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## Just the facts: the perils of expert testimony and findings of fact in gay rights litigation

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Just the Facts:  
The Perils of Expert Testimony and  
Findings of Fact  
in Gay Rights Litigation

Libby Adler\*

*Introduction*

Before *Perry v. Schwarzenegger*,<sup>1</sup> all judicial victories for same-sex marriage in the United States during the first decade of the new millennium were decided on motions for summary judgment.<sup>2</sup> None required the testimony of witnesses; none produced a trial transcript; none resulted in findings of fact.<sup>3</sup> When Chief Judge

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<sup>1</sup> 704 F.Supp.2d 921 (N.D. Cal. 2010).

<sup>2</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 43 Cal.4th 757 (2008).

<sup>3</sup> See, e.g., MASS. R. CIV. P. 56(c) (the summary judgment rule provides in relevant part that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). In the 1990's, Hawai'i did hold a trial on same-sex marriage, complete with

Vaughn Walker of the Northern District of California struck down Proposition 8, the voter approved referendum amending the California constitution to define marriage as the union of a man and a woman,<sup>4</sup> however, he presided over an actual trial. He made over fifty pages of factual findings, widely speculated to have been a strategic move to render his decision difficult to reverse on appeal.<sup>5</sup>

Top-shelf litigators David Boies and Ted Olsen, who were famously opponents in *Bush v. Gore*,<sup>6</sup> joined forces to lead the plaintiffs' legal team and assembled a star-studded line-up of expert witnesses, armed with lengthy *curricula vitae* composed of authoritative books and peer-reviewed articles. From the experts' testimony would emerge a clear picture of Prop 8's irrationality—its ill-

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findings of fact and conclusions of law. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Hawai'i Cir. Ct. Dec. 3, 1996). Applying strict scrutiny on instructions from the state supreme court, the trial court found the prohibition against same-sex marriage to be a violation of the state constitution. Hawai'i promptly amended its constitution, rendering the judicial decisions moot.

<sup>4</sup> Proposition 8 [hereinafter Prop 8] amended the California Constitution to provide that "[o]nly marriage between a man and woman is valid or recognized in California." See *Perry*, 704 F.Supp.2d at 927 (citing Cal. Const. Art. I, § 7.5).

<sup>5</sup> See, e.g., Dahlia Lithwick, *A Brilliant Ruling: Judge Walker's decision to overturn Prop 8 is factual, well-reasoned, and powerful*, SLATE, Aug. 4, 2010, <http://www.slate.com/id/2262766/> (reporting that Judge Walker's opinion contained "elaborate" factual findings and reminding readers that "appellate courts must defer far more to a judge's findings of fact than conclusions of law."); but see Orin Kerr, *More On Whether the Facts Matter in Perry v. Schwarzenegger*, THE VOLOKH CONSPIRACY (Aug. 5, 2010), <http://volokh.com/2010/08/05/more-on-whether-the-facts-matter-in-perry-v-schwarzenegger/#contact> (posting on a conservative-leaning law professor's blog) (observing that most of the facts found in Judge Walker's opinion were "constitutional facts," such as, "marriage is widely regarded as the definitive expression of love and commitment in the United States," and predicting that "[i]t is exceedingly unlikely that an appellate judge . . . would feel compelled to defer to these factual judgments.").

<sup>6</sup> See, e.g., Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18, 2010, at 40.

effects as well as the absence of any legitimate justification for imposing those effects.

Meanwhile, the state of California declined to defend the measure, and a dedicated crew of intervenor-defenders referred to in the opinion as the "proponents" of Prop 8 were able to rustle up only two witnesses.<sup>7</sup> One was Kenneth Miller, a political scientist at Claremont McKenna College.<sup>8</sup> Professor Miller did not give the impression that he was uninformed about everything—just about the subject of his testimony. Judge Walker found Professor Miller's testimony to be of limited value on the specific topic of gay political power,<sup>9</sup> which appeared to be the main purpose for which proponents called him to the witness stand.

The other expert called by proponents was the well-known if poorly regarded David Blankenhorn,<sup>10</sup> who has been making ideological assertions about the failures of non-traditional family forms for years.<sup>11</sup> His claims at trial were so utterly unsubstantiated and easily impugned, that one wonders how he did not faint from embarrassment on the witness stand. Judge Walker described Blankenhorn's demeanor as "defensive"<sup>12</sup> and gave his testimony no credence whatsoever.<sup>13</sup>

Reading the trial transcript, it is hard to disagree with Judge Walker that proponents' experts failed utterly to substantiate a plausible rationale for upholding Prop 8. They offered little of value and Blankenhorn in particular seemed to lack even a passing familiarity with

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<sup>7</sup> Other witnesses who had initially agreed to testify withdrew their agreement when it seemed the trial might be televised, claiming (according to proponents' counsel) that they feared for their safety. Once it became clear that the proceedings would not be televised, however, the proponents declined to re-enlist their services, offering no new explanation. See *Perry*, 704 F.Supp.2d at 944.

<sup>8</sup> See *id.* at 945.

<sup>9</sup> See *id.* at 952.

<sup>10</sup> Blankenhorn is the founder and president of the Institute for American Values. See *id.* at 945.

<sup>11</sup> See Blankenhorn's most well-known book, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995).

<sup>12</sup> *Perry*, 704 F.Supp.2d at 950.

<sup>13</sup> *Id.* at 946.

the methodologies of social science,<sup>14</sup> despite his undaunted willingness to offer his views on what is best for children, families and society. His testimony was easily dismantled on cross-examination.

The plaintiffs' experts, by contrast, were given credence by the judge for good reason. All were highly regarded scholars with impressive credentials. Their testimony came across as authoritative and withstood questioning.

The immense disparity in the quality of trial presentation and expert credibility, as one commentator remarked, looked like the New York Yankees playing the Bad News Bears.<sup>15</sup> Judge Walker was unsparing in his recognition of this discrepancy,<sup>16</sup> and frankly, with the George W. Bush "war on science" in the still painfully recent past, a victory for expertise, evidence, and... well, *knowing something* cannot help but gratify.<sup>17</sup>

Still, the role that expertise played in *Perry* presents, to my mind, a few hidden things to worry about. This paper is an effort to squint past the glow and see them. A case such as *Perry*, in which accomplished and reputable experts give testimony and produce a record in a high-profile trial, and in which the opinions those

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<sup>14</sup> Judge Walker verges on mocking in his assessment of Blankenhorn's methods. "[H]is study of the effects of same-sex marriage involved 'read[ing] articles and hav[ing] conversations with people, and try[ing] to be an informed person about it.'" *Id.* (citing Tr. 2736:13-2740:3). "Blankenhorn's book, The Future of Marriage, DIX0956, lists numerous consequences of permitting same-sex couples to marry . . . Blankenhorn explained that the list of consequences arose from a group thought experiment in which an idea was written down if someone suggested it." *Id.* at 949 (citing Tr. 2844:1-12).

<sup>15</sup> See Johnathan Capehart, *The Prop 8 decision: look at the evidence*, WASH. POST, Aug. 5, 2010, [http://voices.washingtonpost.com/postpartisan/2010/08/the\\_prop\\_8\\_decision.html](http://voices.washingtonpost.com/postpartisan/2010/08/the_prop_8_decision.html). Apologies to Red Sox Nation for this reference.

<sup>16</sup> "Proponents' evidentiary presentation was dwarfed by that of the plaintiffs." *Perry*, 704 F.Supp.2d at 932.

<sup>17</sup> See Chris Mooney, *Mission Accomplished: The "war on science" is over. Now what?*, SLATE, Jan. 15, 2009, <http://www.slate.com/id/2208789/> (describing "the Bush administration's . . . attacks on the integrity of scientific information").

experts offer are subsequently filtered through a fact-finder (here, a judge presiding over a bench trial), can lend expertise the power of law. That power is not merely *regulatory*, but also *productive*. Judge Walker's findings are filled with facts about gay people with which we might not always want to live.

This paper shines a critical spotlight on pro-gay expert testimony and conclusions of fact in *Perry* and in a few roughly contemporaneous gay rights litigations. Rather than enter into debates in the fields of the experts themselves, I confine my analysis to the actions of the lawyers and judges who put the expertise of others to legal purpose, and thereby participate in the law's work of producing knowledge.<sup>18</sup>

The law routinely produces knowledge for itself, in the sense of evolving precedent, establishing rules and standards,<sup>19</sup> shaping the boundaries of argument that are recognizable to those working in the professional culture, and adjudicating questions sometimes for more than a single purpose or occasion.<sup>20</sup> When I refer to the law as "producing knowledge," however, I intend to refer not only to these "internal" functions, but also to law's contributions to the much larger process of knowledge production described by Foucault. That process is characterized not by any point of origin, ultimate authority, or epicenter, but rather by varied and

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<sup>18</sup> See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 194 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) ("We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production."). Foucault was speaking of institutions *other than* the law in this passage, but I nonetheless rely on him to understand law's under-recognized power to produce subjects and identity categories, as opposed to law's more obvious power to regulate behavior.

<sup>19</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976) (discussing rules and standards).

<sup>20</sup> "Estoppel," for example, is when a party is prevented from litigating an issue, sometimes because the issue has been resolved in another litigation. See BLACK'S LAW DICTIONARY 551-52 (6th ed. 1990).

dispersed sources.<sup>21</sup> This paper interrogates a small corner of recent legal occurrence in an effort to lay bare one source of what seems to be the "reality" or "truth" of gay people.

Part I of this paper identifies a handful of canonical conceptions of gay people that show up in the expert testimony put on by Boies and Olsen and in the conclusions of fact drawn from that testimony by Judge Walker. This part argues that these conceptions contradict one another and demonstrates that the trial was an act of participation by pro-gay legal actors in the ongoing production of an internally riven gay subject. More than that, each of these conceptions, while put to a pro-gay purpose in *Perry*, is equally amenable to anti-gay purposes. Relying on a crucial insight from queer theory regarding the chronic instability of the gay subject, this part will argue that the facts found in *Perry* are not logically tethered to advancement of the gay rights cause. To the contrary, the facts about gay people that the trial produced, while adding weapons to the pro-gay arsenal, simultaneously augmented the anti-gay arsenal, building strength and fomenting peril in a single motion.

Part II argues that the plaintiffs' lawyers and the judge who ruled in their favor marshaled the power of expertise to depoliticize their argument, and shepherd their cause into a rights framework, as opposed to leaving it a subject of majoritarian dispute. A signature quality of rights argumentation is a claim for the logical correctness of an outcome based on agreed-upon first principles and following a politically neutral deductive process.<sup>22</sup> Expertise, too, can be a rhetorical move that depoliticizes. The experts offered opinions on the witness stand, but the judge drew from them to find facts. The argument in this part is that the discourse of expertise and the discourse of rights converged in *Perry* to depoliticize, and thereby legitimate, the decision that same-sex marriage is a constitutional entitlement.

That effective act of legitimation might sound like an unmitigated victory for the gay rights cause, but the

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<sup>21</sup> MICHEL FOUCAULT, *Two Lectures, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977, at 78, 98-99 (Colin Gordon ed., 1980).

<sup>22</sup> DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 304-05 (1997).

facts produced are contradictory, and the resultant gay subject is highly unstable. In the long run, the contradictions discussed in Part I undermine the effort to depoliticize as a conceptual matter because they render analytically impossible a neutral, linear deductive process. When two facts conflict in an otherwise linear process, it introduces a decision point. The process is no longer neutral; it involves a choice. This conceptual problem creates in turn a practical problem for the gay rights cause. The suppleness that the contradictions introduce to gay identity means that at any future legal moment, either side of one of these contradictions could garner more credence—today, the side that serves the gay interest, tomorrow, the side that undermines it. A victory balanced so delicately, the paper argues, contains the possibility of its own defeat.

The paper concludes with a broader suggestion gleaned by importing a queer theoretic insight into critical legal analysis. In *Perry*, pro-gay litigators and a sympathetic judge strove to stabilize a gay subject for pro-gay purposes, but instead produced and reproduced instability. The paper proposes that this representational difficulty is likely to persist as long as the central strategy in this area of law reform is the pursuit of equal rights for gay people. This is partly because equal rights requires a rights-bearing subject, but it is also because of the political neutrality requirements of counter-majoritarianism. The Third Branch must hew its justifications to exceed politics. Equal rights argument drives gay rights advocates to attempt to consolidate a gay subject and to seek cover for political desire in discourses such as expertise and neutral, logical deduction, but the more advocates strive for consolidation—for the gay they need to make their case, the more internally riven the gay subject becomes.

