

# SEXUAL AND GENDER VARIATION IN AMERICAN PUBLIC LAW: FROM MALIGNANT TO BENIGN TO PRODUCTIVE

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*Sexuality, gender, and the law now constitutes an important field of legal inquiry and scholarship. This Article traces the evolution of the “big idea” in this area: Contrary to natural law assumptions, the nation is moving decisively toward the norm that sexual and gender variation are typically benign and not malignant. Today, this liberal norm is hotly contested by both traditionalists who oppose legal reforms that require them to accommodate sexual and gender minorities, and progressives who argue that the norm should be pressed more aggressively to assail status quo institutions such as marriage. The notion that sexual and gender variation is benign and can be educational continues to revolutionize American constitutional as well as statutory law.*

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## INTRODUCTION

Sexuality, gender, and the law today stands as an established field of legal scholarship and teaching.<sup>1</sup> The premise of this area of law is that legal rules and

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standards pervasively reflect, regulate, and are undermined by the diversity of gender roles, sexual practices, and gender or sexual identities in a society. The social background of this premise—the background conditions that make possible this area of law—is our collective understanding that biological “sex” (man or woman) does not inevitably determine one’s “gender” (traits, characteristics, and social roles) or one’s “sexual orientation” (preferred sexual partners or activities). This background understanding then motivates intense debate about what role the state should (or can) play in molding gender or sexual identities and channeling gender roles and sexual practices.

Sexuality, gender, and the law was not a conceivable field of inquiry in this country before the Civil War because “sex” was the only relevant classification and because there was not sufficient normative debate about the nation’s regulation of sexual activities (for example, the criminalization of nonmarital intercourse) and gendered hierarchies (for example, the exclusion of women from the franchise, juries, and professions). Part I of this Article traces this social phenomenon and the initial legal response in the United States, which treated variation as *per se* malignant and sought to prohibit, regulate, or expunge it.

The twentieth century witnessed a decline in this “natural law” model for the legal system. As a descriptive matter, Americans recognized that gender roles and sexual proclivities are often different from those demanded by natural law. Confronted with mounting evidence of the independence of gender and sexuality from sex, many Americans believed that the state needed to intervene to preserve or restore the “natural” order. Pushing back against this impulse as a prescriptive matter, feminists, lesbian and gay activists, and trans advocates and their allies, maintained that variation in gender, sexuality, and even sex is typically benign. That is, significant and increasing sexual, gender, and sex variation is not necessarily a matter for normalizing state interventions. Part II provides a broad outline of the social and intellectual forces pressing Americans toward the notion first that most variations are tolerable, and then that some variations ought to be recognized as entirely benign.

By and large, the concept of benign sexual, gender, and sex variation has been articulated as a liberal norm: Gender and sexuality are independent of biological sex, and the state has no business coercing or perhaps even

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1. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* (1st ed. 1998, 2d ed. 2004, abr. ed. 2006, 3d ed. forthcoming 2011); CATHARINE A. MACKINNON, *SEX EQUALITY* (1st ed. 2001, 2d ed. 2007) (sex equality understood through the prism of sexuality and gender); see also MARY E. BECKER, *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1st ed. 1994, 2d ed. 2001, 3d ed. 2007); WILLIAM B. RUBENSTEIN, CARLOS BALL & JANE SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (3d ed. 2008) (sexual orientation casebook whose third edition was refocused to include broader issues of sexuality and gender).

encouraging people to adhere to a collectively determined ideal of standardized gender roles and sexualities. The state ought not force sexual and gender minorities to conform to the old naturalized categories, including one-man, one-woman marriage. Given the benign nature of sexual and gender variation, society and the state ought to provide both freedom and equal opportunities to lesbians, gay men, bisexuals, transgendered persons, and intersexuals, so that they may live flourishing lives.

This idea has had dramatic implications for American public law. It put a public face on the constitutional privacy right, reconnected equal protection law to social prejudice, and sexualized the First Amendment. At the same time, its success has spawned a traditional family values countermovement that seeks to position gay equality as a threat to the privacy and free speech rights of religious persons, many of whom now see themselves as an embattled minority oppressed by the state.

The debate between liberal and neo-natural law stances is not the last word, however. Part III examines issues of sexuality, gender, and the law through a “post-liberal” perspective. The basic descriptive insight of most post-liberal thinking is that sex, gender, and sexuality are interdependent, not independent. Catharine MacKinnon, for example, maintains that subordinate gender role is driven not so much by sex as by sexuality. Michel Foucault argues that sexuality is a social construction, related to gender and sex but also a separate production. Judith Butler says that biological sex itself is a product of gender and heterosexuality. These otherwise different philosophies share the basic normative insight that the state cannot be neutral and thus bears some responsibility for the construction of sex, gender, and sexuality in a society. This means that the norms surrounding, and often coercing, sex, gender, and sexuality ought to be deliberated about in communities where multiple voices are heard. In such an ongoing conversation, sexual and gender variation is not just tolerable (the weak liberal idea) or benign (the stronger liberal claim), but positively productive (the post-liberal contention). Variation provides a lever for reforming unjust features of the status quo.

This Article closes with some observations about how the evolution of discourse concerning sexuality, gender, and the law has transformed the constitutional doctrines of privacy, equal protection, and freedom of speech. The sexualized privacy right has not only been unmoored from its traditional connection to procreative marriage, but has become a mechanism for transforming marriage itself. Cases involving sex, gender, and sexual orientation discrimination have dislodged the U.S. Supreme Court from the double standard created by its race discrimination cases and helped move equal

protection doctrine toward a sliding scale of scrutiny. Finally, the imperial First Amendment now protects sexualized and gendered identity speech, including that of religious minorities who self-identify as nongay and traditionally gendered.<sup>2</sup>

I. THE NATURAL LAW MODEL: NATURAL SEX-BASED ROLES  
AND MALIGNANT VARIATION

In the colonial era and the early nineteenth century, American society and law were organized around the biological binary of “man” and “woman.” What we would call a person’s *gendered* traits or roles and her or his *sexuality* were, linguistically as well as culturally, indistinguishable from the biological categories. Nineteenth-century Americans understood “gender” to be “[a] sex, male or female”<sup>3</sup> and “sexuality” to be “[t]he state of being distinguished by sex.”<sup>4</sup> Each sex carried with it assumed traits and roles that were considered essential features of being a man or a woman. The traits and roles were intimately tied to procreation within marriage: A woman’s highest calling was to be a wife and a mother, so that her sex-based roles were private, domestic, and nurturing; a man’s highest calling was to be the head of the household, so that his sex-based roles were public, economic, and civic.

These assumptions about naturalized categories of man and woman structured public life in pre-Civil War America. Power and authority were vested securely in the hands of (white) men, who were presumed fit to run the nation’s businesses, staff the militia and national armed forces, and serve as public officials. Not everyone adhered to these naturalized roles: Some women and men did not marry, some marriages produced no children, and slaves and some servants were denied the dignities (including the right to marry) afforded free white men. But among America’s governing classes—namely, those Americans

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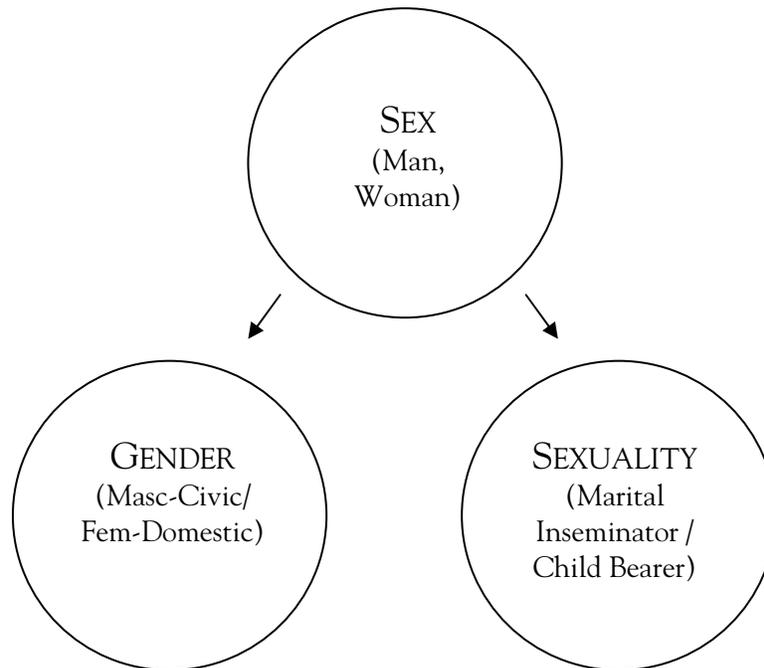
2. By deeming it “imperial,” I suggest that the First Amendment has expanded in the last generation, reaching into ever more arenas of society and governance.

3. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 90 (1828) (definition of “gender”); cf. LINDLEY MURRAY, ENGLISH GRAMMAR (5th ed. 1824) (defining gender as “the distinction of nouns with regard to sex”). Twentieth-century editions of Webster’s listed this definition as “obsolete” but did not replace it with a modern definition until Webster’s Third was published in 1961. Since 1961, Webster’s has defined “gender” as “the behavioral, cultural, or psychological traits typically associated with one sex.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 944 (3d ed. 1961).

4. WEBSTER, *supra* note 3, at 69 (definition of “sexuality”). Subsequent nineteenth-century editions essentially repeated this definition, until Webster’s Second, published in 1934, which defined “sexuality” as the “[q]uality or state of being sexual; possession or exercise of sexual functions, appetites, etc.” WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2297 (William Allen Nielson et al. eds., 1934).

who could vote, serve on juries, and who formed the core of the armed forces—these naturalized categories were nearly universal in their command. What we today would consider gender and sexuality were virtually invisible to American culture before the Civil War because sexual impulses and gender roles were thought to be tied both *descriptively* (as a matter of nature) and *prescriptively* (as a matter of God-given natural law rules) to one's status as a man/woman, husband/wife, and father/mother. Figure 1, below, diagrams the natural law understanding of sex, gender, and sexuality according to the social, political, and legal features associated with being a man or woman.

Figure 1. The Natural Law Model of Sex, Gender, and Sexuality



American law before 1861 pervasively reflected and provided normative confirmation for this natural law understanding. State-supported marriage was the central regulatory institution: Free men and women were strongly encouraged to enter it, and within that institution they were governed by rigid rules. Thus, state criminal codes channeled sexual activities into procreative (penile-vaginal) intercourse within marriage by declaring fornication and adultery (intercourse

outside of marriage), sodomy (nonprocreative anal intercourse), and seduction (intercourse with a minor incapable of marrying) to be serious felonies.<sup>5</sup> Children born outside of marriage were subject to social disadvantages and legal exclusions.<sup>6</sup> Because they were socially and sometimes legally excluded from most occupations, women had powerful economic incentives to marry men; once married, women were legally “covered” by their husbands.<sup>7</sup> Married women could not own property, enter into contracts, or engage in litigation without the consent of their husbands.<sup>8</sup> American public law also embraced the natural law understanding. Voting, jury service, and military service were limited to free (white) men.<sup>9</sup>

The natural law paradigm was not unchallenged in nineteenth-century America. Increasing numbers of women objected to coverture within the family and exclusion from participatory rights in the body politic.<sup>10</sup> Thousands of women “passed” as men to exercise these rights, and not a few women served in the armed forces.<sup>11</sup> Other women defied the natural law ideal by refusing to marry and even more by engaging in sex work outside of marriage.<sup>12</sup> Many men, in turn, engaged in nonmarital or nonprocreative sexual activities—usually behind closed doors—but those doors were occasionally thrust open. The target of a few volleys well before 1861, the legal regime of the natural law model came under intense fire after the Civil War.

Industrialization and tremendous population growth brought public displays of deviation from the natural law regime to America’s largest cities in

5. WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003*, at 24 (2008); see generally NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 126–32, 160 (2000) (listing state criminal laws enforcing marital monogamy); JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC* 66–133 (1993) (collecting colonial and early American statutes criminalizing fornication, adultery, sodomy, etc.).

