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History Unbecoming, Becoming History

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GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET. By *William N. Eskridge, Jr.* Cambridge: Harvard University Press. 1999. Pp. ix, 470. $45.

The last few decades have seen a torrent of legal commentary supporting gay equality and attacking the punishment, failure to protect, and refusal to affirm gay conduct and identity. William Eskridge,[1] a prominent voice in this fin-de-siècle literature, now draws together and expands on his previous work[2] in *Gaylaw: Challenging the Apartheid of the Closet.* Though far more successful in shaping the uses of the past than in showing the way to the future, the book instructs even where it fails. It augurs a century that could well witness the end of official discrimination against gay individuals, and the relegation of "gaylaw" to American legal history.

Eskridge builds his chapters around three discrete definitions of gaylaw:

- "Gaylaw is the ongoing history of state rules relating to gender and sexual non-conformity" (p. 1).
- "Gaylaw is, *also*, reconceiving law from a more gay-friendly or gay-neutral perspective" (p. 2; emphasis added).

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1. Professor of Law, Yale Law School.

2. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW (1997); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) [hereinafter ESKRIDGE, CASE FOR SAME-SEX MARRIAGE]; William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos, *and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817 (1997); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703 (1997).

- "Gaylaw is, *finally*, derived from insights of the gay experience in America and its theoretical sibling 'queer theory'" (p. 2; emphasis added).

Under the first two definitions, he offers an excellent synthesis of the historical backdrop to modern laws and a cogent analysis of legal doctrine that addresses antigay policies. He makes a convincing case against these policies as well, given their frequently unpredictable, untoward consequences. Leaving behind the historical and pragmatic arguments, however, Eskridge plunges into a theoretical thicket in forging his third definition of gaylaw. He makes internally contradictory appeals to liberalism and to various postliberal models that undermine his doctrinal arguments, many of which depend heavily on liberal premises.

That the book works so well in its historical and doctrinal segments, but is less convincing in its final, theoretically thick segment, may suggest a technique for future gay equality appeals. Legal advocates might do well to underscore, as Eskridge does repeatedly and persuasively, how prohibitions of private, consensual sexual behavior often produce paradoxical, counterproductive results. Government regulation of private sexual behavior typically proves to be wasteful, senseless, and destructive, no matter *what* outcome one prefers regarding the behavior. Techniques that stress this practical insight may yield far more progress in overturning antigay regulations than would techniques that rely heavily on ornate political or legal theories about government power to regulate sexual behavior. There is much to support such a case against antigay laws in Eskridge's well-documented and well-wrought historical exposition.

I.

Eskridge's opening segment canvasses a full century of legal treatment of sexual nonconformity in the United States. This engaging, concise survey addresses government's historically variable attempts to regulate sexual conduct and identity in multiple settings, including the military, the family, social clubs and bars, and the streets. In each venue, American law in the 1900s sought to suppress homosexuality and gender transgression, with uneven, sometimes brutal, often ineffective and paradoxical results. Over the century's course, law's constructions of sexual deviance, and of the social perils of gender transgression, varied significantly.

Pre-1900, the law sought to police the "[w]omen and men who transgressed increasingly hardened gender lines" by arresting individuals whose public presentations disrupted conventional gender rules (p. 13). After World War I, however, the legal focus shifted away from this aesthetic preoccupation with public displays of transgressive gender behavior toward regulation of the "uncontrollable li-

bido" of the homosexual (p. 14). The fear that animated the law was that "children's budding sexuality" (p. 14) would be exploited or corrupted if homosexuality were to go unchecked or unpunished; the prevalent legal image of the homosexual became that of sexual aggressor. During this period, "[t]he vampire lesbian and the predatory child-molesting (male) homosexual replaced the mannish lesbian and the female impersonator as the object of popular and legal concern and, starting in the 1930s, hysteria" (p. 14).

World War II arrested the mounting "hysteria," as the inevitable intensities and single-sex stratifications of military service relaxed customary social barriers, including those between same-sex colleagues. Greater tolerance of male bonding, and a shift in the national gaze toward foreign conflicts rather than domestic, intersocial ones, made American life — temporarily — less sexually fraught. Soon after the War, however, the federal government reasserted gender barriers with a vengeance, and launched an aggressive, anti-homosexual "Kulturkampf" that Eskridge parallels to Nazi Germany's antihomosexual Kulturkampf of 1933-1946 (p. 14). Federal officials drummed homosexuals out of public office, policed heavily known sites of gay congregation, expanded and enforced laws that criminalized sexual variation, and otherwise asked, told, and legally pursued gay men and lesbians.

Yet even a Kulturkampf could not eliminate homosexuality. Instead, it drove the behaviors underground, and in one of the many ironies that mark official attempts to criminalize sexual behavior, it "mold[ed] the context of the double life," and actually may have fostered the very behaviors it most strenuously sought to eradicate (p. 54). As Eskridge observes:

> [B]y teaching thugs that they could have their way with fairies without accountability, the law encouraged their sadism; by teaching fairies that they were subhuman, the law inculcated in some of them a victim mentality of masochism. For most other homosexuals, the law was less brutal, but it still augmented the excitement of same-sex intimacy by rendering it an intrinsically outlaw form of love. [p. 54]

The laws also inspired social organization and, eventually, resistance. Concerted action against the negative attitudes toward homosexuality, and against the most oppressive legal rules, emerged in the 1960s. In 1961, Franklin Kameny founded the Mattachine Society of Washington,[3] and, at the decade's close, the Stonewall riot erupted.[4]

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3. "The Mattachine Society was a secret homophile organization founded in 1950 by Harry Hay . . . ." P. 75. The Mattachine Society of Washington was a Washington-based chapter founded by Franklin Kameny in 1961. P. 97. This chapter was the first group to insist on legal equality for gay people. P. 98.

4. *See* MARTIN DUBERMAN, STONEWALL (1993) (describing the Stonewall riot and its genesis).

Gay rights leaders began to vocally and publicly reject the closeted lives the laws had produced, on the ground that "the closet" was "nothing more than an 'apartheid' . . . that intrinsically denies equal citizenship and human dignity" (p. 15). Lawyers began to challenge the aggressive police surveillance of gay meeting places and intrusions into private zones, as their clients sought control over public spaces, institutions, and communication methods crucial to gay association and culture, for example, bars and restaurants, social and educational organizations, and literature. They likewise demanded, with far less success, equal treatment in employment, military service, immigration status, and family rights (p. 15).

Building on Warren Court decisions that expanded concepts of substantive due process (pp. 83-86), procedural due process (pp. 86-92), freedom of association (pp. 93-95), freedom of speech and press (pp. 95-96), and equal protection (p. 97), these litigants slowly earned isolated, narrow victories that began to disentangle the law's conflation of gay status, speech, and conduct, as well as its unreflective punishment of all three. As Eskridge later explains, early victories required police and prosecutors to observe due process, and expanded speech rights of activists. This helped pave the way to the current, highly unstable doctrinal moment, in which official discrimination based solely on one's status as gay or lesbian is constitutionally suspect,[5] but criminalization of the underlying conduct that is most strongly associated with that status is arguably allowed.[6]

In setting forth this highly compressed synthesis of American law from 1881-1981, Eskridge ably compiles and deploys numerous accounts of these historical periods. He also offers fresh insight into these histories by focusing on the considerable evidence of *non-enforcement* of laws regulating sexual conduct. As Eskridge notes, the most repressive laws, passed during the most repressive eras, were "honored mostly in the breach" (p. 82). Even during the straitlaced, aggressively anti-homosexual 1950s, there were voices opposing these measures, as proven by the notable example of the prestigious American Law Institute's vote to decriminalize consensual sodomy in a tentative draft of its Proposed Penal Code (p. 84); deregulatory and nonenforcement impulses always coexisted alongside the strongest regulatory and enforcement impulses.

