Social Justice for Gender and Sexual Minorities: A Discussion with Paisley Currah* and Aeyal Gross**

Joseph J. Fischel***

Abstract

This is a discussion between Professors Aeyal Gross and Paisley Currah, moderated by Joseph Fischel, about how we configure law, legal theory, state recognition, and institutionalized sex classifications in our pursuit of sexual and gender justice. Fischel asks what the terms *queer, legal, and studies* mean for the scholarship and political commitments of Currah and Gross, whose responses generate a broader discussion about, among other questions: the identitarianism and anti-identitarianism of progressive world-building; the meanings of *violence* for our movements; state apparatuses’ definitions and delimitations of *sex*; and why legalization and regulation may present different problems for gender minorities than sexual minorities.

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Joseph Fischel: Paisley and Aeyal, you are extraordinary, prolific legal scholars of social, sexual and gender justice, and you both have long been involved as civil rights advocates, internationally and in your respective communities. Beyond these general similarities though, you have pursued rather different lines of thought and activism within the macro zone of what we might call policed sex, gender and intimacy (and Aeyal, later I shall ask you what connections you perceive, if any, between your research on the legality of colonial occupation and your defense of “sexual rights”).¹ Yet I think one way to cohere our discussion, and to solicit reflections on your work in light of your conversationalist’s, is to invite your first round of comments by way of the key words of this issue: *queer, legal, and studies.*

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I. queer

JF: The term *queer* has been debated since its entry into the academy, but here I am less interested in your takes on its definition or normativity than its meaningfulness to you, whether as motivation, aspiration, or neither.

Aeyal, you have expressed caution that regimes of what you term “global gay governance” (NGOs, international financial institutions, UN commissions) have adopted a human rights framework for protecting LGBT communities, potentially forsaking queerer politics that links the oppression of LGBT folks with the violence and vulnerability experienced by sex workers, or with the experiences of women unable to access legal abortion and other reproductive services.\(^2\) You have also argued that Israeli, U.S., and U.K. courts have phobically ruled against defendants whose gender identifications and sexual desire cannot be neatly binarized.\(^3\) So it seems like you carry a brief for *queer*.

Paisley, in several of your writings, co-authored and singly authored, you have gestured to a vexed relationship between *queer* and *trans*. Surely “queering things” is not identical to “critically trans”-ing them, but are such endeavors rhizomatic or at least harmonic?\(^4\) It appears your commitment to gender pluralism along with your resistance to state classificatory systems of binary sex and gender is, well, queer. But like Aeyal, you also understand state and state-like recognition to be symbolically and materially empowering for gender and sexual minorities, a position that some self-described queer activists might not endorse. You take seriously, too, how important the civil rights frame has been for transgender political victories, and you push back against those who would saddle transgender plaintiffs with the responsibility of being radical gender vanguards.\(^5\)

In what ways does *queer* matter to each of you and your interventions? Do you have fidelity to this abstraction, an abstraction acutely allergic to any normative notion of fidelity?

Aeyal Gross: Thanks for this question. In recent years, I have been interested in a framework I call “queer-as-critique” (with a gesture to Benhabib’s and Cornell’s *Feminism as Critique*, but we can also think of Butler’s “Critically Queer”).\(^6\) How do we maintain or rekindle the idea of queer-as-critique? Not queer-as-ideology, nor queer-as-identity. Queer

\(^2\) Id. at 167; see also Aeyal Gross, Gay Governance: A Queer Critique, in Governance Feminism: Notes from the Field (Janet Halley et al. eds., forthcoming).


\(^5\) Paisley Currah, The Transgender Rights Imaginary, in Feminist and Queer Legal Theory: Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations 245, 246 (Martha Albertson Fineman et al. eds., 2009) [hereinafter Currah, Transgender Rights Imaginary]; see also Paisley Currah, Gender Pluralisms under the Transgender Umbrella, in Transgender Rights 3, 12-13 (Paisley Currah et al. eds., 2006) [hereinafter Currah, Gender Pluralisms].

