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*(Article begins on next page)*

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# Symposium

## Intersections:

## Sexuality, Cultural Tradition, and the Law

### Introduction

**Janet E. Halley\***

This Symposium inhabits two intersections: the intersection linking sexual orientation with other axes of social stratification, and the intersection linking the legal future to the legal past, legal reform to legal history. Francisco Valdes examines the relationship between sex and gender in Euro-American cultural and legal history to support a reform proposal on behalf of “sexual minorities”; Robert J. Morris excavates the cultural history of same-sex relationships in Hawai‘i to support a claim that Hawaiian cultural preservation, mandated by the Hawai‘i State Constitution, includes recognition of same-sex marriage; and Mary Coombs and Angela Harris provide critical comments on sociological, affiliative, intellectual, and historiographical intersections that structure Morris’ and Valdes’ claims. Valdes and Morris offer

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perhaps *the* most richly researched and polemically targeted cultural-historical accounts of sexual orientation in the law review literature. Particularly with the addition of Coombs' and Harris' critical responses, this Symposium frames the debate for queer legal history and historiography. It should be read under the immemorial motto: Those who don't study historiography are doomed to repeat it.

The most urgent substantive question posed by this Symposium is the relationship between discrete systems of social classification and stratification: What are the relationships between sex, gender, and sexual orientation (Valdes and Coombs); and between sexual orientation and national and native culture (Morris and Harris)? These are questions which, thanks to the work of Kimberlé Crenshaw and Angela Harris, we have been accustomed to think of as "intersectional" because they inquire into the simultaneous, interlocked operation of semi-autonomous social and discursive systems.

Claims about intersectionality can be euphoric or dysphoric. The lead articles in this Symposium propose euphoric models of intersectionality; the comments propose dysphoric ones. Valdes argues that a single system suppresses all women and all "sexual minorities," so the academic, political, and legal disruption of that system is a suitable goal for a harmonious coalition of gay men, lesbians, women, and "sexual minorities" generally. Morris argues that the incorporation of Hawai'i as a state of the United States infused U.S. legal culture with the homophilic traditions of native Hawaiian culture, and so the academic, political, and legal revival of native Hawaiian culture is a suitable project for a harmonious coalition of natives and nonnatives alike. The comments offer dysphoric corrections: Coombs notices that Valdes and Morris have made "gay" history from historical records by and about men (What about women? What about lesbians?), while Harris challenges Morris' translation of native history into American terms (What about the problems of cultural translation and appropriation?).

To abstract a bit: The euphoric claims in this Symposium emphasize the conjunctive operation of discrete identity systems and thus make differently subordinated people *alike* in some way; the happiness of their implicit social change narrative arises from an appeal to coalition identity politics. The dysphoric claims emphasize the disparate, unrelated, contradictory, or incommensurate operation of discrete identity systems and thus assert that differently subordinated people are different; the unhappiness of these claims arises from their resolute recognition of political separateness.

The allocation of optimism in this volume is one of its novelties. Intersectionality, which elsewhere has frowned, wears a surprisingly happy face here. In their inaugural statements of intersectional

analysis, Crenshaw, Harris, and others were pointedly dysphoric: Black feminists noted that they didn't have the luxury of worrying about gender only, or about race only, because they inhabited the place where gender and race oppression meet. The central dysphoric claim was that the intersection of race and gender stratification was a social and epistemic affliction. (There was also the dysphoria with which white feminists greeted the news that we had made this affliction worse when we called for a movement of women and thus rode through the intersection as though it were our own right of way. But our dismay and shame were collateral to the central, dismal fact of interlocking and reinforcing mechanisms of oppression and invisibility afflicting a distinctive population as such.) Valdes and Morris implicitly accept the call for intersectional analysis, and set out to study sexual orientation identity not in isolation but in the context of impinging identity systems. But they refuse the dysphoria of the opening phases of intersectional analysis: They replace unity and difference with diversity, and supplant both hegemonic claims to represent others and particularistic claims to represent specific communities with invitations to coalition politics.

