort of derived for heterosexuals. We use the language because we don't have a better one to explain what we are talking about, but it describes that there is a sense of a commitment relationship, there is a union to take place, this person is part of my family . . . .

*Id.* (quoting Greenfield deposition).

Kravitch responded to this implied claim tersely: "Neither 'marriage' nor 'wedding' is a proprietary legal term."<sup>241</sup>

Judge Godbold, in his *en banc* dissent and in his earlier majority opinion for the Eleventh Circuit panel, does not ground the importance of the wedding and marriage to the couple in their personal desire to express their commitment to one another or to the world; rather, he expends considerable energy exploring the validity of the wedding and marriage within a recognized religious tradition and the commitment of the couple to that tradition.<sup>242</sup> The identity Shahar claims protection for deserves protection because it is grounded in her sincere and longstanding participation in a traditional religious group.<sup>243</sup> (Well, not altogether

241. *Id.* See generally Poirier, *Cultural Property*, *supra* note 19 (arguing that the traditionalist claim to restrict access to marriage can best be understood as a type of cultural property claim, even though there are very good reasons not to grant that claim).

242. Thus Judge Godbold wrote in his panel decision:

The intimate association Shahar asserts is not based upon false or sham assertions of religious belief, or hasty decision, or overnight conversion. She and her partner grew up in traditional Jewish families. Shahar attended Hebrew school from the third grade. She was bat mitzvahed at age 13 and continued in Hebrew school until she was confirmed at age 16. Greenfield grew up in a conservative, kosher, Jewish home. She went through Jewish training through high school, attended Jewish summer camps, and was involved in Jewish youth groups.

Shahar and Greenfield have been significant participants in the life of their synagogue, located in Atlanta . . . . Shahar has led services at the synagogue and has given several sermons. She and Greenfield often attend together. The proposed ceremony was announced at a service of the synagogue.

*Shahar*, 70 F.3d at 1222–23. In his *en banc* dissent, Judge Godbold concludes, "the critical facts are that Shahar and her partner are lifelong adherents to Judaism and good-faith, dedicated participants in the Reconstructionist Movement; the Reconstructionist Movement is a significant movement within American Judaism; and it regards same-sex marriage as acceptable and desirable in preference to couples living together without marriage." *Shahar*, 114 F.3d at 1120.

243. Reconstructionist Judaism is a blend of old and new, though it is typically welcoming to same-sex couples. The district court in fact considered the depositions of three rabbis, two Reconstructionist and one Conservative. *Shahar*, 70 F.3d at 1223 (discussing evidence before the district court). The depositions "reveal that Judaism in the United States does not have a monolithic view of same-sex marriage." *Id.* Indeed, Judaism provides quite an interesting contemporary example of the contest within religious denominations in western culture around the status of GLBT folks and same-sex couples. See generally RABBI STEVEN GREENBERG, *WRESTLING WITH GOD & MEN: HOMOSEXUALITY IN THE JEWISH TRADITION* (2004) (exploring and applying the Jewish tradition of disputation to teachings about homosexuality and same-sex couples, focusing on the way Orthodox Judaism approaches these questions); Jeff Diamant, *Gay Unions Gain a Place in Conservative Judaism: Divisive Votes Also Lifts a Ban on Gay Rabbis*, (Newark, N.J.) STAR-LEDGER, Dec. 7, 2006, at 1; Laurie Goodstein, *Conservative Jews Allow Gay Rabbis*



traditional.) We could distinguish Judge Godbold's reasoning from the claims sometimes made on behalf of marriage equality, that marriage constitutes a unique expressive resource to which individuals need access in order to express themselves about their relationships and identities.<sup>244</sup> Godbold's concern is not with protection of a pre-existing authentic self, seeking to express itself however it chooses, but rather with appropriate constitutional protection of the Shahars' ability to participate in an identity (re)producing religious tradition without undue burden from the state. On Godbold's analysis, "[t]he intimate relationship between Shahar and her partner whom she planned to marry did not involve marriage in a civil, legal sense but it was inextricably entwined with Shahar's exercise of her religious beliefs."<sup>245</sup>

Judge Kravitch, in contrast, does not parse this as a religious exercise claim. She would view the Shahars' relationship as protected intimate association even if they were not demonstrably religious within a clear tradition.<sup>246</sup> I acknowledge what I take to be Judge Kravitch's concern about overly focusing the right of intimate association on individuals who participation in religious exercise. Nevertheless, in terms of themes of constitution of identity through participation in performances whose meaning is shared and understood by an interpretive community, it is clear here that what the Shahars did to stabilize and solidify their commitment to one another was to seek out a traditional status as a married couple, which their faith, Reconstructionist Judaism, happened to make available to them as a same-sex couple. The Shahars turned to both the civil vocabulary and lexicon and the religious one. The religious community turned out to be

---

and Unions, N.Y. TIMES, Dec. 7, 2007, at A26.

244. See, e.g., David Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 930-33 (2001) (arguing that marriage is a unique expressive resource).

245. *Shahar*, 70 F.3d at 1224.

246. See *Shahar*, 114 F.3d at 1123 (Kravitch, J., dissenting) (recognizing Shahar's relationship with her partner as a "protected intimate association under the First Amendment" regardless of whether it was based in a religious tradition). This is not the place to explore further what the constitutional freedom of intimate association might mean, generally or for same-sex marriage in particular. The freedom was separately articulated, though not applied, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). It has its roots in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and was given prominence in part through Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). Its current contours are unclear. See generally Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty-First Century*, 16 GEO. MASON U. CIV. R. L. J. 269 (2006).

more hospitable to their relationship than the civil one. But that is not always the case, as our next example demonstrates.

### B. Ocean Grove versus Ocean Grove

This section describes a current controversy in Ocean Grove, New Jersey, over the location of same-sex civil union ceremonies. There is no final outcome as yet, only a finding of probable cause in a state civil rights investigation by a state administrative agency,<sup>247</sup> and an unreported federal court decision dismissing a collateral attempt to enjoin the state civil rights investigation.<sup>248</sup>

Ocean Grove was founded as a strict Methodist community in 1869, under a corporate charter of the Ocean Grove Camp Meeting Association.<sup>249</sup> By the mid-1990s, gay and lesbian couples were moving in,

247. *Bernstein v. Ocean Grove Camp Meeting Ass'n of the United Methodist Church*, N.J. Dept. of L. & Pub. Safety, Div. on Civ. Rts., Docket No. PN34XB-03008 (2007) [hereinafter *Bernstein*] (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. A second similar complaint resulted in a finding of no probable cause. *Moore v. Ocean Grove Camp Meeting Ass'n of the United Methodist Church*, N.J. Dept. of L. & Pub. Safety, Div. on Civ. Rts., Docket No. PN34XB-03012 (2007) [hereinafter *Moore*] (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Moore-v-OGCMA-NPC.pdf>. A footnote in *Bernstein* indicates that if the Camp Meeting Association were to reinstate Pavilion rentals for weddings, *Bernstein* rather than *Moore* would apply. *Bernstein, supra*, at 6 n.2. See generally Jill C. Capuzzo, *Civil Union Dispute Pits Methodist Retreat Against Gays Who Aided in its Rebirth*, N.Y. TIMES, Sept. 3, 2007, at B1 (providing background on the Pavilion rental controversy).

248. *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Papaleo*, 2007 WL 3349787 (D. N.J. Nov. 7, 2007).

249. Ocean Grove was founded in 1869, and was chartered by the state in 1870 at a time when corporate charters were still issued by individual statute. The corporate charter and bylaws require the Association to operate under strict Methodist principles, for the purposes of producing a week-long revival style Camp Meeting each summer. See generally ALAN J. KARCHER, *NEW JERSEY'S MULTIPLE MUNICIPAL MADNESS* (1998) (account of the founding of many New Jersey municipalities, including Ocean Grove and neighboring communities in Monmouth County); TROY MESSENGER, *HOLY LEISURE: RECREATION AND RELIGION IN GOD'S SQUARE MILE* (1999) (providing a book-length history of Ocean Grove); Glenn Uminowicz, *Recreation in a Christian America: Ocean Grove and Asbury Park, New Jersey, 1869–1914*, in *HARD AT PLAY: LEISURE IN AMERICA 1840–1940*, at 8 (Kathryn Grover ed., 1992) (providing a study of Ocean Grove in its heyday as a Methodist Camp Meeting and seaside religious resort). The 1870 state charter granted the Association local governmental powers, an arrangement eventually held unconstitutional as an establishment of religion in 1979. *State v. Celmer*, 404 A.2d 1 (N.J.), cert. denied, 444 U.S. 951 (1979) (holding Ocean Grove's form of government invalid on Establishment Clause grounds; based on a challenge from someone convicted of a traffic misdemeanor); cf. *Schaad v.*

and by the time the controversy arose, about one-fourth of the residents were estimated to be same-sex couples.<sup>250</sup>

The gist of the conflict is simply stated. New Jersey enacted a civil union statute in December 2006.<sup>251</sup> Soon after this law became effective in February 2007, two lesbian couples living in Ocean Grove, New Jersey, sought to reserve a beachfront Pavilion in Ocean Grove for their civil union ceremonies.<sup>252</sup> Among its other uses, the Pavilion was traditionally rented out for weddings during the summer season.<sup>253</sup> The owner of the Pavilion, the Camp Meeting Association, refused to rent the Pavilion to these couples, on the grounds that the Camp Meeting Association was a Methodist association, that the Pavilion was a religious structure, and that the Methodist Book of Discipline prohibited the celebration of same-sex unions in Methodist churches.<sup>254</sup>

The couples filed complaints with the State's Division on Civil Rights,<sup>255</sup> arguing that the Pavilion was a public accommodation within the meaning of the State's Law Against Discrimination (LAD), which prohibits discrimination on the basis of affectional or sexual orientation and also civil

Ocean Grove Camp Meeting Ass'n, 370 A.2d 449 (N.J. 1977), *overruled in part* by *State v. Celmer*, 404 A.2d 1 (N.J. 1979) (holding that Ocean Grove's form of government did not violate the Establishment Clause, but that prohibitions of sales of newspapers on the Sabbath and of vehicular traffic on the Sabbath that had the effect of preventing delivery of the Sunday New York Times violated state and federal constitutional guarantee of Freedom of the Press). In *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1361–62 (N.J. 1992), the state supreme court characterized the two Ocean Grove decisions as involving a religious organization's enforcement of secular laws. Although the Borough of Neptune, whose territory includes Ocean Grove, now exercises municipal authority over the municipality, the land and many public buildings, including the Pavilion, continued to be owned by the Association. KARCHER, *NEW JERSEY'S MULTIPLE MUNICIPAL MADNESS* 92 (1998).