This leads to a relevant and intriguing question that often is under-explored in historical accounts of antigay regulation: Who *wasn't* prosecuted (and *why*)? Eskridge, significantly, addresses this puzzle

5. *See* Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional a state constitutional amendment that prohibited local governments from adopting regulations that barred discrimination on the basis of sexual orientation).

6. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's sodomy statute under substantive due process).

and observes that race and class often influenced whose sexual nonconformance was (and still is) allowed to go unnoticed, and whose was (and still is) not. He notes that law does *not* always prosecute those who "flaunt" their sexuality; sometimes it does, and sometimes it does not. Homosexual men are, Eskridge scoffs, "ridiculously easy to catch" (pp. 65, 227). Yet "for every homosexual arrest there were tens of thousands of *unarrested* homosexual acts" (p. 82; emphasis added). Why?

Eskridge's simple and sensible answer is that full enforcement of the anti-homosexual measures "would have been grossly expensive to carry out properly, rested upon questionable and sometimes wacky ideas, and — critically — included middle-class white men in [their] dragnet" (pp. 82-83). Moreover, the enforcement of these laws often had ironic, boomerang results: "[These laws] generated [their own] opposition" by outing gay people, creating "shared identity" among them, and eliciting anger and support among sympathetic nonheterosexuals" (p. 83). Indeed, anti-homosexual regulations and the underlying animus that may explain them actually "*create*[*d*] a homosexual rights movement" (p. 83; emphasis added), a claim that should give aggressively antigay legislators pause.

II.

In his second segment, Eskridge turns to the contemporary American legal scene, within which "gay people remain second-class citizens" (p. 139). He analyzes the prohibition of same-sex marriage, criminal statutes that still prohibit same-sex intimacy (especially consensual sodomy), family law presumptions against child custody or adoption rights for gay parents, the United States Military's exclusion of openly gay service people, exclusion of sexual orientation from the forms of prohibited discrimination under federal, state, and local antidiscrimination laws, and the various federal, state, and local policies that prohibit teaching that homosexuality or same-sex intimacy are acceptable — policies that Eskridge wryly terms "no promo homo" provisions (pp. 139-40).

Eskridge frames this legal analysis with overarching observations about law and social change. First, "evolution in public law is driven, but not predetermined, by changes in society and culture generally, and changing social and political power in particular" (p. 141). Thus, for example, the law's transition from criminalization of cross-dressing to its forgoing of these forms of gender policing was not a matter of doctrinal logic, but the result of changing views about, and wider awareness of, gay lives, gay identities, and collective gay interests (p. 142).

Second, law plays a role in how we talk and think about sexual variation (p. 143). It influences the governing rhetoric, and thus can

shift the public and private focus away from pathologizing these variations to assigning people rights based on these sexual variations. Taken together, these insights suggest — sensibly enough — that any future legal transitions, such as decriminalizing same-sex intimacy, permitting gay people to serve in the military, or authorizing domestic partnerships, will depend upon a cultural shift toward greater acceptance of same-sex relationships and legal rhetoric that promotes such acceptance.

In support of his more controversial assertion that law can effect social transformation, Eskridge points to the Warren Court case law on freedom of speech and constitutional criminal procedure, which enabled gay people to "come out" with less fear that police and censors would punish them (p. 147). These legal decisions influenced social practices in positive ways that Eskridge believes belie more skeptical accounts of courts' power to effect significant social change.[7] Correlatively, of course, law can have a significant negative impact on gay lives. Cases like *Bowers v. Hardwick*[8] actually may promote closeted behaviors by treating homosexuals as presumptive sodomites, rather than as co-citizens (p. 146). That is, law acts as an *independent variable* that affects gay people's lives (p. 145), for good or bad, *notwithstanding* the powerful role of factors external to law.

Eskridge urges that legal and social forces should tolerate sexual variation and destigmatize homosexuality. Specifically, he argues that "there is nothing about gender and sexual variation that justifies legal discrimination and . . . the public culture ought to implement the principle of benign sexual variation by recognizing equal rights for gay people" (p. 147). This would mean "state nondiscrimination as to gay people, state neutrality as to these sexual variations, and state insistence on nondiscrimination in the marketplace" (p. 147). If the state endorses these gay equality ends, then the stigma attached to sexual orientation will slowly disappear (p. 147), an end that Eskridge desires.

* * *

Having set forth these descriptive claims about law's role in shaping social practices, and a normative touchstone for critiquing this role, Eskridge then turns to specific examples of antigay regulation. He begins with *Hardwick*, and details the familiar critiques of the

7. The well-known contemporary work that casts doubt on the United Supreme Court's influence on social change is GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39-169 (1991). Rosenberg writes, "I have found little evidence that the judicial system . . . produced much of the massive change in civil rights that swept the United States in the 1960s." *Id.* at 157.

8. 478 U.S. 186 (1986).

Court's logic, use of precedent, presentation of history, constitutional interpretation methodology, and empirical analysis (pp. 149-66). Eskridge concludes that *Hardwick* fails on all of these fronts, but particularly violates doctrinal logic.

Hardwick fails as a matter of substantive privacy, because that doctrine teaches that "the state has no business in the bedrooms of consenting adults" even if what they are doing there is "disgusting" (p. 173). Sodomy laws also violate freedom of expression principles, because they censor expressive conduct on a content-specific basis.[9] Eskridge maintains that "sex is uniquely communicative" (p. 177) and is clearly "no less — and sometimes a great deal more — communicative than erotic dancing, flag-burning, and wearing hate symbols" (p. 178). Talking about *and* engaging in sex thus deserve First Amendment scrutiny because both may promote the libertarian values of autonomy and self-expression (pp. 178-79), as well as the democracy-enhancing values of citizen education, tolerance, and robust public debate about public issues (pp. 180-82). Moreover, to the extent that the First Amendment prohibits content- and viewpoint-based censorship, it promotes equality values, which Eskridge believes point against allowing the State to selectively punish gay sexual expression (pp. 182-83).

Anticipating reproaches that a great deal of conduct is similarly expressive but not treated as protected speech; that freedom of expression has never been unlimited for anyone in the military, on the job, or in many other contexts crucial to gay rights; and that the privacy of others may be infringed unduly if gay sexual expression is deemed protected speech, Eskridge offers a brief reply. He concedes that slippery slope objections are the "most intellectually serious" ones, but says that the Supreme Court already has begun the slide toward "sexualizing" the First Amendment by acknowledging that erotic dancing has expressive content.[10] Why this alleged sexual slide should continue, however, is more assumed by Eskridge than shown.