Coombs and Harris don't dispute the importance of intersections or the strategic value of coalitions, but they do dispel the warm, fuzzy feeling of Valdes' and Morris' euphoria. "Not so fast," they say: "Euphoric intersectionality misses some methodological and even ethical problems." Women, and particularly lesbians, have been made invisible by male writers who subsume them into a generic human, or a generic gay, identity; reading native culture from a western perspective may occlude everything that is distinctive about it; mining native culture as a source for legal reform can be a gesture of neo-colonial appropriation.

Much of this critique will be roughly familiar to anyone who has studied the semi-secession of feminist legal theory from critical legal studies and of critical race theory from both. Further novelties emerge, however, from the fact that this collection replays familiar tensions in a new context: It is about *sexual orientation*. Let's admit it: Social stratification on the basis of sexual orientation or sexuality is not much like social stratification on the basis of race, ethnicity, class, and sex. The differences are both epistemic and metaphysical, and affect the very possibility of, and modes for, doing intersectional analysis involving sexual orientation.

Modes of knowing first: Folk knowledge supposes it knows what the races and sexes are and who belongs to which one; the ethnicities don't get on the social or legal map unless they reproduce this feature of the races; and we're all agreed that it is so much harder to live on \$15,000 a year than it is to live on \$150,000 a year that the difference

makes people different. Even the inaugural essays on intersectionality presupposed the real existence of black women, and their cognitive authority to declare themselves to be like each other and unlike others. The project of defining the sexual orientations and of assigning people to them, on the other hand, has become a threshold question in academic and political contexts. Eve Kosofsky Sedgwick's *Epistemology of the Closet*, David M. Halperin's *One Hundred Years of Homosexuality*, and the 1993 debates about military anti-gay policy all made the same point: The questions "what is homosexuality" and "who is homosexual" are profound questions, the answers to which have a history and an ever-evolving politics. If discussion of racial, sexual, and economic-class stratification can posit "real" answers to similar questions and nevertheless produce entire volumes of serious, canonical analysis, nothing of the kind is possible in arguments about sexual orientation. The definitional ground of study constantly reasserts itself as a source of uncertainty.

The metaphysics of sexual orientation groups and their subordination are also anomalous, so that many of the assumptions about the caste-like structure that ensures the continued subordination of racial and ethnic groups, of "the poor," and of women don't work when the subject shifts to sexual orientation. We're not discrete or insular; indeed, the worst thing about us may be that we are everywhere. We pass; and the moment we refuse to pass, we recruit. Our parents aren't like us and are, in many cases, our first and primary oppressors. If you can think about us without thinking about what we do in bed, you're a better man than I. And what we do in bed—or rather, the phantasmatic projection of what we do in bed—is deeply troubling to many people: I know one lesbian whose father actually *threw up* (and then disinherited her) when she came out to him. Finally, the differences among us are manifold: We appear (or hide) in every subordinated and superordinated group as more or less unwelcome infiltrators, in the process taking on strong cultural affinities with these disparate social locations; some of us have a lot of money and institutional power while others are socially marginalized and economically disabled; and those of us who are women have *chosen* to disassociate from men to some degree, while those of us who are men have made the same decision about women (on both sides, often, with great *ressentiment*). Just try to make equivalent statements about groups subordinated by race, ethnicity, sex, or poverty.

The strategic pressure to obscure these anomalies is tremendous, and explains the happiness of intersectional claims linking sexual orientation to supposedly more canonical identity systems. It explains why the first wave of pro-gay normative arguments claimed that

sexual-orientation subordination *is like* race subordination, and why early pro-gay legal arguments claimed that anti-gay discrimination *is like* race discrimination. More recently, race-based claims have subsided and sex-based claims have moved to the fore: Sexual-orientation subordination is said to *be* sex (or gender) subordination, and anti-gay discrimination is said to *be* sex (or gender) discrimination. Intersectionality is euphoric for pro-gay argument not only because it articulates plausible audiences for coalition exhortation, but more fundamentally because it borrows *systematicity* from forms of subordination that are widely understood to be widely understood, and from forms of discrimination that get heightened scrutiny.

