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DENATURALIZING AND DESEXUALIZING LESBIAN AND GAY IDENTITY

*Cheshire Calhoun**

INTRODUCTION

IF the choice between essentialism and constructivism simply is the choice between “thick” and “thin” identity descriptions,¹ then I think Professor Ortiz is right; we need not choose. It makes sense, as he points out, for us sometimes to be constructivists and sometimes to be essentialists.² Thus, in my comments I do not want to question his claim that the *methods* of essentialists and constructivists are both ones that we might want to embrace. Instead, I want to call into question the *content* to date of the essentialist and constructivist accounts of gay identity. Both camps appear to agree that gay and lesbian identity is a sexual identity. Essentialists understand gay and lesbian identity thinly as a matter of same-sex desire.³ Constructivists understand that identity more thickly as a deviant way of sexually being in the world that has its historical origin within the medical discourse of the late nineteenth century.⁴ In what follows, I want to stall what, given Professor Ortiz’s paper, would seem a natural move. That is the move from accepting both essentialist and constructivist approaches to defining identity to accepting the sexual descriptions of gay and lesbian identity that have so far dominated essentialist and constructivist literature,⁵ legal opinions like *Bowers v. Hardwick*,⁶ and popular thinking.

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¹ “Thick” and “thin” refer to the degree of culturally and historically specific content in the identity description. The thinner the identity description, the more culturally and historically neutral it is and thus the more likely that individuals across cultures and time periods will share the same identity.

² Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 Va. L. Rev. 1833, 1845-47 (1993).

³ Id. at 1836.

⁴ For the classic statement of the constructivist view, see 1 Michel Foucault, *The History of Sexuality* (Robert Hurley trans., Pantheon Books 1978) (1976).

⁵ See, e.g., *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Edward Stein ed., 1990).

⁶ 478 U.S. 186 (1986).

I will ultimately suggest that if there is an essential gay identity, it is not best described in terms of same-sex desire. Instead, it is best described as an identity that breaks heterosexual law. I will also suggest that, given the cultural complexity of heterosexual law, there is more than one way of breaking it. Same-sex desire is one culturally possible violation. Emotionally intense—possibly Platonic—lifetime bonding between men or between women is another. Thus, gay history need not and, I will argue, should not be told solely as a story of same-sex desire. Indeed, the telling of gay history loses an important political dimension if it is limited to the story of same-sex desire.

I intend to approach this thesis—that what is essential to gay and lesbian identity is violation of heterosexual law, not same-sex-desire—through the back door. I begin by examining the assumptions behind the idea that an essential gay and lesbian identity must be defined in terms of same-sex desire. Those assumptions are: (1) an essential identity—one that is cross-culturally and cross-temporally invariant—must be defined in terms of natural facts about persons, i.e., characteristics persons could have even outside of any culture; and (2) same-sex desire is a natural fact. Taken together, these two assumptions naturally lead to the view that what is essential to gay identity is the having of same-sex desires. Professor Ortiz appears to accept both assumptions and therefore appears to accept the necessity of defining the essential gay and lesbian identity in terms of same-sex desire. In keeping with the first assumption, he cites biological sex, biological eunuchism, and biological motherhood as prime examples of essential identities.⁷ “[O]ne can meaningfully talk of biological females across time and cultures,”⁸ he notes, because the facts that determine one’s identity as female are natural, culture-independent ones. In keeping with the second assumption, Professor Ortiz likens same-sex desire to biological sex, observing that “[t]he essentialist description, the thin one, describes sexual identity much the way sex describes men and women.”⁹ Given that sex, in his view, “offers a biological description of people,”¹⁰ same-sex desire presumably also, in his view, offers a biological description of people.

⁷ Ortiz, *supra* note 2, at 1838-40.

⁸ *Id.* at 1844.

⁹ *Id.* at 1845.

¹⁰ *Id.* at 1844.