250. KARCHER, *supra* note 249, at 91; Capuzzo, *supra* note 247, at B1 (Ocean Grove has seen the opening of a large number of gay-owned restaurants, hotels and shops for at least the past decade); Tom Moran, *Gays Only Welcome If they Know Their Place*, THE (NEWARK, N.J.) STAR-LEDGER, Sept. 7, 2007, at NJ 19 (gay and lesbians moved into Ocean Grove in recent decades, bringing new businesses and fixing up houses); Nawal Qarooni, *Unfurling Their Rainbow: Lesbian Couple Holds Ceremony on a Pier after Use of Pavilion is Barred*, THE (NEWARK, N.J.) STAR-LEDGER, Sept. 17, 2007, at 13 (stating that Ocean Grove is about 25 percent gay and lesbian).

251. 2006 N.J. Laws ch. 103.

252. *Ocean Grove Camp Meeting Ass'n, of the United Methodist Church v. Papaleo* 2007 WL 3349787 at \*1 (D. N.J. Nov. 7, 2006).

253. *Id.*

254. See *Bernstein*, *supra* note 247; *Moore*, *supra* note 247; UNITED METHODIST BOOK OF DISCIPLINE ¶ 341.6 (2004 ed.).

255. See *Bernstein*, *supra* note 247; *Moore*, *supra* note 247.

union status.<sup>256</sup> The Camp Meeting Association then filed suit in federal court seeking to enjoin the investigation as a violation of the free speech, free exercise, and expressive association rights of the Association.<sup>257</sup> The federal district court declined to enjoin the investigation.<sup>258</sup>

The parties filed unusually extensive briefs.<sup>259</sup> Two opinions from the state Division on Civil Rights were handed down on December 29, 2008. The Division found probable cause of violation of the Law Against Discrimination in the earlier of the two incidents of refusal to rent.<sup>260</sup> The second refusal to rent, although it occurred less than four weeks later, was found not to demonstrate probable cause for violation of the state public accommodations law, because the Camp Meeting Association had ceased renting the Pavilion for any weddings whatsoever approximately two days before the rental request.<sup>261</sup> The two opinions are preliminary findings of probable cause under New Jersey law, where the standard is "a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing."<sup>262</sup> The Ocean Grove controversy will very likely go through a "contested case" administrative hearing before an impartial administrative law judge, receive a final determination from the agency, and then eventually be appealed into the state court system pursuant to N.J. STAT. ANN. 10:5-21.<sup>263</sup>

256. *See id.* (citing N.J. STAT. ANN. 10:5-3, -4, -5(l) (describing New Jersey's legislative findings in favor of an anti-discrimination policy and provide the substantive statute against discrimination inter alia in public accommodations). Civil union status is addressed by 2006 N.J. Stat. Ch. 1083 § 88, and will eventually be incorporated into the code in various locations.

257. *Ocean Grove Camp Meeting Ass'n*, 2007 WL 3349787 at \*2.

258. *Id.* at \*2-\*6 (relying on *Younger v. Harris*, 401 U.S. 37 (1971), as interpreted to apply to civil rights administrative investigations in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986), to allow the investigation to go forward).

259. Interview with Larry Lustberg, Co-Counsel for Plaintiffs (Sept. 5, 2008).

260. *Bernstein*, *supra* note 247, at 2. The Division also found that enforcement of the Law Against Discrimination against the Camp Meeting Association would not violate the First Amendment to the United States Constitution. *Id.*

261. *Moore*, *supra* note 247. Several paragraphs finding facts related to the reversal of the Pavilion rental policy are also found in *Bernstein*, *supra* note 247, at 5-6. Also, respondents' counsel "described the decision to cease permitting use of the Pavilion for weddings as an 'interim policy.'" *Id.* at 5.

262. *Bernstein*, *supra* note 247, at 7 (citing *Frank v. Ivy Club*, 228 N.J. Super. 40, 56 (App Div. 1988), *rev. on other grounds*, 120 N.J. 73 (1990); *Sprague v. Glassboro State College*, 161 N.J. Super. 218, 226 (App. Div. 1978)).

263. Counsel for the Camp Meeting Association said that his clients would continue to fight against being forced to allow civil unions on the property. *See Lesbian Pair Wins*

Doctrinally, the outcome of the controversy may well turn on the characterization of the beachfront Pavilion—whether, although privately owned, it is a public accommodation subject to the LAD.<sup>264</sup> The opinion in *Bernstein* finds that "beginning at least as early as 2002, [the Camp Meeting Association] permitted the public to reserve its Boardwalk pavilion for exclusive use for events, mostly weddings and occasionally for other events such as memorial services."<sup>265</sup> Moreover, when the Pavilion is not reserved, it is open for general public use, "as a place to sit, congregate, picnic, play and to seek shade and shelter from the weather."<sup>266</sup> Beginning in 1989, the Camp Meeting Association also officially opened the Pavilion to the public under a state "Green Acres" program that allows private property owners to receive a tax exemption for doing this.<sup>267</sup> These facts formed the basis of the Division's determination at this stage that the Pavilion was probably a public accommodation.<sup>268</sup> If the Pavilion is ultimately found to be a public accommodation, the Camp Meeting Association may yet have available a statutory exemption of religious real

*Ruling Over Refusal of Ceremony*, N.Y. TIMES, Dec. 30, 2008, at A22 (stating position of Brian Raum of the Alliance Defense Fund, counsel for the Camp Meeting Association); Mary Ann Spoto, *State Sides with Lesbian Couple in Fight Against Ocean Grove Association*, STAR-LEDGER (Newark, N.J.), Dec 30, 2008, at 11 (same).

264. See N.J. STAT. ANN. 10:5-3, -4, -5(d), -(f) (providing protection against discrimination in public accommodations).

265. *Bernstein*, supra note 247. As to weddings, the Camp Meeting Association "did not distinguish between religious or secular weddings, or between Christian weddings and religious weddings of other faiths." *Id.* Moreover, the other secular events for which the Pavilion would be reserved included "musical performances, university group meetings, fundraising events for secular non-profit organizations, and a civil war reenactment." *Id.*

266. *Id.* at 4. The Camp Meeting Association sought property tax exemption under the open space protection policy of the state Green Acres program rather than as a building used for religious purpose, although that exemption might also have been available. *Id.* at 8 n.4.

267. *Id.* at 4–5. The most recent Green Acres tax exemption application was withdrawn after the civil union controversy arose, and the state rescinded the then-applicable tax exemption for the Pavilion (but not the boardwalk, which the Association also owns and which it also dedicated as a park). *Id.* at 6; Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007, sec. B, pt. 2. In addition, various public funding programs for beach preservation and restoration also typically contained public access conditions, which the Association as the owner of the property apparently agreed to. Judy Peet & Mark Mueller, *In Ocean Grove a Dignified Dispute over Civil Unions: Gay Couple, Methodist Group at Odds in Legal Tangle*, THE (NEWARK, N.J.) STAR-LEDGER, Aug. 16, 2007, at 17 (quoting United States Congressman Frank A. Pallone as saying that the Camp Meeting Association had received state and federal money to help refurbish buildings and maintain the beach); Interview with Larry Lustberg, Co-Counsel for Plaintiffs, (Sept. 5, 2008).

268. *Bernstein*, supra note 247, at 7–9.

estate from the LAD.<sup>269</sup> Also potentially available are the broader constitutional claims around free speech, free exercise, and freedom of association.<sup>270</sup>

For purposes of this article I do not wish to explore the doctrinal details further or predict the outcome. The point here is that the two sides in the Ocean Grove controversy are fighting over where same-sex union ceremonies will take place, which is one aspect of the staging of the set of identity performances that comprises the wedding. They fight because it matters, in a larger set of cultural controversies, where civil union ceremonies are allowed to be visible and recognized. New Jersey is one of a minority of states that had legislated legal recognition of same-sex couples (albeit not "marriage" and albeit in response to a state supreme court decision).<sup>271</sup>

---

269. N.J. STAT. ANN. 10:5-5(n) (stating, in its definition of real property, "[n]othing herein contained shall be construed to bar any religious or denominational institution or organization . . . from making such [admission] selection as is calculated by such organization to promote the religious principles for which it is established or maintained"). In an unpublished decision on January 7, 2007, the Director of the Division on Civil Rights concluded that this section was not applicable to public accommodations, but only to real property rentals. See *Bernstein*, *supra* note 247, at 7 n.3 (referencing the January 7, 2007, decision).

270. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–57 (2000) (holding that in some circumstances a constitutional right of expressive association could trump the enforcement of a state antidiscrimination statute); *Bernstein*, *supra* note 247, at 9–12 (discussing and rejecting claims that freedom of expressive association or free exercise of religion prevent enforcement of the Law Against Discrimination). The public uses of the Pavilion formed an important factual basis for the Division's rejection of the Camp Meeting Association's constitutional claims at this stage of the proceeding. With regard to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (finding unanimously that organizers of a St. Patrick's Day parade had a free speech right that would be compromised by enforcement of Massachusetts' public accommodations law so as to require a GLB group to march under a banner), the facts in the Ocean Grove controversy were found to be different. The Division found that:

[t]he Boardwalk Pavilion is not primarily used to convey a message . . . . [T]he Pavilion is put to a variety of uses, and they are not bound by the underlying conveyance of a united message. All members of the public are invited to travel through the pavilion, whether to rest, eat ice cream, engage in private conversation or to pray.

*Bernstein*, *supra* note 247, at 10–11. Moreover, the Division found that the Pavilion "is not a place that is inherently dedicated to religious worship," and that at the time the complainants' application was made the Pavilion was not exclusively used for religious practice. *Id.* at 11.

271. See 2006 N.J. Stat. ch. 103 (civil union law); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (requiring the state to grant equal benefits to committed same-sex couples either through marriage on an equivalent legal status).

But in Ocean Grove, the two plaintiff couples sought something more. As long-term residents of Ocean Grove, they sought to be married *in* Ocean Grove.<sup>272</sup> Their visible civil union ceremony in a public place where they lived would convey something about their claim to recognition as a couple by the local community; and it would foster further visibility and acceptance within that community. It would enact and entrench the normalization conferred by the state's legal recognition of same-sex unions. Moreover, the couples sought to appropriate the special local cultural significance of the Pavilion, which the community understood was regularly used for weddings. Even though the couples could not call their civil unions legal marriages, celebrating their civil union ceremony in a traditional place for weddings would bolster the legitimacy and normalcy of the identity claim being performed and secured through the ceremony.