Eskridge acknowledges that courts typically defer to the military, to employers, or to other government actors who manage controlled environments. He adds, however, that the government's ability to suppress such speech is restrained by the prohibition against *viewpoint discrimination*, and by a more constitutionally pervasive obligation to

9. Here, Eskridge draws on his earlier work with a former colleague. *See* David Cole & William N. Eskridge, Jr., *From Hand Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

10. Pp. 176-77; *see also* City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000) (concluding that nudity is not inherently expressive, but nude dancing is expressive conduct); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion) (suggesting that nude dancing is expressive conduct, though it falls within the outer ambit of First Amendment protection).

act *reasonably*.[11] Antigay policies fail to satisfy either requirement. For example, Eskridge argues, the military "unit cohesion" defense of its "don't ask, don't tell" policy, is neither reasonable nor evenly enforced. It is also belied by the analogous American experience with racially integrated troops. Unit cohesion was not undermined by racial integration of soldiers, despite the strong fears to the contrary that were advanced to resist this change. Moreover, the First Amendment's distaste for allowing a "heckler's veto" to silence a speaker (p. 191) points against regulation of gay sexual expression. The military or other government actors therefore should not permit straight people's hostility to gay people to stifle the gay people's open expression of their identities.

Eskridge scoffs at claims that open expression of sexual identity would burden the privacy interests of straight people, even in the confines of the military barracks. Straight soldiers *already* risk whatever loss of privacy may come from close living (including showering) with closeted gay soldiers (p. 193); this loss of privacy is only *veiled*, not reduced, by a policy that prohibits people from revealing their identities.

Eskridge then suggests that the real motive behind the military's antigay policy is actually far more complex than any of the military's commonly advanced but implausible explanations. It is that "homosexual attraction may be *useful* to the unit cohesion of same-sex units, but only so long as the existence of a sexual feature to this bonding can be plausibly *denied*" (p. 194; emphasis added). "Don't ask, don't tell" helps the military preserve a delicate, unspoken sexual balance among its members, which preserves *the military's* sexual identity, and makes the close quarters and same-sex intimacies of service life less fraught (p. 194).

To this last, provocative justification for suppressing open expression of service people's sexual identity, Eskridge responds, in essence, "get over it." Open expression of sexuality — whether among soldiers or among other citizens — simply would not release a "Devlin-Scalia parade of horribles" (p. 197), undermine troop morale, or erode public morality. Nor would the First Amendment's central purpose as a safeguard of political speech somehow be diluted by affording sexual expression full free speech protection (pp. 197-99). The slippery slope concern is overstated, says Eskridge, because other sexual conduct still would receive First Amendment *scrutiny*, not, necessarily, *insulation* from regulation. Moreover, deregulating sexual expression might pave the way to "sexual discourse without hysteria," "yield more sexual peace and less sexual neurosis" (p. 195), and highlight wider anomalies in free expression jurisprudence (p. 200). For example, the

11. Pp. 188-89. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-78 (1998) (recognizing that even in a "nonpublic" forum, the government regulation of speech must be reasonable in light of the purpose of the property).

treatment of obscenity as "unprotected" speech might be revisited (pp. 200-01). Again, government might still be permitted to *regulate* obscenity and pornography (pp. 203-04), but only if the regulation could withstand First Amendment strict scrutiny.[12]

Finally, Eskridge makes equal protection-based objections to antigay measures that overlap with his privacy and freedom of expression arguments, insofar as equal protection too requires that classifications based on sexual orientation be rational. It also requires that the classifications not rest solely on prejudicial stereotyping or resort to rigid gender roles or animus. Eskridge states that "responses to sexual or gender variation can usually be categorized as driven by either morality (homosexuality is an abomination) or animus (I hate queers)" (p. 210). Although the former may be a legitimate basis for regulation, per *Hardwick*, the latter is an improper basis for regulation, per the Court's recent decision in *Romer v. Evans*.[13]

Romer held that Colorado's Amendment 2, which prohibited adoption of any state law that banned discrimination on the basis of sexual orientation, violated the Equal Protection Clause.[14] The Court viewed the amendment as a "status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests,"[15] and insisted that any antigay law must rest on an assertion of something more than "popular animosity" (p. 151). That is, the State must show that the disfavored class of people is committing harm, *a harm that must be demonstrable*; the regulation may not flow from mere animus or, as Eskridge puts it, "hysterical and obsessional fears" of gay people (p. 225).

The State likewise cannot rely on justifications that conflict with the Court's other case law, for example its prohibition of official enforcement of fixed gender roles (p. 222). Rather, antigay regulations now must bear some relation "to ability *to perform or contribute to society*" (p. 217; emphasis added). This is a quite different, more difficult standard for the State to meet than the standard deployed in *Hardwick*, where the Court upheld Georgia's criminalization of "homosexual sodomy" on the basis of historical condemnation of homo-

12. According to Eskridge, sexualizing the First Amendment also might force the Court to address a First Amendment "paradox," under which courts are most vigilant in protecting *political* expression in a *public* setting, while "most vigilant in protecting *sexual* expression in a *private* setting." P. 200 (emphasis added). This paradox reflects, among other things, the ways in which sex and intimacy are deemed intrinsically private in the United States. P. 201. Eskridge maintains that protecting sexual expression in the public sphere would erode this public/private dichotomy, which not only might free gay sexual expression for public expression, but might protect more political speech in private settings.

13. 517 U.S. 620 (1996).

14. *See Romer*, 517 U.S. at 635.

15. *Id.* at 635.

sexuality.[16] Eskridge thus concludes — correctly, in my view[17] — that *Romer* cannot be squared with the antigay logic of *Hardwick* (pp. 150, 151, 210-11).

Eskridge advocates that courts resolve this tension by overruling or narrowly construing *Hardwick*, given the historical materials regarding the futility and occasional brutality of antigay regulations. In any event, he believes that the *animus* feature of antigay legislation will often be more powerful than any public morality feature. Moreover, the Court in *Romer* rejected Colorado's stated reasons for upholding Amendment 2, which included conservation of scarce resources for enforcing civil rights, the interest of landlords and employers in not associating with gay people, and the State's interest in conveying disapproval of homosexuality (p. 209). These interests, Eskridge notes, clearly were more weighty than "antihomosexual sentiment held to be a rational basis for sodomy laws in *Bowers v. Hardwick*" (p. 209). Eskridge believes that the rhetoric and reason of *Romer*, not of *Hardwick*, eventually will prevail, as changes in society and culture continue to erode an unblinking belief in the "unnatural" *harm* of homosexuality. Legal doctrine will shift to prohibiting official discrimination on the basis of homosexuality, because homosexuality causes no demonstrable harm that satisfies the *Romer* test.

What Eskridge does not consider is that the *Romer* shift in judicial rhetoric — which demands a showing of *reasons* for antigay policies — could have adverse consequences. To approve an antigay measure, post-*Romer*, courts must declare the measure to be "rational." This could lend a different, more worrisome rhetorical force to official intolerance of, or animosity toward, gay people (it may be harsher to call an antigay measure "rational" than to simply uphold it on the ground that it has "ancient roots," as the Court did in *Hardwick*).[18] Eskridge nevertheless appeals to judicial reason, by asserting that

> laws focusing on homosexuality or gay people have usually been motivated by hysterical, obsessional, or narcissistic and not public-regarding, fact-based reasoning; have repeatedly proven to be socially unproductive laws that either wreak policy havoc or waste state resources or (if unenforced) simply serve as symbolic spite measures; and focus on a class of people subject to unjustified social scorn and violence, whose unfair

16. The Court in *Hardwick* invoked the "ancient roots" of proscriptions on homosexuals as a basis for its refusal to invalidate the Georgia sodomy law. *See* 478 U.S. at 192. As the Court further stated, "[t]he law ... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* at 196.

17. *See* Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 88 (1996).

18. *See id.* at 86-87, 93-94, 102-09 (discussing several potential problems with a rational basis strategy).