In what follows, I will give reasons for thinking that both assumptions are false: essential identities need not be defined in terms of natural facts, and same-sex desire itself is not a natural fact. In challenging the first assumption, I aim to show that there *is* something to the constructivist-essentialist debate. Professor Ortiz is correct in pointing out that this debate often gets wrongly conflated with debates over the etiology of identity.¹¹ But constructivists also have a legitimate complaint against one prominent form of essentialism. That legitimate complaint is what I want to get out in the open. In challenging the second assumption, I hope to make it possible to ask “What *is* the essential gay identity?” without it being a foregone conclusion that the answer will be “the having of same-sex desires.” If one comes to see that same-sex desire is a social fact, not a natural one, then one might also come to see that same-sex desire is one among a number of social facts in terms of which one might try to define gay and lesbian identity.

I. TWO ESSENTIALISMS

In order to see where constructivists might have a legitimate disagreement with essentialists, it is important to distinguish between two different types of essentialism, which I will call “naturalistic essentialism” and “universalistic essentialism.” Both claim that identity should be defined thinly. Thus, constructivists who advocate thick descriptions may object to both forms of essentialism. I agree with Professor Ortiz that the constructivist objection to thin descriptions per se is misguided. Naturalistic essentialism, however, makes an additional claim that essential identities are rooted in natural facts about persons. This, in the naturalistic essentialist view, explains the transcultural and transtemporal prevalence of those identities. What some constructivists object to most is this “biologizing” of identity, not the thinness of the identity descriptions. It is this second constructivist complaint, which criticizes the biologizing of identity, that I take to be the legitimate one.

A. *Naturalistic Essentialism*

Although Professor Ortiz does not distinguish naturalistic essentialism from universalistic essentialism, he in fact has illuminating

¹¹ Id. at 1837-38.

things to say about both. His opening definition of essentialism captures the distinctive features of naturalistic essentialism. Essentialism, he says, "represents the belief that gayness is an *intrinsic* property, one that does not vary across history and culture. An essentialist would hold, for example, that a gay person *transported* from one time and place to any other would still be gay."¹² To say that gayness is an intrinsic property is to say that gayness is not a property that one acquires by virtue of living in a particular culture. It is not like being a Republican. Being a Republican is a social fact and thus not portable. "P is a Republican" is true, or at least meaningful, only within a culture that does politics a certain way. P, if transported to, say, nineteenth-century Samoa, could not be a Republican. There would be no Republican kinds of things to do in nineteenth-century Samoa, and it is precisely in the doing of Republican kinds of things that one becomes a Republican.

Gayness, according to the naturalistic essentialist view, is not at bottom a social fact. Instead, it is a natural fact, just like having five fingers or having the measles is a natural fact. Such facts are true of individuals regardless of the culture in which they live because the having of five fingers or the measles does not depend, as being a Republican does, on the availability of a particular sort of cultural opportunity. To say that gayness is an intrinsic property is thus to say that experiencing and acting on same-sex desires does not depend on the availability of any particular sort of cultural opportunity. Indeed, it does not depend on cultural opportunities at all. It is thus possible to be gay not only in any culture but also *outside* of any culture in the same sort of way that it is possible to have the measles in any culture as well as outside of any culture. It is this independence from culture that makes gay identity so portable.¹³ Gayness is thus viewed as a natural fact, intrinsic and independent of the surrounding culture, not a social fact that is culture-dependent.

B. Universalistic Essentialism

Universalistic essentialism does not similarly assume that the trans-cultural and transhistorical prevalence of some identities is due to

¹² Id. at 1836 (footnote omitted) (emphasis added).

¹³ In thinking about the difference between natural facts and social facts, I have found helpful Ian Hacking's *Making up People*, in *Forms of Desire*, *supra* note 5, at 69.