### *I. The Internally Riven Gay Subject*

Twenty years ago, Eve Kosofsky Sedgwick identified a pair of contradictions central to homo- and heterosexual definition in *Epistemology of the Closet*. As she explained in her introductory chapter,

The first is the contradiction between seeing homo/heterosexual definition on the one hand as an issue of active importance primarily for a small, distinct, relatively fixed homosexual minority (what I refer to as a minoritizing view), and seeing it on the other hand as an issue of continuing, determinative importance in the lives of people across the spectrum of sexualities (what I refer to as a universalizing view). The second is the contradiction between seeing same-sex object choice on the one hand as a matter of liminality or transitivity between genders, and seeing it on the other hand as reflecting an impulse of separatism—though by no means necessarily political separatism—within each gender.<sup>23</sup>

Sedgwick described these contradictions as “intractable” and made clear that she had no intention of engaging in a futile effort of trying to resolve them.<sup>24</sup> She did, however, seek to draw attention to the pervasiveness of endlessly contradictory conceptions of homo- and heterosexuality and to the consequence that “an understanding of their irresolvable instability has been continually available, and has continually lent discursive authority, to antigay as well as to gay cultural forces of this century.”<sup>25</sup>

The *Perry* decision is propped on a pair of contradictions similar to those identified by Sedgwick. The first is the contradiction between, on the one hand, the assertion that gay and straight people, as well as gay and straight couples, are different from one another in fundamental respects, and then on the other hand, that they are not meaningfully different but are instead, in all relevant facets, the same. The second contradiction is between, on the one hand, the idea that gay people have been psychologically injured by discrimination and on the other hand, the idea that gay people are as psychologically healthy as everyone else.

Sedgwick demonstrated that the contradictions she identified pervaded Western culture and were evident in classic literary texts. The contradictions discussed in this paper pervade gay rights discourse and are evident

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<sup>23</sup> EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 1-2 (1990).

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 10. Sedgwick is addressing an expanded array of binarisms in this sentence. By “this century” Sedgwick referred of course to the last, but her argument retains its pertinence.

in the *Perry* trial and related gay rights materials. None of the contradictions is resolvable, and all are highly suggestive of endemic instability in representations of the gay subject.

Additionally—and perhaps more to the point for pro-gay law reformers—a close look at the *Perry* trial court decision and related materials suggests cause for concern due to the instability and manipulability of the binarisms on which the plaintiffs' lawyers and Judge Walker relied. Each side of each contradiction can be deployed for good or for ill (from a pro-gay perspective). Just as gay rights advocates can advance their cause using the following "facts,"<sup>26</sup>

- A.1. gay people are indistinct from straight people
- A.2. gay people form a discrete group
- B.1. gay people are psychologically injured by discrimination
- B.2. gay people are as psychologically healthy as straight people

so can their opponents.

### *A. Same Difference: A Precarious Balance*

This section disentangles a cluster of related arguments and demonstrates that gay rights advocates have deployed conceptions of both the sameness and difference of homosexuals in relation to heterosexuals. I will not argue that one is right and one is wrong, or even that they are mutually exclusive, but rather that they discursively produce a dangerously pliable gay subject,

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<sup>26</sup> Necessarily, my use of the term "facts" engages legal and non-legal associations. In law, juries and judges make "findings of fact," a term of art that refers to conclusions drawn from evidence, some of which might have been hidden from the fact-finder. See BLACK'S LAW DICTIONARY 632 (6th ed. 1990). Beyond law, "facts" are tied up with the question of "truth," and of "knowing." See, e.g., MICHEL FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977, at 109, 112 (Colin Gordon ed., 1980) (on the politics of science, or what "governs" scientific acceptability). I have used quotation marks around the word "facts" to signal cognizance of their provisional and political character.

and that each argument drawn from pro-gay advocacy is amenable to the anti-gay cause.

### *1. Gender's Demise...Long Live Gender!*

Professor Nancy Cott of Harvard University is one of the nation's leading experts on the history of marriage.<sup>27</sup> She testified in *Perry* about the trajectory of marriage in the United States, from its early days as a fundamentally gendered institution, to its present incarnation, in which neither spouse occupies a gendered juridical position.<sup>28</sup> Cott stated that "marriage traditionally in the United States came from the common law. And the common law included a doctrine that was called 'coverture' that described what marital roles and duties were."<sup>29</sup> As she proceeded to explain, coverture was part of a

marital bargain to which both spouses consented. [The husband's] obligation was to support his wife, provide her with the basic material goods of life, and to do so for their dependents. And [the wife's] part of the bargain was to serve and obey him, and to lend him all of her property, and also enable him to take all of her earnings, and represent her in court or in any sort of legal or economic transaction.<sup>30</sup>

Asked whether this bargain was premised on a belief in "a natural division of labor" between the sexes,<sup>31</sup> Cott answered

This asymmetricality had everything to do with the sexual division of labor. Because assumptions were at the time, that men were suited to be providers . . . . whereas women, the weaker sex, were suited to be dependent . . . . [T]he sexual division of labor underlay the formation of the marital household, and the reason that a man and a woman were seen to be necessary to form the marital household. So that their complementary tasks and duties

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<sup>27</sup> Her work includes *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000). Highlights among her credentials are listed by Judge Walker at *Perry*, 704 F.Supp.2d at 940.

<sup>28</sup> Transcript of Proceedings at 181:17-353:24, *Perry*, 704 F.Supp.2d 921 (No. C 09-2292-VRW) [hereinafter *Perry Tr.*].

<sup>29</sup> *Id.* at 240:6-9.

<sup>30</sup> *Id.* at 240:22-241:6.

<sup>31</sup> *Id.* at 241:16-17.

and talents would be put in synch and would enable the household to survive.<sup>32</sup>

The journey from state-enforced gender-based roles to legal gender-neutrality depended on several historical developments, which Professor Cott briefly described, including "industrialization," and the shift "away from agrarian society," as well as accompanying changes "in values about what is appropriate for each of the two sexes to do."<sup>33</sup> The legal domain, too, saw crucial developments. Cott's testimony covered the demise of coverture<sup>34</sup> and the recapturing by women of their separate legal personalities, the advent of Title VII of the Civil Rights Act, and a series of equal protection decisions during the 1970s.<sup>35</sup> All of these changes together, Cott explained, produced formal equality between spouses.<sup>36</sup>

Asked about the relevance of these historical developments to same-sex marriage<sup>37</sup>, Cott answered

Well, in the many years when the sexual division of labor and this assumption that the marital couple was a -- an asymmetrical couple with a provider and a dependent, that was quite consistent with marriage between a man and a woman.

However, the more symmetrical and gender-neutral spousal roles have become in fact, I would say, in the social world and certainly in the law, the more that the marriage between couples of the same sex seems perfectly capable of fulfilling the purposes of marriage.<sup>38</sup>

Judge Walker accepted Professor Cott's testimony that-- as a *legal* matter--marriage is no longer a gendered institution in which each spouse is obligated to a set of distinct, legally enforceable duties, but a "union of equals."<sup>39</sup> Marriage has been "transformed."<sup>40</sup> As a

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<sup>32</sup> *Id.* at 241:18-242:10.

<sup>33</sup> *Id.* at 243:7-19.

<sup>34</sup> *Id.* at 245:4-5.

<sup>35</sup> *Id.* at 243:20-25.

<sup>36</sup> *Id.* at 244:6-10, 245:3-5.

<sup>37</sup> *Id.* at 244: 11-14, 16.

<sup>38</sup> *Id.* at 244:17-25.

<sup>39</sup> *Perry*, 704 F.Supp.2d at 992-93; see also *id.* at 958-59 (providing a review of some of Cott's testimony and related findings of fact).

consequence, the rationale for restricting marriage to heterosexual couples that existed under coverture no longer holds. "Gender no longer forms an essential part of marriage."<sup>41</sup>

The pertinence of this account to the plaintiffs' claim is obvious: marriage has evolved to accommodate the homosexual union. The roles of spouses are no longer complementary, in a hetero-normative sense, but the same—just as two people of the same sex are the same.

Lee Badgett is an economist at the University of Massachusetts, Amherst who also maintains an affiliation with the Williams Institute at UCLA.<sup>42</sup> She testified that barring same-sex couples from marriage imposes concrete economic consequences on them.<sup>43</sup> One piece of Badgett's testimony concerned the benefits of *specialization* in marriage, a term that typically refers to the efficiency advantages of a household in which the superior earner specializes in working in the marketplace while the inferior earner specializes in domestic labor.<sup>44</sup> The concept of specialization is perhaps most closely associated with Nobel Prize-winning economist Gary Becker. He famously elaborated the idea that households operate most efficiently when men specialize in market labor, where they hold a "comparative advantage," while women specialize in domestic labor, where they hold such an advantage,<sup>45</sup> and that as a result of that efficiency, this gendered pattern will continue to predominate.<sup>46</sup>

Denying same-sex couples access to marriage, Badgett urged, denies them access to the efficiency benefits of

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<sup>40</sup> *Id.* at 992. The legal significance of this point in context is that Judge Walker drew the legal conclusion that plaintiffs were not seeking a "new right" but rather access to the existing fundamental right to marry. See *id.*

<sup>41</sup> *Id.* at 993.

<sup>42</sup> Judge Walker reviewed some of Badgett's credentials. *Perry*, 704 F.Supp.2d at 941.

<sup>43</sup> *Id.*

<sup>44</sup> See Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923, 929 (2001) (book review).

<sup>45</sup> See *id.* (citing GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981)).

<sup>46</sup> This theory made Becker something of a *persona non grata* among many feminists. See generally Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007).

specialization and thereby inflicts an economic injury upon them.<sup>47</sup> Badgett's version of specialization, of course, is not explicitly premised on masculine and feminine sex roles. She seems to strain in her testimony to avoid the deeply gendered associations, explaining specialization using vague and genderless examples (*i.e.*, "certain types of labor, whether that's labor -- getting training to enhance your job possibilities or other sorts of training that would make you more productive in other ways").<sup>48</sup> This account of specialization is perhaps the least clear moment of Badgett's testimony, which is otherwise forceful and articulate. Her struggle here suggests the difficulty she has extricating specialization from its hetero-normative moorings. Despite the suppression of "his and her" language, the gendered associations persist, and her explanation nonetheless easily conjures the image of a butch lesbian suited up for marketplace participation while the femme stays home to feed the baby and vacuum. Here, gay couples might be homosexual in one respect, in the sense of being the same as one another, but they are a lot like heterosexuals in another—an economic butch-femme.<sup>49</sup> Except in the most formal sense, marriage need not evolve for these gays. The old complementarity will do just fine.

Judge Walker accepted Professor Badgett's testimony, and cited lack of access to specialization among the economic consequences of the state's discriminatory marriage law.<sup>50</sup> He did so apparently without noticing any contradiction between this conclusion and the conclusions he drew from Professor Cott's testimony.

This is not to say that only Professor Cott or Professor Badgett can be right. They spoke from different disciplines and for different purposes. The point is not that either expert witness was wrong or out

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<sup>47</sup> Perry, 704 F.Supp.2d at 978 (citing Tr. 1330: 14-16).

<sup>48</sup> Perry Tr., *supra* note 28, at 1333:10-13.

<sup>49</sup> *But see* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 31 (1990) ("'[B]utch' and 'femme' as historical identities of sexual style cannot be explained as chimerical representations of originally heterosexual identities . . . . [G]ay is to straight not as copy is to original but, rather, as copy is to copy.").

<sup>50</sup> Perry, 704 F.Supp.2d at 963 (citing Tr. 1331:15-1332:9, 1332:25-1334:17).

of keeping with the standards of her discipline. Instead, I mean to draw attention to the legal purposes to which their testimony was put and the knowledge of gay people that the testimony produced, particularly once "found as fact."