6. Cf. COTT, *supra* note 5, at 32 (discussing the unequal status of children born outside of marriage).

7. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 430 (1765) (discussing the merger, or covering, of a wife’s identity with that of her husband upon marriage).

8. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 115–16 (2000) (describing Blackstone’s theory of coverture).

9. See generally Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499 (1991); Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 *YALE L.J.* 473 (1997).

10. On feminist objections to coverture and campaigns to revoke it, see NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800–1861* (1987).

11. San Francisco Lesbian and Gay History Project, “*She Even Chewed Tobacco*”: A Pictorial Narrative of Passing Women in America, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 183 (Martin Baum Duberman et al. eds., 1989).

12. See TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790–1920* (1994).

the three generations after the Civil War (roughly 1865–1946). Feminists demanded the end of coverture, campaigned for legal rights to own property and enter contracts, objected to compulsory motherhood and large families, sought the right to vote and serve on juries, and insisted on educational, professional, and other economic opportunities.<sup>13</sup> Other social developments shocked and challenged the dominance of the old model. The yellow press and moralists bombarded society with evidence of cross-dressing women, women who lived with other women in “Boston marriages,” and women who renounced marriage for sex work or relations with other women.<sup>14</sup> Also alarming to polite society was evidence that cities were teeming with men who dressed as women, engaged in oral and anal intercourse with other men (often for compensation), and solicited men as well as women in public places.<sup>15</sup>

Although traditionalists were compelled to allow wives some legal rights and all women the right to vote, they responded to the new urban challenges by reasserting and modernizing the natural law norm.<sup>16</sup> Thus, “unnatural” gender roles and sexual practices were freshly presented in medical terms, as degenerate and inverted, and in civic terms as endangering vulnerable children and polluting public culture.<sup>17</sup> Medical professionals, civic leaders, and moral crusaders supported new forms of coercive regulation. The reassertion of the modernized natural law model in the United States between 1861 and 1961 inspired dozens of legal responses, including the following:

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13. See ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848–1869* (1978).

14. See generally LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* (1981) (documenting examples of female relationships and women in “Boston marriages”); RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918* (1982) (exploring the rise of sex work among working class women).

15. See ESKRIDGE, *supra* note 5, at 43–46 (documenting the emergence of visible and infuriating subcultures of female sex workers and male “fairies” in the two generations after the Civil War).

16. CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 176–81 (1985); see, e.g., Reva B. Siegel, “*The Rule of Love*: *Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2117, 2119–20 (1996) (arguing that lawmakers and jurists responded to women’s demands for autonomy with a “modernized” discourse that rearticulated natural law ideas in modern terms).

17. See ESKRIDGE, *supra* note 5, at 23–31, 46–49 (noting the modernization of the discourse of disgust and contagion that was the basis for natural law disapproval of sexual and gender minorities). For contemporary examples, see HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX: SEXUAL INVERSION* 261–63 (3d ed. 1927); WILLIAM LEE HOWARD, *THE PERVERTS* (1901); William Lee Howard, *Effeminate Men and Masculine Women*, 71 *N.Y. MED. J.* 686 (1900).

- new and increasingly detailed criminal prohibitions against bawdy houses and sex work, sexual solicitation, cross-dressing, oral sex, child molestation, abortion, and contraception;<sup>18</sup>
- new civil exclusions of “degenerate” women and men from entry into the United States as immigrants, service in the armed forces, professional licensing, and service at licensed liquor establishments;<sup>19</sup>
- new and more vigorously enforced censorship of literature and pamphlets depicting “unnatural” or “perverted” sexual practices, handbooks instructing or even discussing abortion and contraception, and bans on the sale or importation of lewd plays and movies as well as novels.<sup>20</sup>

Confronted with increasing evidence of variation from natural law gender roles and sexual behavior, America’s governing classes responded by modernizing and medicalizing the morals-based natural law model, and mobilizing state administrative structures to give legal force to the traditionalist norm.

## II. THE LIBERAL NORM: TOLERABLE OR BENIGN SEXUAL AND GENDER VARIATION

The twentieth century witnessed a sea change in understandings about sexuality and gender in the United States. A critical mass of Americans who significantly and publicly deviated from the natural law norm joined together to form social movements after World War II. These included women who worked outside the home and otherwise participated in public life; women who openly supported the use of contraceptives (and, later, abortions) to limit the size of families; sexually cohabiting couples who were not married; cross-dressing women and men; urban subcultures of “homosexuals” (later, lesbians and gay men); and transgendered and intersexual persons.<sup>21</sup> Typically urban

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18. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 17–34 (1999) (discussing the new crimes of cross-dressing, homosexual solicitation, and oral sex); PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998) (examining the development of child molestation crimes); ROSEN, *supra* note 14 (examining crimes of commercial sexual solicitation and bawdy houses).

19. See ESKRIDGE, *supra* note 18, at 34–40, 43–52 (documenting civil exclusions for “degenerates” and “perverts” in immigration law, military service, and licenses).

20. See *id.* at 32–35, 46–49 (discussing state and federal censorship of materials even mentioning homosexuality or depicting homosexual relationships).

21. See LISA DUGGAN, *SAPPIC SLASHERS: SEX, VIOLENCE, AND AMERICAN MODERNITY* (2000) (independent women and lesbian subcultures); ESKRIDGE, *supra* note 5, at 138–39 (“homosexuals” and gender minorities); JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 14–167 (2002) (gender benders and transgendered persons); ELIZABETH

residents, these Americans challenged long-held assumptions and pushed the country towards a new view of sex, gender, and sexuality.

The ascendant population of gender and sexual variants served both as an audience and ultimately an advocacy group for a new understanding of the relationship among biological sex, gender traits and roles, and sexual practices and preferences. The sexual and gender revolution of the 1960s was the context within which these social movements gained mass energy. Freed from procreation by the new birth control pill, sexually liberated women stood at the fore of a whole generation of Americans who rejected traditional gender roles and dress codes, compulsory heterosexuality, and even marriage.<sup>22</sup>

The emerging regime recognized a wide range of gender and sexual variation as *tolerable* or (more ambitiously) as *benign*. Benign variation suggests that no gender role is inevitably “best” for every woman or every man, and no sexual practice or orientation is inevitably “best” for every person. The implication for law is that the state should not force a diverse population into traditional natural law molds; the state must tolerate a wide array of gender identities and sexual practices.

Conceptually, the parent of the new norm was eighteenth-century British philosopher Jeremy Bentham. Contrary to the natural law model, Bentham argued that human beings properly seek “utility,” their own pleasure and happiness, rather than conformity with the “natural” order.<sup>23</sup> Consequently, the goal of law ought to be overall social utility—namely, the greatest good for the greatest number.<sup>24</sup> In an unpublished essay, Bentham urged that the British law against consensual sodomy be repealed, because it harmed people who enjoyed that activity and did not serve offsetting social purposes.<sup>25</sup> The sodomy essay illustrates the key argument for a libertarian approach to consensual sexual behavior: So long as personal choices do not harm third parties or invade the public sphere, the state should tolerate them.<sup>26</sup> Although Bentham’s 1785 essay

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REIS, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX (2009) (history of the intersexuals’ rights movement).

22. See, e.g., SWINGING SINGLE: REPRESENTING SEXUALITY IN THE 1960S (Hilary Radner & Moya Luckett eds., 1999).

23. JEREMY BENTHAM, THE THEORY OF LEGISLATION 476 (C.K. Ogden ed., 1931) (1821) (appendix on “Offenses Against Taste” added by the editor from Bentham’s notes).

24. *Id.*

25. Jeremy Bentham, *Offences Against One’s Self: Paederasty* (1785) (written 1785, annotated 1816), published in two parts in 3 J. HOMOSEXUALITY 389 (1978) [hereinafter Bentham, Part I] and 4 J. HOMOSEXUALITY 91–107 (1978) [hereinafter Bentham, Part II].

26. Bentham, Part II, *supra* note 25, at 94–98 (finding consensual sodomy law grounded upon “antipathy,” which is an irrational basis for regulation); Bentham, Part I, *supra* note 25, at 389–90 (distinguishing between consensual private sodomy, which should be left alone, and nonconsensual or public sodomy, which should be regulated).

was never published, it presaged the libertarian philosophy later developed by John Stuart Mill's *On Liberty* (1859), and its specific prescriptions regarding sex crimes were popularized by Havelock Ellis's *Sexual Inversion* (1915).<sup>27</sup> Feminists such as Margaret Sanger made Benthamite arguments for providing women with birth control information and devices to control the size of their families. The famous German sexologist Magnus Hirschfeld also agreed with Bentham and extended his argument to include cross-dressers and other minority gender identities.<sup>28</sup>

In early twentieth-century America, feminists were able to secure the rights to vote and to use contraceptives, but there was little political support for a libertarian approach to minority gender and sexual roles and practices. Nonetheless, such an approach was smuggled into American culture by scientists. Their basic insight was that "nature" produced a lot more variation, most of it perfectly functional, than the "natural" law model assumed. For example, Columbia University anthropologists Ruth Benedict and Margaret Mead (secret gender benders and sexual variants themselves) demonstrated that Americans' obsession with the distinction between masculine and feminine, and the demonization of "homosexuality," were idiosyncratic to modern western culture and had no universal applicability, contrary to natural law claims.<sup>29</sup> Medical experts, drawing from Mead and Benedict and their own observations of the burgeoning urban subcultures of sexual and gender minorities, found a great deal of natural variation in gender and sexuality, and wondered whether traditional state regulation was too dogmatic.<sup>30</sup>

A dramatic breakthrough came in the work of an Indiana University biologist, Professor Alfred Kinsey. His massive empirical analysis of the sexual practices of white males (1948) and females (1953) revealed that Americans engaged in a much greater variety of sexual practices (especially homosexual

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27. See JOHN STUART MILL, *ON LIBERTY* 134–67 (Legal Classics Library 1992) (1859) (giving a detailed argument for a libertarian presumption against state regulation of private personal activities); ELLIS, *supra* note 17, at 346–55 (elaborating on the Benthamite argument against consensual sodomy laws).

28. See MAGNUS HIRSCHFELD, *THE HOMOSEXUALITY OF MEN AND WOMEN* 923–52, 979–1005 (Michael A. Lombardi-Nash trans., 2000) (1920).

29. RUTH BENEDICT, *PATTERNS OF CULTURE* (1934); MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935). See generally LOIS BANNER, *INTERTWINED LIVES: MARGARET MEAD, RUTH BENEDICT, AND THEIR CIRCLE* 285–376 (2003) (discussing Benedict's and Mead's parallel critiques of the natural law model); HILARY LAPSLEY, *MARGARET MEAD & RUTH BENEDICT: THE KINSHIP OF WOMEN* (2001); Lee Wallace, *Academic Recognition: Margaret Mead, Ruth Benedict, and Sexual Secrecy*, 11 *HIST. & ANTHROPOLOGY* 417 (1999).

30. E.g., Karl M. Bowman, *Psychiatric Aspects of the Problem*, 22 *MENTAL HYGIENE* 10, 12–20 (1938); Joseph Wortis, *Sex Taboos, Sex Offenders and the Law*, 9 *AM. J. ORTHOPSYCHIATRY* 554–64 (1939).

activities) and gender performances than law and public culture assumed.<sup>31</sup> Building on the descriptive account, the studies argued that state regulation of consensual sexual practices, especially homosexual sodomy, was ridiculously overbroad and ought to be significantly curtailed for essentially Benthamite reasons.<sup>32</sup> Kinsey, himself a closeted bisexual, also pioneered the idea that sexuality represented a continuum rather than a binary (heterosexual/homosexual<sup>33</sup>). Other scientists extended his notion to think about gender identity, also, as a continuum.<sup>34</sup> Dr. John Money and his colleagues at the Johns Hopkins Medical School demonstrated that even sex itself was not binary; many intersexual human beings had hormonal patterns, genitals, sexual organs, and chromosomes that did not match the man/woman binary.<sup>35</sup>

Introduced at the height of American law's insistence on sexual and gender conformity in the 1950s, the combination of a Benthamite political philosophy and well-publicized scientific evidence of gender and sexual variation inspired a great deal of reform activities in the 1960s and afterward. The reformers rejected any claim of a necessary relationship, either descriptively or normatively, between one's biological sex and one's sexuality or gender. Figure 2, below, encapsulates the Bentham-inspired "liberal model" of tolerable gender and sexual variation. As with the natural law model above, the liberal model features both descriptive and prescriptive dimensions.