individuals sharing some intrinsic property. Rather than regarding gayness as an intrinsic property, universalistic essentialists would claim simply that gay identity is properly described thinly and is a transhistorically and transculturally stable identity category. In doing so, they remain neutral with respect to the *source* of the identity's stability. That stability might be due to the presocial, intrinsic nature of the identity. Alternatively, it might be due to the transhistorical and transcultural stability of certain social facts. Professor Ortiz's discussion of the criminal identity helpfully illuminates this second possibility and makes it clear that essentialists need not biologize identity.¹⁴ Being a criminal is not an intrinsic property like having the measles. In an important respect, being a criminal is like being a Republican: it depends on the availability of a particular sort of cultural opportunity, namely, the opportunity for breaking a law. In the absence of the cultural opportunity to break laws, "P is a criminal" cannot be a true or meaningful description of a person. Even though the criminal identity is a social construction, it nonetheless can be and is a transhistorically and transculturally stable identity. The stability of the criminal identity derives entirely from the fact that most, perhaps all, cultures have some sort of legal system. Thus, no matter what time period or culture one finds oneself in, one will have the cultural opportunity to become a lawbreaker. Notice, however, that criminal status is *not* portable: who counts as a criminal depends upon each culture's legal system. If I have become a criminal in the twentieth-century United States through tax evasion, I will not, if transported to nineteenth-century Samoa, still be a criminal. Although I cannot carry my criminal status with me, I can reestablish it by breaking one of nineteenth-century Samoa's laws. Thus, the fact that an identity category is transculturally stable does not entail that individuals occupying that identity category in one culture will actually occupy it in all possible cultures. It does, however, mean that they will have the transcultural *opportunity* of occupying it.

C. Critique of Naturalistic Essentialism

It is important to keep these two different definitions of essentialism separate. Naturalistic essentialism claims that some identities are invariant because they are based on presocial, natural, and portable

¹⁴ See Ortiz, *supra* note 2, at 1841-42.

facts about persons. Universalistic essentialism leaves open the possibility that invariant identities exist because some cultural opportunities are invariantly available across history and cultures. Thus, essentialists might be saying one of two things about gay identity. They might be saying that same-sex desire is a presocial, natural fact about persons. Alternatively, they might be saying that the cultural opportunity to qualify as someone having same-sex desires is invariantly available to individuals, just as the opportunity to qualify as a criminal is invariantly available.

Given this distinction between naturalistic and universalistic essentialists, it is possible to locate two different essentialism/constructivism debates. Constructivists who complain about the thinness of essentialist identity descriptions object to both universalistic and naturalistic essentialism. They do not care *why* essentialists think that certain identities are invariant. They simply care *that* essentialists believe in invariance. The identity descriptions that enable us to see gay identity as invariant are, these constructivists argue, too thin, too ahistorical, too insensitive to cultural differences to give us a clear sense of what it really means to be a criminal, or a lesbian, or a woman at a particular cultural place and time. Such thin descriptions cannot, as Professor Ortiz suggests, explain why Americans in the 1990s care about keeping gay men and lesbians out of the military.¹⁵

But sometimes the essentialism/constructivism debate has a different focus. The constructivist critique is aimed not at the thinness of essentialist accounts of identity but at the tendency to biologize identity, treating identity descriptions as natural facts about persons (like having the measles) rather than as social facts. Constructivists who argue that all identities are cultural products therefore object only to naturalistic essentialism; such constructivists need not also object to thin identity descriptions.

For instance, when feminists like Monique Wittig and Gayle Rubin describe women as the sexual property of men, they are offering thin descriptions of the gender identity "woman."¹⁶ They deny, however, that the transhistorical and transcultural stability of the identity "woman" is due to some intrinsic property of women. Their point

¹⁵ Id. at 1846.

¹⁶ Monique Wittig, *The Straight Mind and Other Essays* (1992); Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *Toward an Anthropology of Women* 157 (Rayna R. Reiter ed., 1975).

instead is that cultures uniformly "traffic in women." It is the universality of the cultural practice of trafficking in women that makes it possible to construct a universal definition of the identity "woman." This kind of constructivism, though accepting thin definitions for some purposes, such as telling the history of women under patriarchy, might also emphasize the importance of thick descriptions in capturing the cultural variability in how the traffic in women is carried out.

Although possibly agreeing with Professor Ortiz on the utility of employing both thin and thick identity descriptions, this second sort of constructivist would firmly resist the tendency to biologize essential identities. She would not, for example, regard sexual identity as any less culturally constructed than gender identity. Although having a vagina or a penis is a natural, intrinsic, and portable fact about persons, sexual *identity* is not. Whether a particular individual qualifies as male, female, or possibly neither, depends on how a particular society has constructed sexual identity out of natural facts. Arnold Davidson, for example, points out that in the Middle Ages, hermaphrodites were not regarded as having a sex.¹⁷ Because biological facts were taken as nondeterminative, hermaphrodites were first assigned a sex at birth and then allowed to choose their sexual identity at the time of marriage.¹⁸ By contrast, "in the eighteenth and into the nineteenth centuries, all apparent hermaphrodites came to be treated as pseudo-hermaphrodites," their true sex being determined by their sexual anatomy.¹⁹ In the latter half of the nineteenth century, sexual identity become detached from anatomy in such a way that "[s]exual identity [was] no longer exclusively linked to the anatomical structure of the internal and external genital organs. It [was] now a matter of impulses, tastes, aptitudes, satisfactions, and psychic traits."²⁰ And sexual identity continues to be detached partially from biological facts, as is evident in transsexuals' assertion that they have the wrong body for their sexual identity.