> plight has typically been worsened by state brutalization and stigma. [p. 217]

The passage implicitly assumes that the enumerated flaws of antigay regulation will be recognized as such by judges, and that judicial rulings against these laws will produce positive social change for gay people.

Eskridge bolsters this rational basis argument against antigay measures with arguments that discrimination against gays and lesbians must be supported by "exceedingly persuasive justification[s],"[19] because it is a form of gender discrimination. He then applies these multiple principles to the denial of marriage licenses to same-sex couples, and concludes that these denials are unconstitutional, per the equal protection logic of *Loving v. Virginia*.[20] The Court in *Loving* prohibited states from denying marriage licenses to interracial couples (p. 219). In both the interracial and the same-sex marriage examples, similarly situated actors arguably are treated "alike" (i.e., *no one* can marry outside of his or her race; *no one* can marry a person of the same sex). Marriage is not — the argument continues — inherently monoracial, inherently procreative, or inherently heterosexual. The prohibitions therefore are best explained by other, constitutionally illegitimate motives — i.e., to preserve white supremacy, in the case of antimiscegenation laws, and to preserve traditional gender roles and heterosexuality supremacy, in the case of laws that restrict marriage licenses to male/female partners.[21]

Before concluding his cumulatively powerful arguments against antigay laws, however, Eskridge equivocates. If allowing same-sex marriage or openly gay people to serve in the military is too politically unpopular, he cautions, then the Court might, and perhaps *should*, simply dodge these issues, whether by denying certiorari or by maintaining, à la *Hardwick*, that the political process should determine these prohibitions' fate. He then inserts still another caveat: this last move too would expend judicial political capital. (If, for example, the Court upholds "don't ask, don't tell," on the ground that the military alone should decide issues of troop cohesion and effectiveness, then the Court must justify that conclusion; "[a]n analytically or factually flawed opinion would open the Court to harsh criticism" (p. 229);

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19. United States v. Virginia, 518 U.S. 515, 524 (1996) (holding that equal protection precluded Virginia from reserving exclusively to men the unique educational opportunities of Virginia Military Institute) (quoting Mississippi Univ. Women v. Hogan, 458 U.S. 718, 724 (1982) (internal quotation marks omitted)).

20. 388 U.S. 1 (1967) (striking down Virginia's miscegenation laws on equal protection and substantive due process grounds).

21. Pp. 220-28. There is a rich subliterature within contemporary work on gay rights that takes up the controversial subject of same-sex marriage. For an elaboration of Eskridge's views and the applicable constitutional arguments, see ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, *supra* note 2.

similar to the resounding criticism it received for *Hardwick*.) The safest course among these perilous ones thus may be to engage in Bickelian "not doing,"[22] and allow experimentation among the states, at least in areas like same-sex marriage, where state constitutional issues dominate.[23]

III.

In his final, most troubling segment, Eskridge moves beyond historical and contemporary legal frames to argue that gay experiences and queer theory might, or should, shape not only future gender law, but future general jurisprudence. He plunges into a morass of conflicting theories and perspectives, including (but not limited to) liber-

22. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 169 (1962) (describing the Court's "techniques of 'not doing,' devices for disposing of a case while avoiding judgment on the constitutional issue it raises").

23. These state-level developments are well under way, as the Vermont Supreme Court held in December of 1999, in *Baker v. State*, 744 A.2d 864 (Vt. 1999). The court held that the common benefits clause of the Vermont Constitution requires that the Vermont legislature confer the same benefits upon same-sex couples as it grants to married couples, on the ground that "legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity." 744 A.2d at 889. This judicial act of will and grace is counterpoised, of course, by legislative measures in other states that expressly prohibit same-sex marriage; in Vermont itself, the legislative response was not to sanction gay marriage, but to move toward domestic partnerships that confer the same benefits on same-sex couples as are conferred upon married couples.

In any event, this "safest course" for the United States Supreme Court is no longer available in some areas, such as in the Title VII context, where the Court already has addressed whether same-sex harassment is an actionable form of sex discrimination. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding same-sex harassment is actionable if similar harassment of a different sex victim would not have been tolerated by the employer). Unless the Court later concludes that discrimination "on the basis of sex" means something quite different under Title VII than it does under the Fourteenth Amendment, then these Title VII developments are very likely to influence constitutional rights as well as statutory ones. To frame two different *definitions* of what constitutes discrimination "on the basis of sex" would be a quite different distinction between statutory and constitutional rights than it was for the Court to frame two different *standards for establishing* a Fourteenth Amendment violation and a Title VII violation. *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that the racially disparate impact of a facially race-neutral measure does not, absent evidence of intent to discriminate, trigger strict scrutiny, and contrasting this constitutional standard with the stricter standards of Title VII, which do not require a showing of intent).

Still another area where the Court has chosen to act, rather than to wait and see, involves the fuzzy zone between public antidiscrimination laws and private associational and expressive freedom. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual, Inc., 515 U.S. 557 (1995) (holding that public accommodations law could not be applied to compel private group to include gay and lesbian group in St. Patrick's Day parade). The Court's pending case reviewing the New Jersey Supreme Court's decision that the Boy Scouts cannot exclude gay youths and adults from positions of leadership also will address this tension, and could further restrict government's power to prohibit antigay private conduct. *See* Boy Scouts of America v. Dale, 120 S. Ct. 865 (2000), *granting cert. to* 734 A.2d 1196 (N.J. 1999).

alism, pragmatism, progressive postliberalism, and feminism — all covered over with a mossy romanticism.

I will first summarize the arguments of this third segment, before turning to why I find the segment baffling on many levels. According to Eskridge, the guide to the future is "queer theory," which by his account "starts with the assumption that gender, sexuality, and perhaps even sex are social constructions and not natural givens" (p. 444 n.1). Obviously, this insight destabilizes the natural-law assumptions behind the legal regulation of sex, and requires a reconsideration not only of laws against homosexuality, but of consensual sadomasochism, intergenerational sex, incest, and more. Even these forms of sexual expression, which are unlikely to obtain legal protection, would receive a new analysis — one mindful of the tendency of sexual regulations to "yield a costly dynamic and . . . contribute to the ongoing tradition of sex negativity in America" (p. 258).

This tradition of sex negativity springs in part, Eskridge suggests, from the "hysterical," "obsessional," and "narcissistic" impulses that undergird the legal and social suppression of sexual nonconformity (pp. 224-25, 298). A more sensible and humane legal regime would grant "full equality" to gay people (p. 320), and would embrace "benign sexual variation" just as it has embraced the idea of "benign religious variation" (p. 293). The State should restrain itself "from engaging in *public* anti-religious or antigay censorship or discrimination" and should "prohibit *private* censorship or discrimination on the basis of religion or sexual orientation" (p. 302; emphasis added).

The liberalism that Eskridge endorses elsewhere — with its stress on the state's negative obligations, i.e., noninterference with basic life decisions, privacy, freedom of expression, and procedural due process — seems out of place in this brave new world. Yet Eskridge betrays his ambivalence about abandoning altogether a theory that may further gay equality aims. Indeed, he observes that if the basic assumption of queer theory is wrong, and sexual identity is innate, then "the liberal arguments *retain almost full strength*[, because then] compulsory heterosexuality cruelly stigmatizes and penalizes gay people for traits they cannot control, and hurts nongay people who enter into unfulfilling relationships with closeted gays" (p. 284; emphasis added). There is an awkward embrace at this point — *if* liberalism can do the work of advancing gay equality, then it may be the weapon of choice.