The Association's interest in preventing access to the Pavilion is symmetrical, albeit opposed to, the couples' interest in obtaining access to the Pavilion. The United Methodist Church opposes the recognition of same-sex unions, even as it also expressly recognizes the dignity of homosexual persons.<sup>273</sup> It prohibits the use of its churches and places within which to celebrate civil unions.<sup>274</sup> New Jersey state law apparently permits ministers to refuse to celebrate civil unions, according to their faith,<sup>275</sup> and probably does not require a religious denomination to use its churches for civil unions.<sup>276</sup> One reason the current controversy in Ocean

272. As Harriet Bernstein, one of the plaintiffs, said, "We wanted to have it in Ocean Grove because that's where we live[.]" Robert Schawneberg, *Civil Union Law Has First Test on Boardwalk*, The (NEWARK, N.J.) STAR-LEDGER, June 21, 2007, at NJ 20. Randy Bishop, a local government official in Neptune Township, of which Ocean Grove is a part, contrasts the Pavilion with local churches, saying that the Pavilion is "part of the community." Caren Chesler, *Gays in a Methodist Town? No Problem (Until Now)*, N.Y. TIMES, June 10, 2007, § 14NJ at 6 (quoting Mr. Bishop). The couples have since held civil union ceremonies at other locations, at least one of them in Ocean Grove. Qarooni, *supra* note 250, at 13.

273. See UNITED METHODIST BOOK OF DISCIPLINE ¶ 341.6 (2004 ed.) ("Ceremonies that celebrate homosexual unions shall not be conducted by our ministers and shall not be conducted in our churches.").

274. *Id.*

275. See Op. Att'y Gen. 1-2007, 2007 WL 749808 (N.J. 2007) (explaining that ministers and similar religious leaders may exercise their power to celebrate marriages and can choose not to celebrate civil unions, regardless of the requirements of New Jersey's Law Against Discrimination and of *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)). The opinion was issued by Stuart Rabner, now Chief Justice of the State of New Jersey.

276. In the course of litigation over whether the addition of protection of sexual orientation was constitutional, the state apparently conceded that churches would not be forced to serve as the venues for such ceremonies. See Presbytery of New Jersey of

Grove arose is because the past uses of the Pavilion make ambiguous whether the structure is a church or falls somewhere on the secular and public side of building uses. Be that as it may, the point here is that the Methodist Church and the Camp Meeting Association, as a Methodist organization,<sup>277</sup> seek to prevent a particular kind of identity performance from occurring on or in a certain type of property that they own—churches and other religious structures.<sup>278</sup> They do so in furtherance of their version of what constitutes proper performances of the identity of a married couple. Essentially, they banish a particularly salient performance of identity from the most visibly Methodist of public spaces. In so doing, they seek to preserve or reclaim a principle of Methodism about the nature of marriage, and thus about the nature of sex, gender, and sexual orientation.<sup>279</sup>

The Ocean Grove controversy presents a curious and interesting symmetry with the *Shahar* controversy.<sup>280</sup> In *Shahar*, the same-sex couple sought recognition, and related rituals of identity, through a welcoming

Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1461 (3d. Cir. 1994) (reproducing a statement in an affidavit to the effect that the state would not attempt to force churches to act contrary to sincerely held religious belief). The opinion in the case finds the controversy, over whether the addition of "affectional or sexual preference" to the state Law Against Discrimination, impermissibly burdened constitutional right to freedom of speech, ripe as to clergymen acting outside their religious capacity, but not ripe as to churches. *Id.*

277. See Interview, *supra* note 259 (discussing that the Camp Meeting Association concedes it is not a church, but rather a private corporation originally chartered to develop land for the specific purpose of operating a Methodist Camp Meeting every summer).

278. Indeed, the attorney for the Camp Meeting Association said in response to Bernstein that the Association would continue to resist allowing civil unions "on the property." *Lesbian Pair*, *supra* note 263, at A22; Spoto, *supra* note 263. As reported, the Association's position is now based on the Pavilion being private property of a devoutly religious organization—not on the Pavilion being a church.

If the right to exclude is based purely on property ownership, a further possibility of a vexing argument arises. Even after *Celmer*, the Camp Meeting Association still owns as private property the entire square mile of Ocean Grove. It is all leased on 99-year leases. One might ask whether the claim of a right to ban civil union ceremonies, made by the Association here, can be extended to all of Ocean Grove. The Association is basically a religious landlord on a grand scale.

279. The Camp Meeting Association's assertion of a right to exclude in order to protect a traditional identity ritual is thus on all fours with the claim made successfully by the organizers of the Boston St. Patrick's Day Parade in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In Ocean Grove, the ritual is a wedding-like ceremony, and the place was the Pavilion; in *Hurley*, the ritual was the parade, and the place was the streets of Boston during the time annually set aside for the parade. See generally Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996).

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



religious community, of which they were longstanding participants. The State of Georgia, which was hostile at that time to sodomy as well as to other manifestations of homosexual visibility and claims to non-stigmatized identity, controlled Robin Shahar's employment. Georgia punished Shahar for engaging in visible misappropriations of married identity, by banishing her from work as a lawyer for the State.<sup>281</sup>

In the Ocean Grove controversy, same-sex couples seek social and legal recognition and to that end wish to deploy rituals of identity provided to them under civil law by the state of New Jersey. They seek, moreover, to have these identity rituals performed in a place particularly meaningful to them and to the community in which they live. Property law, however, in the form of the right of an owner to exclude, delivers control of this place to the Camp Meeting Association; unless, that is, the Pavilion is a public accommodation or somehow otherwise has been made irrevocably public. The Camp Meeting Association has relied on a basic property right and its religious identity to exclude homosexual unions, in order to control and reject the sought-after public identity performance. In this way, it signals to a wider audience its adherence to a strict Methodist view of the lexicon of couple performances, and thus of marriage, sex, gender, and sexual orientation.<sup>282</sup>

The *Shahar* case and the Ocean Grove controversy involve more than individuals or couples seeking recognition or seeking to express their true selves. We must take account of the competing interpretive communities within which and by which the couples' microperformances of identity as a couple will be evaluated and interpreted. As Goffman pointed out, to understand performances of the self, we also have to look to the audience.<sup>283</sup> There is more than one possible audience in these case studies. One potential audience is local civil society, and another is a structured

281. *Id.* at 1101.

282. One can easily identify similar attempts to restrict LGBTQ visibility by other traditionalist organizations. *See, e.g.,* Poirier, *Piecemeal*, *supra* note 87, at 342–44 (discussing briefly how the Boy Scouts of America, the United States military, and the Catholic Church seek to deploy decreased visibility to impair the logic of piecemeal change through GLBT performance as functional citizens, couples, parents, and role models); *see also* Schacter, *supra* note 55, at 369–70 (coerced invisibility is a response to increased GLBT presence in public life).

283. *See supra* Part II.A (discussing Goffman). Another way of approaching the issue—one itself rich with overtones of the problem of accommodating religious and civic worldviews together—would be to turn to Robert Cover's concept of nomic communities. Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

religious community. In each controversy, the audience communities behave as would-be guardians of the lexicon, seeking to encourage or prohibit certain identity performances, in furtherance of particular social structures, so as to express and (re)produce particular views about sex, gender, and sexual orientation.

*C. Make Change, Not Lawsuits: Marriage Equality, "Conversations," and the Lexicon*

Our final case study again reveals an attempt to control performances by same-sex couples in order to affect the lexicon. This time the agents seeking to control performance are national LGBT advocacy groups. In May 2008, the California Supreme Court held that California was required to allow same-sex couples to marry under the State constitution as a matter of both equal protection and privacy analyses.<sup>284</sup> The decision is remarkable and important in many ways. It made marriage widely available to same-sex couples in the United States for the first time; California, in contrast to Massachusetts at that time, had no residency requirement for couples seeking to be married there.<sup>285</sup>

The California decision, *In re Marriage Cases*, generated *Make Change, Not Lawsuits*.<sup>286</sup> *Make Change* was a communication by the nine most important United States GLBT advocacy organizations to their collective base.<sup>287</sup> It is a broad attempt to influence the behavior of same-

284. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

285. At the time of the California decision, marriage was of course already available to same-sex couples in Canada and a few countries in Europe and Africa. Massachusetts had opened marriage to same-sex couples in 2004, but only for Massachusetts residents and residents of those few states that did not prohibit marriage between same-sex couples. See *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006) (upholding the applicability of Massachusetts' marriage evasion act, MASS. GEN. LAWS ch. 207, §§ 11–12 (2008)); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (holding that Massachusetts must allow same-sex couples to marry, effective 180 days after the date of the decision); see also *Opinions of the Justices to the Senate*, 802 N.E.2d 563 (Mass. 2004) (clarifying that the *Goodridge* mandate would not be satisfied by a civil union law). The Massachusetts marriage evasion statute was repealed in July, 2008. Mass. St. 2008 ch. 216 § 1.

286. *Make Change*, *supra* note 16 (offering advice to same-sex couples who might marry in California and then seek to enforce their California marriage against the federal government or in other states).

287. The advocacy organizations listed in *Make Change* include the American Civil Liberties Union, GLAD, Lambda Legal, the National Center for Lesbian Rights, the Equality Federation, Freedom to Marry, the Gay and Lesbian Alliance Against Defamation, the

sex couples in the wake of the California decision. One purpose of *Make Change* is to stress that same-sex couples who get married in California should not then sue the federal government or, if they live elsewhere than California or another welcoming state, their home states and their employers, to force legal recognition of their marriages. *Make Change* explains in layperson's terms why these lawsuit strategies are likely to be harmful to the goal of nationwide marriage equality. They would produce losses and would entrench further legal positions hostile to marriage equality.<sup>288</sup> *Make Change* serves to educate same-sex couples and their allies about the realities of a legal civil rights strategy that has been carefully calibrated to avoid making bad law in unsympathetic jurisdictions and to shift public perception, bit by bit, in a favorable direction.<sup>289</sup>

What does *Make Change* encourage same-sex couples to do instead? The opening paragraph exhorts, "[i]f you're ready and it's right for you, get married in California. If you do, claim the name and act like what you are—married."<sup>290</sup> The document continues:

Couples who want to should get married, call themselves married, and ask (sometimes demand) that family, friends, neighbors, businesses, employers and the community treat their marriages with respect. Making the marriages of same-sex couples a conscious part of American society will help us get something we'll need to win ultimately: public acceptance of lesbian and gay families.<sup>291</sup>

This is an identity performance strategy. It applies in both the registers that Goffman identified: the "direct" verbal claiming of the status and identity of married couple, and the "indirect" nonverbal performances of identity and status of a married couple.<sup>292</sup> The idea is further explained:

Changing the law through Court decisions based on fundamental principles of fairness and equality helps persuade people that change is the right thing. But the most powerful agent of change in America is people.

---

Human Rights Campaign, and the National Gay and Lesbian Task Force. *Id.*

288. *See id.* at 3 (explaining that losing court cases will hurt the gay marriage cause by causing more delay and by hurting gay people on other constitutional issues like employment, adoption, and custody).

289. *See id.* ("Right now, we need to make gains in both public opinion and state law.").

290. *Id.* at 1.

291. *Id.*

292. *See* GOFFMAN, PRESENTATION OF SELF, *supra* note 6, at 2 (discussing a distinction between direct and indirect modes of performances of the self in everyday life).

Nothing moves America more on LGBT rights in general and marriage in particular more effectively than conversations that all LGBT people can have with our friends and family members about how it feels to be treated differently and why that is so unfair . . . .