Claims of systematicity made in the two lead essays of this Symposium amply exceed the diffidence one expects in cases of mere strategic manoeuvring, however; their metaphysical range and epistemological bravado are so grand that I am tempted to call them pre-post-structuralist. Valdes sets out not a conceptual model but a history of the actual conflation of sex, gender, and sexual orientation in systematic human interactions that we inherit directly from Athens via Rome-the-capitol-of-the-Roman-Empire and then Rome-the-Holy-See. His claim is that a single “Euro-American sex/gender system” has been transmitted, synchronically from metropole to periphery and diachronically from metropole to metropole, in an unbroken chain of cultural causation initiated at the invention of agriculture and ultimately producing contemporary childrearing practices and federal judges’ blithe refusal to take seriously the Title VII claims of effeminate men. Morris attributes similar structural coherence and persistence to pre-contact Hawai’i and Hawaiianess: He claims to uncover in *aikāne* bonds (traditional same-sex relationships to which he attributes an erotic component and which he dubs “homogamy”) a “central cultural pattern”<sup>1</sup> of “Hawai’i [when it] was pure Hawai’i,”<sup>2</sup> observes that “the hallmark of Hawaiian culture is the way it continues and regenerates itself,”<sup>3</sup> and declares that this systematic persistence of Hawaiian essences includes *aikāne* relationships which “continue to this day” with all their original “validity” and “Hawaiian-ness.”<sup>4</sup>

What explains the bold sweep of these claims? I think Morris and Valdes have picked up a historiographical gauntlet thrown down by

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1. Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105, 140 (1996).

2. *Id.* at 111.

3. *Id.* at 140.

4. *Id.* at 141.

the Supreme Court in *Bowers v. Hardwick*. *Hardwick* invoked the history of sodomy regulation as a source of and justification for anti-gay normativity.<sup>5</sup> Morris seeks to disable the Court's logic by bringing to light an originary moment in which one of the United States—Hawai'i—cherished same-sex relationships. Like the Supreme Court Justices, he assumes that past practices provide the normative ground for the present; he disagrees only about what the relevant past was. Valdes, who has made an argument like Morris' elsewhere,<sup>6</sup> concentrates here on a complementary approach: Sure, he concedes, pretty early on Western Civilization monolithically condemned same-sex sex, but its decision to do so was historically contingent and in any event history is the nightmare from which liberalism bids us to awake. However different their legal and historical claims are from one another and from the picture of the past set out in *Hardwick*, Morris and Valdes concede two points that propel them towards grand systematics: Cultures and epochs, as such, have normative views; and contemporary legal norms can be recognized as such to the extent that they repeat or deny past ones.

In response to these claims both Coombs and Harris raise the hideous specter of "law-office history." The emergence of this term at this juncture should be no surprise: It was invented precisely to deal with the problem posed for legal-historical standards when the Supreme Court indicated that parties might win or lose constitutional cases depending on whether they could prove up an "original intent" or legal "tradition" favoring their claim. It would be a mistake, however, to suppose that Coombs and Harris ask only for a rehearsal of the by-now familiar criticism that lawyers' history (including the history made by lawyers who happen to be Supreme Court Justices) depends on "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data offered";<sup>7</sup> that it is generated by "legal advocates" who "selectively adduce historical evidence to support their clients' positions" while foregoing the discipline of professional historians, who strive "to control the extent to which their historical understandings are shaped by present day

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5. The majority Justices said that Georgia's sodomy statute had "ancient roots," which Chief Justice Burger traced all the way back to the beginnings of "Western Civilization"; and the majority went on to hold that the Bill of Rights and the Fourteenth Amendment could hardly protect conduct which the states ratifying them had criminalized. *Bowers v. Hardwick*, 478 U.S. 186, 192-96 (1986); *id.* at 196 (Burger, C.J., concurring).

6. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Culture*, 83 CAL. L. REV. 1 (1995).

7. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13.



experiences and concerns”;<sup>8</sup> and that it therefore “reduces complexity and contradiction to simplicity and provides a story in which all evidence points to a single conclusion.”<sup>9</sup>

If only that were all. The distinctive tension of this Symposium arises because it drives back and forth across a double intersection—across that spot on the conceptual map where the intersections among the Big Identities criss-cross the intersection between the legal future and the legal past, between legal legitimacy and legal-historical knowledge, between advocacy and historiography. Thus Coombs diffidently concludes that the lead essays “appear to be good history”—a provisional decision she is content to leave at that—“[but] limited history, for each focuses overwhelmingly on the history of lovemaking between men.”<sup>10</sup> *Where are the lesbians?* she asks. However good or bad the history, Coombs insists, its success depends on its utility to lesbians and gay men as we decide how persistently we can work together in a single movement. Coombs asks what the history of homosexuality is history *of*, and proposes to test answers to that question against strictly defined contemporary legal “interests.”<sup>11</sup>

If Coombs objects to Valdes’ history for turning the gay male/lesbian flying cloverleaf into a simple four-way stop, Harris objects to Morris’ history for failing to see that colonial historiography is a jackknifed tractor-trailer blocking all four lanes in every direction. Harris concludes that Morris’ essay represents the “worst sort of ‘law-office history’” not merely because Morris “elid[es] uncertainty, ambiguity, difficulties of translation” (standard objections in the original-intent/constitutional-tradition debates), but because he does so across a *colonial* boundary: “[A] historian dealing with questions of cultural difference in a colonial context must strive to acknowledge and to undermine the very culture-boundedness that makes the lawyer’s argument so persuasive and certain.”<sup>12</sup> Though Harris states her belief that “the translation Morris argues for *is* possible,”<sup>13</sup> it must certainly be exceedingly difficult.

Both Coombs and Harris complicate the problem of interested legal history in two ways: They recognize that the relevant interests may be multiple, intersecting, *in conflict*; and they point to epistemological

8. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1613 n.160 (1990).

9. Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 173 (1994).

10. Mary Coombs, *Between Women/Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sex Sexual Activities*, 8 YALE J.L. & HUMAN. 241, 242 (1996).

11. *Id.*

12. Angela P. Harris, *Seductions of Modern Culture*, 8 YALE J.L. & HUMAN. 213, 229 (1996).

13. *Id.* (emphasis in the original).

undertows (lack of documentary history, orientalism) that may swamp claims of historical knowledge in skepticism. And yet for every “may not” and “cannot” in Learned Hand’s dismal prognostication for interested legal history, Coombs and Harris say “must”:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar’s gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voices of doubt.<sup>14</sup>

The question for a journal of *law* and the *humanities* is whether and how interdisciplinary work can manage to toggle between Hand’s “cannot” and the Symposiasts’ “must.”

The most problematic historical and political gestures in the following pages suggest that performing that toggle well requires a firm grasp on a thesis borrowed not from historical study but from literary criticism: that even the most pedestrian truth-claim links a speaker and an audience in a relationship that is at least potentially, and possibly always actually, political. (In *How To Do Things With Words* J.L. Austin destroyed his own distinction between constative and performative utterances—between descriptive statements and “speech acts”—by relentlessly testing brilliantly classified utterances against this thesis.) Dealing carefully with the possibilities raised by this thesis can bring an interested legal-historical scholar into better alignment with historical standards of proof *and* enable her to manage the political complexities of interested representation, particularly at the crossroads travelled by semi-autonomous identities.