Cott's testimony, strictly speaking, was about marriage, not gay people. By using it to support the proposition, however, that marriage in its current incarnation is amenable to same-sex couples because it is amenable to *sameness within a marriage*, her expert testimony evokes an image of homosexuality that really emphasizes the *homo*. Gay couples do not resemble straight couples, but it does not matter for purposes of contemporary marriage, which has evolved to render heterosexual difference legally insignificant. Marriage now accommodates the absence of differentiation that characterizes the same-sex couple. Badgett, by contrast, de-emphasizes the sameness *within* each same-sex couple, producing instead a same-sex couple characterized by complementarity. By addressing the economic consequences of exclusion from marriage, again not speaking directly to the nature of gay people, Badgett suggests the *sameness of gay couples and straight couples*. Both kinds of couples can benefit from specialization. The two expert witnesses evoke contrasting images of marriage, and thereby also evoke contrasting images of same-sex couples.

The fundamental likeness or unlikeness of gay couples to straight couples is an unanswerable question. As I have argued elsewhere,<sup>51</sup> the equal protection right claimed by same-sex marriage advocates is indeterminate because there are no agreed upon or requisite points of comparison. Those who think that love, commitment and capacity to live financially and emotionally interdependent lives are the relevant factors are likely to deem same-sex couples and different-sex couples similarly situated for purposes of marriage and are also likely to see the denial of marriage rights as a denial of the right to equal protection. But those who believe that biological complementarity, procreative capacity, and conformity with certain familiar religious/moral teachings are the relevant factors are likely to see

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<sup>51</sup> Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 601 (2010).

same-sex couples as quite differently situated from heterosexual couples, so that exclusion of same-sex couples from marriage is not a question of equality. Much turns on this incipient judgment, which is made by adherents of both positions with no foundation other than political preference.

For same-sex marriage advocates, the outcome of an equal protection challenge nonetheless rides on the hoped-for judicial belief that same-sex relationships and different-sex relationships are in all relevant respects the same. Judge Walker acted accordingly and found the essential sameness of the two types of couples:

Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.<sup>52</sup>

To reach this conclusion, Judge Walker relied on the testimony of Letitia Anne Peplau, a psychologist at UCLA who specializes in the study of human relationships, sexual orientation and gender.<sup>53</sup> According to Peplau, the relevant research shows "great similarity across couples, both same-sex and heterosexual" with regard to the quality of relationship.<sup>54</sup> On cross-examination, Peplau was confronted with the awkward evidence of a statistical difference between gay male couples and other (both lesbian and heterosexual) couples with respect to the value and practice of monogamy. She had to concede that a higher percentage of gay male couples "may have an agreement that their relationship does not need to be sexually exclusive," but hastened to add that "if a

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<sup>52</sup> *Perry*, 704 F.Supp.2d at 967. See also *id.* at 1001 ("[R]ather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same . . . . The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.").

<sup>53</sup> See *id.* at 942 (providing a summary of Peplau's credentials).

<sup>54</sup> *Id.* at 968 (citing Tr. 583:12-585:21).

couple has an agreement . . . then acting on that agreement is not a breach of trust," and does not affect relationship satisfaction.<sup>55</sup> (This gay male non-monogamy aberration does not appear in Judge Walker's findings of fact.)

To reach his finding of sameness, Judge Walker also relied on Badgett's testimony that "[s]ame-sex couples have more similarities than differences with opposite sex couples, and any differences are marginal."<sup>56</sup> What is peculiar, however, is that at other moments in the case put on by the plaintiffs, the expert testimony seemed designed to hammer home the point that sexual orientation is a defining trait, one that is fundamental to an individual's character, distinguishing and immovable.

## *2. 100% Guaranteed Gay (But See Exclusions and Disclaimers)*

Gregory Herek is an expert in social psychology and a professor of psychology at UC Davis where he "regularly teaches a course on sexual orientation and prejudice."<sup>57</sup> His doctoral dissertation "focused on heterosexuals' attitudes towards lesbians and gay men."<sup>58</sup> At trial, Herek testified that

[s]exual orientation is a term that we use to describe an enduring sexual, romantic or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction.

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<sup>55</sup> Perry Tr., *supra* note 28, at 617:1-618:4. This example goes again to the point about indeterminacy. Persons of different political or moral predispositions are probably of different minds on the question of whether monogamy is a *sine qua non* of marriage. There is no epistemologically sound basis upon which to decide whether this gay male cultural practice justifies excluding gay men from the institution of marriage—at least not in jurisdictions such as California, which have no adultery statute.

<sup>56</sup> *Id.* at 968 (citing Tr. 1362:5-10).

<sup>57</sup> *Id.* at 943. For a general review of his credentials, see *id.*

<sup>58</sup> *Id.*

And it's also sometimes used to describe an enduring pattern of behavior.<sup>59</sup>

Herek's emphasis here is on the thrice-used term "enduring." He stressed that "the vast majority of people are consistent in their behavior, their identity, and their attractions."<sup>60</sup>

How does Herek know? Well, he asked them. For example, "[i]n his own research, Herek . . . asked ordinary people if they [were] heterosexual, straight, gay, lesbian or bisexual, and that is a question people generally [were] able to answer."<sup>61</sup>

Herek also asked 2,200 people, all of them self-identified as gay, lesbian or bisexual about the degree of choice they had about their sexual orientation.<sup>62</sup> "Among gay men, eighty seven percent said that they experienced no or little choice. . . . Among lesbians, seventy percent said that they had no or very little choice."<sup>63</sup>

Judge Walker relied heavily on Herek's testimony, notwithstanding the challenges that Herek faced on cross-examination. Anybody who put him- or herself in the position of advocating that people are consistent in their sexuality would face such challenges. The difficulty, it seems to me, is that once one has contended that people are consistent, it is necessary to find a way to deal with all of their inconsistency.

For example, even granting the assumption of accuracy to Herek's survey results and that eighty seven and seventy percent are sizeable majorities, thirteen and thirty percent are not exactly chopped liver. What is the significance of those surveyed who reported some degree of choice in their sexual orientations? Not much is said in the transcript or findings about them.<sup>64</sup>

And what about those who do exhibit some "inconsistency" during their lifetimes? Heterosexual acts in the trajectories of gay people's lives, Herek testified, are easily explained by the fact that people grow up burdened with heterosexual expectations. Some

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<sup>59</sup> *Id.* at 964 (citing Tr. 2025:3-12).

<sup>60</sup> *Id.* at 964 (citing Tr. 2070:19-2073:4).

<sup>61</sup> *Id.* at 964 (citing Tr. 2026:7-24).

<sup>62</sup> *Id.* at 966 (citing Tr. 2054:12-2055:24).

<sup>63</sup> *Id.*

<sup>64</sup> See Perry Tr., *supra* note 28, at 2055:9-2057:18.

gay or lesbian people, therefore, might engage in heterosexual intercourse in error, but "[i]ts not part of who they are, and not indicative of current attractions."<sup>65</sup>

But these arguments still leave inconsistency running in the other direction unexplained—i.e., when an otherwise straight person engages in homosexual sex. For example, as Patricia Hill Collins describes it, a subculture among black men emerged in the 1990s that confounds Herek's neat identity distinctions:

'Rejecting a gay culture they perceive as white and effeminate, many black men have settled on a new identity, with its own vocabulary and customs and its own name: Down Low. There have always been men—black and white—who have had secret sexual lives with men. But the creation of an organized, underground subculture largely made up of black men who otherwise live straight lives is a phenomenon of the last decade.' Most of the Black men who are on the Down Low (DL) date or marry women and engage sexually with men that they meet in bathhouses, parks, the Internet, or other anonymous settings. Most DL men do not identify themselves as gay or bisexual, but primarily as Black.<sup>66</sup>

Collins adds later that "DL culture places a premium on pleasure and there is a certain degree of freedom in not having to fit within rigid sexual self-definitions. Men on the DL convey a strong sense of independence."<sup>67</sup> It is interesting to contemplate how someone on the DL might answer Herek's questions. If one of the appealing features of life on the DL is evasion of "rigid sexual self-definitions," a real appreciation for that life and its pleasures might upend the "enduring" quality and "consistency" that came across so strongly in Herek's testimony.

Professor Aaron Belkin, a political scientist who provided expert testimony in one of the pre-repeal challenges to the military's Don't Ask/Don't Tell

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<sup>65</sup> *Perry*, 704 F.Supp.2d at 966 (citing Tr. 2202:8-22). Herek renders consistent those people with strong heterosexual tendencies and strong homosexual tendencies by framing them as consistently bisexual. See *infra* text accompanying notes 72 and 73.

<sup>66</sup> PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 173 (2005) (quoting Benoit Denizet-Lewis).

<sup>67</sup> *Id.* at 291.

policy,<sup>68</sup> provides another example of inconsistency. Belkin testified that even if the military were somehow able to expel all gay and lesbian members from military service, including openly gay as well as closeted members,

it's very clear that there would still be sexual activity among same sex service members. The reason is that many of the people who have same-sex sex in the military are not gay. This is why Congress has put a Queen For A Day exception into the law [permitting people to prove that even though they have engaged in homosexual sex, they are nonetheless heterosexual]. The military knows quite well that there are straight service members who engage in same sex sexual activity in military spaces.<sup>69</sup>

Belkin went on to testify that "the percent of male American veterans who have had same-sex sex, according to one study, is higher than the percent of civilian men who have had same-sex sex."<sup>70</sup>

In this portion of his testimony, Belkin was undermining the so-called "privacy rationale" for excluding openly gay men and lesbians from military service. According to the privacy rationale, Don't Ask/Don't Tell protected straight service members from the discomfort of supposed gay and lesbian leering in the showers and in other close quarters where service members might go unclothed.<sup>71</sup> But, as Belkin's testimony suggests, if heterosexual male service members are engaging in homosexual acts, then one must conclude that homosexual desire cannot be excised by banishing

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<sup>68</sup> *Log Cabin Republicans v. United States*, 716 F.Supp.2d 884 (C.D.Cal. 2010).

<sup>69</sup> Transcript of Proceedings at 622:14-24, *Log Cabin Republicans*, 716 F.Supp.2d 884 (No. CV 04-08425-VAP (Ex)). Belkin went on to explain that the "Queen For A Day" exception refers to a provision in the federal law that exempts from discharge those found to have engaged in homosexual conduct who can prove that they are not gay. *Id.* at 623:12-20. He testified that "[t]here is a very good reason why the military has that . . . . If they didn't, they would end up firing a lot of straight people who engage in same-sex sex."

<sup>70</sup> *Id.* 624:13-16. Belkin added that the study does not make evident whether the men were more likely to have engaged in the sex during or subsequent to their service. *Id.* at 624:17-19.

<sup>71</sup> He made a number of undermining points; I am recounting only one. See *id.* at 615:13-626:11.

homosexuals. In other words, if there is leering going on in the showers, it could be straight men leering at other men.

Belkin battles mightily in this portion of his testimony to disassemble the homosexual subject, in stark contrast to Herek in *Perry*, who fights just as hard for homosexual coherence. Herek never provides an explanation for same-sex sexual practices among straight-identified people, apparently unperturbed by the possibility that some sexual subcultures might elude him; he merely characterizes these practices as exceptional, reiterating his mantra that "most people are consistent" even if "some" are not.<sup>72</sup> When specifically asked on cross-examination about heterosexually identified men who have sex with other men, Herek grudgingly replied, "[t]his is a phenomenon that has been observed, yes."<sup>73</sup>

Not only did Judge Walker follow Herek's lead and look right past all of the exceptions to homo- and heterosexual consistency, he also appeared unmoved by proponents' counsel's cross-examination of Herek's methodologies. For example, Herek was questioned on his method of selecting a sample for a study from which he determined that most gay people experienced little or no choice about their sexual orientation. According to Herek, a threshold question to potential survey-takers asked "something to the effect of, Are you lesbian, gay, or bisexual? And so if they answered yes to that question, they were considered eligible for participation in one of the studies." In other words, only people who began the survey by describing themselves in the specified identity terms were invited to proceed to parts of the survey that would ultimately vindicate the aptness of those terms. The possibility that this gate-keeping question might have had some effect on the data apparently made no impression on Judge Walker.