We'll win marriage because individual couples get married, tell their family, friends, co-workers, and community that they are married, and talk in very practical terms about why it is so important. And about what it means to be same-sex and married, with all the fundamental freedoms that others have.

Simply getting married and telling people will spark these conversations.<sup>293</sup>

Same-sex married couples are also encouraged to ask for the benefits of marriage from their employers and town, though without suing for those benefits willy-nilly.<sup>294</sup> "But maybe more important, [these requests will] spark the conversations we need to make the changes in law enduring and real at the day-to-day level."<sup>295</sup>

This "conversations" strategy finds an echo in the majority opinion in *Lewis v. Harris*.<sup>296</sup> The court there declined to require the legislature to change the definition of marriage, leaving that decision up to a "democratic process."<sup>297</sup> But in the processes that will lead to identifying the "proper labels,"<sup>298</sup> the court expects that the legislature will be guided by a diffuse and evolving social practice that includes same-sex couples calling themselves married couples rather than civil union partners, and also same-sex couples securing religiously-recognized marriages.

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship.<sup>299</sup>

293. *Make Change*, *supra* note 16, at 5.

294. *Id.*

295. *Id.*

296. 908 A.2d 196, 224 (N.J. 2006).

297. *Id.* at 223.

298. *Id.*

299. *Id.*

I will offer two points here about *Make Change*, and one further point in the concluding section of this article. First, although the document attempts to steer same-sex couples in the direction of conversations and visible performances of married couples, it does not provide any details of the script. It need not do so. Everyone already understands what it means to be married, on a variety of levels. The status and identity of marriage have personal meaning to the couple themselves, to their close relatives and friends, to their casual neighbors, to those with whom they have brief "service interactions" (to use a term from Goffman).<sup>300</sup>

That is not to say that there is no variation in various United States populations about what it means to be married or how that is manifested in microperformances. But the claim made by same-sex couples and their allies relies crucially on the fact that those involved in dialogic identity performance interactions already understand what "marriage" in general means in our society. The claim is that we should apply this understanding in practice equally to same-sex couples. Everyone—all same-sex couples and their allies—already knows what to do in these "conversations" if they are willing to be visible and verbal and to risk embarrassment, humiliation, and rejection.<sup>301</sup> It is not unlike the kind of pervasive, impolite and potentially effective behavior that Goffman noted with admiration in the Quakers.<sup>302</sup>

The already-known quality of what marriage is about is central to an accurate description of the stakes in the same-sex marriage/marriage equality controversy. And that is what will be claimed, and be understood to be claimed, in the microperformances that *Make Change* encourages. Andrew Sullivan provides a telling description in a recent essay entitled *My Big Fat Straight Wedding*.<sup>303</sup> It provides an anecdotal account of how the microperformances involved in a same-sex wedding have larger effects on the participants, family, and friends, and result in immediate recognition, acceptance, and legitimacy. I quote at some length.

It happened first when we told our families and friends of our intentions. Suddenly, they had a vocabulary to describe and understand our relationship. I was no longer my partner's "friend" or "boyfriend"; I was

---

300. GOFFMAN, PRESENTATION OF SELF, *supra* note 6, at xi.

301. See *Make Change*, *supra* note 16, at 5 (discussing the importance of talking with friends and family about "how it feels to be treated differently and why that is so unfair").

302. See Goffman, *The Interaction Order*, *supra* note 6, at 13 (discussing the Quakers' "wonderfully disruptive power of systematic impoliteness").

303. Andrew Sullivan, *My Big Fat Straight Wedding*, THE ATLANTIC, Sept. 2008, at 17. I am indebted to colleague Sarah Waldeck for calling this essay to my attention.

his fiancé. Suddenly, everyone involved themselves in our love. They asked how I had proposed; they inquired when the wedding would be; my straight friends made jokes about marriage that simply included me as one of them. At that first post-engagement Christmas with my in-laws, I felt something shift. They had always been welcoming and supportive. But now I was family. I felt an end—a sudden, fateful end—to an emotional displacement I had experienced since childhood.

The wedding occurred last August in Massachusetts in front of a small group of family and close friends. And in that group, I suddenly realized, it was the heterosexuals who knew what to do, who guided that gay couple and our friends into the rituals and rites of family. Ours was not, we realized, a different institution, after all, and we were not different kinds of people. In the doing of it, it was the same as my sister's wedding and we were the same as my sister and brother-in-law. The strange, bewildering emotions of the moment, the cake and reception, the distracted children and weeping mothers, the morning's butterflies and the night's drunkenness: this was not a gay marriage; it was a marriage.

And our families instantly and for the first time since our early childhood became not just institutions in which we were included, but institution that we too owned and perpetuated. My sister spoke of her marriage as if it were interchangeable with my own, and my niece and nephew had no qualms in referring to my husband as their new uncle. The embossed invitations and the floral bouquets and the fear of fluffing our vows: in these tiny, bonding gestures of integration, we all came to see an alienating distinction become a unifying difference.<sup>304</sup>

An editor might suggest summarizing this passage. But it is precisely a string of details, microperformances, associations, and consequent recognitions and reaffirmations, all described in Sullivan's writing—details the understanding of which is in fact shared widely—that are the raw materials which create and recreate the identity of being a married couple. I cannot cut this down.

The "conversations" exhorted by *Make Change* entail identity work by all the individuals involved in recognizing identity performances regarding same-sex marriage. *Make Change* asks same-sex married couples to initiate this work, but it is of course also imposed on the couples' various audiences. Many who encounter microperformances and verbal claims by same-sex married couples will experience traditional trait associations, consciously or unconsciously—i.e. that marriage is between people of opposite sex<sup>1</sup>, who behave in masculine and feminine ways sorted by sex<sup>1</sup>,

---

304. *Id.* at 18.

and who have heterosexual desires and heterosexual sex.<sup>305</sup> Such people will experience the transparency of their conscious or unconscious associations challenged by the performances being made by same-sex couples.<sup>306</sup> At the very least, such conversations will force folks to undertake an examination of what they assumed was natural about couples and marriage. To be sure, if *Make Change* were written explicitly in this kind of theoretical language, it would be much less effective than written as it is, in terms of getting married, acting married, and having perfectly normal if potentially somewhat awkward "conversations" about marriage. But that is how this strategy operates.

A second point is that the joint authors of *Make Change* have got it wrong in terms of the ordering of the process. Most of the document describes legal strategy.<sup>307</sup> Its authors seem to give the law primacy in terms of achieving social change around marriage equality: "There are two things we need to do to win the freedom to marry nationwide. First, we need to change the law . . . . The second thing we need to do . . . is to convince America to accept the change, to accept the idea that our constitution does not allow discrimination."<sup>308</sup> *Make Change* makes conversations second, coming after the law has been changed. This might be a deliberate overemphasis on formal litigation and legislation, or evidence of a professional deformation that sees law, rather than culture, as the primary arena of cultural struggle.<sup>309</sup> In any event, the joint authors appear to believe that legal change comes first. It doesn't.

---

305. Heteronormativity is linked to the normativity of reproduction. See, e.g., Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–97 (2001) (arguing that feminism has inadequately theorized expectations of reproduction, i.e., reproductivity, and calling for further theorization of female sexuality outside of reproduction); José Gabilondo, *Irrational Exuberance about Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD J. 1, 11–34 (2008) (describing parental taste both for heterosexuality and for offspring who reproduce, and showing how this taste is reflected in some of the marriage equality opinions).

306. Cf. Flagg, *supra* note 65 (discussing transparently white subjective decision making).

307. See, e.g., *Make Change*, *supra* note 16, at 4 ("In some states, we'll get marriage through the state legislature, to show that it has popular support. In other states, we'll go to the courts, to show that excluding same-sex couples is inconsistent with basic principles of fair play.").

308. *Id.* at 4–5.

309. See generally Gusfield, *supra* note 98 (distinguishing more formal, goal oriented aspects of new social movements and more fluid, individual-reinterpreting aspects of social movements).

Courts respond to social change,<sup>310</sup> though the relationship between social change and legal change is complex and the process cannot easily be generalized.<sup>311</sup> Jay Michaelson has argued that culture, not the courts, effectively overruled *Bowers v. Hardwick*.<sup>312</sup> Andrew Sullivan writes, with regard to the California marriage decision, "What the California court did . . . was not to recognize a new right to same-sex marriage. It was to acknowledge an emergent cultural consensus."<sup>313</sup> The shifting social or cultural consensus is often eventually expressed in general and abstract terms, formalized in legal recognition. That stabilizes the new emerging consensus at the expense of the old one. Through performances of visibility without shame, gay men and lesbians can eventually become accepted formally as equals, through legalized access to marriage. But the transformation occurs first and always at the level of individuals' experiences and the identity performances of basic level categories, including the kinship categories addressed by the status of marriage. As Sullivan writes, "[i]t was a moment that shifted a sense of our own identities within our psyches and even our souls. Once this happens, the law eventually follows."<sup>314</sup>

The LGBT advocacy groups who authored *Make Change*, and who have steered the marriage equality movement for a decade or more now, are hardly throwing open the doors to whatever plan for legitimization of same-sex relationships anyone can come up with. It is not a liberty strategy for same-sex couples, at least in the short run. Theirs is an attempt to steer the microperformances of identity by same-sex couples. As Janet Halley

---

310. See Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1955 (2006) (noting that courts respond to social change); *id.* at 1961 (noting that courts are "inescapably involved in absorbing, evaluating, and influencing changes to popular judgments regarding social groups").

311. See Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 864 (2006) (explaining that, given the number and variety of individuals and groups upon whom a decision generates social change, it is very difficult to generalize about court decisions as a vehicle for social change).

312. See Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1562 (2000) (noting that in matters such as these law may often follow society rather than leading it). See generally Susan J. Becker, *Many Are Chilled, but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER, SOC. POL. & L. 177 (2006).

313. Sullivan, *supra* note 303, at 18.

314. *Id.*



wrote, a decade ago, "if advocacy constructs identity, if it generates a script that identity bearers must heed, and if that script restricts group members, then identity politics compels its beneficiaries. Identity politics suddenly is no longer mere or simple resistance: it begins to look like power."<sup>315</sup> In identity politics, advocates for change do not simply seek material change; they also "manage the discursive rendering of the group."<sup>316</sup> And this may sometimes involve seeking to curb "race-to-the-courthouse individualism."<sup>317</sup>

*Make Change, Not Lawsuits* is a contemporary example of how those at the head of identity-based social movements will sooner or later attempt to steer not only focused legal efforts aimed at achieving specific goals, but also the social processes that underlie and facilitate those more concrete goals. The conversation approach grows apace. As this article was going to press, the author received an email from the director of the American Civil Liberty Union's LGBT and AIDS Project, announcing a similar conversation project directed not just at marriage equality but at making the family and friends of LGBT folk more familiar with and sympathetic to the experience of being gay or lesbian, by encouraging gay and lesbian individuals to have conversations with three friends about what it is like to be lesbian or gay.<sup>318</sup> This new "Tell3" project is a considered response to the defeat of marriage equality at the polls in California in Proposition 8.<sup>319</sup> It is anchored by a website describing how to undertake such conversations, but not prescribing their content in detail.<sup>320</sup> Other LGBT advocacy organizations are undertaking similar conversation projects.<sup>321</sup>

Any attempt by the leaders of organized LGBT advocacy groups to control diffuse social interactions in the interest of the movement is likely to be experienced by some who are affected by and participate in the

315. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 117 (David Kairys ed., 3d ed. 1998) (discussing K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 149 (Amy Gutmann ed., 1994)).