\(^6\) Feminism as Critique: On the Politics of Gender (Seyla Benhabib & Drucilla Cornell eds., 1987); Judith Butler, Critically Queer, 1 GLQ 17 (1993).
matters to me as critical engagement with sexuality. The term owes to the histories (and ethnographies) of sexuality (and of gender) which pointed to the social construction and contingency of sexuality as we know it, and for me, it is from this work (of course Foucault, Halperin, Sedgwick and Butler all come to mind) that I think we learn about the political division heterosexual/homosexual (or man/woman—to follow on Butler8) as well as the contradictions in this division (to follow Sedgwick).9 Once you contemplate sex/gender/sexuality as a system (Sedgwick10), or sex, gender and heterosexuality as “regulatory fictions” (Butler11), or the idea that the heterosexual/homosexual division is itself homophobic (Halperin12)—then the critical queer engagement invites an interrogation of limits of identities (especially those constructed around a hierarchical binary), and an examination of the contradictions within social structures.

Now to say I am interested in engaging with queer-as-critique rather than queer-as-identity means I think that the LGBTQ form appropriates queer as another form of identity, losing its potential as a critique of identity. I do not want to deny the self-identification of people who identify as “queers,” be it an umbrella term for LGBT or a term for those who want to emphasize an alternative to mainstream LGBT identities. But when assimilated as another identity people are attached to, we have traveled far from queerness as “refusing to be who we are” (to paraphrase Foucault in “The Subject and Power”).13 We lose the idea of queer as questioning identity, questioning borders being built between people based on arbitrary markers such as gender, sexuality, etc. My work on defendants whose gender identifications and sexual desires cannot be neatly binarized—defendants who had allegedly criminally deceived their intimate partners for not disclosing their [the defendants’] “real” gender—pointed to the limits of the identity model.14 To say the defendants in these cases were men, transgender, lesbian, or any identity, often limits complex situations where they, and others, interpreted their identities in various forms. There are costs to pinning down sexual subjects to a single letter of our usual taxonomy (L, G, B, T . . .).

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7 See, e.g., 1 Michel Foucault, The History of Sexuality: An Introduction (Robert Hurley trans., 1978); David M. Halperin, One Hundred Years of Homosexuality (1990); Eve Kosofsky Sedgwick, Epistemology of the Closet (1990); Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (1990).
8 Butler, supra note 7.
9 Sedgwick, supra note 7.
10 Id.; see also Eve Kosofsky Sedgwick, Tendencies 1-22 (1993).
11 Butler, supra note 7, at 46.
12 Halperin, supra note 7.
13 Michel Foucault, The Subject and Power, 8 Critical Inquiry 777, 785 (1982) (“Maybe the target nowadays is not to discover what we are but to refuse what we are.”).
14 See supra note 3.
All of this does not mean I think identities do not matter. I borrow from what Critical Race Theory objected to as vulgar anti-essentialism\(^{15}\), people interpret themselves and are interpreted by others as belonging to identities (such as gay). They are discriminated against based on these identities, and they resist from them, developing an attachment to them. The challenge in queer thinking is to engage with both the affirmation and deconstruction of identities such as “gay.”

Queer-as-critique and not as identity or ideology replaces doctrinaire approaches to social questions with critical engagement. For example, the “queer” heterodoxy on same-sex marriage is to oppose it because of its normalization and so on. Now I align myself with the criticism of the family ideology, and the correlating concerns that first, people feel legitimated only when the state recognizes their relationships, and second, that this legitimation arrogates too much power to the state.\(^{16}\) But I also want to resist the queer anti-same-sex marriage heterodoxy for a few reasons. First, because in jurisdictions which recognize some form of common law marriage/cohabitation, not having registration options for civil partnership or marriage normalizes too: couples must “prove” behaviorally—say, by practicing monogamy, or joint banking—what they cannot establish formally. When it comes to not being thrown out of a house, or losing your inheritance rights, normativity can be otherwise compulsory, if not coercive, absent formal relational recognition. This leads to the second point: let us critique marriage ideology but acknowledge marriage’s material benefits for many people (from immigration to property and much more). For me, queer engagement with marriage resists its normalizing function while understanding marriage as not just a right but also a license.\(^{17}\) I would rather see a recognition of +1 registration and various forms of relationships.\(^{18}\)

But to simply say marriage is only normalizing, hetero, or otherwise bad misses so much; that position is ideological, not critical.