Later during the cross-examination, Herek conceded that "people are not always aware of their mental processes . . . or why they do things," explaining that this is the reason that when new drugs are tested, some study subjects receive a placebo.<sup>74</sup> Herek was then asked, "when you ask individuals whether they experience little or no choice with respect to their sexual orientation, you take

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<sup>72</sup> See, e.g., *Perry Tr.*, *supra* note 28, at 2069:7-10.

<sup>73</sup> *Id.* at 2071:1-3.

<sup>74</sup> *Id.* at 2257:10-23.

them at their word, correct?"<sup>75</sup> Herek replied, "Umm, I take them at their word, that they experience little or no choice, yes."

Of course, it is hard to know whose word to take when describing a person's "experience" other than the person whose "experience" it is, if that is as far as the inquiry goes. But the cross-examination did not proceed to the matter of how it is that people might come to "experience" themselves as they do. Counsel for the proponents of Prop 8 simply were not equipped to pursue this line of questioning, which—if done skillfully—might at least have cast a critical light on the ability of "ordinary people" to identify themselves as gay, straight or bisexual. If, for example, George Chauncy, one of the expert historians working for the plaintiffs, had switched sides, he might have done some real damage to the apparent "realness" of these categories, as he has done in his scholarly work.<sup>76</sup>

Proponents' counsel did confront Herek with some studies that found sexual orientation to be a bit less tidy than Herek maintained, including studies conducted by another plaintiffs' expert, Letitia Peplau. In one article, Peplau included a table that distinguished "Old Perspectives" on women's sexual orientation from "New

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<sup>75</sup> *Id.* at 2258:12-14.

<sup>76</sup> See, e.g., GEORGE CHAUNCY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 48 (1994) ("The fundamental division of male sexual actors in much of turn-of-the-century working-class thought . . . was not between 'heterosexual' and 'homosexual' men, but between conventionally masculine males, who were regarded as men, and effeminate males, known as fairies or pansies, who were regarded as virtual women, or, more precisely, as members of a 'third sex' that combined elements of the male and female. The heterosexual-homosexual binarism that governs our thinking about sexuality today, and that, as we shall see, was already becoming hegemonic in middle-class sexual ideology, did not yet constitute the common sense of working-class sexual ideology."); see also Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in *TRANSGENDER RIGHTS* 141, 146 (Paisley Currah, et al. eds. 2006) (drawing on Chauncy's history to undermine the sharp distinction between gay and transgender identity categories). Chauncy and Minter both demonstrate that there is nothing inevitable or natural about the identities claimed by Herek's subjects.

Perspectives.”<sup>77</sup> In the “Old Perspectives” column, one could read that “[s]exual identity attractions and behavior form discrete categories, i.e., heterosexual, homosexual, bisexual.”<sup>78</sup> On the “New Perspectives” side of the table, it said “[s]exual identity, attractions and behavior can be varied, complex and inconsistent.”<sup>79</sup> Unwilling to differ outright when asked whether he agreed with Peplau’s characterization of the latest thinking on the subject of women’s sexuality, Herek surmised that Peplau was probably referring to a “relative minority of individuals.”<sup>80</sup>

Later, proponents asked Herek to respond to another study on women’s sexuality (in which Peplau was a co-author), which stated that “[s]cholars from many disciplines have noted that women’s sexuality tends to be fluid, malleable, shaped by life experiences, and capable of change over time.”<sup>81</sup> Again, Herek conceded the possibility of change, but insisted that “for . . . most people, it doesn’t seem to happen.”<sup>82</sup>

When proponents’ counsel directly posited to Herek that sexual orientation is a “social construction,” and therefore “not a ‘valid concept,’” Herek shot them down. People who speak about sexual orientation in those terms, he explained, are merely speaking “at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class.”<sup>83</sup> Despite the many hours proponents obviously devoted to culling material that would challenge the discrete categories of sexual orientation, they did not seem to know how to get past that wall of refusal. Perhaps fortunately for the plaintiffs’ case, a vigorous dialogue on the social construction of sexuality did not ensue.

Citing Herek’s testimony and data, Judge Walker made this finding: “[s]exual orientation is fundamental to a person’s identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group. Proponents’ assertion that sexual orientation cannot be

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<sup>77</sup> Perry Tr., *supra* note 28, at 2128:14-15.

<sup>78</sup> *Id.* at 2128:19-21.

<sup>79</sup> *Id.* at 2128:22-24.

<sup>80</sup> *Id.* at 2129:10.

<sup>81</sup> *Id.* at 2225:19-22.

<sup>82</sup> *Id.* at 2226:24-2227:3.

<sup>83</sup> Perry, 704 F.Supp.2d at 965 (citing Tr. 2176:23-2177:14).

defined is contrary to the weight of the evidence."<sup>84</sup> The factual conclusion to which Judge Walker is committed here is clear: sexual orientation is "fundamental," the characteristic is "distinguishing" as well as "defin[ing]," and the group is "discrete."

This "fact" sometimes seems to be the one that best serves the gay rights cause. As Suzanne Goldberg wrote, responding to a colleague's proposal to use a social constructionist argument in a pro-gay rights brief,

[t]o me, the argument that sexual orientation was a social construct rather than a biological or otherwise deeply rooted, 'natural' trait seemed potentially more dangerous to the plaintiffs' case than most of the arguments made by our adversaries . . . . I feared the Court might seize on the social construction argument and find the category of 'gays and lesbians' too diffuse to amount to a cognizable class. After all, a court needs to understand who has been harmed before deciding whether and how to order relief from an injurious classification. If the Court had become persuaded that the trait of sexual orientation derived its meaning from shifting cultural understandings of gay identity, rather than a 'natural' or fixed source, it could then have decided that sexual orientation, as a trait, was not susceptible to an administrable definition. As a result, the Court might have found that the lesbian and gay plaintiffs did not comprise a meaningful, comprehensible group and did not suffer any shared or similar burden as a result of the measure.<sup>85</sup>

Goldberg indicated her own personal agreement with the social constructionist perspective,<sup>86</sup> but worried that in court it could unsteady the ground of civil rights litigation, depriving judges of the solid idea of the class whose injury they were being asked to remedy. By calling into question the very category of "gay," social construction might be "more dangerous" to gay rights than other arguments levied by opponents.

In the *Perry* litigation, the decision to deploy Herek, whose testimony was designed to depict the most static

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<sup>84</sup> *Perry*, 704 F.Supp.2d at 964.

<sup>85</sup> Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 630-32 (2002).

<sup>86</sup> See *id.* at 630-31.

and essentialized possible version of homosexuality,<sup>87</sup> can be rendered justifiable by the reasons set forth by Goldberg. Herek's testimony also helped to emphasize that heterosexual marriage "is an unrealistic option for gay and lesbian individuals."<sup>88</sup> In contrast, George Chauncy, whose scholarly work makes vivid the historical contingencies of gay and transgender identities and how racial and class dimensions of identity helped to shape our modern understandings,<sup>89</sup> was not invited to testify on this subject. Rather, he was called by the plaintiffs to speak to the history of anti-gay discrimination and stereotypes and to the historical resonance of the stereotypes used in the campaign to pass Prop 8.<sup>90</sup>

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<sup>87</sup> The little bit of Herek's scholarship that I examined is pretty consistent with his testimony, but perhaps a bit more forthcoming about some of the issues raised above. See, e.g., Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 SEXUAL RES. & SOC. POL'Y 176, 197 (2010) (conceding that an initial screening question in his survey was likely to have excluded some gay people and affected the sample); see also Gregory M. Herek, *Homosexuality*, in ENCYCLOPEDIA OF PSYCHOLOGY 149 (Alan E. Kazdin ed., 2000) (stating that "[n]ot all people display consistency among their sexual feelings, behaviors, and identity; some experience considerable fluidity," but going on to describe most people as consistent).

<sup>88</sup> *Perry*, 704 F.Supp.2d at 969.

<sup>89</sup> See CHAUNCY, *supra* note 76. The fourth chapter of this book, for example, entitled *The Forging of Queer Identities and the Emergence of Heterosexuality in Middle-Class Culture*, provides compelling evidence that in 1920s New York, effeminacy in men acquired an association with low class status, and that middle-class gay men who aspired to bourgeois acceptability "blamed anti-gay hostility on the failure of fairies to abide by straight middle-class conventions of decorum in their dress and style." *Id.* at 105. "Not all queers [the favored term for non-effeminate gay men defined by sexual desire rather than effeminate gender presentation] were middle class . . . just as not all fairies were of the working class. But if the fairy as a cultural 'type' was rooted in the working class culture of the Bowery, the waterfront, and parts of Harlem, the queer was rooted in the middle-class culture of the Village and the prosperous sections of Harlem and Times Square. . . . [T]he cultural stance of the queer embodied the general middle-class preference for privacy, self-restraint, and lack of self-disclosure." *Id.* at 106.

<sup>90</sup> *Perry Tr.*, *supra* note 28, at 356:22-567:1.

Peplau, too, whose research on women's sexuality might have cast sexual orientation in less stark and more "fluid" terms, was left out of this part of the discussion. She was called to testify to the benefits of marriage for same-sex couples, the similarities between same- and different-sex couples, and the unlikelihood that same-sex marriage will harm heterosexual marriage.<sup>91</sup>

By calling Herek and leaving Chauncy and Peplau on the sidelines when it came time to characterize sexual orientation, Boies and Olsen made a choice between a consolidated, essentialized version of homosexuality that explains away or exceptionalizes any inconvenient, nonconforming behaviors, and an historically contingent or mutable version that embraces a fuller range of sexual conduct and identity. They chose the former, apparently believing that a clear idea of what "gay" means and who falls into the category is better for gay rights. And it may be—sometimes.

The Williams Institute for Sexual Orientation Law and Public Policy is a pro-gay think tank associated with UCLA School of Law, which frequently provides expert opinions (such as that offered by Lee Badgett<sup>92</sup>) and submits amicus briefs in gay rights cases.<sup>93</sup> It recently released a study<sup>94</sup> authored by one of its distinguished scholars, Gary Gates,<sup>95</sup> finding:

[O]nly 1/3rd of adults who have had same-sex sexual experiences identify as lesbian, gay, or bisexual. While 3% of adults identify as lesbian, gay, or bisexual (LGB),

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<sup>91</sup> *Id.* at 574:6-19.

<sup>92</sup> See *supra* note 42.

<sup>93</sup> The Williams Institute seems to hold as a significant part of its mission the production of facts. It is a fact-factory of sorts, churning out reports and studies, and issuing press releases and email announcements about its discoveries faster than one can keep up. It performs the crucial function in the pro-gay world of bridging ideology and expertise, demonstrating awareness of the power of producing facts for legal and cultural consumption.

<sup>94</sup> GARY GATES, WILLIAMS INST., UCLA, SEXUAL MINORITIES IN THE 2008 GENERAL SOCIAL SURVEY: COMING OUT AND DEMOGRAPHIC CHARACTERISTICS (2010).

<sup>95</sup> The *Perry* plaintiffs relied on other research conducted by Gates. See, e.g., Exhibit 909 and *Perry Tr.*, *supra* note 28, at 576:51-577-23.

an additional 6% identify as heterosexual but say that they have had same-sex sexual partners since age 18.<sup>96</sup>

The study also found that "[b]isexuals are more likely to be a racial/ethnic minority than heterosexuals, gay men, or lesbians. More than half of bisexuals are non-white compared to approximately 30% of heterosexuals, gay men and lesbian."<sup>97</sup> In the press release announcing the study findings, Dr. Gates made this (one must presume) well-thought out statement:

These provocative findings demonstrate the challenge in understanding the complex relationship between sexual orientation identity and behavior. Given that nearly half of Americans still believe that homosexual relationships are morally wrong, it is not surprising to find ambiguity between how people behave sexually and how they identify their sexual orientation.<sup>98</sup>

Sometimes it seems best for gay rights to consolidate the definition of "gay" and take as self-evident that we can know who belongs in the "discrete" group. Other times, however, the best strategy might be to implicate more people—as encapsulated in the motto "We Are Everywhere."<sup>99</sup> The "We Are Everywhere" strategy, suggesting that homosexuality is diffuse and pervasive rather than concentrated in a small segment of the population, lies a great distance from Herek's expert opinion, with its emphasis on the consistency of behavior, attraction and identity.