316. *Id.* at 120.

317. *Id.* at 127. Writing ten years ago, Halley specifically had in mind the problem of "decisions to sue to obtain marriage licenses even though [the] cases would likely produce bad law because of bad timing or bad venue." *Id.* at 129.

318. Email, Matt Coles, February 26, 2009 (on file with author).

319. *Id.*

320. Tell3 Homepage, <http://tell-three.org> (last visited Dec. 18, 2008).

321. So says Mr. Coles. Coles, *supra* note 318. See also IAN AYRES & JENNIFER GERARDA BROWN, *STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS* (2005) (outlining a similar conversation strategy).

identity-resignifying aspect of the movement as an imposition or constraint, inimical to the freedom that they understood the movement to be about. Judith Butler criticizes the professionalization of gayness, and although her critique is aimed at an academic professionalization, it will do for political movement-based professionalization as well. "The professionalization of gayness requires a certain performance and production of a 'self' which is the constituted effect of a discourse that nevertheless claims to 'represent' that self as a prior truth."<sup>322</sup> The *Make Change* document exposes the social construction of identity being engineered by the professional LGBT movement in the latter half of 2008, as the professional movement purports to represent its constituents' interests by telling them how to behave in daily interactions, based on what the constituents already supposedly are and know that they are, all as a way of shifting social and legal norms.<sup>323</sup>

*Make Change* is a clear product of what Gusfield calls the "reflexivity of social movements."<sup>324</sup> Gusfield posits a dichotomy between structured aspects of social movements, with clear organizational goals, and diffuse and fluid aspects of social movements, reflected in the potential for opening up or shifting individual understandings of the meaning of identities and events.<sup>325</sup> The two types of effects—shifts in the meaning of individual identity (including shifts in the interpretation of microinteractions), and the achievement of specified identifiable goals—are mutually reinforcing, in a kind of feedback loop (my word)<sup>326</sup> or reflexivity (Gusfield's term).<sup>327</sup> *Make Change* is generated by a group of structured movement associations

322. Butler, *Imitation*, *supra* note 1, at 18.

323. Just to be clear, this statement is not necessarily a critique of the GLBT organizations for some sinister manipulation or failure to represent movement members as to what they might want, independent of the movement. Once one goes down the social constructionist path for understanding identity and identity-based social movements, one must abandon the dream that the "correct" way to approach a social movement is to allow it to occur spontaneously and naturally. The processes that create and recreate identity, from which identity-based social movements emerge, are ever-present and ever-political. Identity-based social movements always shape their adherents to one degree or another. *See, e.g.*, Gusfield, *supra* note 98, at 70 (describing the way in which individuals will reinterpret their daily lives in light of social movements, regardless of whether the individuals are even actively involved in the movement). At the same time, as Nancy Fraser observes of subaltern counterpublics, the political structures that seek to shape social movements may well, in the event, be antidemocratic, antiegalitarian, or more subtly marginalizing and exclusionary. Fraser, *supra* note 229, at 124.

324. Gusfield, *supra* note 98, at 68.

325. *Id.* at 64–66 (contrasting older and new social movements).

326. *See supra* Part I.

327. The title of Gusfield's essay adverts to the "reflexivity" of the new social movements. Gusfield, *supra* note 98, at 58.

and the individuals who command them, in order to corral the diffuse, fluid, meaning-focused aspects of the marriage equality movement, in the service of achieving specific law-related goals.

Traditionalists on the one hand, and the mainstream LGBT groups on the other, are not the only ones seeking to manage the movement's version of identity and its politics. We must not overlook the longstanding critiques of the marriage equality movement from the feminist left and from the queer left. As to the left feminist critique of marriage equality, a germinal essay by Paula Ettelbrick is entitled *Since When is Marriage a Path to Liberation?*<sup>328</sup> Nancy Polikoff recently wrote a book length argument about the threat of marriage to alternative families.<sup>329</sup> Ruthann Robson goes further, challenging even the family as a legitimating structure because of its exclusion of lesbians.<sup>330</sup> For her part, Katherine Franke laments the shift of the rights bearing subject of the lesbigay rights movement from the individual to the couple.<sup>331</sup> Franke suggests that the desire for recognition by LGBT folks has turned to legal and state authority to remedy a harm understood to be caused by non-recognition.<sup>332</sup> The kind of recognition being sought relies on a form of normative kinship but also, and more importantly, on the state.<sup>333</sup> "We seek to be understood within a community of the governed on terms equal to others in that political community"<sup>334</sup> and we seek a particular form of address, kinship.<sup>335</sup> This kind of recognition "presupposes the internalization of a set of norms of self-governance—self-governance within the couple and governance of the couple by the state."<sup>336</sup>

328. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, reprinted in SAME-SEX MARRIAGE PRO & CON: A READER 122 (Andrew Sullivan ed., 2004).

329. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008). In an earlier influential essay, Polikoff wrote, "[A]n effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible." Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1546 (1993) [hereinafter *We Will Get What We Ask For*] (taking issue with Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 18–19 (1991) (quoted in the title of Polikoff's essay)).

330. Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 975 (1994).

331. See Franke, *supra* note 5, at 239.

332. *Id.* at 240–41.

333. *Id.* at 245.

334. *Id.* at 246.

335. See *id.* (lesbians and gays are now asking the state for recognition in a particular form, kinship).

336. *Id.*

Franke argues that this move towards recognition of the couple as normal has resulted in a loss of political interest in other forms of sociability.<sup>337</sup>

Michael Warner's *The Trouble with Normal* is a paradigmatic text for the queer critique of marriage equality.<sup>338</sup> In a chapter entitled "Beyond Gay Marriage,"<sup>339</sup> he takes the marriage equality movement to task, in the process excoriating many of its leaders. Special attention is reserved for Andrew Sullivan, after whose book *Virtually Normal* Warner's volume in part takes its title.<sup>340</sup> Warner sets his critique in a broader theoretical background<sup>341</sup> in which he discusses sex, shame, and stigma.<sup>342</sup> He argues that while sexual activity will always be accompanied by shame,<sup>343</sup> it is also as a descriptive matter typically accompanied by stigma, which marks certain types of sexual activities as normal and others as dishonorable.<sup>344</sup> The gay movement always has to cope with both shame and stigma, but the two are often confused.<sup>345</sup> The LGBT movement is about achieving dignity,<sup>346</sup> but dignity can be accomplished in one of two diametrically opposite ways—by moving toward a recognition that different ways of being sexual should be accorded equal dignity, or by using the pre-existing paradigm of normal and stigmatized to manage homosexuality.<sup>347</sup> Of this latter concept Warner writes that we might as well call it bourgeois propriety.<sup>348</sup> Warner also explicitly draws on Goffman's work on stigma,<sup>349</sup> including

337. *Id.*

338. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 7 (1999).

339. *Id.* at 81–147.

340. ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1995). Warner addresses Sullivan's book and other key books and essays by Sullivan at numerous points in *The Trouble with Normal*. WARNER, *supra* note 338, at 52–54, 60–61, 92, 112–13, 134–41, 145–46.

341. Warner writes that his book "rises from the abstract to the concrete." *Id.* at vii.

342. *Id.* at 1–40 (chapter entitled "The Ethics of Sexual Shame").

343. *Id.* at 3.

344. *Id.* at 27–28. Warner includes here various kinds of sexual difference—his argument is not just limited to homosexuality. See *id.* at 37 (mentioning gender identity issues such as nelly men and butch women, and different sexual practices such as prostitution, leather, anal play, sex toys, sadomasochism, and sex in public places).

345. *Id.* at 28.

346. See *id.* at 37 ("The lesbian and gay movement at its best has always been rooted in a queer ethic of dignity.").

347. *Id.* at 36 (presenting a view of two kinds of dignity, one a dignity that is hierarchical and "requires soap," the other fundamentally democratic).

348. *Id.*

349. *Id.* at 27–28 (discussing GOFFMAN, *STIGMA*, *supra* note 6).

a dichotomy Goffman posits between those who embrace stigmatized identity (stigmaphiles) and those who, although themselves stigmatized, seek to escape stigma (stigmaphobes).<sup>350</sup> Warner observes that "The stigmaphobe world is the dominant culture, where conformity is ensured through fear of stigma."<sup>351</sup> And, he writes, loathing of queer sexuality defines the leaders of the gay movement. "Those with the biggest fig leaf stand, as always, at the top of the hierarchy."<sup>352</sup> There is a hierarchy of sexual shame,<sup>353</sup> and political leaders driven by fear of stigma exploit and reproduce it.<sup>354</sup> At the same time, they claim to represent those of whom they are so ashamed.<sup>355</sup>

Warner's critique of the current marriage equality movement unfolds from these broad premises. Thematically, the marriage equality movement systematically seeks to gain normal status by continuing to stigmatize those whose sexual tastes and acts cannot be made to conform to the idealized model of marriage.<sup>356</sup> Whereas the early gay and lesbian movement was characterized by brave and sometimes insurrectionary acts of stigmaphiles, the movement has shifted now to stigmaphobe politics.<sup>357</sup> This realignment began in the early 1990s.<sup>358</sup> The marriage equality movement is part of it;<sup>359</sup> it thrives on an "amnesia" of the earlier stigmaphile approach.<sup>360</sup> It is "not so much a campaign for marriage as a campaign about the constituency and vocabulary of the gay and lesbian public."<sup>361</sup> Warner links the marriage

350. *Id.* at 43.

351. *Id.*

352. *Id.* at 40. At another point he writes, "Political groups that mediate between queers and normals find that power lies almost exclusively on the normal side." *Id.* at 44.

353. *Id.* at 24–27 (discussing Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1984)).

354. *Id.* at 31–32 (the official gay movement fails to target the politics of shame and instead blames queer sexuality as a way of addressing stigma); *id.* at 49 (gay and lesbian politics is built on embarrassment and tends to reproduce the hierarchy of shame).

355. *Id.* at 44.

356. *See, e.g., id.* at 113 (summarizing Andrew Sullivan's argument as "marriage . . . would make for good gays—the kind who would not challenge the norms of straight culture, who would not flaunt sexuality, and who would not insist on living differently from ordinary folk").

357. *Id.* at 75.

358. *Id.* at 76–77.