Consider, for instance, Valdes’ claim that Plato contributed an idea to “the Greek sex/gender system” that was crucial to the triple conflation he attributes to Euro-American thought and social life, to wit, the conflation of sexual orientation with sex. His text is the *Symposium*, in particular the myth in which Zeus sliced the original humans, with their two sets of genitals, in half, committing the unhappy remnants to seek reunion by intercourse with the genitals they had lost.<sup>15</sup> Valdes’ implicit claim is that Plato’s intellectual authority made this myth and its meaning (sexual orientation tracks bodily sex) a central part of Western sexual systematics. But as John Milton advised, “The author is ever distinguisht from the person he

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14. LEARNED HAND, *On Receiving an Honorary Degree*, in *THE SPIRIT OF LIBERTY* 134, 138 (Irving Dilliard ed., 3d ed. 1974).

15. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to its Origins*, 8 *YALE J.L. & HUMAN.* 161, 197 (1996).

introduces.”<sup>16</sup> The myth isn’t Plato’s really; it’s Aristophanes’; or rather, Plato in the *Symposium* attributes it to a fictional representation of the historical figure Aristophanes as he is reported to have spoken at the supposed banquet.<sup>17</sup> Of course if any of the speakers at the banquet are to be read for Plato’s “meaning” it would be Socrates, but we have Socrates’ speech about love at a quadruple remove: Socrates gained his understanding of love (which he characteristically refused to insist was a “truth”) in a dialogue with Diotima, which he reported to the banqueters second hand; and we have even that only because Aristodemus, who attended the banquet, reported what was said and done there to Apollodorus, and because Apollodorus, years later and unsure of his memory but having checked everything with Socrates, recited what he remembered to Glaucon, and because Apollodorus eventually reported his report to Glaucon to whomever is supposed to have committed the *Symposium* to paper.<sup>18</sup> At least, that is what the text of the *Symposium* would have us believe about its provenance.

The *Symposium* is not (as Valdes suggests) a “tract,” but a dialogue, one that worries the relationship between meaning, speech, and writing until it is an open sore. If the myth “means” anything, it does so only as an utterance made in a politically complex and dynamic scene. And there remains the question of its concrete social effects: Are they more simple than its meaning? Valdes thinks so: “Plato specified a *direct* connection between sex and sexuality. This idea pervades subsequent Euro-American discourse. The path to full conflation was thus set.”<sup>19</sup> But surely a text as scandalous, obscure, and canonical as the *Symposium* has obtained concrete effects in Western intellectual life and social organization only at specific historical moments; surely to identify and understand those moments one needs to worry about the social and political structure of its audience, and the power of its audience to mold new social and intellectual traditions; and surely the difficult structure of the text must have made at least occasional contributions to that reception. Surely the *Symposium*’s representation of how meaning is socially transmitted understates the complexity of its own transmission.

Harris objects that Morris reads the textual record of pre-contact Hawaiian culture with little more attention to its origin in Western, literate transcription of native, oral tradition than Valdes gives to the

16. JOHN MILTON, *An Apology Against a Pamphlet Call'd a Modest Confutation of the Animadversions upon the Remonstracion Against Smectymnuus*, in *Complete Prose Works of John Milton* 862, 888 (Don M. Wolfe ed., 1953) (1642).

17. PLATO, THE SYMPOSIUM 59-65 (Walter Hamilton trans., Penguin Books 1951).

18. *Id.* at 33-35, 79-95.