The message of the Gates statement is that first, the relationship between sexual identity and behavior is "complex," but more than that, there is at least a partial explanation for its complexity. "[N]early half of Americans still believe that homosexual relationships are morally wrong," and "given that," the fact that people are having homosexual sex but declining to

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<sup>96</sup> Press Release, Williams Institute, UCLA School of Law, New Williams Institute Study Shows 9% of Adults Have Had Same-Sex Experiences (Oct. 12, 2010), available at <http://yubanet.com/usa/New-Williams-Institute-Study-Shows-9-of-Adults-Have-Had-Same-Sex-Experiences.php#.TtQaM2OBqU8>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., MARK BLASIUS AND SHANE PHELAN, WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS (1997).

identify themselves as gay or bisexual is "not surprising." He suggests that social forces do have something to do with self-definition, and that suggestion supports two pro-gay arguments. First, anti-gay bias is not a trifle. Second, anti-gay bias actually reduces the number of people willing to claim a gay identity; it should therefore be concluded that more people are implicated in the gay rights cause than gay population numbers indicate.

This second argument recalls one of Sedgwick's binaries. Gates draws on what Sedgwick called the *universalizing*, as opposed to *minoritizing*, conception of homosexuality. Writing under the auspices of the Williams Institute, Gates deploys the universalizing conception for pro-gay purposes, though, as Goldberg warns, an excessively diffuse understanding of homosexuality also has the potential to undermine the gay rights cause. In fact, as Sedgwick contended, *both* universalizing *and* minoritizing conceptions are available for *both* pro- *and* anti-gay purposes. It is a good idea to be anxious about the deployment of the universalizing conception, but the perceptive advocate will extend as well his or her anxiety to the minoritizing conception. The "We Are Everywhere" strategy and Gates' public statement are moments of awareness that the conception of gays as a small, concentrated minority could work to gay people's disadvantage. It could minimize the political importance of gay concerns (*e.g.*, suggest that a greedy minority is trying to change marriage for everyone else) or fix attention on some gay difference (such as the practice of non-monogamy) that rendered gays ill-suited to an equality right (such as marriage).

Gay rights advocates sometimes depict gay people and same-sex couples as meaningfully different from straight people and heterosexual couples and other times as indistinguishable on any legitimate grounds. Sometimes gay rights advocates portray gays as composing a discrete group comprising individuals who are dependably homosexual in their desires and practices, and sometimes they represent sexual orientation as "complex," and the boundaries that demarcate gay from straight as hazy and arbitrary.

Likewise, gay rights advocates sometimes worry that anti-gay forces might reduce homosexuality to the concern of a small and marginalized minority, and portray same-sex couples as differently situated from heterosexual

couples. Gay rights advocates also worry, however, that anti-gay forces will make hay out of social construction, obscure the existence of the equality-seeking class of gay persons, and render a legal remedy untenable.

Following Sedgwick's lead, I make no attempt to settle this ultimately irresolvable question. The question is a political one, carrying different short-term stakes each time it is posed. The peril lies in the problem that anti-gay forces have access to the same "facts" produced by experts testifying in service of a pro-gay cause, and could deploy them for ill at any time.

Sedgwick called this problem "the double-bind," explaining that such contradictory conceptions are "sites that are *peculiarly* densely charged with lasting potentials for powerful manipulation."<sup>100</sup> Pro- and anti-gay rights lawyers and judges have the same arsenal from which to draw, or put another way, both sides of each contradiction have the capacity to work for both sides of the fight. Gay rights advocates leave themselves vulnerable to being blind-sided if they forge ahead with the idea that facts found in their favor are logically bound to the advancement of their cause.

The double-bind presented by the arguments in Part I.A can be represented like this<sup>101</sup>:

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<sup>100</sup> SEDGWICK, *supra* note 23 at 10 (emphasis in original).

<sup>101</sup> The model for this table and the one that ends the next section comes from Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1748 (1993). Halley also provides a helpful explanation of Sedgwick's double-bind. See *id.* at 1748-49.

	Pro-Gay	Anti-Gay
Gay People and Same-Sex Relationships are Indistinguishable from Straight People and Heterosexual Relationships	<p>Relationship quality is the same (Peplau), and therefore gay couples should be allowed to marry.</p> <p>Gay couples should have access to specialization (Badgett).</p> <p>Many self-identified straight people are engaging in same-sex sex. Sexual orientation categories are blurry, and therefore, more people are implicated (Gates &amp; Peplau's study).</p>	<p>Sexual orientation is just a social construction, therefore:</p> <ul style="list-style-type: none"> <li>• No real class to which to award a remedy exists, and</li> <li>• Everyone can simply marry heterosexually; no discrimination if everyone can marry</li> </ul> <p>(Proponents of Prop 8).</p>
Gay People are a Discrete Group and Same-Sex Relationships Differ from Heterosexual Relationships	<p>People can just tell you whether they are gay or straight. Their identity,</p>	<p>Relationships are different, (e.g., many gay male couples do not value monogamy,) therefore marriage is not</p>

	<p>attractions and behavior are consistent. A discrete group is real and available for remedy (Herek).</p> <p>Legal developments in 19<sup>th</sup> and 20<sup>th</sup> centuries producing formal equality between spouses create new grounds for counter-majoritarian action (Cott).</p>	<p>suitable for same-sex couples (Proponents of Prop 8).</p> <p>Gay people are a small minority trying to change marriage for everyone else (Proponents of Prop 8).</p>
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*B. The Kids are Alright<sup>102</sup>...Or are They?: The Delicate Politics of Injury*

The question of gay psychological health is central to several different gay rights matters. This section takes up a cluster of pro-gay arguments in which gay people are sometimes portrayed as no less well-adjusted than their heterosexual counterparts and other times as psychologically injured due to the stress of discrimination. Again, the arguments will prove available for both pro- and anti-gay purposes.

Proponents' witness David Blankenhorn repeatedly asserted that the married, heterosexual, biological household is optimal for child-rearing outcomes, although he backed off from several of those assertions upon cross-examination.<sup>103</sup> The alleged supremacy of differently sexed parents is of course a critical issue in same-sex marriage litigations, even in cases decided without the benefit of a trial.<sup>104</sup> To establish that

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<sup>102</sup> *The Kids are All Right* is a 2010 movie about a lesbian couple who conceived two children using anonymous donor insemination. *The Kids are Alright* is a 1964 rockumentary about The Who. I opted for the correct spelling, but the reference is to the 2010 movie.

<sup>103</sup> See, e.g., Perry Tr., *supra* note 28, at 2746:16-19, 2766:9-2768:23 (where Blankenhorn asserts on direct examination the importance of a child's biological parents also serving as a child's social and legal parents); see also *id.* at 2795:1-5 (where he concedes on cross examination that due to screening, "adoptive parents . . . actually on some outcomes outstrip the biological parents in terms of providing protective care for their children").

<sup>104</sup> See, e.g., *Goodridge*, 798 N.E.2d 941 at 962-64 (addressing the state's argument that restricting marriage to heterosexual couples furthers the state interest in "ensur[ing] that children are raised in the 'optimal' setting"). Despite absence of a trial in this case, many of the same factual assertions entered into the litigation via the mechanism of the amicus brief. Nancy Cott, for example, participated in just such an expert submission on the history of marriage. See Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae Supporting Plaintiffs-Appellants, *Goodridge*, 798 N.E.2d 941 (Mass. 2003) (No. SJC 08860). Trial

"children raised by gays and lesbians are just as likely to be well-adjusted as children raised by heterosexual parents,"<sup>105</sup> plaintiffs called highly credentialed psychologist Michael Lamb.<sup>106</sup>

Based on Lamb's testimony, Judge Walker found that "[t]he factors that affect whether a child is well-adjusted are: (1) the quality of the child's relationship with his or her parents; (2) the quality of the relationship between the child's parents . . . and (3) the availability of economic and social resources."<sup>107</sup> Neither gender nor sexual orientation is a determinative factor.<sup>108</sup> Excerpting Lamb's testimony, Judge Walker added that "[s]tudies have demonstrated 'very conclusively that children who are raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents.'"<sup>109</sup>

Now, as Judge Walker forthrightly states, all this debate about fitness for parenting is logically irrelevant. "Proposition 8 has nothing to do with children, as [it] simply prevents same-sex couples from marrying. Same-sex couples can have (or adopt) and raise children [regardless of the outcome of the case] . . . . Proposition 8 does not affect who can or should become a parent under California Law."<sup>110</sup> That matter is governed by the state's law on custody and adoption. Still, marriage and child-rearing are conceptually entwined enough that the assertion that gay parenting is calamitous for children demands an answer.

Also, Judge Walker was no doubt mindful of the perils of the rational basis test, according to which the mere possibility that Prop 8 signaled a rationally supportable preference for heterosexual parenting could be sufficient to withstand judicial review. He therefore made

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is perhaps more spectacular, but not the only method of filtering expert submissions through a legal process and churning out knowledge.

<sup>105</sup> *Perry*, 704 F.Supp.2d at 943.

<sup>106</sup> *See id.* (providing summary of Lamb's credentials).

<sup>107</sup> *Id.* at 980 (citing *Perry Tr.*, *supra* note 28, at 1010:13-1011:13).

<sup>108</sup> *See id.*

<sup>109</sup> *Id.* (citing *Perry Tr.*, *supra* note 28, at 1025:4-23).

<sup>110</sup> *Id.* at 1000.

elaborate factual findings that would rule out such a conclusion.

Moreover, while Boies and Olsen are not movement lawyers, as other attorneys involved in same-sex marriage litigations have tended to be,<sup>111</sup> they surely must have been cognizant of the implications that their case might have for gay parenting cases. Among the most significant is the recent decision striking down Florida's long time total ban against gay people adopting.<sup>112</sup>

In that case, *X.X.G.*, a mid-level state appellate court affirmed the decision of a Juvenile Court to approve the adoption of two foster children aged eight and four (genetic half-brothers), by a gay man who had been their foster father for four years, and in so doing, declared Florida's statutory ban on gay adoption a violation of the state constitution.<sup>113</sup> This was not the first time that Florida's statutory ban had been challenged. In addition to a failed federal challenge,<sup>114</sup> there had been a previous state level challenge, which, upon review in the state Supreme Court, was remanded for lack of a sufficient trial record to determine whether the law had a rational basis.<sup>115</sup> Following remand, the petitioner in that case dropped the petition, leaving the constitutional issue unresolved.<sup>116</sup> The trial judge in *X.X.G.*, therefore, took her cue to hold an evidentiary hearing that would result in a complete factual record—one that would ultimately justify the conclusion that Florida's ban on gay adoption lacked rationality.<sup>117</sup>

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<sup>111</sup> Cf. Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18, 2010, at 40 (describing how major gay civil rights organizations were initially against bringing the case).

<sup>112</sup> Fla. Dep't. of Children & Families v. *In re Matter of Adoption of X.X.G. and N.R.G.*, 45 So.3d 79 (Fla. 2010) [hereinafter *X.X.G.*]; see also FLA. STAT. § 63.042(3) (2006) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

<sup>113</sup> See *X.X.G.*, 45 So.3d at 81-82.

<sup>114</sup> *Lofton v. Sec'y of Dept. of Children & Fam. Svcs.*, 358 F.3d 804 (11th Cir.), rehearing en banc denied, 377 F.3d 1257 (11th Cir. 2004).

<sup>115</sup> See *X.X.G.*, 45 So.3d at 83-84 (citing *Cox v. Florida Dept. of Health & Rehabilitative Svcs.*, 656 So. 2d 902 (Fla. 1995)).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 82-84.

The position of the Florida Department of Children and Families ("the Department") was not that the categorical exclusion "reflected a legislative judgment that homosexual persons are, as a group, unfit to be parents."<sup>118</sup> It would have been tough to stand behind that position given the Department's placement of numerous children, including the two boys in this case, in foster care or guardianship with gay caretakers. The precise issue as framed by the appellate court, therefore, was whether a rational basis undergirded the distinction between Florida's "utiliz[ation of] homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons."<sup>119</sup> To address the question, the court turned to expert testimony.