359. *Id.* at 87 ("Marriage became the dominant issue in lesbian and gay politics in the 1990s, but not before."); *id.* at 145–46 (same).

360. *Id.* at 137.

361. *Id.* at 143.

equality movement to a long history of concern by "proper" lesbian and gay leaders over how to manage the appearances in public of less reputable parts of the community<sup>362</sup>—which of course amounts to a claim of a right to define membership in the community. Warner thus depicts the current marriage equality movement as an attempt to exercise power from above and to exclude inappropriate behavior and claims. In Warner's view, a less centralized and more democratic approach would allow creative alternatives for relationships to develop, fostering a wider array of alternatives that would be better for all.<sup>363</sup> And it might allow some of the other issues obscured by marriage equality to reemerge.<sup>364</sup> Pushing for same-sex marriage "represents a widespread loss of vision in the movement."<sup>365</sup> It is also "profoundly antidemocratic."<sup>366</sup>

I have identified for separate discussion here the queer critique of marriage equality, even though it intersects at many points with the feminist critique of marriage equality. The difference seems to me to be often a question of background concerns and of emphasis. The feminist critique looks to the constraints that a focus on access to traditional marriage imposes on other more liberating relationships and on each individual's freedom to define her/his relationships in new ways. The feminist critique does not especially focus on sexual activity as such.<sup>367</sup> The queer critique looks to underlying issues of sexual behavior, shame, and stigma, and is concerned with the undermining of what was at one point in time a focus of the gay movement on a freedom to engage in sexual activity in various ways that were stigmatized and that certainly did not resemble monogamy within marriage.<sup>368</sup> The feminist and queer critiques converge on certain important issues. They disapprove of giving marriage equality primacy to

362. See, e.g., *id.* at 45–46, 50 (providing examples from the history of the gay and lesbian movement of scandals over stigmatized sexuality).

363. *Id.* at 85 (describing alternatives to marriage that have been obscured by the marriage equality movement).

364. See *id.* at 84 (listing issues obscured by the emergency of marriage equality).

365. *Id.* at vii. Warner also points out that an earlier phase of the movement understood marriage equality to be part of a broader array of issues. *Id.* at 90. He suggests that the marriage movement could be reconceptualized in this fashion. *Id.* at 146.

366. *Id.* at 112.

367. An early, notable exception within the feminist approach is Rubin, who seeks to introduce a sex-positive approach into the feminist platform. See generally Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1984).

368. Michael Warner for example suggests that the goal should be "sexual autonomy, consistent with everyone else's sexual autonomy . . ." WARNER, *supra* note 338, at 7.

the detriment of other issues they see as equally important or more important. They criticize the politics of leadership of the marriage equality movement, beginning in the mid-1990s, when marriage equality was put forward as a central issue. And both approaches address what they view as an unjustified intrusiveness of the state into assigning status only to a certain type of relationship—marriage—and consequently privileging the mode of idealized sexuality attributed to marriage. They consider that the marriage equality movement errs in its reliance on the state to confer normal status, to be achieved through marriage. They posit a more diverse and democratic vision of sex and of relationships.

Both the feminist critique and the queer critique have the description of the turn to recognition through marriage exactly correct, correct in terms of an assessment of the current state of same-sex marriage politics and of the underlying mechanism of recognition.<sup>369</sup> As Judith Butler writes, "[o]ne may wish for another lexicon altogether."<sup>370</sup> I am not sure, however, that anything else is possible, certainly not all at once.<sup>371</sup> Any attempt to move gay and lesbian identity and relationships from stigmatized to normal will include expressing the yearning for assimilation into the normal by strategizing around achieving access to the already-known normal status, which is the married couple. We currently have no other widely shared and deeply embedded language in which to express it.<sup>372</sup>

---

369. I would note that, from a very different point on the political spectrum, Mae Kuykendall makes a similar assessment about the link of traditional marriage to the political order. See Kuykendall, *supra* note 226, at 102 ("[T]here may yet be some cultural force to the claim that traditional marriage is a central re-enactment of the premises of consent to the political order."). Kuykendall further states that "the inclusion of same-sex marriage in the reenactment confirms that the undertaking to create everyday affirmations of consent to the political order, and the quest for engagement, is a common undertaking."

370. JUDITH BUTLER, UNDOING GENDER 107 (1994).

371. In a personal communication Mae Kuykendall terms the alternative aspiration of Franke and similar feminist critics of marriage equality "utopian." Email, Mae Kuykendall to Marc Poirier, Jan. 21, 2009 (on file with author).

372. See generally Kuykendall, *supra* note 227 (describing the marriage controversy in terms of giving priority to a living language that evolves over rigidifying archaic linguistic forms).

IV. *Some Further Observations*A. *The Same-Sex Marriage Controversy Is About More than Covering, It Is About Claiming and Transforming Identity*

At several points in *Covering* (the article) and *COVERING* (the book), Yoshino argues that the same-sex marriage controversy is an issue of covering.<sup>373</sup> "The right of gays to marry is a question of covering, as it pertains not to the ability of gays to be gay or to self-identify as gay, but to their ability to signal that identity beyond the simple act of self-identification."<sup>374</sup> Later in the article, Yoshino provides a list of behaviors that constitute either gay covering or gay flaunting.<sup>375</sup> He finds same-sex marriage to be on the covering side of some of these binaries and the flaunting side of others.<sup>376</sup> In *COVERING* (the book), Yoshino explains in his view same-sex marriage is both flaunting and covering.

Along the axis of affiliation, marriage is an act of covering, as marriage has historically been associated with straight culture. This is why queer . . . revile it and normals . . . endorse it as an act of assimilation. Along the axes of appearance, activism, or association, however, marriage is an act of flaunting. This is why right-wing moralists object to it as a sign that gays are getting too strident in our claims for equality.<sup>377</sup>

Yoshino also describes *Shahar v. Bowers*<sup>378</sup> as about a failure to cover: in the eyes of the Attorney General the couple had flaunted their homosexuality.<sup>379</sup> True enough, but this is not a full account of the issue. The plaintiff said she did not intend to "transform" her intimate relationship

373. See, e.g., *COVERING* (the book), *supra* note 10, at 19 ("[T]he contemporary resistance to gay marriage can be understood as a covering demand; *Fine, be gay, but don't shove it in our faces.*").

374. Yoshino, *Covering* (the article), *supra* note 9, at 776.

375. *Id.* at 842–48. Behaviors listed include abstention from sodomy vs. engagement in sodomy; private displays of same-sex affection vs. public displays; straight-culture focused vs. gay-culture focused; nonactivist vs. activist; prioritizing other identities vs. prioritizing gay identity; allied with straights vs. allied with other gays; allied with mainstream vs. allied with other "deviants"; monogamous vs. promiscuous; single or secretly coupled vs. openly coupled.

376. See *id.* at 848–49 (locating marriage on the covering side of some binaries and the signaling side of others).

377. *COVERING*, (the book), *supra* note 10, at 91.

378. 114 F.3d 1097 (11th Cir. 1997) (*en banc*).

379. See *COVERING* (the book), *supra* note 10, at 97.



into a public statement.<sup>380</sup> Nevertheless, the majority found that she *had* done enough to "transform" it into a public statement, one sufficient to warrant the Attorney General's concern.<sup>381</sup> This dispute over the interpretation of microperformances, in order to control their transformative potential, is a central part of the controversy over same-sex couples and same-sex marriage. It can seem a bit slighted in Yoshino's accounts, unless we understand covering to also be about a possibility for transformation through transgressive performance.<sup>382</sup> And COVERING (the book) falls especially short here, when it invokes the quest for authenticity. The goal then comes to be allowing individuals who so choose to uncover their authentic gay selves, rather than to facilitate transforming the lexicon for themselves and others.

Andrew Sullivan's testimony suggests that the power of wedding and marriage to transform both subjective self-understanding and identity shared with others is quite real. Sullivan went through a "real" wedding, participating in a traditional set of rituals from top to bottom.<sup>383</sup> His wedding was not a matter of pre-existing selves that "came out" but of a participation in a recognizable and (newly in Massachusetts) available particular kind of interaction ritual, in which the self could be performed and made real for all in a different way.<sup>384</sup> His wedding and marriage enabled everyone concerned, from him and his husband, to the relatives, to

380. *Shahar*, 114 F.3d. at 1106 (quoting Robin Shahar).

381. *Id.* at 1107.

382. In *Covering* (the article), Yoshino does acknowledge that some kinds of covering activities are self-constituting. See *supra* note 9, at 870–73. This part of the article develops two models of identity: a strong performative model, based on JUDITH BUTLER: GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2d ed. 1999), and a weak performative model, based on JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993). But this passage is undeveloped, and not connected to his arguments about marriage.

383. Sullivan is Catholic, or was Catholic last time I checked. He surely did not have a Catholic same-sex wedding. It was a small, traditional civil wedding. Sullivan, *supra* note 303.

384. See Ronald Dworkin, *Three Questions for America*, N.Y. REVIEW OF BOOKS, <http://www.nybooks.com/articles/19271> (Sept. 21, 2006) (discussing the differences between civil unions and marriage). As Ronald Dworkin writes:

Civil union status . . . does not provide the social and personal meaning of [marriage] because marriage has a spiritual dimension that civil union does not. For many people, this is a religious dimension, which some same-sex couples want as much as some heterosexuals do. For others it is the participation in the historical and cultural traditions that both kinds of couples covet.

*Id.*

the friends, and maybe even to the caterer, to recognize him differently.<sup>385</sup> It transformed them as well. Just these kinds of transformations—experienced, or expected and claimed by California-married same-sex couples—have the potential, as both *Make Change* and *My Big Fat Straight Wedding* acknowledge, to facilitate further legal recognition. We have to acknowledge that this would also be a change, of sorts – a change to the lexicon, though not nearly of the magnitude of the aspirations to change social practice of the feminist and queer critics of marriage equality. Even as regards the normalizing aspiration of the mainstream marriage equality movement, it remains an open question whether allowing same-sex couples legal recognition will simply admit them to a persistent and pervasive reaffirmation of conservative values,<sup>386</sup> or will subtly destabilize the naturalized gender and sexuality assumptions undergirding traditional marriage.<sup>387</sup>

Whatever the frame one chooses to put on the activity, visible participation by same-sex couples in the daily rituals of marriage evidences a desire to be recognized as married by themselves and others.<sup>388</sup> This recognition occurs socially, dramaturgically, if you will, within the particular audiences and contexts in which same-sex couples live and move, and perhaps eventually more broadly within transformed shared social structures.<sup>389</sup> At some point the recognition then can occur legally, in a formal way that formally redefines the boundaries of what marriage is, and

385. See Sullivan, *supra* note 303 (describing the personal impact of his own same-sex marriage).

386. See generally, e.g., Kuykendall, *supra* note 226 (connecting traditional marriage vows not just to traditional family but to an American democratic civic ideal); Polikoff, *We Will Get What We Ask For*, *supra* note 329 (critiquing the notion that legal recognition of same-sex marriage will destabilize the gendered structure of marriage); Sullivan, *supra* note 303 (expressing how personally enacting a traditional "marriage" with all the trappings changed his perception of self and his interactions with others and the way they perceived him).