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31. ALFRED E. KINSEY ET AL., *SEXUAL BEHAVIORS IN THE HUMAN MALE* 639–51 (1948) [hereinafter *KINSEY, HUMAN MALE*]; ALFRED E. KINSEY ET AL., *SEXUAL BEHAVIORS IN THE HUMAN FEMALE* 474–75 (1953) [hereinafter *KINSEY, HUMAN FEMALE*].

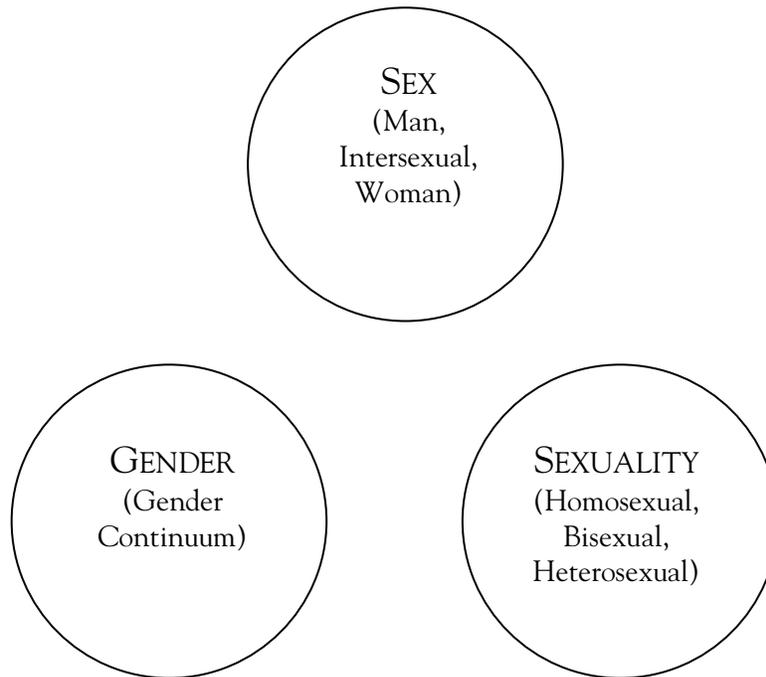
32. *KINSEY, HUMAN FEMALE*, *supra* note 31, at 8–21. On Kinsey as a moral crusader deploying science to assault traditional morality, see JAMES H. JONES, *ALFRED C. KINSEY: A PUBLIC/PRIVATE LIFE* 465–66, 518–33 (1997); PAUL ROBINSON, *THE MODERNIZATION OF SEX: HAVELOCK ELLIS, ALFRED KINSEY, WILLIAM MASTERS AND VIRGINIA JOHNSON* (1989).

33. *KINSEY, HUMAN MALE*, *supra* note 31, at 636–38 (0–6 scale, with 0 being completely heterosexual and 6 being completely homosexual).

34. HARRY BENJAMIN, *THE TRANSEXUAL PHENOMENON* 21–22 (1966) (gender identity continuum).

35. John Money, Joan G. Hampson & John L. Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 *BULL. JOHNS HOPKINS HOSP.* 301 (1955).

Figure 2. The Liberal Model of Sex, Gender, and Sexuality



As a descriptive matter, the liberal model *disaggregates* gender and sexuality from sex. Identifying an individual as a “man” does not tell us precisely what role he plays in society (he may be a doctor, he may be a nurse, he may be a stay-at-home dad), what gendered traits he possesses (he may be aggressive, he may be nurturing), or his preferred sexual practices or partners (he may enjoy procreative intercourse with women, or he may prefer oral sex with men). As a normative matter, the liberal model abjures a role for the state that requires or even encourages a particular relationship among sex, gender, and sexuality. That is, the law should be *neutral* with regard to a person’s gender identity, sexual practices, or sexual orientation, unless they pose tangible harms for third parties.<sup>36</sup>

In the 1950s and 1960s, millions of women, homosexuals and bisexuals, and transgendered or intersexual persons came to believe that the privileged status

36. The possibility of harm to third parties is foreclosed for variations that are benign and unlikely for those that are tolerable. For an example of the liberal understanding of state neutrality with regard to sexual practices as applied by the authors of the Model Penal Code, see Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 673–86 (1963).

accorded heterosexual males was unjustified under a Benthamite metric of overall social good.<sup>37</sup> Profoundly inspired by the African American civil rights movement, these Americans saw the natural law model as a product of prejudice and stereotypes that denied women and minorities equal treatment.<sup>38</sup> Scientific claims about natural gender and sexual variation not only inspired legal arguments for reforming the law to tolerate variation, but also constitutional claims asserting the illegitimacy of laws discriminating upon the basis of sex, sexual orientation, and gender identity.

The motivations and social cohesiveness created by legal discrimination, combined with a science-based refutation of the natural law model and a general surge in support for the Benthamite theory of the state, mobilized women and sexual and gender minorities against the status quo.<sup>39</sup> A revived and more united feminist social movement coalesced in the 1960s to seek abortion choice and the Equal Rights Amendment. Social and legal activism merged in the National Organization for Women (formed in 1966), the National Association for the Repeal of Abortion Laws (1968), and the ACLU's Women's Rights Project (1970).<sup>40</sup> The lesbian and gay rights movement mounted an attack on consensual sodomy laws and antigay discriminations through the Lambda Legal Defense & Education Fund (1972), the ACLU's Privacy Project (1974), and later its Lesbian and Gay Rights Project (1985).<sup>41</sup> The lesbian and gay rights movement

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37. For important and early statements of dissent, see SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., ed., 1953) (1949); MATTACHINE SOCIETY OF WASHINGTON CONST., art. II (1963); PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, *AMERICAN WOMEN* 44–45 (1963); as well as popular works such as HELEN GURLEY BROWN, *SEX AND THE SINGLE GIRL* (1962); BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966); GORE VIDAL, *MYRA BRECKINRIDGE* (1968); *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* (Karla Jay & Allen Young eds., 1972).

38. See NAN ALAMILLA BOYD, *WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965*, at 204–12 (2003) (describing the emerging civil rights consciousness in San Francisco in the late 1950s/early 1960s); DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2003) (discussing the emerging civil rights consciousness in D.C.); William N. Eskridge, Jr., *January 27, 1961: The Birth of Gaylegal Equality Arguments*, 58 N.Y.U. ANN. SURV. AM. L. 39 (2001) (similarly focusing on civil rights inspired arguments in a 1961 cert petition).

39. My account of this process for race, sex, and sexual orientation groups can be found in William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

40. See generally CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968*, at 126–34 (1988); ROSEN, *supra* note 14. On the women's movement's deployment of civil rights tropes and arguments, see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004).

41. See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970* (1983); ESKRIDGE, *supra* note 5.

was particularly law-centered, and the same has been true of similar movements for transgendered and now intersexual persons.<sup>42</sup>

Espoused by social movements, publicized to great effect by the media, and litigated by their legal allies, the liberal model of tolerable gender and sexual variation has worked a revolution in American statutory and constitutional law. Although neo-natural law countermovements have fought its advancement at every turn, the tolerable variation agenda reflected in the liberal model is in the process of triumphing in American public law. The norm itself has been evolving, toward the notion that sexual and gender variation is not only tolerable (that is, not as good as the traditional norm, but no danger either), but is benign (that is, just as good as majority preferences or conditions). Many laws discriminating against women, gender minorities, and gay or bisexual people have been repealed.<sup>43</sup> Those that remain have been radically recharacterized according to the liberal norm that justifies state intervention only in the presence of third-party or public harm.<sup>44</sup> Although the concepts of “harm” and “consent” are open to contestation, the public debate now takes place largely along liberal lines.

#### A. Sex and Gender Crimes Refocused Around Nonconsent

The most obvious legal implication of the liberal model is that the state should not render women and sexual and gender minorities outlaws by criminalizing the activities that allow them to participate in modern society. For each social movement, decriminalization—of contraception and abortion (feminists), consensual sodomy (gay people), or cross-dressing (transgendered

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42. See MEYEROWITZ, *supra* note 21, at 208–54 (tracing the rights-claiming transsexual rights movement); Noah Ben-Asher, *The Necessity of Sex Change*, 29 HARV. J.L. & GENDER 51 (2006) (contrasting the rights claims of transsexuals and intersexuals).

43. In 1960, every state of the United States considered consensual sodomy a crime, almost all the states excluded these purported “sex criminals” from securing teaching certificates or professional licenses, no state allowed open lesbians or gay men to serve as police officers or other public servants, most states discriminated against lesbian or gay parents or caregivers, and not a single state provided protections for gay people against discrimination or violence. See ESKRIDGE, *supra* note 18. In 2010, not a single state has an enforceable consensual sodomy law, very few openly discriminate in state employment or licensing against gay people, and more than half have statewide laws or executive orders prohibiting employment discrimination based on sexual orientation. See Lambda Legal, *In Your State*, <http://www.lambdalegal.org/states-regions> (last visited June 1, 2010) (maintaining a state-by-state survey of legal rights and discrimination against sexual and gender minorities).

44. The best example is the ongoing exclusion of lesbian and gay couples from civil marriage. This exclusion is now justified largely on liberal rather than moral grounds. Melissa Murray, *Marriage Rights & Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2009).

persons)—served as the initial focus of legal reform.<sup>45</sup> Although members of religious and even medical communities objected to these activities, reformers countered that they were at least tolerable variations from the natural law model, because they did not harm third parties or the public. In a remarkable concession to the liberal model, public defenses of abortion and sodomy laws after the 1960s focused on asserted harms to fetuses (characterized as human beings) and children (the supposed victims if a state unleashed homosexuals into public culture).<sup>46</sup>

The last two generations of legal policymakers have reformulated the law of sex crimes around the notion that private sexual activities between consenting adults ought not be subject to state criminalization. This was the Benthamite agenda represented by the American Legal Institute's (ALI) Model Penal Code (MPC) written in 1962, which urged decriminalization of private and consensual sexual activities, including fornication, adultery, and sodomy.<sup>47</sup> The MPC also suggested the substantial decriminalization of abortion.<sup>48</sup> Essentially, the ALI's case for decriminalization asserted that these morally controversial activities (all condemned by natural law) were tolerable so long as they did not impose harm on nonconsenting persons (especially minors) or upon public spaces (thus, sexual solicitation remained a crime).<sup>49</sup> Feminists and other progressive groups supported these reforms, usually in combination with increased criminalization for nonconsensual activities such as sexual assault and sexual activities with minors.<sup>50</sup> Feminists, gay rights advocates, and transgendered persons also fought, with virtually uniform success, to repeal or revoke laws criminalizing cross-dressing.<sup>51</sup> Repealing consensual sodomy laws proved more difficult, especially between

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45. See ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* 200–42 (1992) (contraception); ESKRIDGE, *supra* note 5, at 109–330 (consensual sodomy); LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1976) (contraception); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997) (cross-dressing laws).

46. See DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIREY PROTEST* 44–46 (1994) (discussing pro-life arguments against abortion); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1338–46 (2000) (noting that antigay discourse has refocused on the harms gay rights cause children and families).

47. MODEL PENAL CODE § 213 (1962) (containing no provisions for penalizing consensual fornication, adultery, or sodomy).

48. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962) (distinguishing between “justified” and “unjustified” abortion).