Psychologists Michael Lamb and Letitia Peplau, both of whom also testified in *Perry*, were among the ten expert witnesses called by the petitioning father in *X.X.G.*<sup>120</sup> All of the petitioner's experts offered what the trial and appellate courts took to be credible and helpful testimony, leading to the finding of a professional consensus that "there are no differences in parenting of homosexuals or the adjustment of their children . . . [and] that the issue is so far beyond dispute that it would be irrational to hold otherwise."<sup>121</sup>

In defense of the statute, the Department called two expert witnesses who interpreted the available data on gay parenting differently, but the trial and appellate courts agreed that their methodologies were full of flaws that placed their work beneath the standards of their fields.<sup>122</sup> As a result, both courts heavily discounted their testimony.<sup>123</sup>

Whether in a parenting case or in the conceptually entwined context of marriage, it is crucial that gay and lesbian parents are shown to be indistinguishable from heterosexual parents. The slightest whiff of a

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<sup>118</sup> *Id.* at 85.

<sup>119</sup> *Id.* at 86.

<sup>120</sup> See *id.* The *X.X.G.* trial was in 2008, prior to the *Perry* trial.

<sup>121</sup> *Id.* at 87 (excerpting trial court opinion).

<sup>122</sup> See, e.g., *id.* at 88 (excerpting trial court opinion).

<sup>123</sup> See *id.* at 88-90.

difference would almost certainly satisfy the rational basis test in cases challenging a pertinent legal classification.<sup>124</sup> The accumulation of data and the impression of a consensus among mainstream experts that same-sex parented children are equally likely to be well-adjusted is imperative to law reform goals in this domain, because even the absence of certainty can be used as a reason for judicial deference to the majority.<sup>125</sup> For this purpose, therefore, equivalency of fitness to parent is vital.

Equality advocates simultaneously make another argument, however, for which they employ a discursive vehicle that collides directly with the equivalency point. Boies and Olsen, for example, apparently wanted to demonstrate in *Perry* that discrimination imposes appreciable harm, that it is not something that merely offends, but something that concretely injures. One way

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<sup>124</sup> In *Perry*, Lamb did testify to some differences, but they apparently were deemed too insignificant to make it into Judge Walker's factual findings. Lamb testified that "a number of studies . . . have . . . shown that in some cases children raised by gay and lesbian parents have less sex stereotyped attitudes than those being raised by heterosexual parents." *Perry Tr.*, *supra* note 28, at 1034:2-5. Lamb was questioned on cross about one study that showed that "sons of lesbian mothers behave in less traditionally masculine ways than those raised by heterosexual single mothers," *id.* at 1155:19-21, and about another study that showed a higher cognitive competence for children raised by two heterosexual parents than for those raised by either single mothers or lesbian couples, *id.* at 1170:2-16. Lamb cleared much of this up on redirect, however, by speaking to the larger body of research. A couple of the studies showing differences were, according to Lamb, methodologically flawed. *Id.* at 1195:20-1200:22. A few showed differences along one measure, "[a]nd, clearly, you expect to find those kinds of local variations when you are talking about a large body of literature. But there is no other study [besides one he characterized as methodologically deficient] that shows, in this way, major problems on the part of children being raised by gay and lesbian parents." *Id.* at 1200:5-9.

<sup>125</sup> See, e.g., *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting) ("Conspicuously absent from the court's opinion today [finding a state constitutional right to same-sex marriage] is any acknowledgement that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results.").

they tried to make this point was to call social epidemiologist Ilan Meyer<sup>126</sup> to the witness stand. Meyer "offered three opinions: (1) gays and lesbians experience stigma, and Proposition 8 is an example of stigma; (2) social stressors affect gays and lesbians; and (3) social stressors negatively affect the mental health of gays and lesbians."<sup>127</sup> To make that third point on direct examination, plaintiffs' counsel asked, "Dr. Meyer, does the research show that stigma and the minority stress that you talked about contribute[] to a higher incidence of . . . adverse mental health consequences or . . . attempted suicide . . . in the gay and lesbian population than in the population at large?"<sup>128</sup> Meyer answered, "Yes . . . . There ha[ve] been pretty consistent findings that show excess disorder or higher level of disorder in gay and lesbian populations as compared to heterosexuals."<sup>129</sup>

Judge Walker relied on Meyer and other testimony and evidence to make the finding that Prop 8 "places the force of law behind stigmas against gays and lesbians."<sup>130</sup> He did not, however, dwell in his findings of fact on Meyer's testimony regarding the effects of stigma on mental health, perhaps wary of the implications that those facts could have for the fitness of gay and lesbian people to marry and/or parent. If gays and lesbians are suffering significant psychological consequences as a result of the stress of stigma, then perhaps they are less likely to be capable of maintaining stable relationships<sup>131</sup> and raising well-adjusted children.

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<sup>126</sup> *Perry*, 704 F.Supp.2d at 942 (introducing Meyer and his credentials).

<sup>127</sup> *Id.* (citing *Perry Tr.*, *supra* note 28, at 817:10-19).

<sup>128</sup> *Perry Tr.*, *supra* note 28, at 872:11-15. "Minority stress" is a term Meyer used to refer to "any stress that is related to stigma, prejudice, and discrimination." *Id.* at 832:7-8; see also *id.* at 828:11-870:12 (providing a fuller discussion of the concept).

<sup>129</sup> *Perry Tr.*, *supra* note 28, at 872:16-21.

<sup>130</sup> *Perry*, 704 F.Supp.2d at 973.

<sup>131</sup> Indeed, when asked to speculate about the reason for some indication that cohabiting homosexual relationships may tend to be of shorter duration than heterosexual relationships (married and cohabiting), psychologist Letitia Peplau testified: "there may be ways in which stigma and prejudice and discrimination take a toll on the relationships of lesbians and gay men." *Perry Tr.*, *supra* note 28, at 591:2-4.

Judge Walker might have foreseen the double-edged potential of developing this line of argument.<sup>132</sup>

Consider how the argument plays out in *X.X.G.*, in which both the mental health of the parents and the stigma of discrimination delivered upon the children figured prominently. One of the Department's experts in that case testified that "homosexual adults have a higher lifetime prevalence of major depression, affective disorders, anxiety disorders and substance abuse."<sup>133</sup> Experts for the petitioner quarreled with that analysis, but not by refuting it wholesale. Rather, as the trial court (relying on petitioner's expert) explained,

[a]s a general premise, elevated occurrences of psychiatric disorders and rates of depression and suicidality are associated with demographic

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<sup>132</sup> Judge Walker did, however, draw from Lamb's testimony that marriage can improve adjustment outcomes for children, *Perry*, 704 F.Supp.2d at 963 (citing Tr. 1042:20-1043:8), and he also relied on a Position Statement issued by the American Psychiatric Association for the proposition that marriage benefits the children of a couple, *id.*, and on Peplau's testimony that ninety-five percent of married same-sex couples surveyed in Massachusetts reported benefits of marriage to their children, *id.* at 973 (citing Tr. 599:12-19). Badgett testified to the economic benefits that accrue to children as a result of their parents' marriage, but the position of the American Psychiatric Association and the psychologist testimony seemed to be about psychological rather than material benefits. While economic security can undoubtedly result in a psychological pay-off, it would be surprising if material benefits resulting in psychological benefits accounted for the ninety-five percent figure in the Massachusetts survey; that would mean that the difference between the unmarried financial situation and the married financial situation for an awful lot of same-sex couples had been so significant that it affected their children psychologically to a degree noticeable to the parents. Moreover, only a third of those surveyed indicated that marriage enabled them to share in spousal health benefits. In any event, these findings are apparently designed to support the proposition that parents' marriage is good for children. Yet somehow, we are not to conclude from this the obverse, *i.e.*, that children are faring less well in the homes of gay and lesbian parents *now*, while most gays and lesbians are unmarried. Much of the other evidence put on by the plaintiffs is designed to demonstrate that there is no outcome difference between gay and straight parenting.

<sup>133</sup> *X.X.G.*, 45 So.3d at 88.

characteristics, such as race, gender, socioeconomic status and sexual orientation. . . . [T]aken as a whole, the research shows that sexual orientation alone is not a proxy for psychiatric disorders, mental health conditions, substance abuse or smoking . . . . [W]hile the average rates of psychiatric conditions, substance abuse and smoking are generally slightly higher for homosexuals than heterosexuals, the rates . . . are also higher for American-Indians as compared to other races . . . . Poignantly, [petitioner's expert] pointed out that if every demographic group with elevated rates of psychiatric disorders, substance abuse and smoking were excluded from adopting, the only group eligible to adopt under this rationale would be Asian American men.<sup>134</sup>

The Florida court strikes a delicate balance here. On the one hand, a certain concession to the Department's (less credible, religiously and ideologically driven) expert witness is detectable. The data *do* show a higher prevalence of mental health and substance abuse problems among gays and lesbians. That the same could be said of Native Americans does not make it less so.<sup>135</sup> Moreover, pro-gay advocates sometimes seem quite invested in the significance of the data regarding the effects of stigma on mental health. In the context of bullying, for example, it has been a staple contention that anti-gay harassment in schools and in the new social media leads gay and lesbian adolescents to depression, substance abuse and suicide.<sup>136</sup> In order to persuade policy-makers

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<sup>134</sup> *Id.* at 89.

<sup>135</sup> Also, Native Americans and other racial or ethnically-defined groups would benefit from strict scrutiny if they were excluded from adopting under a state law, so the disparity in prevalence could easily lead to different consequences in the constitutional analysis.

<sup>136</sup> See, e.g., JOSEPH G. KOSCIW, ET AL., THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (A REPORT FROM THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK) 48 (2010), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1675-2.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf) (reporting elevated levels of depression and anxiety due to harassment in schools); see also David Crary, *Suicide surge: Schools confront anti-gay bullying*, BOSTON GLOBE, Oct. 9, 2010, available at [http://www.boston.com/news/nation/articles/2010/10/09/suicide\\_surge\\_schools\\_confront\\_anti\\_gay\\_bullying/?page=full](http://www.boston.com/news/nation/articles/2010/10/09/suicide_surge_schools_confront_anti_gay_bullying/?page=full) (reporting spate of teen suicides related to anti-gay harassment).

to take anti-gay bullying seriously, advocates must call attention to what can be grave consequences. They must remove the phenomenon from the generally tolerated field of routine teenage teasing and hurt feelings and show that this kind of discriminatory conduct can result in a truly injured person.

That injured person, however, might grow up and want to marry, and/or adopt a child. At that point, the narrative of the injured gay or lesbian, suffering the stigma of discrimination, and driven to depression, drug or alcohol abuse and suicidality, could present some difficulties for his or her argument regarding equivalency of parental fitness. The trial court in *X.X.G.* seemed intuitively to appreciate this problem, as she tried to minimize and disperse the mental health consequences of discrimination.<sup>137</sup>

The problem here is that advocates seem to need both truths,<sup>138</sup> *i.e.*, that gay and lesbian people are equally likely to be good parents *and* that many gay and lesbian people have suffered emotionally the consequences of discrimination and stigma. They probably are both truths and yet they can be pretty tough to manage simultaneously. The contradiction *at the level of discourse* makes for a very pliable gay or lesbian

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<sup>137</sup> The Department in *X.X.G.* also argued that children adopted by gay and lesbian parents would themselves face stigma and discrimination as a result of their family forms. The appellate court did not deny this assertion—and perhaps it could not—at least not while simultaneously impugning the state for irrationally discriminating against gay and lesbian parents. The court observed instead that the stigma that the children might face did not provide a sound basis for distinguishing between adoption and foster care or guardianship. See *X.X.G.*, 45 So.3d at 91.

<sup>138</sup> This is not the only context in which two competing truths seem to be necessary. Another context is child abuse. While some people concerned with this social problem have tried to associate child abuse with poverty in order to make evident that family violence may be among the dire consequences of the stress of poverty, others have worked just as hard to promote an image of child abuse as a problem unconnected to class, perhaps hopeful that if persons across class lines are implicated then a broader coalition of people will be concerned enough to address the problem. Cf. BARBARA J. NELSON, *MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS* 15 (1984).

subject—sometimes psychologically injured, sometimes fit to produce well-adjusted children.<sup>139</sup>

This is not a vulnerability that afflicts only the pro-gay side. The Prop 8 proponents also tried to have it both ways. In their cross-examination of Meyer, they first attempted to undermine Meyer's testimony that gays and lesbians were at higher risk of mental health problems. Proponents' counsel started this line of inquiry by inviting Meyer to agree to characterize a well-known 1950s study by Evelyn Hooker of the mental health of homosexuals as "classic" and "methodologically rigorous."<sup>140</sup> Meyer agreed with the characterization.<sup>141</sup> Proponents' counsel then read a description of Hooker's findings, which included the statement that "[t]he heterosexual and homosexual groups did not differ significantly in their overall psychological adjustment,"<sup>142</sup> and again invited Meyer to agree with the description. He did.<sup>143</sup> Here, proponents put on view the psychologically healthy homosexual, in an effort to disrupt the plaintiffs' discrimination injury narrative.