These three examples give us three different accounts of the relation between biology and sexual identity: (1) biological facts sometimes indicate that one is neither male nor female; (2) biological facts

¹⁷ Arnold Davidson, *Sex and the Emergence of Sexuality*, in *Forms of Desire*, supra note 5, at 89, 92.

¹⁸ *Id.* at 92.

¹⁹ *Id.* at 93.

²⁰ *Id.* at 96.

always indicate whether one is male or female; and (3) biological facts are sometimes irrelevant to determining one's maleness or femaleness. Thus, although there are natural biological facts about persons, sex is not among those facts. Whether "P is female" is true of a particular individual depends on the availability of a particular cultural reading of biological and psychological facts. Whatever transcultural uniformity there is in the definitions of male and female identity is not due to the intrinsic nature of sexual differences but to the fact that cultures care about the reproductive activities of individuals and thus have *cultural* reasons to demarcate sex difference by reference to reproductive anatomy.

II. DENATURALIZING SAME-SEX SEX

For similar reasons, constructivists who object to the biologizing of identity would also deny that same-sex desire can be found among the natural facts. Just as having a vagina does not entail that one automatically qualifies for the social identity "female," so too genitally interacting with an anatomically similar person does not entail that one qualifies for the social identity "person with same-sex desires."²¹ Whether a person qualifies as being sexually oriented toward sameness rather than difference depends on what the culture takes the most important similarities and differences between sexual partners to be. Cultures need not attach supreme importance to anatomical similarity and difference. Instead, a culture could be more interested in knowing whether individuals are attracted to those who are similar in gender, age, or sexual role. In some cultures, for example, males having sex with other males still qualify as heterosexual so long as they occupy the dominant position and do not permit penetration of themselves. As Morris Kaplan observes of male-male relationships in ancient Greece, "[s]o long as adult [male] citizens played the dominant role in sexual interaction (as phallic penetrators), whether they chose to penetrate women or boys was a matter of ethical indifference

²¹ In her symposium paper, Janet Halley criticizes the practice of outing all individuals who sometimes engage in genital sex with anatomically similar people, because such outing practices uncritically assume that the acts of heterosexuals cannot overlap with the acts of gays and lesbians. Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1737-38 (1993).

to the Athenians.”²² That he allowed himself to be penetrated was *not* similarly a matter of indifference. In other words, the critical difference to be preserved was the adult male citizen’s difference from those who were not adult, not male, or not citizens.

In other cultures, males are significantly oriented toward difference as long as one is a man and one is a boy. William Eskridge provides illuminating discussions of such transgenerational relationships between men and boys in ancient Greece, Nuer Africa, Japan, and Melanesia.²³ It would appear that generational difference enables the two parties to adopt different gender positions in relation to each other and thus the appearance of heterosexuality. In addition, many of these transgenerational same-sex relationships support the larger heterosexual system by preparing youth for heterosexual adulthood. In Melanesia, for example, man-boy sexual relations “not only facilitate[] the boy’s passage into manhood, but also prepare[] him for his marriage to a woman.”²⁴ So too, the mummy-baby relationships between Basotho girls in Lesotho “prepare . . . girls for marriage, including its rockier moments.”²⁵ In still other cultures, persons with similar anatomies could have sex that was not clearly demarcated from heterosexual sex if they adopted different gender roles. The varieties of transgenderal (or *berdache*) relationships between same-sex individuals in North America, Asia, and Africa are cases in point.²⁶ In all of these cases, one individual crosses gender lines, either into the male or into a third gender, while the other individual retains a sex-“appropriate” gender. Gender difference is thus preserved within a same-sex relationship. And in our own culture, many men claim that they are heterosexual because they only occasionally have sex with other men or because the males they are having sex with are “real women,” i.e., drag queens.