387. See, e.g., Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 18 (1991) (arguing that legal recognition of same-sex marriage will destabilize the gendered structure of marriage); Poirier, *Cultural Property*, *supra* note 19 (describing the traditionalist concern with same-sex marriage as one of dilution or pollution of a central cultural ritual, motivated in part by a concern to preserve traditional gender roles).

388. See Franke, *supra* note 5, at 245 (discussing the desire for formal recognition through kinship as a driving force in the same-sex marriage politics). Franke disapproves, arguing that a freedom to be otherwise is lost when fitting in is the goal. *Id.*

389. See Kuykendall, *supra* note 226; Poirier, *Cultural Property*, *supra* note 19, at 383–401 (discussing the social settings in which same-sex couples express desires to be recognized as married).

that recognizes there has already been a cultural shift. The marriage controversy is not simply about uncovering authenticity, as Yoshino can be read to suggest, but about producing a dialectic around the social categories, the lexicon.

### B. Claiming What?

I turn to Judith Butler for the last word. Butler's writing is difficult,<sup>390</sup> her arguments have developed and shifted over time,<sup>391</sup> and she often uses the language of continental theory, what the late Louise Halper frequently referred to in conversation as the "advanced Frenchie stuff." I offer one interpretation of part of one text, relevant and helpful in summing up the themes advanced in this article.

*Imitation and Gender Insubordination*<sup>392</sup> is a relatively early essay, in which Butler questions whether one can or ought to define what it means to be a lesbian.<sup>393</sup> Butler reminds us that "identity categories tend to be

390. In a scathing 1999 review, Martha Nussbaum criticized Butler's poor writing, among other things. Martha Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37. Butler has responded that difficulty in her writing is intentional as a method for forcing the reader to come to grips experientially with her points inter alia about meaning, play, identity, and politics. She writes:

What concerns me is that the critical relation of ordinary grammar has been lost in this call for radical accessibility. It's not that I'm in favor of difficulty for difficulty's sake; it's that I think there is a lot in ordinary language and in received grammar that constrains our thinking—indeed, about what a person is, what a subject is, what gender is, what sexuality is, what politics can be—and that I'm not sure we're going to be able to struggle effectively against those constraints or work within them in a productive way unless we see the ways in which grammar is both producing and constraining our sense of what the world is.

Judith Butler, with Gary A. Olson and Lynn Worsham, *Changing the Subject: Judith Butler's Politics of Radical Resignification*, in THE JUDITH BUTLER READER 325, 327–28 (Judith Butler & Sara Salih eds., 2004). See also *id.* at 356 (arguing that everyday grammar and everyday language allow us to take for granted what qualifies as human). Butler, Olson, and Worsham further argue that "[t]aking for granted one's own linguistic horizon as the ultimate linguistic horizon leads to an enormous parochialis . . . and closes us off from the possibility of understanding others and ourselves in a more fundamentally capacious way." *Id.*

391. See Yoshino, *Covering* (the article), *supra* note 9, at 319 (distinguishing two different theories of performance and identity in two different works of Butler). For helpful longitudinal assessments of Butler's work, see generally ELENA LOIZIDOU, JUDITH BUTLER: ETHICS, LAW, POLITICS (2007); SARAH SALIH, JUDITH BUTLER (2002).

392. Butler, *supra* note 1.

393. See *id.* at 13–14 (questioning whether one can or ought to define being a lesbian).

instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for liberatory contestation of that very oppression."<sup>394</sup> Identity categories are in fact sites of "necessary trouble."<sup>395</sup> Using the language of semiotics to describe this characteristic problem of identity as applied to lesbianism, Butler writes that she "would like to have it permanently unclear what precisely that sign [the mark of being lesbian] signifies."<sup>396</sup> Any theory that claims to define "lesbian" is already political.<sup>397</sup> This includes this discourse of academics seeking to legitimate gay and lesbian studies, which was part of the explicit goal of the conference that generated the anthology in which Butler's essay appeared, circa 1990.<sup>398</sup>

Butler expressly focuses on the problem of seeking to contain sexuality and eroticism within any identity category that would seek to describe and authorize them.<sup>399</sup> She could be read here to depict sexuality and eroticism as having some special basic uncontainable and destabilizing force. But her same argument around arbitrariness, shifting meanings, and desire for control could be made with regard to other identity categories as well, especially those involved in relations of dominance and subordination.<sup>400</sup> Butler argues that the person who is "out" as lesbian or

394. *Id.* at 13–14. In the same passage Butler refers generally to MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (John Hurley trans., 1980) (1976) for the general proposition that a particular homophobic discourse can be both a restraint and a starting point for opposition. *Id.*

395. *Id.* at 14. This is undoubtedly a reference to the word "trouble" in the title of her roughly contemporaneous work, JUDITH BUTLER, *GENDER TROUBLE*, *supra* note 382.

396. *Id.* at 14.

397. *Id.* at 14–15.

398. See *Acknowledgements*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES v* (Diana Fuss ed., 1991) (describing the emergence of an academic discipline of lesbian and gay studies, as marked by a 1989 conference at Yale, at which most of the essays in the volume were originally presented). Butler, I think somewhat mockingly, describes the conference as about the professionalization of gayness. Butler, *supra* note 1, at 18.

399. *Id.* at 14.

400. In fact, in an essay contemporaneous to *Imitation and Gender Insubordination*, Butler makes a strikingly similar argument about the category of "women." See Judith Butler, *Contingent Foundations and the Question of "Postmodernism"*, in *FEMINISTS THEORIZE THE POLITICAL 3* (Judith Butler & Joan W. Scott eds., 1992). Butler writes:

[A]ny effort to give universal or specific content to the category of women, presuming that that guarantee of solidarity is required *in advance*, will necessarily produce factionalization, and that "identity" as a point of departure can never hold as the solidifying ground of a feminist political movement. Identity categories are never merely descriptive, but always normative, and as such, exclusionary. This is not to say that the term "women" ought not to be used, or that we ought to announce the death of the category. On the contrary,

gay is not in fact therefore free, but is subject to other forces that remain concealed.<sup>401</sup> As we have seen, the very ability to have, perform, and experience an identity involves ongoing shared negotiation and performance, which is always necessarily provisional. As Butler writes with regard to claiming the identity of lesbian, "[i]t is always finally unclear what is meant by invoking the lesbian-signifier, since its signification is always to some degree out of one's control, but also because its *specificity* can only be demarcated by exclusions that return to disrupt its claim to coherence."<sup>402</sup>

This rather abstract statement can be made concrete by asking "[w]hat, if anything, can lesbians be said to share?"<sup>403</sup> Here we are, in the territory of sex1, gender, sexual orientation (which involves desire and sex2), and of direct declaration and indirect performative gestures indicative of identity.<sup>404</sup> The identity "lesbian" is going to be contested not only by those who stigmatize the identity, but among those who claim it, once they begin to form a sense of collective identity with an ability to communicate and a potential for political and cultural power.<sup>405</sup> As Butler writes, it is "clear

the very term becomes a site of permanent openness and resignifiability . . . .  
[T]he rifts among women over the content of the term ought to be safeguarded and prized, indeed . . . this constant rifting ought to be affirmed as the ungrounded ground of feminist theory.

*Id.* at 15–16. Butler also makes a similar argument in this essay as to "the subject" generally. *Id.* at 12–14.

401. *Id.* at 15. Nor is Butler's concept here parallel to the struggle depicted by Yoshino in *COVERING* (the book) for ever-greater authenticity. Rather, any identity is always dialectical, caught between different potential interpretations and reformulations.

402. *Id.*

403. *Id.* at 15.

404. As Butler bluntly writes:

If a sexuality is to be disclosed, what will be taken as the true determinant of its meaning: the phantasy structure, the act, the orifice, the gender, the anatomy? And if the practice engages a complex interplay of all of those, which one of [these] erotic dimensions will come to stand for the sexuality that requires them all?

Butler, *supra* note 1, at 17.

405. To employ Fraser's helpful terminology, the "sense of collective identity" happens once lesbians begin to form a "subaltern counterpublic." See Fraser, *supra* note 229, at 117–24 (introducing the term "subaltern counterpublic"). As Fraser observes, subaltern counterpublics are not always virtuous. They can be "explicitly antidemocratic and antiegalitarian, and even those with democratic and egalitarian intentions are not always above practicing their own modes of informal exclusion and marginalization." *Id.* at 124. Like Butler, Fraser recognizes that *any* public will inevitably be shaped by internal currents and involves "a plurality of perspectives among those who participate within it, thereby allowing for internal differences and antagonisms and discouraging reified blocs." *Id.* at

that there is no necessarily common element among lesbians, except perhaps that we all know something about how homophobia works against women—although, even then, the language and the analysis we use will differ."<sup>406</sup> There is no specificity to lesbian sexuality.<sup>407</sup>

Butler makes a second important point. Although identity terms such as "lesbian" or "gay" cannot be transparent or full, they must still be used politically, "to rally and represent an oppressed political constituency."<sup>408</sup> These political uses raise the question of "which use will be legislated, and what play will there be between legislation and use such that the instrumental uses of 'identity' do not become regulatory imperatives."<sup>409</sup> I would say, using somewhat different terms from Butler's, that counterpublics and counterdiscourses organized by specific political groups are necessary, but at the same time problematic.<sup>410</sup> One might for example think of minority covering demands, such as Russell Robinson (among others) has identified.<sup>411</sup>

In terms of same-sex marriage, Butler's broad argument can be understood to apply to the claims and maneuvers of subordinated groups around how things ought to be, at the level of microperformances as well as larger legal and lexical structures. In this light, Robin Shahar and the Attorney General of Georgia, the lesbian couples seeking to rent the beachfront Pavilion and the Ocean Grove Camp Meeting Association, and the LGBT advocacy groups that authored *Make Change* and their

127.

406. Butler, *supra* note 1, at 17.

407. See *id.* (describing the futility of efforts to give specific content to lesbian experience).

408. *Id.* at 16.

409. *Id.*

410. See, e.g., Fraser, *supra* note 229, at 120–23 (introducing the concept of subaltern counterpublics). Fraser notes that the utility of "alternative publics" in which subordinated social groups like gays and lesbians "formulate oppositional interpretations of their identities, interests and needs" while questioning whether it is possible for these groups "to deliberate *as if* they were social peers" when these "specially designated discursive arenas . . . are situated in a larger societal context . . . pervaded by structural relations of dominance and subordination . . ." *Id.* MICHAEL WARNER, *Publics and Counterpublics*, in *PUBLICS AND COUNTERPUBLICS* 65, 117–21 (2002) (critiquing Fraser's concept of a "subaltern counterpublic" and exploring various manifestations of counterpublics).