49. Schwartz, *supra* note 36 (outlining the libertarian approach to sex crimes taken by the drafters of the Code).

50. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

51. ESKRIDGE, *supra* note 18, at 111.

1977 and 1993, when public association of sodomy with homosexuality, child molestation, and AIDS stalled reform efforts.<sup>52</sup> But after 1993, gay rights groups were able to secure sodomy reform even in some states of the Baptist South and Mormon West.<sup>53</sup>

Along with revising sex crime laws, the feminist, gay-lesbian, and transgendered social movements successfully persuaded the U.S. Supreme Court to constitutionalize the liberal model, at least in part, through the recognition of a right to sexual privacy.<sup>54</sup> In *Planned Parenthood v. Casey*<sup>55</sup> and *Lawrence v. Texas*,<sup>56</sup> the Court explicitly acknowledged the debt its sexual privacy decisions owed to the liberal concept of tolerable variation.<sup>57</sup> The joint opinion in *Casey* observed that, notwithstanding the variety of moral views on the subject, women ought to have the discretion to choose abortion as well as motherhood.<sup>58</sup> But it concluded with the equally liberal observation that the state can intervene when third-party interests are at stake, including “potential life” once the viability line has been crossed.<sup>59</sup> Significantly, however, the Court refused to sacrifice a married woman’s right to an abortion to claims by her husband; a woman is an individual and a citizen first, and a wife second.<sup>60</sup> Likewise, *Lawrence* ruled that intimate activities within the home are entitled to presumptive protection from state regulation, so long as the conduct does not harm other persons (in other words, it is consensual) and does not invade public spaces.<sup>61</sup>

Thus, in *Casey* and *Lawrence*, a conservative Supreme Court created a constitutional floor for activities that remain morally controversial but do not cross the Benthamite line of harm to third parties or the public. Tolerance of homosexual sodomy and a woman’s right to choose an abortion did not,

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52. See ESKRIDGE, *supra* note 5, at 267–69.

53. *Id.* at 269–78, 289–98 (reporting successful sodomy reform efforts after 1990 in Baptist Kentucky, Tennessee, Georgia, and Arkansas, as well as Montana (with a relatively large Mormon population) and other states).

54. The leading constitutional privacy cases, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (use of contraceptives by unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion right for unmarried as well as married women), were litigated by feminists and their legal allies. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (2d ed. 1998); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

55. 505 U.S. 833 (1992) (joint opinion).

56. 539 U.S. 558 (2003).

57. *Casey*, 505 U.S. at 850–53. See also *id.* at 926–29 (Blackmun, J., concurring in part) (containing stronger statement of the Court’s pre-1989 abortion jurisprudence).

58. *Id.* at 850–53.

59. *Id.* at 870–76.

60. See *id.* at 888–98.

61. *Lawrence*, 539 U.S. at 578–79 (following *Casey* to protect the right of gay people to engage in consensual private relations, notwithstanding the moral objections from some quarters; noting that the holding did not extend to sexual activities that were not consensual or that were public).

however, entail any kind of moral approval from the Court. Moral distance from the conduct the majority justices were constitutionally protecting saturates both *Casey* and *Lawrence*.<sup>62</sup>

#### B. Antidiscrimination: Suspect Classifications and Beyond

In 1961, hundreds of state-sanctioned discriminatory practices targeted adult citizens because of their (female) sex, (nonconforming) gender, or (homo)sexual activities. Following the civil rights model, feminists and sexual minorities sought repeal or invalidation of these practices and the adoption of affirmative state policies barring discrimination by private employers, schools, and public accommodations.<sup>63</sup> Their arguments reflected a shift toward a more aggressive interpretation of the liberal model embodied in criminal law reform: Sexual or gender variation is not merely tolerable, but benign. This normative point also drew inspiration from the civil rights movement, which successfully maintained that racial variation ought to be considered completely benign as a matter of public policy and constitutional doctrine.<sup>64</sup>

Feminists have been particularly successful in invalidating sex discrimination and securing laws barring sex discrimination in the workplace, educational settings, and public accommodations.<sup>65</sup> The Supreme Court came within one vote of ruling that sex-based classifications, like race-based classifications, require strict scrutiny under the Equal Protection Clause.<sup>66</sup> Subsequent decisions have usually struck down sex-based classifications that discriminate against women.<sup>67</sup> In the workplace and other arenas, sex variation is legally benign and cannot be the basis for discrimination.

Gay people have also successfully advanced the liberal norm of benign variation: The federal government and a large majority of states bar sexual

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62. See Marc Spindelman, *Surviving Lawrence*, 102 MICH. L. REV. 1615, 1619–32 (2004) (examining *Lawrence*'s intense effort to reaffirm heterosexuality and the opinion's treatment of homosexuality with tolerance but not equal respect).

63. See Eskridge, *supra* note 39, at 2124–38, 2169–75, 2188–92 (discussing the shift in feminist and gay legal reform efforts after early success in getting the police off their backs).

64. See *id.* at 2082–96 (tracing the shift in the civil rights movement toward an equality agenda after some success in securing process protections against terrorizing criminal prosecutions).

65. Part of this success can be attributed to the majority women enjoy in the voting electorate. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* (2d ed. 1996) (providing a history of feminists' successful efforts to repeal or invalidate almost all open government discriminations against women on the basis of sex).

66. *Craig v. Boren*, 429 U.S. 190 (1976) (majority ruling that sex is a quasi-suspect classification receiving intermediate scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion finding that sex-based distinctions are subject to strict scrutiny).

67. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (strong version of intermediate scrutiny for sex-based classifications).

orientation discrimination in government employment; nearly half the states and more than one hundred municipalities bar such discrimination by private employers, and almost as many states and cities bar such discrimination in public accommodations and/or educational institutions.<sup>68</sup> A dozen states and a number of municipalities have extended their antidiscrimination rules to include gender identity or orientation as a presumptively irrational basis for employment decisions.<sup>69</sup>

As was the case with decriminalization campaigns, public opposition to antidiscrimination rules has increasingly argued within the liberal model, at the expense of the natural law model (which many Americans still privately embrace as a matter of religious faith). Support for rules openly discriminating against women because of sex has virtually disappeared. Supporters of rules discriminating against sexual and gender minorities have largely abandoned the old arguments that “homosexuals” or transgendered persons are immoral, mentally defective, or unnatural, and argue instead that such minorities disrupt the workplace or other public spaces.<sup>70</sup> The most interesting and ascendant argument is completely liberal, both philosophically and constitutionally: Equal protection for sexual and gender minorities can be harmful because it abridges the liberties of religious minorities—namely, fundamentalists who adhere to the natural law model largely rejected by modern legal culture.<sup>71</sup>

The sex and sexual orientation discrimination cases have transformed the Constitution. The Supreme Court’s equal protection activism in the race cases could be justified by the representation-reinforcement argument that local (southern) political processes were stacked against people of color. The Court’s highly activist constitutional sex discrimination decisions did not enjoy that justification; indeed, most were handed down at precisely the same time the country was debating the Equal Rights Amendment (ERA), which had passed Congress by overwhelming margins and ultimately fell just short of ratification by

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68. See Lambda Legal, *supra* note 43, for a state-by-state survey of sexual orientation antidiscrimination rules.

69. See *id.*

70. See Eskridge, *supra* note 46, at 1328–29.

71. See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008) (collection of essays exploring the increasing conflict between equality for gay people and liberty for some religious people); Andy Koppelman & George Dent, Must Gay Rights Conflict with Religious Identity? (Dec. 4, 2009) (unpublished manuscript, on file with UCLA Law Review). An early version of this argument is ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 13–28 (1977).

three-quarters of the state legislatures.<sup>72</sup> The Court primarily justified its sex discrimination jurisprudence on the substantive judgment that sex ordinarily constitutes an irrational basis for state discrimination—an acceptance of the norm of benign sex variation. Note how remarkable this activism was: A purportedly strict constructionist Court embraced a highly dynamic interpretation of the Constitution in the face of We the People's failure to amend the Constitution, and without the democracy-perfecting features that justified aggressive judicial review in the race cases.

In the future, wider acceptance of the liberal norm of benign gender and sexual variation will probably spur the Court to extend the same consideration to sexual orientation and gender identity classifications. The process is already afoot. In 1992, Colorado voters passed Amendment 2, which preempted local and state antidiscrimination protections for sexual minorities, based largely upon arguments that such laws provided "homosexuals" with "special rights" that deprived traditionalist Coloradans of their liberties.<sup>73</sup> Gay rights advocates challenged Amendment 2 on the ground that it reflected antigay prejudice and not a genuine public interest. Defenders responded that the liberal interest in protecting religious liberty justified preempting gay rights ordinances.<sup>74</sup> Rejecting that argument, but only implicitly, the Supreme Court ruled in *Romer v. Evans*<sup>75</sup> that Amendment 2 lacked a persuasive public justification and was apparently motivated by "animus" against gay people. *Romer* provided the normative background for the Court's subsequent disposition in *Lawrence* (supported by the same six justices): Sexual variation is at least *tolerable*, and the era when a state could demonize lesbians, gay men, and bisexuals as enemies of the people has closed.

Since *Romer* and *Lawrence*, the public law agenda of the lesbian, gay, bisexual, transgendered, and intersex (LGBTI) rights movement has been to persuade Americans that sexual and gender variation is not just tolerable but benign, and that the state should not promote traditional gender roles or heterosexuality as standards suitable for all Americans. LGBTI advocates primarily pursue that norm through laws prohibiting private as well as public

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72. For an excellent update on the relationship among the ERA, feminism, and constitutional doctrine, see Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009).

73. The Amendment 2 ballot materials are reprinted in Robert Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 191–99 (1997), and ESKRIDGE & HUNTER, *supra* note 1, at app. 3, 1524–31.

74. See, e.g., Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners, *Romer v. Evans*, 517 U.S. 620 (1995) (No. 94-1039), 1995 WL 17008428.

75. 517 U.S. 620, 631–32 (1996).

employers from discriminating because of sexual orientation or gender identity.<sup>76</sup> State supreme courts have been increasingly receptive, with some finding sexual orientation discrimination either quasi-suspect (like sex) or suspect (like race).<sup>77</sup> The underlying logic posits that sexual variation is presumptively benign with regard to public-regarding goals and projects, and therefore subjects laws deploying such classifications to a more searching review and presumptive invalidation.<sup>78</sup> Judges in these cases have rejected representation-reinforcing arguments that would leave gay rights claims to the political process.<sup>79</sup> I predict that upon the formation of a rough state court consensus that sexual variation is benign, the Supreme Court will reach the same conclusion and disable the state from insisting on heterosexuality.

### C. Family and Marriage

The recent state cases finding sexual orientation to be a (quasi) suspect classification all involved state constitutional challenges to state same-sex marriage bars.<sup>80</sup> The marriage exclusion will be the last major state sexual orientation discrimination—and one of the last sex discriminations—to be revoked.<sup>81</sup> From a liberal perspective, marriage as one man, one woman is the ultimate testing ground for full public acceptance that variations in sex, gender, and sexuality are all benign and not just tolerable.

As a formal matter, state refusals to recognize same-sex marriage function as discrimination because of sex: If the state would give a marriage license to Lucy and Ricky, but not Lucy and Ethel, the classification that triggers the discrimination is Lucy's sex, for if she were a man she would get the license to

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76. The 2009–2010 version of the federal Employment Non-Discrimination Act prohibits both sexual orientation and gender identity discrimination by private as well as public employers. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009). For state laws barring job discrimination because of sexual orientation or gender identity, see Lambda Legal, *supra* note 43.

77. See e.g., *In re Marriage Cases*, 183 P.3d 384, 441–42 (Cal. 2008); *Kerrigan v. Conn. Dep't Pub. Health*, 957 A.2d 407, 461 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). See also *Commonwealth v. Wasson*, 842 S.W.2d 487, 499–500 (Ky. 1992) (dictum).

78. E.g., *Marriage Cases*, 183 P.3d at 450–54; *Kerrigan*, 957 A.2d at 431–61; *Varnum*, 763 N.W.2d at 889–96.

79. *Kerrigan*, 957 A.2d at 439–61; *Varnum*, 763 N.W.2d at 893–96.