Finally, to address the question you put to Paisley regarding the vexed or purportedly vexed relationship between queer and trans, I want to make one point. For me the queer framework includes an understanding of the limits of binary gender. I used to think queer theory was a great framework for trans issues—and still do for my own work. But I understand queer studies’ lack of trans specificity, and the serious drawbacks of mis- or non-representation. I understand too variations within the “trans position” and I have

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\(^{15}\) Kimberlé Crenshaw et al., Introduction, in Critical Race Theory: The Key Writings That Formed the Movement xiii, xxvi (Kimberlé Crenshaw et al. eds., 1995).


\(^{17}\) Mary Ann Case, Marriage Licenses, 89 Minn. L. Rev. 1758 (2004).

learned a lot from what we may call trans theory, both in its more queer-critical and queer-affiliative modes. And as you intimate, Joe, Paisley’s work suggests we should not think in a dichotomous way about these approaches.

Paisley Currah: I think Aeyal is completely right to suggest that queer-as-identity is not as powerful as queer-as-critique. Initially, as Joe’s question suggests, queering implied movement, a politics; not just a fixed position. LGB people (I’ll get to T in a moment) weren’t the only queers. But over time, in movement politics, queer gradually got pulled into the orbit of LGBTQ, and much of its political charge was lost as queer became incorporated into neoliberal identity politics. Even as it signified a rejection of the banal homonormativity of marriage and mortgages, queer developed as a brand, a species of *homo economicus* of the post-industrial landscape.

In the academy, I think the analytical power of even queer-as-critique attenuates once fluidity or some sense of elasticity becomes its *sine qua non*. Perhaps because the concept of queering is thought to be fundamentally deconstructive—showing how binaries collapse upon themselves—there’s a sense that it’s necessarily edgy, always occupying a radical positionality. Unfortunately, something can only be edgy or fluid or radical in relation to a fixed object. So queer theory depends on a sort of *de-animation* of some objects. Even at the birth of queer theory twenty-five years ago, Biddy Martin worried that “antifoundationalist celebrations of queerness rely on their own projections of fixity, constraint, or subjection onto a fixed ground, often onto feminism or the female body, in relation to which queer sexualities become figural, performative, playful, and fun.”

Much more recently, Jasbir Puar has written about queer theory as a colonizing epistemological force, operating as the “transcendent” proxy for U.S. academics, in contrast to the Global South, which becomes the local and empirical site, a sort of area studies for the queer theoretical project. Martin’s and Puar’s formulations have helped me to understand queer theory’s vexed relation to the transsexual body. Queer studies has no problem accounting for and advocating seemingly unmoored and undomesticated gender identities and expressions—a plasticity that refuses traditional cultural imperatives is the normal of queer theory. But when it comes to the body, its material resistance to the axioms of queer theory

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21 On gay consumerism as political participation, see generally Homo Economics: Capitalism, Community, and Lesbian and Gay Life (Amy Gluckman & Betsy Reed eds., 1997); on the introjection of market logic into the self-understandings of late modern citizens, see Michel Foucault, The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979, at 282-83 (Michel Senellart ed., Graham Burchell trans., 2008); on neoliberalism’s neutralization of liberal and left political projects, see Wendy Brown, Undoing the Demos: Neoliberalism’s Stealth Revolution (2015).