But Eskridge then recites the practical limitations of a liberal approach to sexual variation. First is that American law does not pursue liberalism principles to their logical limits, despite its ostensible commitment to liberalism (p. 245). If it did, certain consensual acts that now are criminalized would not be, including consensual sodomy between adult, same-sex partners, but also — perhaps — consensual fornication, incest, and adultery, among others (p. 247). Eskridge's explanation for this lapse is that "consensual choice is not, even in our

liberal society, separable from recognized statuses" (p. 250). Employment laws recognize, for example, that higher-status partners may coerce lower-status partners to consent to sex, and criminal laws seek to prevent other potentially nonconsensual sex, such as sex with a minor (pp. 250-51). The law also reflects the status of traditional marriage and heterosexuality by preventing same-sex adult partners from marrying or from engaging in sexual relations.

Eskridge's next turn is the most destabilizing. Liberalism not only is imperfectly achieved in American law, but it is also an inherently flawed model for civil rights. The right to be "let alone"[24] by the State may allow and even promote the ways in which private institutions often can, and do, punish nonconformity. Moreover, "[h]uman beings are not autonomous bundles of exogenously defined preferences seeking satisfaction. . . . [but] are social beings struggling to make connections with one another" (p. 283). In family contexts, this limitation of liberal theory is particularly striking.

Eskridge concludes that liberalism's notion that a noninterventionist state is the best means of maximizing gay autonomy must be qualified: some legal interventions are necessary to prevent private abuses of gays. Again, the State must restrain *itself* from interfering with sexual variation, *and* must prevent *private actors* from interfering with sexual variation. In doing both, it should invoke as a substantive backstop the "relational" value of protecting same-sex relationships, i.e., these relationships benefit the adult couples and their children (pp. 285-88). It also should also focus on feminist discourse that emphasizes "sexual mutuality" (p. 268) as the normative measure of sex worthy of legal or social approval, which he says — unfortunately and risibly in my view — has "a procedural component."[25] These procedural steps — a species of notice and opportunity to be heard — "entail[] a conversation about what one enjoys and what one does not enjoy, and . . . stopping when . . . one says 'stop' or a safe word" (p. 269).

Eskridge tries to soften the clash between his postliberal, normative claims, and his liberal, noninterventionist arguments by insisting on their shared gaylaw ends:

> [A]rguments for gay families . . . rest on something more profound than choice . . . . [G]ay families are good for gay people and good for Amer-

24. *See* Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478) (1928) (Brandeis, J., dissenting)).

25. P. 269. I appreciate the important function of "safe words" in sexual encounters, particularly in the shadowy and potentially dangerous realm of sadomasochistic encounters or sex between relative strangers. Yet this description of sex as having a "procedural component" made me chuckle. Procedural due process concepts and terminology play an important role in many venues, but the bedroom is not obviously among them. Perhaps my resistance to proceduralizing sex is itself based on romanticism, not reason, but I resist nonetheless.

> ica because they provide fora in which people form *mutual commitment and children are reared.* Any effort by the state to discourage gay families is perverse because it *discourages commitment and harms children.*" [p. 278; emphasis added]

The policies are *also* wrong because they invade privacy and individual autonomy.

Note well the profound shift — "gay" is *not* just a sexual variation that a liberal state should tolerate and, as necessary, protect from those who are "disgusted" by it; rather, gay is *good.* Moreover, Eskridge elaborates, "sex is *good and normal when the participants welcome it*, when the sex is *truly a joint enterprise* meeting the needs of the partners" (p. 170; emphasis added).

He then weaves away from this normative defense of gay sexual equality, back to his pragmatic argument for deregulating sexual variation. Criminal laws against gay sexual conduct are a "wast[e] [of] valuable human resources that could be expended in producing and problem-solving" (p. 308). Liberals, progressive postliberals, and pragmatists therefore all should agree to this much — that antigay regulations are "bad policy."

Eskridge doesn't forget the feminists. Much antigay animus, he argues, springs from an insistence on traditional gender stereotypes. Consequently, legalization of same-sex marriage, overruling of *Hardwick*, allowing openly gay service people into the military, preventing sexual orientation discrimination in the workplace, awarding gay parents child custody and adoption rights, and possibly allowing "polyparenting" and other unconventional family arrangements *also* would promote the social and legal interests of women. That is, to defy the traditional gender stereotypes that constrain gay and lesbian lives would, perforce, erode the traditional gender stereotypes that constrain many female lives, insofar as they too are premised on negative and mistaken assumptions about the role of gender in shaping human abilities, roles, and natures.

* * *

Eskridge closes this theoretically dense segment with a proposed methodology for recognizing the rights of gays and lesbians while still respecting the interests of heterosexuals. His model comes from the clash at Georgetown University when gay and lesbian student groups sought recognition and benefits equal to other student groups.[26] Invoking its Jesuit roots, Georgetown refused. The students sued under the District of Columbia's Human Rights Act forbidding the denial of educational facilities based on sexual orientation.[27] No court could

26. *See* Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc).

27. *See* p. 303; *Gay Rights Coalition*, 536 A.2d at 4.

resolve this conflict without denying what Eskridge calls the "nomic" community interests of one of these litigants. To honor Georgetown's sense of its Jesuit origin and identity would be to deny the student groups equal participation in the life of the University. To honor the students' participation interests would be to violate Georgetown's interest in shaping its religious identity. Either way, the court would be forced to choose *between* "nomic" communities. A similarly difficult choice must be made between nomic communities when a Presbyterian landlord refuses to rent an apartment to an unmarried couple, or when the Hibernian Order bans openly gay participants from its annual St. Patrick's Day parade.[28] In each scenario, disrespect of some group's values will result regardless of the outcome.

Eskridge argues that in such intractable situations, judges should try to accommodate the colliding perspectives, rather than choose one side as the all-out winner and deem the other side the loser (p. 310). The opponents in the controversy likewise should try to accommodate each other, by respecting "the central need of the other, unless that accommodation would sacrifice that side's central need .... [E]ach side should remain open to information about the other and to the common interests that are still shared" (pp. 311-12), with as much respect for others' points of views as their differing commitments and self-respect may allow. An apt illustration of this accommodationist approach, says Eskridge, was the court's decision in the Georgetown case "to require Georgetown to provide the student groups with equal access and benefits but not to require it to grant official recognition to the groups" (p. 303). Eskridge states that the strength of the opinion was that it "value[d] the claims of both *nomoi*" (p. 303). He does not explain, however, how to weigh each set of *nomic* values, or how to resolve cases in which any compromise among group interests may be experienced not as Solomonic, but as an intolerable loss to all groups concerned. The depth and intensity of *nomic* differences may not always permit accommodation or allow the parties to see their common interests. The method also presupposes a judge who can identify and will value the central needs of both *nomoi*. Such emphatic skills are wonderful judicial (and human) qualities, but are unevenly distributed among us. Nevertheless, Eskridge's accommodationist model is a very appealing one for groups that seek recognition and tolerance as a first step toward acceptance.

28. *See Hurley*, 515 U.S. at 556 (holding that applying public accommodations law to require defendants to include gay and lesbian group in St. Patrick's Day parade violated First Amendment rights of parade organizers).

IV.

Eskridge makes several assertions in his final segment that are hard to square with some of the insights of the preceding segments. First is the assertion of the "good" in what Eskridge describes, often in the singular, as "gay experience" (pp. 244, 259, 269, 323). Second is the celebration of nomic pluralism and apparent embrace of postliberal theory. Third is his psychopathological account of antigay animus. Let me take these in order.