Later in the cross-examination of Meyer, however, the idea that gays and lesbians were peculiarly vulnerable to stress seemed desirable to proponents. Proponents' counsel asked Meyer, "if one of the members of the partnership or the marriage, whatever it might be, if they suffered -- one member suffered from minority stress, it would increase general stress on the relationship and would have a negative impact on their

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<sup>139</sup> As Professor Ilan Meyer explained while commenting on a draft of this paper, there may be a process of "selection" whereby the gay people who survived the stress of anti-gay stigma with the least injurious consequences and are therefore most prepared to parent are the ones who have children, and so what I have described as a "contradiction" can be reconciled in fact. The contradiction I am trying to describe, however, is not at the level of concrete factual incompatibility, but rather at the level of discursive production. The injured gay and the unimpaired gay are two sides of an unstable imaginary gay subject, and as the pro-gay litigation team attempts to consolidate an ideal gay for purposes of its case, it instead produces more and more instability.

<sup>140</sup> Perry Tr., *supra* note 28, at 883:11-24.

<sup>141</sup> *Id.* at 883:25.

<sup>142</sup> *Id.* at 884:8-10.

<sup>143</sup> *Id.* at 884:13-15.

satisfaction, correct?"<sup>144</sup> Meyer had to agree, of course.<sup>145</sup> How could he testify under oath that excess stress would not take a toll on a relationship? Proponents also asked Michael Lamb, who testified after Meyer, whether he "would agree that lots of researchers have shown that being a depressed parent changes the way you behave and interact with your child, and that can indirectly affect the child's adjustment."<sup>146</sup> Lamb answered, "Yes, that's correct."<sup>147</sup> The proponents of Prop 8 wanted both answers: that gay people were not really as injured as Meyer maintained and that gay relationships would be less satisfying as result of stress and therefore less suited to marriage.

The double-bind appears on both sides. For pro-gay rights advocates, if gays are psychologically unharmed by discrimination, the claim to a remedy weakens, but if gays are psychologically harmed, their claim to equal fitness for marriage or parenting weakens. Anti-gay advocates face a mirror-image dilemma: If gays are psychologically healthy, they ought to be able to sustain decent marriages and parent adequately, but if they are psychologically injured, then legal distinctions might be part of the unjust discrimination that gay people face.

The psychological health double-bind could arise in another context, as well. The extent and effects of discrimination could be important in a gay rights case that turned on the standard of review. In *Perry*, Judge Walker did not apply strict or intermediate scrutiny, so he did not have to reason his way into treating gays and lesbians as a suspect or quasi-suspect class, as some state courts did in earlier same-sex marriage cases.<sup>148</sup> In *Kerrigan*, the Connecticut case, for example, there was

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<sup>144</sup> *Id.* at 900:5-9.

<sup>145</sup> *Id.* at 900:10.

<sup>146</sup> *Id.* at 1142:22-25.

<sup>147</sup> *Id.* at 1143:1.

<sup>148</sup> Judge Walker did indicate that he believed that there were grounds for applying strict scrutiny, including both the denial of the fundamental right to marry, see *Perry*, 704 F.Supp.2d at 994, and that "gays and lesbians are the type of minority strict scrutiny was designed to protect," *id.* at 997, but he did not provide an elaborate analysis on the suspect classification point and declared that "strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review," *id.*

a full discussion of whether gay people warranted such treatment, requiring the court to wade into the lack of gay political power and to recite the history of anti-gay discrimination.<sup>149</sup> Judge Walker, however, applied rational basis. For purposes of that level of review, the powerlessness and history of the class are beside the point—even hippies<sup>150</sup> and opticians<sup>151</sup> are subject only to legal classifications rationally related to legitimate state purposes.

Still, the lawyers in *Perry* were well aware of the broader implications of characterizing the gay minority in California along these axes. This cognizance is likely the reason that the proponents of Prop 8 called Professor Miller to testify on the subject of gay political power and why the plaintiffs objected to his qualifications to testify on that point.<sup>152</sup> Boies and Olsen did not want the record to contain testimony by a political scientist that the gays of California were politically powerful. They called, in fact, their own expert, Stanford political scientist Gary Segura, to establish the contrary.<sup>153</sup> Another court in another litigation or in a later phase of *Perry* could easily determine that the critical question was the standard of review—*i.e.*, that the state might have a rational basis but not an important or compelling interest for denying same-sex couples the right to marry. At that point, a depiction of gays as suffering a history of discrimination that has rendered them powerless would be crucial to ensuring that a higher standard was applied. An unimpaired, healthy gay population that parents fabulously well-adjusted children would be the wrong “fact” to display—at least in that particular section of the brief. The section of the brief that makes the case for an elevated level of scrutiny would argue *injury*, and the section that rebuts the state’s important or compelling interest for its classification would argue *no injury*.

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<sup>149</sup> See *Kerrigan*, 957 A.2d at 439-62.

<sup>150</sup> See *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>151</sup> See *Williamson v. Lee Optical*, 348 U.S. 483, 488-89 (1955).

<sup>152</sup> *Perry*, 704 F.Supp.2d at 945.

<sup>153</sup> *Id.* at 943.

Gays must be both psychologically injured and psychologically healthy—and anti-gay forces require both “facts” as well. The double-bind in Part I.B can be represented as follows:

	Pro-Gay	Anti-Gay
Gay People are as Psychologically Fit as Straight People	There is a consensus that kids of gay and lesbian parents are just as well-adjusted as kids of straight parents, therefore no rational basis for denying marriage or adoption rights (Lamb & Peplau).	Gays and lesbians are not injured, and therefore not a suspect or quasi-suspect class entitled to an elevated standard of review (Proponents of Prop 8 & Miller).  Discrimination is not a serious problem (Proponents of Prop 8 & opponents of anti-bullying campaign).
Gay People are Psychologically Injured	Gays and lesbians have suffered a history of discrimination and lack political power. They therefore compose a suspect or quasi-suspect class and should be accorded an elevated standard of review (Chauncy & Segura). Stigma and discrimination result in stress, which results in depression, substance abuse, and suicidality. The injury of discrimination is real and warrants remedies (Meyer, anti-bullying campaign).	Gays and lesbians have a higher incidence of mental health and substance abuse problems that render them less capable of maintaining stable relationships and raising well-adjusted children. There is, therefore, a rational basis (or an important or compelling interest) for denying marriage or adoption rights (Proponents of Prop 8, Florida Department of Children and Families & its expert in X.X.G.).

It might be that the double-bind is a persistent feature of gay rights as a strategy for advancing the interests of persons marginalized by their sexuality. The assertion of an equality or anti-discrimination right in particular requires the assertion of a rights-bearing subject, such that the difficulties of representation revealed by Sedgwick seem likely to follow. This is not to maintain that the relationship between equal rights and the double-bind is an exclusive one,<sup>154</sup> but that the risk of the double-bind may be recurring where there is a practical need to represent an equality-seeking constituency.

## II. Rights and Expertise

Moreover, as a legal matter, an appeal to gay rights, as opposed to say, gay policy preference, is a very specific kind of appeal, one that is designed in part to make claims in a judicial forum, where politically neutral reason, rather than bare political desire, prevails. Here is how Duncan Kennedy explains it:

Rights play a central role in the American mode of political discourse . . . . It is a presupposition of the discourse that there is a crucial distinction between 'value judgments,' which are a matter of preference, subjectivity, the arbitrary . . . and 'factual judgments,' or scientific, objective, or empirical judgments . . . .

Values are supposedly subjective, facts objective. It follows that the status of all kinds of normative assertion . . . is uneasy. Claims that something is 'right' or 'wrong,' or that a rule will 'promote the general welfare' are conventionally understood to be on

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<sup>154</sup> See Chase Strangio, *Beyond a Rights Framework: Unforeseen Costs in Administrative Advocacy*, in Online Colloquium, *Gay Rights and Lefts: Rights Critique and the Distributive Analysis*, HARV. C.R.-C.L. AMICUS (Sept. 2, 2011), <http://harvardcrcl.org/discussion/cr-cl-presents-a-colloquium-%E2%80%9Cgay-rights-and-lefts-rights-critique-and-the-distributive-analysis-%E2%80%9D/> (demonstrating that similar difficulties can arise in pursuit of legal objectives other than equality or anti-discrimination).

the subjective side of the divide, so much a matter of value judgment that they have to be arbitrary and are best settled by majority vote . . . .

The point of an appeal to a right, the reason for making it, is that it can't be reduced to a mere 'value judgment' that one outcome is better than another.<sup>155</sup>

Federally guaranteed constitutional rights such as equal protection can certainly be vindicated by majoritarian agreement and sometimes are,<sup>156</sup> but they are also supposed to be vindicable *notwithstanding* majoritarian agreement, in a counter-majoritarian forum. Rights claims are not supposed to be expressions of mere normative preferences, which we can fight about in the political arena.

Rights, according to Kennedy, have "two crucial properties" that enable them to perform a mediating function between the domains of fact and value.<sup>157</sup> "First, they are 'universal' in the sense that they derive from . . . values . . . that every person shares or ought to share."<sup>158</sup> Equality is a good example. "Second, they are 'factoid,' in the sense that 'once you acknowledge the existence of the right, then you have to agree that its observance *requires* x, y, and z.'"<sup>159</sup> Rights suggest a neutral reasoning process from which one can deduce the correct answer to a particular legal question, such as "does the (agreed upon) right to equality logically require the availability of same-sex marriage?"

In sum, an appeal to rights is an appeal to a broadly accepted and (in the case of same-sex marriage) constitutionally validated value, such as equality, combined with a claim that the value preference aspect *stops there*, and a value-neutral process of deductive reasoning takes over. Assuming the initial value has a broad consensus and constitutional validity, the process that follows is ideally apolitical and the deduction is not merely desired but *correct*. This is imperative when rights are claimed in a federal judicial forum or the

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<sup>155</sup> KENNEDY, *supra* note 22, at 304-05 (emphasis in original).

<sup>156</sup> See, e.g., Voting Rights Act, 42 U.S.C. §§ 1973-1973aa-6.

<sup>157</sup> KENNEDY, *supra* note 22, at 305.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

legitimacy of the counter-majoritarian exercise of power would be in jeopardy.<sup>160</sup> Rights, therefore, while premised on an initial value element, are thereafter claims of logical correctness. That is why we make claims to rights rather than asserting mere political opinions or policy preferences. Rights, discursively speaking, are supposed to exceed our desires.

To this aspect, add another evident aspect from the *Perry* trial: In law, we distinguish—however artificially—between questions of law and questions of fact. Most of the previous same-sex marriage litigations in state courts were decided on motions for summary judgment, meaning, according to the usual standard, that no material facts were in dispute and the question in the case was purely legal and could therefore be decided without benefit of a fact-finding process.<sup>161</sup> *Perry* was distinct in this regard.<sup>162</sup> All of the expert testimony discussed in the previous Part was in service of proving facts.

If, after the trial, it had been found, as a factual matter, that same-sex relationships were fundamentally inferior to, less stable than, and less economically productive than, heterosexual relationships, and that gay parents were predisposed to producing poor child outcomes, then the agreed-upon constitutional value of equal protection combined with the pitch for a neutral deductive process would surely fail same-sex marriage advocates. Even if these were found to be open questions, the reasoning process would be missing a piece, and same-sex marriage advocates could not have prevailed at trial.