80. See cases cited *supra* note 77.

81. In contrast to Europe, American courts have already moved from the assumption of malignant to tolerable variation in child custody cases. Compare Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 898–900 (1979) (discussing the earlier cases, where homosexuality was considered presumptively disqualifying in child custody), with *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (representing the leading case for the modern view that homosexuality cannot be considered unless there is a showing of harm to the child).

marry Ethel.<sup>82</sup> As a functional matter, same-sex marriage denial reflects traditional gender roles, in which a woman is assumed to “need” a man in order to achieve domestic bliss in holy matrimony. In practice, the marriage ban discriminates against lesbian and gay couples, making it the nation’s most important sexual orientation discrimination. Finally, the ban perpetuates gender identity discrimination, as in the case of couples denied marriage licenses because the state finds a transgendered person’s “sex” disrupts the one man, one woman requirement.<sup>83</sup>

Although five states and the District of Columbia now celebrate same-sex marriages, and two others (New York and Maryland) will recognize out-of-state same-sex marriages,<sup>84</sup> this is an idea whose time has not yet come in America. As with antidiscrimination laws, opponents and skeptics of same-sex marriage have deemphasized natural law arguments in favor of liberal ones. Although many Americans might oppose such unions because they find “homosexuality” or gender bending immoral or disgusting, their public justifications have become increasingly liberal. Thus, the primary public arguments against same-sex marriage claim that it would undermine “traditional marriage” for everyone else or would harm children, who assertedly need to be raised by a father-mother couple and taught that one man, one woman marriage is the best way to organize a family.<sup>85</sup> These arguments have had traction in liberal as well as conservative jurisdictions; marriage equality has lost important votes in California, New Jersey, and New York in recent years.<sup>86</sup>

Acceptance of the more progressive liberal norm is by no means universal in America. Table 1, below, provides an overview of the progression of public attitudes regarding sexual and gender variation, the legal regimes each stage entails, and the politics of the progression. One can look at the legal regime in place to make inferences about public attitudes toward sexual variation.

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82. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994).

83. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (denying marriage recognition to a male-to-female transsexual and a man).

84. See Opinion of the Maryland Attorney General, Feb. 10, 2010, <http://lgbtbar.org/newsletter/2010/MDOAGOpiniononSame-SexMarriage.pdf> (surveying states that authorize same-sex marriages or recognize out-of-state marriages of this kind).

85. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 37–41 (2006) (tracing the dramatic evolution of arguments against same-sex marriage).

86. See, e.g., *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (upholding Proposition 8, a popular constitutional initiative that revoked same-sex marriage recognition). In 2009, voters revoked same-sex marriage in Maine, and legislative chambers rejected same-sex marriage bills in gay-friendly New York and New Jersey.

Table 1. Post-1961 American Debate about Sexual &amp; Gender Variation

| Sexual & Gender Variation  | Legal Regime   | Politics  |
|--|--|---|
| <i>Variation Malignant</i><br>(Traditional Norm under Attack after 1961) | Criminalization of sexual- or gender-deviant activities<br><br>Pervasive discrimination against sexual and gender minorities<br><br>Demonization of sexual or gender minorities                    | <b>Politics of the Closet</b><br><br>Moralist politicians scapegoat sexual and gender minorities, blame them for social ills<br><br>Minorities powerless because they are closeted and objects of prejudice   |
| <i>Variation Tolerable</i><br>(Liberal Norm)                             | Nonenforcement/ decriminalization of sexual- and gender-deviant activities that do not harm third parties<br><br>State revocation of official discriminations against sexual and gender minorities | <b>Civil Rights Politics</b><br><br>Sexual minorities mobilize in cities and gain professional allies<br><br>Militant traditionalists redemonize sexual and gender minorities<br><br>Legislators willing to adopt policies of tolerance; judges willing to reverse the burden of inertia against outlier policies |
| <i>Variation Benign</i><br>(Stronger Liberal Norm)                       | New hate crimes<br><br>Antidiscrimination laws, including private employers, accommodations, schools<br><br>Domestic partnerships, civil unions or marriage for LGBTI persons                      | <b>Normal Politics</b><br><br>Sexual and gender minorities attract more mainstream allies<br><br>Legislators and judges see LGBTI persons' grievances as plausible civil rights claims<br><br>Traditionalists retreat on many issues, draw the final line at gay marriage   |

Thus, in most of New England, where state policy treats gay people exactly the same as straight people, we can assume that these states have moved toward the liberal model where homosexuality is generally considered a benign variation.<sup>87</sup> Conversely, in most states of the Baptist South and Mormon West, where discriminatory practices and laws remain in place, attitudes have moved only a little from the natural law model.<sup>88</sup> Most of the country has acquiesced in the liberal notion of tolerable sexual and gender variation (backed up by Supreme Court opinions) but does not consider such variation entirely benign. This gap represents the primary normative political battle in the new millennium, but as Part III suggests, some activists and academics have already moved to a new front, one beyond the liberal model.

### III. POST-LIBERAL MODEL: PRODUCTIVE SEXUAL AND GENDER VARIATION AND DANGERS OF NORMALIZATION

The last generation of American policymakers has seen important challenges to the liberal model of tolerable or benign sexual and gender variation. To some extent, the liberal model has been a victim of its own success. Like the civil rights movement, the social movements seeking equal rights for women and LGBTI people have splintered as they have attracted more openly radical feminists and LGBTI people to their normative campaign *and* as the legal discriminations have diminished. Nothing helps keep a social movement coherent and focused so much as open legal discriminations founded on demeaning claims about its members. Once those obvious discriminations fall away, the sense of shared threat dissipates and the group's agenda becomes a matter for debate. In the LGBTI community, this debate takes place across a larger and less homogenous constituency than in the pioneering days of the movement.

As a general rule, once an identity-based social movement persuades society and the polity to recognize its liberal claims, preexisting divisions between assimilationists (who are relatively happy with formal equality) and radicals (who believe that the movement should transform the status quo beyond its original aspirations) become much more prominent.<sup>89</sup> This divide certainly exists within the feminist and LGBTI rights movements. Many women, gay men, and lesbians have been pleasantly surprised by the achievements of their

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87. See ESKRIDGE & SPEDALE, *supra* note 85, at 242–44 tbl.6.1 & fig.6.1 (state-by-state evaluations).

88. See *id.*

89. Cf. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (closely analyzing the debate between integrationists and nationalists within the civil rights movement in the 1960s).

movements.<sup>90</sup> But other women and gays, as well as many transgendered and intersexual persons, have felt left behind. The success of their shared social movement creates discursive space to conceptualize this disappointment and press the movement in more radical or transformative directions. Consider three examples, representing radical feminism, queer theory, and trans theory.

Catharine MacKinnon argues that the liberal model is deeply misguided because it misses the source of women's subordination and violent oppression: Formal sex-based discriminations and informal gender attitudes are the consequence of an aggressive male-oriented understanding of heterosexuality itself.<sup>91</sup> "Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission."<sup>92</sup> Her distillation: Man fucks woman: Subject verb object. This is the theoretical underpinning of MacKinnon's campaigns against sexual harassment in the workplace and misogynist pornography.<sup>93</sup> Critics worry that MacKinnon overdemonizes sexuality and overstates its relationship to sex discrimination and gender subordination.<sup>94</sup>

A very different conceptualization is found in the work of Michel Foucault, who has inspired a great deal of radical queer theory. Foucault claimed that sexuality is a social production and that the law's hysterical focus on women's bodies, children's developing urges, and the erotic practices of persons at society's margins produced rather than suppressed intense feelings and orientations that modern society now calls "sexuality."<sup>95</sup> In his critique of freedom from state regulation as liberation, Foucault articulated the notion that while the mechanisms may differ, liberal societies can be just as coercive as repressive societies. A repressive society coerces through legal rules, whereas a liberal society coerces

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90. Many women, however, have been dismayed by the feminist movement. See, e.g., KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993). Many of these women have opposed the feminist movement's pro-choice and equality "reforms." See, e.g., LUKER, *supra* note 54, at 158–91 (pro-life women); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 98–117 (1986) (anti-ERA women).

91. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982) [hereinafter MacKinnon, *Feminism, Marxism*].

92. MacKinnon, *Feminism, Marxism, supra* note 91, at 533.

93. MACKINNON, *FEMINISM UNMODIFIED, supra* note 91, at 103–16 (sexual harassment); *id.* at 163–97 (misogynist porn).

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

95. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I* 103–06 (Robert Hurley trans., Pantheon books 1985) (1984). On the social constructionist theory of Foucault, see *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* (Edward Stein ed., 1990) (reprinting essays by McIntosh, Foucault, and critics of the theory).

through normalization, the reporting and obsession about what is normal.<sup>96</sup> While the liberal model may free sexual and gender minorities from constraining natural law rules, it can at the same time restrict those minorities by creating standardized behaviors. Critics of Foucault note that his powerful theories about the social construction of sexuality and about normalization slight the important role that gender plays.<sup>97</sup>

Finally, consider Judith Butler, who has rearticulated Foucault's theory in light of the experience of women and transgendered people. Butler argues that gender is both a social product and a social cause. Specifically, rigid categorization by gender renders modern sex binariness coherent and intelligible, and gender coherence stands both as a product and source of compulsory heterosexuality.<sup>98</sup> From such premises, Katherine Franke maintains that liberal ACLU feminism made a central mistake in disaggregating sex from gender: Like gender, sex is a social production and not a matter of simple biology.<sup>99</sup> Dean Spade has deepened Butler's project by demonstrating how the elemental bureaucracy of state-building (census taking, license issuing, social safety netting) creates an oppressive coherence for sex that crushes transgendered persons.<sup>100</sup>

Three central ideas unite these disparate thinkers (as well as many others), and these commonalities create intellectual excitement and political possibilities in the field of sexuality, gender, and the law. First, as a descriptive matter, the liberal model errs in disaggregating sex, gender, and sexuality. Although the liberal critique of the natural law model is correct and necessary, the consequence of such a critique ought not to be a regime where sex is confined to the realm of biology, gender to the realm of culture, and sexuality to something of both. Instead of disaggregated and independent as in the liberal model (Figure 2), sex, gender, and sexuality are *interdependent* social productions or "performances" as diagrammed in Figure 3 below.

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96. On normalization, see GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* (Carolyn R. Fawcett trans., 1989) (1966); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 182–84 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

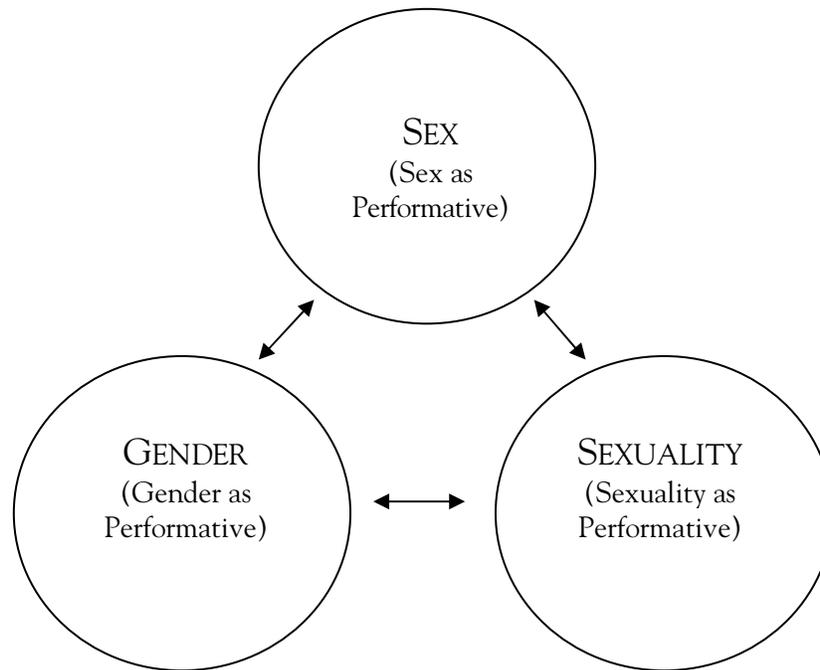
97. E.g., VIKKI BELL, *INTERROGATING INCEST: FEMINISM, FOUCAULT, AND THE LAW* (1993).

98. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 22–25 (2d ed. 1999), drawing from Adrienne Rich. For a more recent articulation of her theory, see also JUDITH BUTLER, *UNDOING GENDER* (2004) [hereinafter BUTLER, *UNDOING GENDER*].

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

100. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008).

Figure 3. The Post-Liberal Model of Sex, Gender, and Sexuality



Second, post-liberal thinkers make an important normative point: Sexual and gender variation is not just benign, but *critically productive*.<sup>101</sup> Minority sexual or gender performances have a lot to teach mainstream society. Particularly useful is Erving Goffman’s notion of “microperformances,” or the power we have when we present ourselves in everyday interactions.<sup>102</sup> Just as our social context impacts upon our identities and feelings of worth, the identities we project—and the pride we suggest—have ripple effects in the world. Consider some examples.

101. I recognize that the notion of productive sexual and gender variation can easily be understood in liberal terms, but the legal thinkers espousing this kind of idea have more in common with antiliberal philosophers such as Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989), than with liberal philosophers such as John Rawls.

102. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, at xi (1959); see Marc Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. C.R. & SOC. JUST. 3 (2008).

Traditionalists argue that the presence of women or gay people or transsexuals in the workplace (or the military) is “disruptive” and therefore undermines the cohesion and purposiveness of the enterprise.<sup>103</sup> Liberals respond that sex, gender, or sexuality differences are benign and have no relationship to the employee’s merit; any disruption exists in the small minds of unenlightened persons who need to transcend their prejudices or stereotypical thinking. Post-liberals agree that these differences are benign but insist that they are also potentially productive and transformative, precisely because microperformances by gender benders and sexual minorities in the workplace do indeed “disrupt” traditionalist attitudes about sex, gender, and sexuality. Thus, it is *good* and not just tolerable or benign to have gay men and lesbians in the workplace, for their open presence disrupts the notion that only heterosexual men who support their dependent wives and children are good workers. It is *good* and not just tolerable or benign to have transgendered employees, for their microperformances destabilize the notion that sex is a stable, biological category.<sup>104</sup> In my view, the notion of productive variation ties together the feminist, gay-lesbian, trans, and intersexual rights movements. They share an understanding of sex, gender, and sexuality as interconnected, and deploy once-marginalized traits as focal points to reconstruct traditional institutions such as the family, the workplace, and the state.

Finally, the post-liberal thinkers question the notion that the liberal state can be neutral. A state that does not openly discriminate because of people’s sex, gender, or sexual orientation can just as powerfully harm them by ignoring private violence against women and sexual/gender minorities or by contributing to pervasive normalizing discourse that marginalizes women and minorities. As Catharine MacKinnon and Robin West (among others) argue, many constructions of sexuality and gender can be harmful if they prevent women and public institutions from deliberating openly about productive performances.<sup>105</sup>

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103. E.g., 10 U.S.C. § 654(a)(4)–(15) (2006) (stating that persons engaging in “homosexual conduct” must be excluded from the armed forces because they would undermine the “cohesion” needed for effective deployment).

104. Cf. BUTLER, UNDOING GENDER, *supra* note 98, at 29–30 (describing how the presence of transgendered individuals destabilizes the political field); see also MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY (1997) (arguing that the presence of the cross-dresser destabilizes the situation, often in productive ways); MARJORIE GARBER, BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE (2000) (making a similar argument about the presence of the bisexual).

105. CATHARINE A. MACKINNON, *Francis Biddle’s Sister: Pomography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED, *supra* note 91, at 163–97 (implementing an engaged politics of sexual-gender critique of misogynistic porn); Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987) (arguing that feminists ought to engage in consciousness-raising conversations to decide what kinds of sexual expression and gender roles are satisfying to women themselves).

I combine all these ideas into the umbrella concept of *productive sexual and gender variation*. Consider how this concept and the dynamics of the post-liberal model shed light on the progressive agenda for public law. On the one hand, considering sexual and gender variation productive rather than just benign opens up critical discourse about the problems with the natural law and other normalizing models: Not only can gay be good, but straight can be bad. We might call this the critical feature of the productive variation norm. On the other hand, the notion of productive variation requires positive thinking as well: What messages should we be sending the nation's youth? What relationship forms work best for family needs? These questions arising out of the constructive feature of the productive variation norm cannot be answered without including LGBTI people as well as feminists in these conversations.

A. Same-Sex Marriage: Denormalizing Heterosexuality, Traditional Gender Roles, and Sex Binarism

Most post-liberals writing about same-sex marriage are highly critical of the idea, because it normalizes an institution many radicals loathe and because social movement resources can be better deployed toward other projects.<sup>106</sup> But these pointed criticisms are far from the only insights suggested by post-liberal theory. Indeed, an excellent social constructionist case exists for same-sex marriage.

The most obvious normalization in the same-sex marriage debate is not married>unmarried, but heterosexual>homosexual.<sup>107</sup> According to opponents, lesbians, bisexuals, and gay men are weird, and recognizing their marriages would be *really* weird. Much of the population resists same-sex marriage because of homophobia, which of course harms all gay people. By admitting gay people into a fundamental mainstream institution, same-sex marriage would contribute to the denormalization of heterosexuality, the denormalization of traditional gender roles, and perhaps even the undermining of sex binarism itself.

Thus, as Nan Hunter says, same-sex marriage “could also destabilize the cultural meaning of marriage. It would create for the first time the possibility of marriage as a relationship between members of the same social-status

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106. I take these points and urge the gentle reader to study the following texts, which are excellent examples of the critical features of post-liberal theory: Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535 (1993); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9.

107. See CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 107–15, 121–31 (2000).

categories.”<sup>108</sup> As traditionalists insist, same-sex marriage would be a dramatic shift in the way western culture thinks about marriage and gender roles. Through daily microperformances as well as the act of marrying, woman-woman marriage refutes the gendered idea that “wives” do not work outside the home. If one man, one woman marriage normalizes sex binarism, traditional gender roles, and compulsory heterosexuality, gay and lesbian marriage cannot help but disrupt this cultural linkage. Indeed, as Mae Kuykendall has argued, the strong cultural resistance to same-sex marriage is founded upon people’s deep cognitive attachment to sex binarism<sup>109</sup>—a point that makes the marriage debate significant from a radical as well as assimilationist point of view.

Additionally, there is emerging evidence that less-gendered households manage conflicts differently, and in some ways more productively, than more-gendered married households. Dr. John Gottman and Robert Levenson’s twelve-year (1987–99) study comparing a sample of forty straight, twenty gay, and twenty lesbian couples found that the lesbian and gay couples negotiated differences differently than the straight couples.<sup>110</sup> The researchers concluded that the same-sex couples handled conflict more congenially and with greater affection than the different-sex couples. The authors speculate that one reason for the more fluid process of conflict resolution is that gay and lesbian couples are less burdened by gender anxieties about power disparity. Although the conclusions of this study are highly provisional given the small and nonrandom samples, they do suggest a good reason why the state ought to give some value to relationships that systematically deny traditional gender roles.

Moreover, the gender-role argument does not depend upon the possibility that same-sex couples will actually abandon the traditional division of labor between breadwinner and housekeeper within marriage. In a woman-woman marriage where tasks are divided up along traditional lines, a woman will be doing the accustomed male role of working outside the home. In a man-man marriage where tasks are divided up along traditional lines, a man will be doing the accustomed female role of keeping house. This symbolism represents the

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108. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 17 (1991); see also LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 104–06 (1995) (making this argument in the context of the authors’ general theorizing about the productive role of sexual dissent in our political culture).

109. See Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 *HARV. C.R.-C.L. L. REV.* 385 (1999).

110. John M. Gottman et al., *Observing Gay, Lesbian, and Heterosexual Couples’ Relationships: Mathematical Modeling of Conflict Interaction*, 45 *J. HOMOSEXUALITY* 65, 73–74 (2003). Dr. Gottman and his colleagues have continued their in-depth study of lesbian and gay partnerships; some recent findings are reported on the Gottman Institute’s website. GOTTMAN INST., *THE 12-YEAR STUDY*, [http://www.gottman.com/SubPage.aspx?spdt\\_id=2&sp\\_id=100842&spt\\_id=1](http://www.gottman.com/SubPage.aspx?spdt_id=2&sp_id=100842&spt_id=1) (last visited June 1, 2010).

deeper challenge to traditional gender roles. In the argot of normalization, when female-female and male-male couples can marry, the wife-housekeeper/husband-breadwinner model for the family becomes less normal, and possibly even abnormal, over time.

Gender is as gender does. Under the view of gender as performative, the display of two women married to one another carries significance. Every day and in public view at least one of the women performs in ways that do not fit with women's traditional roles. A married woman who derives independent satisfaction from her job outside the home becomes more normal.<sup>111</sup> Not only does the ceremony where two women are joined in matrimony function as a powerful bit of choreography, but the day-by-day performances of two women managing a family destabilize rigid gender roles. And if gender serves as the linchpin of compulsory heterosexuality, its destabilization ought to discredit antigay and perhaps also anti-queer attitudes and regulations.

The destabilization can even occur without any legal action, once same-sex marriage becomes part of public discourse. LGBTI people have been given opportunities to be heard and seen in ways not possible before the same-sex marriage debate hit the western world. In an essay exploiting the way that microperformances can be radical, Mary Coombs reminds us that transgendered people have acted as pioneers and activists in favor of same-sex marriage.<sup>112</sup> Many male-to-female transsexuals have been married to women before and after their sex-change therapies and operations. Their marriages force the state to grapple with the question of whether their legal sex, gender, or sexual orientation has changed as well. If the state insists on their heterosexuality and that their marriages are not same-sex,<sup>113</sup> the legal system has already yielded a wonderful pastiche of gender: A woman marries a person with female sex organs, female hormones, female attire, but whose male chromosomes enable the state to pretend that she fills the male sex role so that the marriage can still be considered different-sex. Pastiche like this one not only expose the arbitrariness of denying same-sex couples marriage licenses, but also the arbitrariness of sex and gender as rigid regulatory categories.

From a doctrinal point of view, the post-liberal perspective asserting the interdependence of sex, gender, and sexuality provides intellectual grounding for

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111. On the intrinsic value of work outside the home for women generally and wives in particular, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

112. See Mary I. Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219 (1998). See also Martha Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998) (exploring ways that committed relationships involving intersexuals also destabilize sex binarism).

113. Courts in England and the United States have generally found that transsexual marriages are not same-sex. See Coombs, *supra* note 112, at 244–57 (discussing the cases).

the famous sex discrimination argument for gay rights.<sup>114</sup> After finding that sexual orientation is a suspect classification and that gay people have a fundamental right to marry, the California Supreme Court in the *Marriage Cases* followed other courts in rejecting the sex discrimination argument.<sup>115</sup> But if feminists and gender theorists like Adrienne Rich and Catharine MacKinnon are right—that compulsory heterosexuality is an important dimension of sexism and violence against women<sup>116</sup>—the court’s insistence on keeping the categories separate itself constitutes a deeply problematic move. By ignoring the sex discrimination inherent in the definition of marriage as exclusively for one man, one woman, the court fails to transform the institution into a truly welcome place for same-sex couples.

Finally, the same-sex marriage debate offers political opportunities for radicals. Even in tolerant, relatively gay-friendly jurisdictions such as those of the Northeast, there has been intense opposition to gay marriage. Under such circumstances, legislatures and often courts seek room for compromise. That phenomenon has generated new institutions, including domestic partnerships, civil unions, and reciprocal beneficiaries—just to list the names used in the United States. In Canada and Europe, and more slowly in the United States, straight as well as gay or queer couples can choose from an emerging menu of options (including marriage) for state recognition of their relationships.<sup>117</sup> The regulatory monopoly civil marriage once enjoyed in western civilization has ended. If radicals believe that marriage should be junked, the same-sex marriage debate has provided them a perfect opportunity to invent new institutions that better meet the needs of our population.