Eskridge's historical and legal discussions suggest that a central explanation for law's irrational treatment of sexual variation is that legislators and judges, along with the rest of us, persistently *fail to perceive* (let alone tolerate, accept, or celebrate) the full range and complexities of individual sexual desires. This is a profound point that is best apprehended if one stands back and observes how woodenly the law has responded to sexual complexities over time. History shows that law has resorted to blunt regulatory measures that attempt to construct, cabin, and eradicate particular categories of sexual variation. Law also has ascribed meanings to these variations that are one-dimensional and reductive, and that are *invariably negative*. If Eskridge's theory about law's rhetorical force holds true, then legal history has helped to create what people, including gay men and women, *think* "gay" means. This makes any positive account of "gay experience" problematic, because these experiences are potentially tainted by the stunted and negative legal constructions.

Moreover, Eskridge's use of the terms "gaylaw" and "gay experience" in the third segment departs significantly and confusingly from his use of these terms in the first two segments. In his historical and doctrinal segments, "gaylaw" refers to the law's definition and punishment of a changing assortment of sexual outlaws. Here we meet the "gay" person as gender bender, the "ridiculously easy to catch" violator of sodomy laws, a member of a "homophile group," any female softball team member, any "gay bar" patron, a female inmate who "weds" her partner in a mock prison rite, *and* an apparently "delighted" minor male engaged in sodomy with an older man (p. 88). The "gay" person is also the member of a same-sex couple denied a marriage license, the soldier booted out because of doubt about his or her heterosexuality, a "sodomite," a guidance counselor who says she is bisexual,[29] and a man holding hands with another man in the park.

"Gaylaw" refers both to the regulations of these "gay" people and to the (mostly unsuccessful) judicial challenges of the regulations.

29. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (holding that a public high school guidance counselor's statement regarding her sexual preference was not made as a citizen speaking out on a public matter, and that her resulting discharge was unconstitutional).

"Gay experience," one must assume, was distorted and cramped by these harsh legal constructions of "gay," or else the closet metaphor would not have such gloomy resonance. In any event, "gaylaw" historically has *not* denoted a fixed, unitary status or conduct, and it certainly has not been affirming of gay identity.

Eskridge seems to repress this history and its dark connotations when he invokes the term "gaylaw" to denote law as it might be transformed by "gay experience" and infuses this experience with entirely positive attributes. He states that gay experience "decouple[s] [sex] from procreation" and links it instead "to its social function of deepening human relationships" (p. 240). "Gay families" are "families of choice" and "gaylaw views sex as good and not shameful, public as well as private" (p. 240). "Gaylaw" further denotes law that takes as a normative baseline the experiences of gay people, who are all engaged in relationships founded on principles of mutuality, respect, and love. Again, "gay" is *not* just a sexual variation that a liberal state should tolerate and, as necessary, protect from those who are "disgusted" by it; rather, gay is *good*. Yet this optimistic and monolithic description of contemporary gay experience *cannot* be right, *unless* the past hostility documented by Eskridge has had *no* negative psychosocial consequences for these relationships, or distorting effects on their meanings, which Eskridge forcefully denies.

Romanticizing gay relationships also conflicts with Eskridge's earlier plea that we take the "hysterical" out of legal regulation by permitting even "disgusting" private sexual behaviors (p. 173) and "revolting" expression (p. 198). To replace sexual "hysteria" with approval of gay sexual expression and relationships, on the assumption (or condition) that these relationships are (or must be) founded on mutuality, respect, and love, is to reject implicitly the liberal neutrality that Eskridge urges in his free speech argument.

This leads to another troubling aspect of the third segment: Eskridge's wide angle, all-theories-in-a-storm approach seriously undermines the book's overall conceptual coherence. For example, his embrace of a "relational" approach to family law issues, and of an accommodationist approach to clashes between "classic" communities is hard to reconcile with his appeal for agnosticism toward outré, individual sexual behaviors, or with a strong liberal assignment of individual rights. Postliberal skepticism about the distinction between omissions and commissions, and about the possibility of state "neutrality," greatly weakens arguments against state regulation of sexual expression that "disgusts" others.

For example, if courts were to pitch traditional, liberal definitions of what constitutes a regulable, demonstrable harm, state power, to prevent aesthetic, social, and other costs of disruptive sexual expression, could expand. States more easily could assert that sexually expressive materials and behaviors, such as pornography, sex shops, or

cruising, are visual signals that may encourage lawbreaking and other harmful secondary effects, as some contemporary accounts claim.[30] Courts that embraced a postliberal approach to these alleged potential harms of sexual expression likely would weigh these potential harms more heavily in their free speech calculus. A postliberal construction of harm thus might produce a very ironic result: revival of the pre-1900 and early 1900s approach to policing gender deviance (among other signals of social "disorder") through stricter anti-loitering, censorship, zoning, and other laws — laws that Eskridge earlier describes as "wacky."[31]

The social constructionist insights that Eskridge seems to endorse in the third segment thus pose serious structural problems for the traditional First Amendment principles he touts in the second segment. Indeed, a "social constructionist" approach to free speech doctrine could lead one to conclude that obscenity law, and the much maligned "secondary effects" subcategories within First Amendment case law, are the more sensible and appropriate responses to the societal degradation and other harms of sexual expression. That is, case law that allows communities to regulate, zone, and criminalize some sexual expression should inform the *rest* of First Amendment doctrine (and "gaylaw"), *not* the other way around, as Eskridge would have it.

Eskridge might have responded to these structural concerns by demonstrating how postliberal theory, *too*, would support the gay sexual expression model proposed in the second segment. Instead, he rests his argument for treating sexual conduct as worthy of free speech

30. This literature is based on the "broken windows" theory of crime first asserted by James Q. Wilson and George L. Kelling, which assumes that visible "disorder" breeds crime, and that measures that reassert visual order, such as fixing broken windows and sweeping street corners of persons who appear to be gang members, will reduce crime. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

31. P. 83. Indeed, the new "order maintenance policing" style of law enforcement advocates exactly these sorts of measures to "clean up" neighborhoods. *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (discussing and critiquing order-maintenance policing and the "broken windows" thesis); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 357 (1997) (discussing the importance of reducing the visible signs of criminal activity, because they reduce the stigma of engaging in crime and thereby promote criminal activity).

For a recent, very insightful analysis of the shift in the rhetoric of "harm" that occurs within the new policing measures, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999). Harcourt's exposition suggests that liberalism too might be invoked in defense of the new policing measures, given the conservative deployment of liberal harm principles. *See id.* at 161-67. That is, strict anti-loitering laws can be defended not as "enforcement of morality" measures, but as measures that prevent "harm to others" in a liberal sense. This is because, Harcourt argues, the harm principle "is no longer an effective response to conservative proposals to regulate. To the contrary . . . harm has become the principal argument for state intervention." *Id.* at 146.

protection exclusively on liberal grounds, with no explanation of how that argument survives the critique of liberalism in the third segment.