The deployment of experts, therefore, can be a weighty addition to the “factoid” dimension of the rights claim. Experts are intended by the parties to sound as if they

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<sup>160</sup> I have specified a *federal* judicial forum, even though the argument applies with some force in state judicial fora, as well. This is to avoid pitfalls that might arise due to the fact that some state courts are less counter-majoritarian than others, so the theory of counter-majoritarianism that applies cleanly in the federal system, and also in Massachusetts, does not apply quite as cleanly in states that elect judges or easily amend their constitutions.

<sup>161</sup> See *supra* notes 2 and 3.

<sup>162</sup> *But see supra* note 104. The distinction is not absolute. Expertise can enter the equation via amici briefs.

are on the "scientific" or "objective" side of the discursive divide. They must be appropriately credentialed, of course, and they are likely to be vetted and cross-examined for signs of bias that could be seen to degrade their opinions from the reliably factoid to the self-interested or political. In reality, each party to a lawsuit might put on its own experts and vie in a partisan fashion for superior credibility. Once filtered through the fact-finder, however, some of what began as expert *opinion* might be "found" to be *fact*. In *Perry*, the plaintiffs played an expert-witness shut-out against the proponents of Prop 8. Plaintiffs' witnesses produced facts, while proponents' witnesses produced something between base ideology and a whole lot of nothing. The successful deployment of expert testimony helped plaintiffs to depoliticize their rights claim, boosting its neutrality and legitimating the exercise of counter-majoritarian power.

The *Perry* case is not the only example of how expertise, as a thread within legal discourse, has aided in circumventing the inconveniences of politics. In administrative law, for example, expertise has been used to justify agency power over technical regulatory fields, insulating the decisions of experts working within the bureaucratic agencies from judicial review or democratic accountability.<sup>163</sup> Expertise has been, as Gerald Frug has explained, among the rationales designed to legitimate administrative discretion and send the message, "Don't worry, bureaucratic organizations are under control."<sup>164</sup>

Some administrative law scholars have embraced the discretion exercised by unelected administrative decision-makers, believing that expertise at once constrains discretion and qualifies those entrusted to make policy judgments.<sup>165</sup> Felix Frankfurter, prior to his service on the U.S. Supreme Court, was an early advocate of administrative power premised on agency expertise.<sup>166</sup> While he recognized that some questions before agencies were questions of policy and values, he believed that

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<sup>163</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 224-225 (1992).

<sup>164</sup> Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1284 (1984).

<sup>165</sup> See *id.* at 1283.

<sup>166</sup> HORWITZ, *supra* note 163, at 236.

the critical problems of modern industrial society remained 'deeply enmeshed in intricate and technical facts' that had to be freed from 'presupposition and partisanship.' It was thus necessary 'to contract the areas of conflict and passion' and to expand 'the areas of accredited knowledge as the basis of action.' Thus Frankfurter issued the call for rational, neutral inquiry by experts into the proper course of national affairs.<sup>167</sup>

Frankfurter's confidence in the sharp divide between "partisanship" and "knowledge" was eventually shaken by critics of the National Labor Relations Board who regarded its so-called "expertise" to amount to little more than pro-labor ideology—a skepticism that was reflected in Frankfurter's judicial opinions beginning in the late 1940s.<sup>168</sup> In the following decades, the idea that experts would non-ideologically solve social problems, once a matter of faith on the New Deal left, fell under suspicion, due in part to allegations of agency capture in the 1950s.<sup>169</sup>

In a more contemporary example, it was perhaps at one time entirely taken for granted (by its adherents as well as its detractors) that feminism was a political ideology. A look around reveals, however, that in recent years, feminism in some contexts has morphed into something more like expertise. In a lengthy and detailed discussion of the evolution of international criminal tribunals during the 1990s, including their enabling statutes and prosecutorial agendas, Janet Halley demonstrates how feminism, and in particular a structuralist-feminist conception of gender-based violence, came to be regarded as a field of expert knowledge.<sup>170</sup> While feminist activists and NGOs exerted political pressure to prosecute sex crimes on nascent tribunals confronting human rights violations in Rwanda and the former Yugoslavia, one feminist writer observed, "female judges, investigators, prosecutors, translators, particularly those with expertise in gender crimes, are

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<sup>167</sup> *Id.* at 237.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 241.

<sup>170</sup> Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 33-39 (2008).

extremely useful in the prosecution of gender crimes."<sup>171</sup> Expertise functions here to legitimate the participation of feminist legal actors, sanitizing them of political ideology. As Halley explains, unlike the politics of the feminist activists and NGOs, "expertise in gender crimes" is "palatable among international-law insiders bound to norms of neutrality."<sup>172</sup> "Feminism as knowledge could wear judicial robes and wield prosecutorial discretion without sacrificing legitimacy."<sup>173</sup>

Halley's analysis could easily be extended to the proliferation of experts in gender-based crimes in federal and state prosecutors' offices inside the United States. The point is not that these crimes should not be prosecuted, but rather that the structuralist-feminist analysis of such crimes, an analysis that many dispute (even within feminism, as Halley discusses,<sup>174</sup>) has been recast from an ideology to a field of expertise. This transformation accords structuralist-feminism seemingly neutral authority that it could not have out in the rough-and-tumble of the political arena.

I point to these examples to illustrate that expertise has a history of serving a depoliticizing function. It cloaks political ideology in neutral garb for purposes of gaining legitimacy in a discourse in which bare political desire stands counterpoised to legal correctness. Rights and expertise are two threads in a discourse that sharply distinguishes between law and politics, in which the latter is not a legitimate basis for counter-majoritarian decision-making. With that in mind, reliance on experts to help produce facts about gay people ought to be regarded with critical mindfulness. The line separating expertise from ideology is a discursively produced one.<sup>175</sup>

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<sup>171</sup> *Id.* at 34. The feminist writer quoted by Halley is Joanne Barkan.

<sup>172</sup> *Id.* at 33.

<sup>173</sup> *Id.* at 34.

<sup>174</sup> See *id.* at 81-88.

<sup>175</sup> In explaining the devaluation of Kenneth Miller's testimony, Judge Walker noted that "he has read no or few books or articles by George Chauncy, Miriam Smith, Shane Phelan, Ellen Riggle, Barry Tadlock, William Eskridge, Mark Blasius, Urvashi Vaid, Andrew Sullivan and John D'Emilio." *Perry*, 704 F.Supp.2d at 951 (citing *Perry Tr.*, *supra* note 28, at 2518:15-2522:25). All of these are undoubtedly worthwhile reads, but given the vastness of the literature in sexuality, it is

My intention is not to disparage expertise wholesale. When a pipe in my house leaks, I call a plumber; when my kid is sick, I call a doctor. It is not egregious for historians, economists or psychologists to become learned in their fields and offer opinions. But this is not all that transpires in a trial.

The legal process yields more than judgments and orders. It participates in the production of knowledge. In *Perry*, lawyers making rights claims called experts to the witness stand. A federal judge heard their testimony and made findings of "fact." Facts about gay people.

These findings depict gay people and same-sex relationships in endlessly contradictory ways. Gay people and same-sex relationships are like straight people and heterosexual relationships and unlike them; gay people have been psychologically injured by stigma and discrimination and gay people are psychologically fit as a fiddle. Judge Walker made all of these findings and all can be found in pro-gay rights discourse generally. As an analytical matter, Judge Walker's opinion and the canon of gay rights argument—to the extent that they make a claim to politically neutral correctness—are flawed. Each time a judge or advocate draws an argument from this arsenal, he or she has to make a choice about which from a pair of contradictory "facts" to invoke. The reasoning process is not a straight line. It has a decision-point that will be determined by the political stakes of the moment and the desire of the decision-maker.

*Well, of course, one might respond, Judge Walker is not an idiot. It should not come as a surprise that he selectively invoked facts that served the holdings he wanted to reach. No contemporary legal thinker of any sophistication believes that a judge is a machine that receives fact and law input and churns out a mechanically determined decision. He drafted his decision as smartly as he could, drawing from facts that supported him and downplaying or ignoring facts that did not serve his purposes.*

The problem with this posture is not that it is incorrect. It would be naïve to fail to recognize the ordinariness of what Judge Walker did when he quite sensibly relied on the material in the record that best

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disquieting to come upon this selection of ten authors in a federal district court decision as something of a required reading list.

supported his decision. But when a decision such as *Perry* participates in the production of contradictory facts about gay people, its potential downsides should be considered. As Sedgwick warned, the trouble of the double-bind is that both sides of the same contradictory representations are available to both sides of the struggle. The "fact" about gay people that is asserted *against* gay interests in the next round will have been produced (at least in part) by the expert testimony and findings of fact in *Perry* and related pro-gay materials discussed above. When Judge Walker looked to the record and found the "facts" that he thought would best serve the pro-gay decision, with whatever level of deliberateness or savvy, he was simultaneously finding facts that could hinder the gay rights cause in the hands of tomorrow's judge.

Furthermore, the production and reproduction of the double-bind in the conception of the gay subject may be a recurrent side-effect of work in this domain of law reform as long as the pursuit of equal rights remains the central strategy. Legal thinkers can take from queer theory, and from Sedgwick in particular, some insight regarding the chronic instability of the gay subject. Gay equal rights require a rights-bearing gay subject, and stabilization of that subject, at least in *Perry* and the other materials discussed in this paper, has proved elusive.

The problem is hardened by the conventional demand that the legitimacy of the counter-majoritarian branch be constantly reaffirmed by expunging obvious signs of political desire. The requirement of judicial neutrality elicits the discursive tendency exemplified by the dual strands of rights and expertise, in which fact and value, law and politics, and correctness and desire are sharply and religiously distinguished. Reformers are compelled by the needs of counter-majoritarianism to participate in discourses that aspire to the stable and the factoid, entrenching representational difficulties as they make claims to scientific and logical correctness.

Equal rights are not, as I have argued elsewhere in detail,<sup>176</sup> the only option for law reformers dedicated to

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<sup>176</sup> See, e.g., Libby Adler, *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, HARV. C.R.-C.L. REV. AMICUS (Sept., 2, 2011), <http://harvardcrcl.org/discussion/cr-cl-presents-a-colloquium->

advancing the interests of persons living on the margins of sexuality. The double-bind, both as an obdurate representational difficulty and as a strategic problem of simultaneously buttressing pro- and anti-gay positions, ought to be considered by law reformers when deliberating on the best course of action for advancing the interests of that constituency.

### *Conclusion*

Nothing here is intended to dispute Judge Walker's conclusions, both that the proponents offered no evidence justifying Prop 8 and that Prop 8 lacks even a rational basis. My point has not been to urge a different outcome in that case. Nor has it been to suggest that we should abandon expertise altogether (although we should bring our critical faculties along for each and every ride). A world without expertise is a terrifying one, as we all glimpsed during the anti-intellectual, I-know-things-in-my-gut-and-therefore-I-don't-have-to-read-anything George W. Bush era, which figures such as Sarah Palin and Michele Bachmann threaten to revisit upon us with a vengeance.

It should also be worrisome, however, when expertly-produced facts levitate apolitically above base ideology and thereby elude the critical engagement that "the political" is required to endure. The legal process is representing a gay subject through the articulation of gay rights and the deployment of experts, and that subject is a dangerously unstable one. As pro-gay legal actors deploy expertise without attending to the productive effects of the legal process through which expert opinion is filtered, the effect is an internally conflicted gay subject who is distinct and indistinct, injured and uninjured. The balance is precarious and could tip one way or the other at any time.

Finally, the perils that I have attempted to reveal in this paper may be a frequent consequence of an identity-

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[%E2%80%9Cgay-rights-and-lefts-rights-critique-and-the-distributive-analysis-%E2%80%9D/](#); Libby Adler, *The Gay Agenda*, 16 MICH. J. OF GENDER & L. 147 (2009). These articles provide examples of possible law reform interventions that do not revolve around equal rights but instead around distributive analysis.

based, equal rights-oriented strategy for social change, especially one that is primarily litigated in counter-majoritarian fora, in part due to the representational requirements and in part because of the requirements of political neutrality. It is also vital to consider the mechanics of each particular legal process. Cases decided on motions for summary judgment might raise different flags than those that go to trial. This distinction does not mean that the earlier same-sex marriage cases had no capacity to produce knowledge of gay people, but that the deployment of experts presented some fresh hazards worth considering when deliberating on the best course of law reform for the benefit of persons living on the margins of sexuality.