render it illegible, or at least a persistent problem. Queer theory is left with suggesting that body modification done for the purposes of making one’s body congruent with one’s gender identification is some sort of false consciousness.\textsuperscript{24} Even trans studies within the humanities has, to a surprising degree, imported from queer studies this rejection of transsexuality. As Andrea Long Chu points out, “[T]he transsexual is the only thing that \textit{trans} can describe that \textit{queer} can’t.”\textsuperscript{25} But there is an emerging body of work in trans studies that dispenses with assumptions about what’s fixed, what’s normative, what’s uninteresting and what’s not; this is the methodological premise of my own research on sex reclassification.\textsuperscript{26} There is no default or constitutive baseline, whether it be \textit{the} body, \textit{the} state, marriage, genitals, identifications. Instead, everything under scrutiny is conceivably a moving part.

Aeyal’s observation that the equation of marriage with normalization is ideological, not critical, is exactly on point. Gayle Rubin wrote about how disputes over sex “acquire immense symbolic weight” and become “vehicles for displacing social anxieties.”\textsuperscript{27} Certainly we see that in the culture wars of the first decade and a half of this century, where the right said same-sex marriage would result in total social chaos. But it seems to me that there’s a way in which, unexpectedly, the queer critique of same-sex marriage also exemplifies Rubin’s observation. The queer critique of same-sex marriage has become symbolically huge, taking up so much real estate in the radical queer imagination that it risks squeezing out everything else. Certainly, marriage in the U.S. privatizes rights and benefits that should be more collectively redistributed in a liberal democracy.\textsuperscript{28} But where are the queer theorists protesting the adjunctification of university labor and its terrible pay and nonexistent benefits for queers and non-queers alike? Originally, homonormativity meant a “privatized, depoliticized gay culture anchored in domesticity and consumption.”\textsuperscript{29} Too often, though, the role of marriage in privatizing care and distributing inequality has been eclipsed by critiques of the married monogamous gay couple and its consumption choices—as if avowedly anti-homonormative queer practices and consumption patterns constitute a rejection of capitalism.

\begin{itemize}
\item \textsuperscript{24} See, for example, Christopher Castiglia & Christopher Reed, \textit{Conversion Therapy v. Re-education Camp: An Open Letter to Grace Lavery}, blog post, L.A. Rev. Books, Dec. 11, 2018 (https://blog.lareviewofbooks.org/essays/conversion-therapy-v-re-education-camp-open-letter-grace-lavery/).
\item \textsuperscript{25} Andrea Long Chu & Emmett Harsin Drager, \textit{After Trans Studies}, 6 TSQ 107 (2019).
\item \textsuperscript{26} See also Christine Labuski & Colton Keo-Meier, \textit{The (Mis)Measure of Trans}, 2 TSQ 13 (2015); Micha Cárdenas, \textit{Pregnancy: Reproductive Futures in Trans of Color Feminism}, 3 TSQ 48 (2016); C. Riley Snorton, \textit{Black on Both Sides: A Racial History of Trans Identity} (2017); Margot Canaday, \textit{The Straight State: Sexuality and Citizenship in Twentieth-Century America} (2009).
\item \textsuperscript{27} Gayle S. Rubin, \textit{Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality}, in \textit{The Lesbian and Gay Studies Reader} 4, 4 (Henry Abelove et al. eds., 1993).
\item \textsuperscript{28} See Melinda Cooper, \textit{Family Values: Between Neoliberalism and the New Social Conservatism} (2017).
\item \textsuperscript{29} Lisa Duggan, \textit{The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy} 79 (2004).
\end{itemize}
II. legal

JF: I appreciate how you are both so strenuously non-doctrinal in your assessment of gender and sexuality governance. Paisley, you refuse a false dichotomy between a left activism calibrated to the abolition of gender and a liberal reformism attuned to the recognition and nondiscrimination of gendered identities. You would like us to reconceptualize multiple strategies for pluralistic gender flourishing as just that—so contradictions in theory may evaporate in practice (and you point out that the language of statutory and municipal gender nondiscrimination clauses tend to be not as medicalizing, pathologizing, etc., as some on the queer left might imagine).\textsuperscript{30} Aeyal, your neologism “homoglobalism” diagnoses the relationship between state power, policy reforms, and gay rights as much more dynamic, textured and normatively undetermined than Joseph Massad’s “Gay International” or Jasbir Puar’s “homonationalism.”\textsuperscript{31} Both of you, though, have also demonstrated how formal equality can mystify or make it more challenging to detect and redress substantive, material inequalities.