Let me be clear: I do not object to Eskridge's use of liberalism principles as a matter of doctrinal analysis and proposed litigation strategy. Constitutional doctrine *itself* touts liberal assumptions — however inconsistently — that *do* point toward gay equality ends. Forcing judicial fidelity to this doctrine is supremely fair and logical. What I found so confusing was the *selective* invocation of liberalism within an analysis of government regulation of sexual variations that (1) argues *against* a liberal-traditionalist principle of choice; (2) invokes a normative principle of mutuality as the touchstone of worthy sexual relations (p. 269); and (3) validates a status-based defense of traditional male-female marriage by observing that "underlying cultural anxieties . . . cannot be ignored" (p. 278). The strong liberal argument for a sexualized First Amendment makes little sense if one also insists that the liberal version of the self is "too limited," insofar as it fails to account for the "relational self" (p. 284).

Moreover, if we chuck out liberalism's excessive, characteristic respect for individualism, then it becomes harder to justify judicial interference with the church's or the family's contribution to closeted sexuality (p. 313). Yet to protect and celebrate the value of such "classic" nomic communities, as Eskridge does, could afford the most powerful among these tremendous influence over gay equality's progress and over the fate of the gay, often closeted, members of these communities.

Eskridge nevertheless argues against intervention into these private associations, despite their antigay commitments, in order to respect the relational value of "classic" *nomoi*. He never clearly defines a "classic" *nomoi* (p. 313), however, or explains why "*non*classic" ones should not receive the same respect (p. 179). "Nonclassic," even deeply offensive, nomic communities presumably would promote the experimentalism and pluralism functions of the First Amendment that Eskridge celebrates (pp. 179-80). Likewise confusing is his caveat that respect for subcultural *nomoi* should occur only "so long as their members have the option of *separating*" (p. 313; emphasis added). This is a potentially quite significant restriction of subcultural autonomy and of Eskridge's version of postliberal theory, insofar as separation often is *not* a viable option for members of many "classic" religious *nomoi*. Rather, one who "separates" may be viewed as an outcast, a heretic, or damned, not as a respected member of a coequal, nomic tribe. Postliberal theories that advocate respectful, full deference to group identity and autonomy likely would not accept a broadly stated "right to separate" restriction on group autonomy. It is traditional *liberal* theory, most notably, that insists on the individual's right to "separate" (though even liberalism has difficulty with "separation"

when it includes secession into illiberal, intolerant associations, communities, or practices[32]).

This particular thicket is deadeningly familiar: illiberal philosophies potentially undermine any *public* principle of tolerance of sexual variation, and thus of gay equality, whereas liberal philosophies potentially undermine any *private* value of physical, economic, and psychological security for gay people. We already *know* that liberalism has these values and inherent limitations. By ostensibly shifting to postliberal theory, then adding a liberal caveat, Eskridge doesn't traverse this bog; he merely sinks deeper.

Eskridge had several means of portage here, none of them perfect. He might have stuck to a liberalism plank, until it ran out, and at that point simply observed that no theory is complete — there are trap doors *everywhere* — but that liberalism carries us as far toward gay equality ends as the alternatives. Or, he might have simply rejected the liberalism plank altogether. Instead, Eskridge rests on a liberalism plank in some places, while extending several new planks in others, without fully explaining how (or whether) courts might reconcile them.

A fourth, likely better, option might have been to avoid this political theory morass *altogether*, given that it is *ultimately unnecessary* in achieving the legal outcomes that most engage him — for example, decriminalizing sodomy; providing legal protection to same-sex relationships; respecting custody rights of gay and lesbian parents; and allowing openly gay and lesbian military personnel to serve. Liberalism plausibly (but not perfectly) supports *each* of these outcomes (so might other theories, by the way[33]). Introducing multiple and competing political theories detracts from an otherwise compelling, excellent chronicle of the noncontroversial harms that antigay laws cause, and blunts the more meaningful, sharper point that these noncontroversial harms are not worth incurring or inflicting.

A final difficulty I had with Eskridge's analysis was his treatment of antigay animus. Drawing on the work of Elisabeth Young-Bruehl,[34] Eskridge maintains that much antigay animus resembles racial prejudice in its hysterical qualities, resembles anti-Semitism in its obsessional qualities, and resembles sexism in its narcissistic qualities, which makes homophobia "an all-purpose prejudice" (p. 211). He analo-

32. *See* ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); Allen Buchanan, *Toward a Theory of Secession*, 101 ETHICS 322 (1991); Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315 (1984).

33. *See* Massaro, *supra* note 17, at 92-102 (describing how the economic utilitarianism approach of Richard Posner, the natural law approach of John Finnis, and the social constructionist approach of Janet Halley may all point toward most of the gay equality ends that Eskridge addresses).

34. ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES (1996).

gizes American antigay regulations with Nazism (pp. 80-82) — "[T]he Nazi goal was *Holocaust*, genocide, while the American goal was *Kulturkampf*, erasure" (p. 82) — and argues that the animating psychological impulses of such anti-homosexual urges include "hysterical demonization of gay people as dirty sexualized subhuman, obsessional fears of gay people as conspiratorial and sexually predatory, and narcissistic desires to reinforce stable heterosexual identity and gender roles by bashing gay people" (p. 209). That is, antigay prejudice often is the product of a psychologically disturbed and deeply insecure mind, not just an ignorant or selectively indifferent one.

While some versions of antigay animus likely do merit treatment as a psychiatric disorder, it is doubtful that *all* do. Just as misogyny likely is less common than is treatment of women in unreflective, reductive ways that translate into negative social and economic consequences, "homogyny" likely is less common than is treatment of all people according to heterosexual norms that translate into quite harmful, but often unintended, social and economic consequences for gay people. Moreover, human resistance to, and sometimes even violence in the face of, ambiguity are well known. Although clinical hysteria, obsession, or narcissism may figure in some of our resistance to sexual ambiguity and to deviation from conventional gender norms, a more complete and complicated picture would focus on humans' general discomfort with fuzziness.[35] Drawing some lines — including ones between and among people — is probably inescapable, and may even be psychologically healthy, insofar as separation between oneself and others is necessary to the development of a mature, nonnarcissistic self.[36]

Normalizing the bases of some human prejudices, however, hardly clears the path to gay equality. On the contrary, it throws up more roadblocks than it eliminates. It forces us to see — alas — that many of the most relevant dividing lines here are ones that shape basic social patterns, institutions, and norms. They include the lines between male and female, between permission and taboo, between family and nonfamily, between domesticated and wild, between law and outlaw, and between saved and damned.[37] Coloring outside of *any* of these lines

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35. *See, e.g.*, EVIATAR ZERUBAVEL, THE FINE LINE: MAKING DISTINCTIONS IN EVERYDAY LIFE 35-36 (1991) (describing people's aversion to ambiguity).

36. *See* FRANCIS J. BROUCEK, SHAME AND THE SELF 41 (1991) (discussing the maturational process of seeing oneself as an object autonomous of others).

37. *See* Massaro, *supra* note 17, at 83. This argument is that

> [h]omosexuality threatens the current social organization not only as it is defined by sexually created relationships, but also as it is theologically constructed and, perhaps to a lesser extent, as it is politically organized. Sexual deviance ... poses a triple threat .... The homosexual is not merely a gender outlaw, but also a religious heretic and a political seditionist.

Id.

agitates many of us, to some degree. Coloring outside *all* of them agitates most of us, *not* just the unbalanced homophobe who kills in response to this agitation. Moreover, this agitation is not easily characterized as irrational in a *clinical* sense, though reliance on it by government might be irrational in a liberal, *legal* sense.