What these observations indicate is that sexual orientation toward sameness or difference is not always culturally drawn by looking at the sameness or difference of anatomy. What one does while having

²² Morris B. Kaplan, *Constructing Lesbian and Gay Rights and Liberation*, 79 Va. L. Rev. 1877, 1882-83 (1993).

²³ William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1444-45, 1458-59, 1467-68 (1993).

²⁴ *Id.* at 1468.

²⁵ *Id.* at 1459.

²⁶ *Id.* at 1453-57, 1460-64.

sex, how often one has sex with anatomically similar people, what the relative ages of the two people are, and what the gender roles of the two people are may be much more important. Thus, just as maleness and femaleness cannot be read off biological facts in the absence of a cultural reading of those facts, so too sexual orientation cannot be read off any natural or social facts in the absence of a cultural reading of them. The problem with naturalistic essentialism's account of gay identity is that it mistakenly assumes same-sex desire is a natural, presocial fact about persons.

The point is that even if one grants to essentialists the legitimacy of employing thin identity descriptions of "gay" and "lesbian," this does not entail the legitimacy of regarding gay and lesbian identity as a presocial, natural fact about persons. Even if gay and lesbian identity is essentially a matter of same-sex desire (and I will argue shortly that it is not), culture, not nature, defines who counts as having same-sex desires. Therefore, essentialists need to keep in mind the analogy between being gay and being a criminal. Just as the essentialist cannot know in advance who will count in a particular society as a criminal, because this depends on what the laws prohibit, so too the essentialist cannot know in advance who will count as having same-sex desires, because this depends on how the culture marks off same-sex desire from heterosexual desire.²⁷

III. HETEROSEXUAL LAW AND GAY AND LESBIAN IDENTITY

Once one denaturalizes gay and lesbian identity, desexualizing those identities gains some plausibility. Naturalistic essentialism could not consider this possibility because it assumed that "gay" and "lesbian" are natural, portable identities that are not intimately connected with culturally variable understandings of gender, marriage, family, age, status roles, and the like. But if gay and lesbian identity is not a natural fact because same-sex desire is not itself a natural fact, then there seems to be no *a priori* reason to limit the essential gay and lesbian identity to same-sex desire. Could not those identities also

²⁷ One might, then, question whether the same-sex couples that figure in William Eskridge's history of same-sex marriage would in fact qualify within their own cultures as persons having same-sex desires rather than as persons exhibiting one possible and culturally legitimated form of heterosexual desire. Eskridge, *supra* note 23.

consist of an outlawed relation to a gender identity or an outlawed form of primary, emotionally intense commitment to others?

At this point, I suggest an alternative essentialist, denaturalized, and not exclusively sexual reading of gay and lesbian identity. To be gay or lesbian is essentially to be the kind of person who violates heterosexual law.²⁸ Like the identity "criminal," this identity is transhistorically and transculturally stable. Just as societies invariably set up legal systems, making "criminal" a possible social identity, so societies invariably set up a heterosexual law, making "gay" and "lesbian" possible social identities. One might explain the cross-cultural and cross-temporal prevalence of heterosexual law as a result of recurring cultural interest in ensuring reproduction, tracing biological kinship,²⁹ and securing a sexual division of labor.³⁰ To these ends, cultures need *some*, though not necessarily rigid, prescriptions that desire be heterosexual, that there be a gender dimorphism that maps onto a dimorphism of reproductive anatomy, and that the male-female reproductive unit be central to social organization. These prescriptions entail some set of corresponding proscriptions on nonheterosexual desire, gender-crossing (e.g., proscriptions on cross-dressing, effeminacy in men, masculinity in women), and on the formation of some male-male and female-female social bonds. Heterosexual law is not limited to the proscription of same-sex desire, nor need the regulation of desire and sexual activity be a culture's primary concern. The heterosexual law, like the criminal law, can take different forms

²⁸ In thinking about gay and lesbian identity in terms of transgressions of heterosexual law, I have found Judith Butler's work very helpful, though she might not agree with my particular understanding of this notion. In particular, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990).