#### B. Schools: Programs Against Prejudice and Stereotypes

The previous Subpart redresses an imbalance in the post-liberal literature concerning the marriage issue: Academic writing *against* same-sex marriage from an antinormalizing point of view is rich and useful, but needs to be supplemented with antinormalizing arguments *for* same-sex marriage. In this Subpart, I correct a different kind of imbalance found in the academic treatment of sex,

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114. See Koppelman, *supra* note 82. On homophobia as a key instrument of sexism, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980), reprinted in ADRIENNE RICH, BLOOD, BREAD, AND POETRY: SELECTED PROSE, 1979–1985, at 23 (1986), as well as SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988) and Claudia Card, *Why Homophobia?*, 5 HYPATIA 110 (1990).

115. *In re Marriage Cases*, 183 P.3d 384, 436–39 (Cal. 2008); accord, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 496–505 (2001).

116. Rich, *supra* note 114; MacKinnon, *Feminism, Marxism*, *supra* note 91.

117. See ESKRIDGE & SPEDALE, *supra* note 85, at 7.

gender, and sexuality issues in educational settings. The obvious agenda suggested by the post-liberal model's concept of productive sexual and gender variation asserts that schools have an affirmative duty not only to protect gender and sexual minority students from violence and harassment (the standard liberal agenda), but also to produce an environment where they are welcomed and where their microp performances are appreciated. The notion is not just that minority students deserve such dignified treatment (they do), but also that the engagement of gender and sexual minorities within the school is deeply educational for all concerned. By interacting with students, teachers, and staff members who are themselves openly lesbian or gay, bisexual, transgendered or intersexual, students will gain an appreciation that sex, gender, and sexuality can be presented in many ways.<sup>118</sup>

Consider a concrete example illustrating the connection and contrast between liberal and post-liberal norms about sexual and gender variation. Massachusetts has implemented the liberal agenda: State law not only bars employers, schools, and public accommodations from discriminating against gay persons, but gives full recognition to same-sex marriage and lesbian/gay families. Consistent with the benign variation norm, state education policy requires public schools to address the "detrimental effect of prejudice [including homophobia] on individual relationships and on society as a whole."<sup>119</sup> Some schools in the state have taken this liberal idea somewhat further—to celebrate the productivity of sexual and gender diversity, and in ways that challenge traditional understandings of marriage and gender roles in American society. Thus, schools have introduced first-grade students to books like *Molly's Family*, which depicts a girl who is teased for having two mothers; the lesson of the book is that such teasing results from ignorance, for families come in many varieties.

Some traditionalist parents objected that the state should remain neutral in the debate about the normative superiority of traditional marriage, and they sought notice of such instruction and the right to withdraw their children from it. Their stance is plausibly liberal: Even if the state chooses to treat gay marriage the same as traditional marriage (the benign variation idea), the state should not impose that norm upon the impressionable children of parents whose religion counsels them otherwise. The state responded that reading books like *Molly's Family* teaches students important lessons about lesbian families. Liberals might

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118. For excellent literature along these lines, see, for example, Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand": *Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557 (2009).

119. See *Parker v. Hurley*, 514 F.3d 87, 91 (1st Cir. 2008) (discussing Massachusetts's state rules for health curriculum studies in grades 6–8). See also CAL. EDUC. CODE § 51500 (West 2006 & Supp. 2010) (barring schools from instruction that contributes to antigay bias).

agree with the parents' desire to supervise their children's normative education, but might also support the school on the ground that true neutrality would have to admit the possibility of two mothers. And so the purely liberal model fails to resolve the conflict.

Post-liberal theory would question whether there is any "neutral" policy the school can follow: If the school requires the students to read *Molly's Family*, it not only normalizes lesbian parents, but also lesbian marriage, homosexuality, and nongendered roles within the family. If the school only requires the students to read stories about traditional families, it not only normalizes traditional marriage, but also heterosexuality and (probably) gendered roles within the family. Whatever the school does, it endorses a particular relationship among sex, sexuality, and gender—and so its policy must be defended, ultimately, on the ground that the "coercive" normalizing regime is a good one.

This is a debate traditionalists are willing to engage in, and one that progressives cannot avoid. Another situs of the debate has been the famous "T-Shirt Wars." In *Harper v. Poway Unified School District*,<sup>120</sup> a California school with a history of antigay violence adopted a Day of Silence that celebrated sexual and gender diversity within the school.<sup>121</sup> Protesting the event, student Matt Harper wore a T-shirt citing Romans 1:27, to indicate that homosexuality is shameful, and was disciplined by the school. The school's position can be defended and criticized on both liberal and post-liberal grounds. Liberal theory could defend the school's program as necessary to create a safe space for lesbian and gay students and staff. But it also might criticize the discipline of Harper for repressing his statement of his own diversity as a traditionalist student who did not agree with the benign variation norm. Post-liberal theory could defend the student's dissent as resistance to normalization of a bland tolerance. At the same time, post-liberals might support the school's belief in the importance of demonstrating to students that sexual and gender diversity is a good thing, and in need of nourishment against the antigay violence that can be found in California's history and in the school's own hallways.

Notice here the potential conceptual mobility of the traditional family values position, which can easily be expressed in the language of either the liberal or even the post-liberal model. Traditional family values advocates have already turned to liberal "rights" arguments (privacy and freedom of speech), and in the future they will likely adopt post-liberal antinormalizing arguments (freedoms of

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120. 445 F.3d 1166 (9th Cir. 2006).

121. *Id.* (allowing the school to discipline a student who wore a Romans 1:27 T-shirt insisting that homosexuality is shameful). *Cf. Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008) (allowing the school wide leeway but barring it from disciplining a student whose T-shirt was a milder and wittier "Be Happy, Not Gay" message).

speech, association, and religion) to resist the state's implementation of the concept that sexual and gender variation are either benign or productive. In the process of making these liberal or post-liberal arguments, "traditional" family values conservatives will continue the process of transforming (and perhaps destroying) the natural law model.

### C. Workplace: Accommodation of Difference

A post-liberal perspective also brings a new focus to sexuality, gender, and the workplace. The liberal model lends ambiguous support to general antidiscrimination laws, because such laws function as state intrusions into private workplaces and exercise potentially strong coercive force upon traditionalist employers and coworkers.<sup>122</sup> Post-liberal theory adds that whatever power legal enforcement might have, the power of normalization is even greater. Traditionalists, therefore, make a logical point when they complain of losing their liberties under antidiscrimination laws. Such loss of liberty can be justified, however, by the argument that it is an important public policy for the state to construct a workplace that does not reflect the oppressive gender roles and sexual repression of the past. In constructing such a workplace, the state needs to think holistically: The demography of the workplace (especially the number of women in positions of authority), the correlation between gendered roles and particular sexes, and dating or sexual practices all work together to create a particular kind of workplace.

What would an ideal post-liberal workplace look like? Progressive authors are in greatest agreement that women, gay people, and transgendered persons ought to be well-represented in the higher-order jobs and among positions of employment authority. This workplace demography would not only create new and arguably better understandings about sex roles and gender, but would create better conditions for the meaningful exercise of choice. As Vicki Schultz has explained, both traditionalists and liberals assume that women "choose" lower-paying jobs based upon their own different natures (traditionalists) or social conditions (liberals).<sup>123</sup> Both sides therefore miss the ways in which women's gendered choices are channeled by gendered employment policies and

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122. See ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1996) (arguing from a liberal perspective that gay rights should focus on ending state discrimination, including same-sex marriage bars, but should not follow the civil rights model of general antidiscrimination laws). Cf. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (describing company censorship of an employee's display of Leviticus 20:13 in reaction to its gay-friendly signs).

123. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

by sex-segregated functions within workplaces (including the near-monopoly men have on positions of authority).<sup>124</sup> Gendered workplaces also tend to be relatively hostile to their LGBTI workers; the reported cases of antigay harassment reflect highly gendered workplaces where stereotypes about women as well as gay people animate harassing behaviors.<sup>125</sup>

A post-liberal approach suggests the need for restructuring of workplaces, not just rules barring open discrimination. This was one of the many brilliant contributions of MacKinnon's theory of sexual harassment: Women's subordination in the workplace would not be successfully transformed until its animating ideology—the predatory construction of male sexuality—was confronted and resisted at all levels. The law changed, and probably for the better, when the EEOC and the federal courts responded to women's experience and demands with guidelines that made illegal many sexualized mores that rendered workplaces frustrating or toxic for women and minorities.<sup>126</sup> It is at the level of workplace structure, however, that MacKinnon has been most cogently critiqued. Schultz has demonstrated that employers have deployed sexual harassment rules as mechanisms to “sanitize” the workplace, often to the detriment of lesbian, gay, bisexual, transgendered, and female employees (those who are most likely to be viewed in sexual terms) and urges a focus on gendered harassment rather than sexuality per se.<sup>127</sup>

Noah Zatz has noticed another important feature of the federal sexual harassment guidelines: the transformation of an antidiscrimination rule into a mandate that employers accommodate workers' needs.<sup>128</sup> Rules that impose responsibilities on employers to maintain a workplace not hostile to women may require them to accommodate the needs of some female employees and to create structures that protect against harassment before it occurs. Likewise, the Pregnancy Discrimination Act sometimes requires employers to accommodate needs of pregnant workers.<sup>129</sup> Particularly important is the Family and Medical Leave Act of 1993 (FMLA), which requires employers to accommodate both male and female employees who need family time.<sup>130</sup> As Joan Williams has argued, the agenda of the FMLA is distinctively post-liberal: The state abandons

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124. *Id.*

125. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc) (evaluating sexual harassment claims of a gay man who was feminized and abused by his male coworkers).

126. CATHERINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court*, in MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 91, at 103.

127. See Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2065–66 (2003).

128. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 209 *COLUM. L. REV.* 1357 (2009).

129. 42 U.S.C. § 2000e(k) (2006).

130. 29 U.S.C. § 2601 (2006).

any pretense of neutrality and seeks to transform the workplace not only to accommodate the needs of mothers, but also of fathers. The ultimate agenda is to transform the way fathers think about themselves, from the gendered notion of fathers as primarily breadwinners and careerists to the more balanced notion of both parents being caregivers as well as careerists.<sup>131</sup>

Along the lines discussed above, Table 2 summarizes the current conceptual and policy debates. One premise of Table 2 is that the modernized version of the natural law model retains considerable power. Although neo-natural law supporters will not be able to resist the wave of support for decent treatment of most sexual and gender minorities, they may be able to prevent dramatic transformation of American law regulating families, schools, and workplaces.

Table 2. Legal Regimes Associated with Current Normative Models

| Models   | Family Law   | Schools  | Workplaces   |
|--|--|--|--|
| <i>Liberal Model<br/>(Benign<br/>Variation)</i>                | Marriage equality +<br>lesbian/gay families  | Nondiscrimination<br>Antiharassment<br>Tolerance<br>curriculum   | Nondiscrimination<br>Antiharassment<br>Accommodation of<br>difference  |
| <i>Post-Liberal<br/>Model<br/>(Productive<br/>Variation)</i>   | Transformation of<br>marriage,<br>ungendering marital<br>roles<br><br>Menu of relationship<br>options: diversity of<br>choices   | Gay is good, trans is<br>terrific curriculum<br><br>Support LGBTI<br>students against<br>bigots, but caution<br>against creating<br>resistance discourses        | Antiharassment rules<br>should restructure<br>workplaces<br><br>Accommodation of<br>difference; family<br>leave model<br>transforming gender<br>role attitudes |
| <i>Neo-Natural<br/>Law Model<br/>(Malignant<br/>Variation)</i> | Marriage is the best<br>regime for children<br>and parents<br><br>Normalizing choice<br>+ menu = productive<br>of marriage decline,<br>broken homes, loss of<br>rights for parents | Abstinence and<br>marriage ought to<br>be supported<br><br>Curricular "reform"<br>normalizes unnatural<br>gender/sexual roles +<br>loss of rights for<br>parents | Support a sanitized<br>workplace<br><br>Accommodation of<br>religious beliefs ><br>accommodating<br>gender/sexual<br>minorities                                |

131. Joan C. Williams & Stephanie Bornstein, *The Evolution of 'FReD': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

CONCLUSION:  
A SEXUALIZED AND DEGENDERED CONSTITUTION

Most of the effect of feminist, gaylegal, and trans activist movements on American public law has been actualized through municipal, state, and federal statutes administered by sympathetic agencies. But the liberal and progressive discourses flowing from these social movements have also profoundly affected constitutional law doctrine. Specifically, the ongoing conversation among liberal, traditionalist, and progressive lawyers has shaped the cutting edge of constitutional rules assuring privacy, equal protection, and free speech and association. Consider a brief account of how constitutional rights and theory have themselves been affected by discourses of sexuality and gender.