Defining this liberal, legal meaning of "irrational" is extremely important in fashioning constitutional arguments for gay equality, given the Supreme Court's judicial unwillingness to apply elevated judicial scrutiny to classifications other than ones that already have been receiving such scrutiny. This foreclosure of any new "strict" or "intermediate" scrutiny routes for overturning discriminatory measures effectively forces litigants down the "rational basis" path of review, which will, I predict, excite considerable scholarly, judicial, and lawyerly interest in defining legislative "irrationality." Eskridge's psychological approach to irrationality is not helpful to this legal inquiry, because it is both too narrow and too broad.

In any event, there is considerable irony (though also undeniable symmetry) in psychologizing antigay animus and the people who act on it. Same-sex erotic desires only recently shook off their own psychopathological fetters.[38] Freeing same-sex desires and experiences from their legal shackles, and from the residual social stigma and shame, is not obviously furthered by reverse psychological labeling of those people who are discomfited by, or even angrily resistant to, sexual variation.[39]

V.

Gaylaw's many virtues *and* its occasional weaknesses may point the way toward a workable, even winnable, technique for challenging

38. The shift occurred in 1973, when the American Psychiatric Association formally declared that homosexuality "does not constitute a psychiatric disorder" and "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-II) § 302.0, at 44 (6th prtg. 1974); Resolution of the American Psychiatric Association, Dec. 15, 1973, *reprinted in* 131 AM. J. PSYCHIATRY 497 (1974).

39. Pathologizing antigay animus also fits awkwardly into the book's overarching generosity toward communities that oppose homosexuality. Eskridge is remarkably charitable throughout the book, even when describing regulations that criminalize consensual same-sex intimacy, that terminate distinguished and honorable careers in the military and public sector, and that otherwise inflict countless psychological, physical, and economic harms on gay people. He betrays great respect for Georgetown's Jesuit traditions, despite their harsh application to its gay and lesbian students. In some other passages, he betrays less patience with antigay impulses and derides opponents of gay rights. For example, he comments, amidst his otherwise formal litany of the historical legal suppression of gay people, that homosexuals have been viewed as "dangerous 'pod people' out of the popular movie *The Invasion of the Body Snatchers*," p. 60, and that "antihomosexual terror in America .... rested upon ... wacky ideas," pp. 82-83. But these are gentle, droll gibes — gibes that hardly compare to the stern condemnation in the passages that deploy a psycho-topology of antigay animus.

antigay measures. Gay equality appeals in this next legal era should hammer home the impressive historical and contemporary evidence of the ineffectiveness of legal regulation of sexuality. *Romer* likely is the best doctrinal cover for these legal appeals, because the *Romer* framework is so spare, and thus may avoid theory snarls that might discourage judicial intervention. Most of the antigay regulations that Eskridge opposes could be toppled by a *Romer*-based, pragmatic assault; more important to this Review, however, is that *none would fall any faster, or more obviously, by another*. Advocates of gay equality should *avoid* the thicket of ornate political theorizing and the potential boomerangs of postliberal legal theories. Instead, they should rivet the judicial gaze on the practical, human consequences of each antigay policy — what it really is, what it really does, whom it really hurts, and what it really costs. The analysis should proceed policy by policy, factual frame by factual frame.

An illustration of this technique can be found in the most recent work of Janet Halley, which analyzes the military's "Don't Ask, Don't Tell" policy.[40] Halley opens by noting the pervasive assumption that the 1993 policy is more lenient toward gay men and lesbians in uniform than the policy it replaced. She follows immediately with her underscored, unequivocal, and simple thesis: "The new military policy is *much, much worse* than its predecessor."[41] The balance of the book is a penetrating, factually detailed, and thorough justification of this grim characterization of the 1993 amendments.

Halley does several things that are of particular note here. She holds one object of critique — the military policy — constant throughout. In doing so, she also exercises excruciating care to avoid *either* the absurd sundering of homosexual self-identification and same-sex erotic conduct that the status/conduct distinction entails, *or* the equally troublesome tendency to conflate them.[42] She zeroes in on the ironic tautology embedded in the military policy — one that surfaces in *so many* attempts to regulate (or to even describe) homosexuality: "[W]hen the military predicts that self-described homosexuals will commit homosexual sodomy unacceptably often, *it invokes a category of persons that has been developed precisely to make sense of its category of acts*."[43] Indeed, the ironic, rhetorical renvoi that Halley identifies may be *inescapable*. Not only the military policymaker, *but also the serviceperson who says, "I am gay,"* implicitly may invoke that *same* "category of persons that has been developed precisely to make

40. JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

41. *Id.* at 1.

42. *See id.* at 63.

43. *Id.* at 65 (emphasis added).

sense of its category of acts." This is because all statements of gay soldier identity must be understood against the backdrop of the military's (and other regulatory forces') problematic, labile, customarily negative, psycho-sociolegal assumptions about what "gay" *is*. Halley grasps the pervasive significance of this irony and takes particular care not to compound it.

Halley's attack on the military antigay policy — a policy that now stands virtually alone in the Western world — is distinctive in two other respects. It systematically unpacks the military policy to strip away its *veneer of sense*, and it does so with minimal doctrinal or other theoretical props. Only at the very end does Halley suggest a specific legal plank for her attack — the rational basis test of constitutional law. But she quickly exits this doctrinal discussion and lets the fact-based arguments do the persuasive work. She thereby elides the most constricting double binds of doctrine, while deploying conventional, quintessentially lawyerlike skill in exposing the infirm analytical struts of the military policy.

She also pays scrupulous attention to language — not only the military's, but also her own. She eschews open-ended statements like "gay is good" or, for that matter, "heterosexuality is good." Rather, she avoids reinstating any "gay" category in to the legal lexicon. This is prudent, because deploying the term does not materially advance arguments for restricting the government's role in regulating sexual variations, and it may well boomerang. For "gay experience" to drop away as a *punishable* behavior, "gay experience" should not be invoked as a touchstone for any transformed jurisprudence. To characterize *any* law as "*gay*law" is to risk — however unintentionally — perpetuating a flat, reductive, and unnuanced understanding of sexual variations, which make it easier for lawmakers to justify attempts to categorize and punish these variations.

Obviously, lawyers cannot escape doctrinal lines, categories, or reductive terminologies altogether. But there is a more or less to this when it comes to legal advocacy. In contemporary constitutional challenges of antigay regulations — the primary focus of Eskridge's text — advocates should aim for *less*. That means minimal theorizing, in favor of maximal factfinding, and extensive documentation of the concrete, adverse, and unpredictable consequences of antigay measures.

CONCLUSION

Gaylaw correctly identifies a central problem — law has constructed "gay," engulfed "gay," and fostered a confusing, often harmful, unexpected profusion of possible readings and misreadings of the people and behaviors it seeks to control. The way out of this snarl, however, is not to re-enmesh "gay" within "law." Rather, advocates

of gay equality should minimize theoretical adornments and avoid terminology that obscures the complexities and range of human sexual desires, identities, and conduct. Although the natural and understandable impulse is to counter historically negative legal, psychological, and social treatment of gay experiences with a subversively positive, updated meaning of "gaylaw," this urge should be resisted; for the best way to free "gay" from law's constructing and constricting grasp is *not* to fuse them anew, but to *pry these terms apart*.

Gaylaw offers excellent tools for effecting this separation. One need only mine its rich historical passages and deft doctrinal arguments, pare away its theoretical excesses, and disaggregate its title. The considerable residue is an elegant and well-documented pragmatic argument against most, if not all, of the remaining legal obstacles to gay equality. The argument may hasten the day when the unbecoming "gaylaw" chapter of American law is — at last — relegated to American history.