²⁹ In societies where biological relation largely determines the social relation of kinship, one would expect the biologically reproductive unit (biological father/biological mother) to be the social parenting unit. Heterosexual laws against same-sex parents would help ensure the biological relation between parents and children, brothers and sisters, etc. Were the social parenting unit a same-sex couple (i.e., a nonreproductive unit), kinship would need to be based on grounds other than biological relation. According to Kath Weston, this radical redefinition of kinship is exactly what gays and lesbians are advocating in stressing the idea of chosen families. Kath Weston, *Families We Choose* 21-41 (1990).

³⁰ Most obviously, the division of familial labor into men's work and women's work presupposes a household founded on a heterosexual couple. Men could not systematically exempt themselves from child care, food preparation, and the like unless they planned on allying themselves with women who did this work.

in different cultures.³¹ Thus, the particular activities that establish one's heterosexual criminal status are culturally variable even if the identity "heterosexual criminal" is a stable one. It is, I want to suggest, the establishment of heterosexual law that first makes possible its violation and thus makes possible gay and lesbian identity.³²

IV. ESSENTIALIST FICTIONS

What now are we to make of gay history? I began by agreeing with Professor Ortiz that gay history cannot be faulted because it presupposes a thinly described essential gay and lesbian identity. I have argued, however, that it is a mistake both to naturalize gay and lesbian identity and to limit it to same-sex desire. Therefore, gay history might still be faulted for two reasons. First, it uncritically assumes that the line between heterosexual and same-sex desire is drawn cross-culturally in the same place. Second, it arbitrarily reduces the multiply transgressive gay/lesbian identity to a single transgression of heterosexual law, namely, same-sex desire.

What is the alternative to a gay history based on naturalistic essentialism? One alternative is to predicate gay history on a constructivist understanding of the essential gay and lesbian identity: to be gay or lesbian is to be the kind of person who violates heterosexual law, in part but not solely by having same-sex desires. Who has this essential identity will vary depending on how different cultures construct the meanings of both same-sex desire and heterosexual law. Both a limited history of same-sex desire and a comprehensive history of heterosexual transgression would require adopting a perspective relative to culture. The constructivist historian could not assume that individu-

³¹ See *supra* p. 1863. Consider, for example, that although Anglo-American heterosexual law flatly prohibits two women from marrying, Native American heterosexual law only prohibits two cross-gendered females from marrying. Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, 10 *Signs* 27, 35 (1984). Also consider that, although Anglo-American heterosexual law flatly prohibits sodomy, Athenian heterosexual law only prohibited the penetration of male citizens. Kaplan, *supra* note 22, at 1882-83.

³² If this is correct, gay and lesbian identity and heterosexual identity are mutually dependent. That is, in the absence of heterosexual law, there would not be a gay or lesbian identity because gay and lesbian identities are defined through their exclusion from heterosexuality. Nor would there be a heterosexual identity, because heterosexuality is defined by what it excludes. For a defense of this view, see Judith Butler, *Imitation and Gender Insubordination*, in *Inside/Out: Lesbian Theories, Gay Theories* 13 (Diana Fuss ed., 1991).

als who meet *our* criteria for same-sex desire and heterosexual transgression also do so within their own cultures and time periods. Like the criminal identity, gay and lesbian identities are not necessarily portable. Thus, in their narratives, constructivist historians could only include individuals qualifying *within their own cultures* as having same-sex desires or as transgressing other parts of heterosexual law.

The unfortunate upshot of constructivist history is that some key players in current historical narratives would drop out. For example, from a constructivist viewpoint, Kenneth Dover did not write a history of Greek homosexuality.³³ Instead, his book documents in large measure, as Morris Kaplan puts it, the "healthy, horny, heterosexual male in search of phallic satisfaction."³⁴ Nor are the *berdache*³⁵ obvious players in a constructivist history, because their gender difference from their sexual partners may disqualify them from the category of same-sex desire, and from the point of view of their Native American cultures they apparently did not transgress heterosexual law.