19. Valdes, *supra* note 15, at 197 (citation omitted).

literary structure of the *Symposium*.<sup>20</sup> But Morris locates himself not only outside native Hawaiian culture in order to usher it into “United States law,”<sup>21</sup> but also *inside* it: He calls upon us to accept his claims about pre-contact *aikāne* relationships out of deference to his identification with the racially and nationally subordinated culture which he describes. The issue becomes not just the speech act in the text under examination, but the speech act involved in scholarly description of it: Morris’ authorial persona is under construction here. He concludes that a mythic pre-contact *aikāne* relationship was “a family and a marriage” on the strength of an obscure passage which he describes as “the plainest possible language”;<sup>22</sup> he concludes that the same relationship involved same-sex erotic contact on the basis of a song which Morris declines to quote, advising us instead that “Everyone should read at least the complete translation, better still the original Hawaiian”;<sup>23</sup> and he substantiates the “persistence of *aikāne* values in modern times” by reference to performances and scholarship that he does not cite, referring us instead to the persuasive impact they had on him and not doubt would have on us if we were there.<sup>24</sup> Morris’ legal argument is that *aikāne* relationships have necessary implications for the analysis of sodomy laws and the bar on same-sex marriage because they were marital, they were sexual, and they persist;<sup>25</sup> this fact throws the moments in which Morris emerges as a knower and teller whom we should trust into considerable prominence. The systematicity of native culture in Morris’ representation of it permeates his presentation of *himself* as its spokesperson: He has its “Hawaiianness” and thus its coherence, “validity,” and authority. The problem for multiply intersectional work raised by this knowledge claim is not whether Morris is entitled to insider status, but whether insider status is itself a sufficient evidence for historical conclusions.

Simplification of the object of study and of the subject doing the studying doesn’t strengthen the legal leverage and political appeal of the resulting scholarship—if anything it weakens them. Systematicity in Valdes’ article produces a coalition exhortation to heterosexual women and “sexual minorities,” particularly lesbians, gay men, bisexuals, transsexuals, and bi/transgendered or socially gender-

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20. Harris, *supra* note 12, at 220-26.

21. Morris, *supra* note 1, at 139.

22. *Id.* at 145.

23. *Id.* at 145 n.185.

24. *Id.* at 141.

25. The third point must be established if *aikāne* relationships are to fall within the reach of a clause of the Hawai’ii constitution protecting some native cultural customs from state regulation. See *id.* at 117.

atypical people.<sup>26</sup> In a call for coalition that is also a call for papers, Valdes predicts that future “excavations inevitably will further unpack the common interest in the dismantling of hetero-patriarchal structures that is shared by women and by sexual minorities.”<sup>27</sup> The coalition invoked here will remain an “us” only if these excavations reconfirm Valdes’s findings, and its not at all clear that they will. At least one of the sexual minorities Valdes includes in his coalition—transsexuals, particularly male-to-female transsexuals—have entered onto the political scene insisting that gender *is* conflated with bodily sex.<sup>28</sup> Not only have they disagreed with feminists and lesbian feminists about the social construction of gender; they have actually insisted that they *like* that crucial premise of Valdes’ hetero-patriarchy. The thesis that truth-claims link speakers with audiences in complex ways would be most useful to anyone seeking to understand and negotiate this resulting conflict within Valdes’ coalition.

Morris encounters a parallel problem, grounded less in his description of Hawaiian culture as systematic than in his derivation of authority from it. In an ominous passage, he rebukes (Western?) (lesbian?) (feminists?) who object to the decision to make marriage a top priority of the pro-gay legal agenda by invoking his identification with Hawaiian systematicity and their shared validity: The concept of love registered in the native term *aloha* “is central to the same-sex relationship; the denial of same-sex marriage chills this love. Those who argue that ‘same-sex love doesn’t need a marriage license’ are wrong in a profoundly Hawaiian sense.”<sup>29</sup> As a truth-claim this is far from self-evident; as a speech act managing a relationship between a truth-claim, a speaker, and an audience, it is quite abrupt, a gesture of subaltern authoritarianism.

Doubly intersectional work—that is, work examining the inter-relationships among semi-autonomous systems of social stratification and seeking links between their cultural history and their legal future—is in its infancy. I can think of no academic project more compelling or more difficult. The articles and comments here make a strong claim that sexual orientation, with all its epistemological and metaphysical oddities, belongs on the agenda of intersectional scholars. And they make it clear that the issue facing law-and-humanities work within that project is not just what the intersections

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26. Valdes, *supra* note 15, at 163 nn.7-8.

27. *Id.* at 212.

28. See MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 93-117 (1992).

29. Morris, *supra* note 1, at 120 (emphasis added).

are, but how they can be apprehended and described—and how our answers to those questions establish new cultural forms for our current legal and political interactions.