The constitutional right to privacy was for most of our history closely tied to traditional marriage and family life.<sup>132</sup> Feminist and gay attorneys have successfully pressed the Court to liberalize the privacy right to include sexual choices outside of marriage.<sup>133</sup> Because the privacy right has been situated in the Due Process Clause, the newer cases represent a rethinking of what has historically been fundamental to American life. This is an important reimagining of American public law.

Although traditionalists view the new privacy right as deeply offensive to natural law baselines, their constitutionalism has given greater emphasis to its positive agenda, modernized to rearticulate family values as parental privacy rights and religious values as liberty and associational rights.<sup>134</sup> Post-liberal activists and thinkers, in turn, openly assert that the pro-choice reading of privacy is not neutral, and is changing the American family and even the institution of marriage—in some ways for the better.

Indeed, the jurisprudence of privacy has become one focal point for what traditionalists and progressives consider a major reconceptualization of marriage

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132. E.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (leading case recognizing a fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a privacy right by married couples to use contraceptives); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (leading privacy case, protecting core privacy rights “to marry, establish a home and bring up children, to worship God according to the dictates of [one’s] own conscience”).

133. E.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (expanding the right to contraceptives beyond the married couples protected in *Griswold*), followed and expanded in *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a right to choose an abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (redefining the privacy right as one available for a wide array of sexual choices), overruling and rejecting the jurisprudence of *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a constitutional right to engage in “homosexual sodomy” because that is purportedly not connected to marriage and family life).

134. See *supra* notes 70–71, 74, 85.

and family in the United States.<sup>135</sup> California's *Marriage Cases* represented the first time an American appellate court had accepted the privacy-based right to marry argument to support same-sex marriage. A post-liberal perspective on this important decision would emphasize how revolutionary it was for the court to deploy a privacy-based right to open up "traditional marriage" to long-excluded lesbian and gay couples. Unlike liberals who run away from this consequence, progressives celebrate it and urge the creation of alternative forms of relationship recognition.<sup>136</sup>

The Equal Protection Clause has evolved just as dramatically as the unenumerated privacy right. Although originally targeting state laws discriminating against African Americans, the Equal Protection Clause has acquired a new bite in response to the demands of liberal social movement lawyers. Thus, the Burger and Rehnquist Courts provided intermediate scrutiny for sex-based classifications<sup>137</sup> and rational basis with bite for classifications based on sexual orientation.<sup>138</sup> Traditionalists have resisted this discourse by insisting that equal protection activism not be expanded beyond race and perhaps sex,<sup>139</sup> and by refusing to recognize marriage exclusions and other restrictions as formal discrimination.<sup>140</sup> The dialogue between liberal and traditionalist claims has yielded a sliding scale for equal protection cases: Whether a state discrimination passes muster depends on (1) how fishy the classification is, (2) how much harm the excluded group suffers, and (3) the importance of the state justification for the precise discrimination.<sup>141</sup>

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135. Liberals defending same-sex marriage cling to the notion that the expansion of marriage would be on the whole policy-neutral. I share that perspective, for I believe that same-sex marriage itself would not have the major effects on American families that cohabitation, no-fault divorce, and nonenforcement of adultery laws have had. (All of these major effects have been incurred by the polity for the convenience of straight couples; virtually none of the Christians devoutly opposing same-sex marriage today has lifted a finger to protect children harmed by no-fault divorce.)

136. *E.g.*, ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* (2007) (noting that one effect of the same-sex marriage movement has been to create new state institutions for structuring romantic relationships and advocating a deemphasis on civil marriage in law and culture). Traditionalist opposition to same-sex marriage has fueled the creation of new forms of family recognition, including domestic partnership laws that are typically available to straight as well as gay couples. *See* ESKRIDGE & SPEDALE, *supra* note 85.

137. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976).

138. *See* *Lawrence v. Texas*, 539 U.S. 558, 580–84 (2003) (O'Connor, J., concurring) (summarizing the Court's prior cases to say that antihomosexual measures will receive a "more searching" judicial scrutiny).

139. Hence, new traditionalist arguments that suspect classifications can only accrue to minority groups whose trait is "immutable" (like race) and that are politically powerless (like people of color in the apartheid-era South). *E.g.*, *In re Marriage Cases*, 183 P.2d 384, 466–67 (Cal. 2008) (Baxter, J., concurring and dissenting).

140. *E.g.*, *id.* at 465.

141. The sliding scale approach originated with civil rights leader Justice Thurgood Marshall, *see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (dissenting opinion), but has been pressed

Moreover, post-liberal thinking has demonstrated the importance of root-and-branch reform and not just purging regulatory codes of discriminatory “classifications.”<sup>142</sup> This line of thought has not appeared in formal equal protection doctrine (yet), but it did exercise an influence in *Nevada Department of Human Resources v. Hibbs*.<sup>143</sup> Upholding the Family and Medical Leave Act as applied to the states, the Supreme Court reasoned that antifamily employer policies tended to create workplaces that were gendered: Women were ghettoized because supervisors assumed they, and not male employees, would have to be accommodated for family reasons.

The back and forth on issues of sexuality, gender, and the law has expanded the First Amendment’s imperial reach in the modern polity. Liberals relied on free speech and associational rights during the civil rights era, gay people have benefited from its protection of “coming out” speech and association,<sup>144</sup> and transgendered persons and women have invoked free expression values to escape workplace or school dress codes.<sup>145</sup> Now that many states and cities have adopted official antidiscrimination laws and policies, traditionalists are powerfully invoking First Amendment values to carve out religion-based or family-protective speech or association from equality rules.

An example of the new gay equality-religious liberty clash is *Christian Legal Society v. Martinez*.<sup>146</sup> The Hastings Law School’s antidiscrimination policy bars official student groups from discriminating on the basis of sexual orientation and other traits. The Christian Legal Society (CLS) excludes “unrepentant” homosexuals, and the issue before the Supreme Court is whether Hastings (a state actor) can refuse to recognize the CLS. The Society makes the liberal argument that Hastings is forcing conformity upon it in violation of its constitutional speech and associational liberties. Hastings’s main response also is

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by majority opinions in cases involving other kinds of discrimination. See *Nguyen v. INS*, 533 U.S. 53 (2001) (majority opinion balancing these factors in a sex discrimination case); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (concurring and dissenting opinions both taking a sliding scale approach to the rights of persons with disabilities); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (discussing exclusion of gay couples from civil marriage).

142. E.g., Catharine MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281 (1991) (noting that just challenging discriminatory classifications does women no good; the structures of sexism must be challenged); Dean Spade, *Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN’S RTS. L. REP. 288 (2009) (making a similar argument for transgender rights advocates).

143. 538 U.S. 721 (2003).

144. E.g., *Gay Law Students Ass’n v. PT&T*, 595 P.2d 592 (Cal. 1979).

145. E.g., *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (finding violations of both free expression and antidiscrimination rules for school to deny transgendered student the right to wear attire consistent with her gender).

146. No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) (mem.), cert. granted, 77 U.S.L.W. 3635 (U.S. Dec. 7, 2009) (No. 08-1371).

liberal—that equality requires it to create a school where all are welcomed on an equal basis; hence, no school-recognized student group can exclude anyone from its membership.

Both CLS and Hastings have powerful post-liberal arguments as well. CLS can suggest that religious and viewpoint diversity is just as important for a college or professional school as sexual and gender diversity, and by normalizing student groups around the notion of open membership, Hastings is coercing CLS and discouraging future groups that might push back against the PC (politically correct) agenda. Hastings can respond that an antigay agenda premised upon homophobic readings of Scripture is similar to the race-segregationist agenda premised upon racist readings of Scripture a generation ago; just as the state refused to support racist religious views then, so it ought to reject homophobic religious views today.<sup>147</sup> Similar controversies will continue to arise and in response push the Court's First Amendment jurisprudence to evolve.

Table 3, below, summarizes some of the ways the dialogue among liberals, neo-natural law traditionalists, and post-liberal progressives has enriched and complicated the constitutional doctrines discussed above. Of course, the arguments will not cycle indefinitely. Once there is movement toward a social consensus, some of the arguments will end—but new issues will emerge, and the dialogue will resume its transformative and productive work.

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147. See William N. Eskridge, Jr., *Noah's Curse and Paul's Admonition: How the Civil Rights Revolution Helps Us Understand Recent Clashes Between Religious Liberty and Gay Equality* (draft Apr. 2010) (arguing that public law's endorsement of benign racial variation emboldened religious liberals to discredit longstanding racist readings of Scripture).

Table 3. How the Sex, Sexuality, and Gender Cases Have Transformed the U.S. Constitution

| Normative Regime  | Constitutional Privacy  | Equal Protection Clause   | Free Speech and Association   |
|---|---|---|---|
| <i>Liberal: Benign Sexual/Gender Variation</i>                        | Identity Outside Marriage: refocus privacy around sexual ( <i>Lawrence</i> <sup>148</sup> ) + gender ( <i>Eisenstadt</i> <sup>149</sup> ; <i>Roe</i> <sup>150</sup> ) choices | Dynamic Equality: sliding scale scrutiny to classifications reflecting gender stereotypes ( <i>Craig</i> <sup>151</sup> ) or antigay prejudice ( <i>Romer</i> <sup>152</sup> )      | Identity speech protected, incl. coming out as transgendered or gay ( <i>PT&amp;T</i> <sup>153</sup> )  |
| <i>Traditionalist: Malignant or Tolerable Sexual/Gender Variation</i> | Traditional Liberties: religious liberty not to associate + rights of parents ( <i>Casey</i> <sup>154</sup> )   | Reserve Strict Scrutiny for Race: sex ( <i>Nguyen</i> <sup>155</sup> ) and sexual orientation ( <i>Romer</i> <sup>156</sup> ) discriminations are not as malignant as apartheid was | Expression Trumps Equality: integration of nontraditional identity/conduct/viewpoint ( <i>Dale</i> <sup>157</sup> ; <i>Christian Legal Society</i> <sup>158</sup> ) |
| <i>Post-Liberal: Productive Sexual/Gender Variation</i>               | Redefine marriage and family via privacy discourse ( <i>Marriage Cases</i> <sup>159</sup> )   | Root & Branch Reform: equality justifications for restructuring workplaces/schools to be welcoming environments for minorities and women ( <i>Hibbs</i> <sup>160</sup> )            | Homophobia and sexism ought to follow racism as ideologies the state does not have to respect (state's argument in <i>CLS</i> <sup>161</sup> )                      |

148. *Lawrence v. Texas*, 539 U.S. 558 (2003).149. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).150. *Roe v. Wade*, 410 U.S. 113 (1973).151. *Craig v. Boren*, 429 U.S. 190 (1976).152. *Romer v. Evans*, 517 U.S. 620 (1996).153. *Gay Law Students Ass'n v. PT&T*, 595 P.2d 592 (Cal. 1979).154. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).155. *Nguyen v. INS*, 533 U.S. 53 (2001).156. *Romer*, 517 U.S. 620.157. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).158. *Christian Legal Soc'y v. Martinez*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) (mem.), cert. granted, 77 U.S.L.W. 3635 (U.S. Dec. 7, 2009) (No. 08-1371).159. *In re Marriage Cases*, 183 P.3d 384, 436-39 (Cal. 2008).160. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).161. *Christian Legal Society*, 2009 WL 693391.