These results make a constructivist gay history unacceptable. But how could one avoid these results without reinvoking naturalistic essentialism? A solution can be found by recalling the point of telling gay and lesbian history. It is a political one. When we look across cultures and time periods at persons who, if transported to *our* culture would violate *our* heterosexual law against, for example, same-sex desire, we discover a politically significant fact: there has never been a universal taboo on same-sex desire as we understand it.³⁶

Many cultures regard sexual interaction between men as compatible with being heterosexual. Some cultures, notably ancient Greece, have valorized what *we* see as man-boy homosexuality, ranking it over what *we* see as heterosexuality. Other cultures, for example in New Guinea and Melanesia, have prescribed sexual interaction between men and boys as a necessary transition to heterosexual adulthood.³⁷ Still others, such as Native American cultures, have institutionalized

³³ K.J. Dover, *Greek Homosexuality* (1978).

³⁴ Kaplan, *supra* note 22, at 1890.

³⁵ See Walter William's work on Native American *berdache*, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture* (1986), as well as William Eskridge's cross-cultural description of transgenderal same-sex relationships, *supra* note 23, at 1453-57, 1460-64.

³⁶ See *supra* Part II.

³⁷ See Edward Stein, Conclusion: The Essentials of Constructionism and the Construction of Essentialism, *in* *Forms of Desire*, *supra* note 5, at 325, 345-46.

what to our eyes are same-sex marriages.³⁸ What studies like Dover's history of Greek homosexuality³⁹ or Eskridge's history of same-sex marriage⁴⁰ underscore is the parochialism and, from a global point of view, arbitrariness of our culture's obsessive aversion to sexual interaction between men or between women. Seen in this light, contemporary sodomy laws, proscriptions on gays and lesbians in the military, and legal toleration of discrimination against gays and lesbians simply because of their sexual activity seem insupportable. They cannot be justified by appeal to the "naturally" abhorrent nature of same-sex desire. The historical and cross-cultural record suggests that there is nothing natural at all in our culture's intolerance of same-sex desire. Instead, it might best be explained as the direct product of Judeo-Christian conceptions of sinful sex. The enforcement of that intolerance thus seems tantamount to an enforcement of Judeo-Christian beliefs and a violation of the legal value-neutrality espoused by a liberal political society.⁴¹

Gay history and anthropology thus serve as valuable political tools when they essentialize descriptions of transgressors of twentieth-century heterosexual law. Only by doing so can gay history and anthropology reveal the constructedness of our contemporary heterosexual law and, hopefully, the constructedness of heterosexual law itself. What this means is that the essential gay identity from which historians have worked is a fiction, but it is a politically useful fiction.

V. THE POLITICS OF GAY VERSUS LESBIAN HISTORY

Gay history, however, loses the full breadth of its political opportunities when it takes on only the task of deconstructing the taboo on same-sex desire rather than framing for itself the much larger task of deconstructing heterosexual law itself. In order to seize the full breadth of its political opportunities, gay history needs to work from multiple essentialist fictions, not just the equation of gay and lesbian identity with same-sex desire. That is, it needs to essentialize the various ways that gays and lesbians violate contemporary heterosexual law and to read those essentialist fictions back through history. Les-

³⁸ Eskridge, *supra* note 23, at 1453-57.

³⁹ Dover, *supra* note 33.

⁴⁰ Eskridge, *supra* note 23.

⁴¹ As William Eskridge argues in this volume, that intolerance is not even consistently evident within the Christian tradition itself. *Id.* at 1449-52.

bian feminist efforts to write lesbian history provide one example of a second useful essentialist fiction.

Although lesbians, as Professor Ortiz points out,⁴² have not obsessed about the validity of essentializing same-sex desire, they in fact have argued over a quite different essentialist definition of lesbian identity. In her ground-breaking work, *Compulsory Heterosexuality and Lesbian Existence*, lesbian feminist Adrienne Rich argued for the notion of a "lesbian continuum."⁴³ What is essential to lesbian identity, she claimed, is not women's genital activities with other women. Rather, it is their resistance to compulsory heterosexuality—to a cultural system that compels women to invest their erotic energies in men. By "erotic" she did not mean "sexual." She took the limitation of the erotic to genital sex to be a product of patriarchy. Properly understood, the erotic includes all forms of primary emotional intensity. What makes a lesbian a lesbian is that her sexual activity with other women expresses her bonding with other women. Woman-bonding—the insistence that the site of primary emotional intensity be between women—is not limited to practicing lesbians. Chinese marriage resisters who made formal vows of lifetime companionship to each other, nuns who formed "particular friendships," nineteenth-century American women who formed deeply romantic friendships that were sustained during marriages to men, and the twelfth-through fifteenth-century Beguines who established autonomous communities of women all share this essential lesbian identity.⁴⁴ Thus she said:

I mean the term *lesbian continuum* to include a range—through each woman's life and throughout history—of woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman. If we expand it to embrace many forms of primary intensity between and among women, including the sharing of a rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support; if we can also hear in it such associations as *marriage resistance* and the 'haggard' behavior identified by Mary Daly . . . we begin to grasp breadths of female history and psychology which have lain out

⁴² Ortiz, *supra* note 2, at 1847.

⁴³ Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *The Signs Reader: Women, Gender & Scholarship* 139 (Elizabeth Abel & Emily K. Abel eds., 1983).

⁴⁴ *Id.* at 159.

of reach as a consequence of limited, mostly clinical, definitions of 'lesbianism.'⁴⁵

Viewed through the lesbian feminist lens, the contemporary taboo (as well as some, though not all, historical taboos) on lesbianism seems located not in the deviancy of lesbians' sexual desire but in the deviancy of their insistence on centering their personal, emotional, social, economic, and productive life around women rather than around men. At least within our culture, the centering of women's lives around women simultaneously breaks heterosexual law and patriarchal law.

Adrienne Rich is not alone in essentializing lesbians' woman-bonding. Lillian Faderman's *Surpassing the Love of Men*, Janice Raymond's *A Passion for Friends*, and Carroll Smith-Rosenberg's *The Female World of Love and Ritual* tell lesbian history as the history of the passionate bonding between women regardless of whether or not the women in this historical story engaged in genital sex.⁴⁶ Just as same-sex desire violates contemporary heterosexual law, so does passionate woman-bonding. Contemporary heterosexual law requires that romantic love occur between women and men, not between women or between men. It requires that the basic social, economic, and reproductive unit be the heterosexually married couple. It requires that the only sustaining, life-long, personal partnerships between individuals be between men and women. Both lesbians and

⁴⁵ Id. at 156-57 (footnote omitted).

⁴⁶ Lillian Faderman, *Surpassing the Love of Men* (1981); Janice G. Raymond, *A Passion for Friends* (1986); Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 *Signs* 1 (1975).

Lesbian feminist essentialists have not been without their constructivist critics. Ann Ferguson, for example, has argued on constructivist grounds that the lesbian is an early 20th-century creation and that Rich and others' essentialist definitions distort the historical record. See Ann Ferguson, *Patriarchy, Sexual Identity, and the Sexual Revolution*, 7 *Signs* 147 (1981). Thus, even though Professor Ortiz is correct that there has not been a lesbian essentialist/constructivist debate over same-sex desire, there *has* in fact been an essentialist/constructivist debate over *woman-bonding*.

Though I am not inclined to take Ferguson's point of view, I still find some of these works problematic if used as models of lesbian history. Rich and Raymond focus on resistance to (hetero)patriarchy rather than transgression of heterosexual law. Thus, their essentialist definitions sometimes seem better suited to doing a history of feminism rather than a history of lesbianism. Also, they are not sufficiently careful to specify from whose point of view these women qualify as transgressors: ours or their own time period's. For example, the romantic friendships of the 19th century did not transgress the heterosexual law of their time but certainly transgress 20th-century American heterosexual law.

gay men violate this law when they celebrate same-gender romantic love, set up households together, have or adopt children, share joint checking accounts, purchase a home together, arrange their work lives together, celebrate anniversaries, write joint wills, take responsibility for each others' health care, and, in short, insist on the reality and importance of their personal bonds to another person who is of the same gender.

Lesbian feminist history has a critically important political point. What it reveals is the constructedness, parochialism, and, ultimately, the arbitrariness of our cultural denial of the possibility of romantic love and family life within same-sex couples. It thus provides an important tool for challenging the justification for excluding lesbians and gay men from marriage law, adoption rights, spousal health insurance benefits, marital income tax breaks, and legitimate proxy consent. Were the lesbian feminist understanding of gay and lesbian identity more prominent in our way of thinking about what it means to be lesbian or gay, Justice Byron R. White could not have so easily said that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."⁴⁷

⁴⁷ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).