411. See Robinson, *supra* note 10, at 1819–26 (discussing minority-imposed covering). Cf. Fraser, *supra* note 229, at 124 (arguing that subaltern counterpublics may be explicitly antidemocratic and antiegalitarian, or may practice subtler modes of informal exclusion and marginalization). Such processes would in turn result in pressures for passing and covering—that is minority-imposed covering demands.

counterpart marriage-traditionalist advocacy groups, are all engaged in symmetrical and opposing attempts to regulate gay and lesbian identity in various ways—including through regulation of the microperformances of same-sex marriage by same-sex couples. As Janet Halley cautions, LGBT legal reformers must invoke identity, but in doing so "they may approach and even cross the dangerous line . . . between advocacy and coercion."<sup>412</sup>

A third important point in Butler's essay links the sense of identity inextricably with the individual's participation in play about identity.<sup>413</sup> I hear here an echo of Goffman's dramaturgical approach. Butler asks:

How is it that I can both "be" [a lesbian], and yet endeavor to be one at the same time? . . . . To say that I "play" at being one is not to say that I am not one "really"; rather, how and where I play at being one is the way in which that "being" gets established, instituted, circulated, and confirmed. This is not a performance from which I can take a radical distance . . . .<sup>414</sup>

Butler describes this identity play as "deep-seated" and "psychically entrenched" and not experienced as a mere role.<sup>415</sup>

A thoroughgoing theory of social construction of identity can accommodate such an idea.<sup>416</sup> As sociologist Stevi Jackson writes, we need not conceive of a prediscursive "I", but only an "I" that is "the fleeting mobilization of a socially constituted self. This self is not a fixed structure but is always 'in process' by virtue of its constant reflexivity."<sup>417</sup> Similarly, Butler argues that "the 'I' is a site of repetition, . . . the 'I' only achieves the semblance of identity through a certain repetition of itself . . . ."<sup>418</sup> The very category constituted by repetition is necessarily unstable.<sup>419</sup> This observation is true not just of identity categories such as gender and sexual orientation, but also of the underlying "person" or self to whom we attribute

412. Halley, *supra* note 315, at 118.

413. Butler, *supra* note 1, at 18.

414. *Id.* at 18.

415. *Id.* She writes, "[T]his 'I' does not play lesbianism as its role." (emphasis omitted). *Id.*

416. See Jackson, *supra* note 21, at 18–19 (describing four intersecting levels of social construction: the structural or social; meaning, encompassing the meanings negotiated in everyday life; routine everyday social practices; and subjectivity, "through which we experience desires and emotions and make sense of ourselves as embodied gendered and sexual beings").

417. *Id.* at 31 (referencing G.H. MEAD, MIND, SELF, AND SOCIETY (1934)).

418. Butler, *supra* note 1, at 18.

419. See *id.* ("[I]t is precisely the *repetition* of that play that establishes as well the *instability* of the very category that it constitutes.").

these identity characteristics. Butler writes that the "I" is always "permanently non-self-identical."<sup>420</sup> A mouthful of a term, to be sure, but accurate. "What 'performs' does not exhaust the 'I'; it does not lay out in visible terms the comprehensive content of that 'I,' for if the performance is 'repeated,' there is always the question of what differentiates from each other the moments of identity that are repeated."<sup>421</sup> Moreover, "there is no 'I' that precedes the gender that it is said to perform; the repetition, and the failure to repeat, produce strings of performances that constitute and contest the coherence of that 'I.'<sup>422</sup> This understanding exposes heterosexuality, among other characteristics, as "perpetually at risk."<sup>423</sup> It also suggests that claims made for heterosexuality being "natural" are a defense against its being—if not "undone" as Butler argues<sup>424</sup>—at least done quite differently.<sup>425</sup> As Stevi Jackson writes, because we are constantly "doing gender" in a set of complex interpretational processes, "gender and

420. *Id.*

421. *Id.*; see *id.* at 24 (stressing that she is not denying that there is a subject; but instead challenging the idea that the subject exists prior to its expression). "[G]ender is not a performance that a prior subject elects to do, but gender is *performative* in the sense that it constitutes as an effect the very subject it appears to express." *Id.*

422. *Id.* at 18.

423. *Id.* at 23.

424. *Id.* The term resonates with the title of her later book, JUDITH BUTLER, UNDOING GENDER (2004).

425. Feminist theory considers it important to address the naturalization or essentialization of gender categories. If gender is understood as socially constructed, then current norms are contestable because they are less than inevitable. See, e.g., Poirier, *Hastening the Kulturkampf*, *supra* note 142, at 303–06 (discussing the theoretical argument for desessentializing gender, with reference to BEM, *supra* note 28; BUTLER, GENDER TROUBLE, *supra* note 382; BUTLER, BODIES THAT MATTER, *supra* note 382; and Valdes, *supra* note 21); Ramachandran, *supra* note 189, at 218 (reading Butler to say that the problem is not identity but the naturalization of identity). There seems to me to be an evident link between this feminist notion of destabilizing structures of dominance and subordination through denaturalizing social structures and the process of using microinteractions to challenging tacit assumptions about identity, as explored in the works of Goffman, Schwalbe & Mason-Schrock, and Gusfield discussed *supra* Part II.A, see text at notes 6, 71–72 & 98. This important set of correspondences in the theory of social movements and of the social construction of identity will have to await another occasion for fuller examination.

Traditionalist understandings of marriage often resort to the rhetoric of nature and essence. See, e.g., William C. Duncan, *supra* note 40, at 266 (marriage is "pre-political") and *id.* at 267–68 (marriage is "rooted in realistic understandings of human nature and the consequences of sex difference.").



normative heterosexuality are constantly reaffirmed, but it is also here that their meanings can be unsettled or renegotiated."<sup>426</sup>

The matter of inherent and inevitable instability of identity returns us to another political question. Butler asks whether it is not politically risky to expose this basic instability of lesbian and gay identities, when they are already threatened with obliteration.<sup>427</sup> Might it not be better to act as though the categories were natural and stable, and not provisional? Butler can be read to suggest not that there should be no policing of gender categories, but rather that whatever category is being advanced politically should also be "made to account for what it excludes."<sup>428</sup> She asks how we can use an identity sign effectively politically now, for the time being, without foreclosing possible future significations that are different.<sup>429</sup> Here Butler's concern resonates with that of others on the feminist left and the queer left about the traditionalist normativity of the marriage equality movement; I have earlier identified Katherine Franke, Ruthann Robson, and Nancy Polikoff, for the feminists, and Michael Warner for the queer, and they will stand in for many others.<sup>430</sup> *Make Change* is only one example of the mainstream LGBT movement's naturalizing reliance on existing diffuse social structures to deliver the political goods—goods that consist not of benefits (as required by *Baker v. State*<sup>431</sup> and *Lewis v. Harris*<sup>432</sup>)—but of a more available traditional identity.<sup>433</sup> The marriage equality movement is driven by a widely shared desire for access to an assimilative, normalizing identity process around kinship categories that derive from what is known as marriage.<sup>434</sup> For the most part the mainstream LGBT movement's theory

426. Jackson, *supra* note 21, at 29.

427. See Butler, *supra* note 1, at 19 ("There is no question that gays and lesbians are threatened by the violence of public erasure . . .").

428. *Id.*

429. *Id.*

430. See generally Franke, *supra* note 5; Robson, *supra* note 330; Polikoff, *We Will Get What We Ask For*, *supra* note 329, and text accompanying notes 382–393.

431. 744 A.2d 864 (Vt. 1999) (requiring the state to provide same-sex couples the benefits of marriage, but leaving up to the legislature whether to call the legally-recognized status of same-sex couples "marriage" or something else).

432. 908 A.2d 196 (N.J. 2006) (requiring the state to provide same-sex couples the benefits of marriage, but leaving up to the legislature whether to call the legally-recognized status of same-sex couples "marriage" or something else).

433. See Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, CONN. L. REV. (forthcoming 2009) (analyzing the stigmatic injury in providing a separate name for legally recognized same-sex relationships while at the same time providing all the same benefits as opposite-sex "marriage").

434. See Polikoff, *supra* note 329, at 184 (arguing that advocates of same-sex marriage

and praxis simply do not leave room for a future troubling of that identity process.<sup>435</sup>

Butler would prescribe a somewhat different course: "In avowing the sign's strategic provisionality (rather than its strategic essentialism), that identity can become a site of contest and revision, indeed, take on a future set of significations that those of us who use it now may not be able to foresee."<sup>436</sup> As Butler writes in another essay, specifically about same-sex marriage,

[L]egitimation is double-edged: it is crucial that, politically, we lay claim to intelligibility and recognizability; and it is crucial, politically, that we maintain a critical and transformative relation to the norms that govern what will and will not count as an intelligible and recognizable alliance and kinship. This latter would also involve a critical relation to the desire for legitimation as such.<sup>437</sup>

So "Butler promotes gender trouble, rather than freedom from gender."<sup>438</sup> Perhaps, as to marriage, the feminist left and queer left will be able to propose recognizable alternatives. If the alternatives are not recognizable as marriage, however, the alternatives will not confer the kinship, status, and microinteraction-based identity that marriage does, and will arguably therefore fall short of goals that might well be expressed as dignity and equality.<sup>439</sup> For, as this article has shown, these experiences depend in significant part on microinteractions of interpersonal recognition.

Meanwhile, the Robin Shahars and Andrew Sullivans of the marriage equality movement, as dependent as they are on misappropriation and transgressive microperformances of a traditional kinship form, at the very same time seek the stability and identity of normalizing and already widely shared understood kinship categories, which they wish to experience as theirs also. They sincerely do not want "trouble" in Butler's sense. They would not wish to acknowledge (nor as a political matter could the marriage

who rely upon normative arguments tend "to paint a picture of marriage that is almost identical to marriage as currently constructed in society . . .").

435. Not coincidentally, the assertion of a particular normalizing position also tends to foreclose questioning of these groups' authority to determine the contents of that position.

436. Butler, *supra* note 1, at 19.

437. JUDITH BUTLER, *Is Kinship Always Already Heterosexual?*, in UNDOING GENDER 117 (2004).

438. Ramachandran, *supra* note 189, at 219. By this Ramachandran means "the capacity to experiment with, challenge, and trouble social norms and roles." *Id.*

439. The problem of achieving sufficient recognition for alternatives to marriage to establish the underlying goals of equality or dignity is a topic of my ongoing research. See generally Poirier, *Name Calling*, *supra* note 433.

equality movement purvey as a goal for its adherents)<sup>440</sup> the idea that identity categories—of sex, gender, sexual orientation, and of married status—still leave us inevitably betwixt and between.

---

440. See Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 239, 258 (Edward Stein ed., 1990) (arguing that a constructionist understanding of gay and lesbian identity does not agree with the self-understanding of many gay and lesbian folks, and poses a threat the concept of legitimation through belonging to a group).