This is prologue to ask: what role does or should law play in each of your visions of social, sexual and gender justice? Given the many ways law has hierarchized, stabilized, malformed, trivialized and at times demonized minority sexual and gender identities, how do we deploy the law for gender and sexual pluralism, or for what Paisley terms the “transgender rights imaginary” or “the larger political imaginary of the transgender rights movement.”\textsuperscript{32} I suppose we might start by disaggregating the thing I am calling “law.”

PC: Can one do product recalls in scholarship? Because I’d like to recall the celebration of gender pluralism in my earlier work. That is not to say that I’ve abandoned the idea, but now I see it as premature. What I meant by gender pluralism was the disestablishment of gender, of getting the state out of the business of policing the relation between one’s sex as assigned at birth, one’s gender identity (as male or female and now I would add gender nonbinary), and one’s expression of gender. I saw the gender pluralism operating under the transgender umbrella—which allowed for all sorts of ways of being gender non-normative, from old school transsexual people not particularly critical of the medicalized model of the gender binary that made their transitions possible, to people rejecting the gender binary altogether, to people reconstituting it in very new and unexpected ways—as a normative ideal for how the state should treat trans people. I’m still drawn to that imaginary. But in the intervening years, as I focused on the problem of sex classification, or rather sex reclassification, I realized that we can’t just click our heels three times and bring a better state into existence. That represents the doctrinal approach, which constructs the state as a

\textsuperscript{30} Currah, Transgender Rights Imaginary, supra note 5, at 256; Currah, Gender Pluralisms, supra note 5, at 23.

\textsuperscript{31} Gross, supra note 1, at 166, 169; see also Joseph Massad, Re-Orienting Desire: The Gay International and the Arab World, 14 Pub. Culture 361 (2002); Puar, supra note 23.

\textsuperscript{32} Currah, Transgender Rights Imaginary, supra note 5, at 246, 255.
benevolent yet sometimes muddled or behind-the-times night watchman: just make the rational argument and eventually the legislators, the courts, and policymakers will get it right. The other hesitation I now have with the gender pluralism notion is that we lose the ability to recognize asymmetry in the workings of gender as a technology to distribute rights and resources. That is all a fancy way of saying that it makes the oppression of women much less visible. For example, when LGBT legal advocates first filed a lawsuit challenging North Carolina’s HB2, none of the plaintiffs were transgender women, even though the law was passed in part because of the panic surrounding the idea of trans women using women’s bathrooms.33 Another example: violence against transgender women—and the victims of this violence are disproportionately women of color—gets packaged as violence against transgender people. And worse, as people like Sarah Lamble, Riley Snorton and Jina Haritaworn have pointed out, the deaths of trans women are monetized by largely white LGBT and trans organizations, organizations that also generalize the violence as against transgender people, not women.34 There’s nothing wrong with using a trans vs. cis frame to show that trans people are more likely to be victims of violence. But violence against trans women should also been seen as driven by misogyny. It’s women who are disproportionately affected by this violence, which is overwhelmingly intimate in nature. The continuities between trans women and cis women drop out of the picture, and that inhibits our ability to develop effective responses.

On the question of law, I’m not interested in doctrinal analysis or strategies located wholly inside the law—for example, how we can make gender nonconformity more intelligible vis-à-vis the categories already recognized by legal structures. That sort of work is vital and important. I am more interested, however, in teasing apart all these very specific apparatuses that govern sex. So I substitute the state for the law, and then pluralize the notion of the state: the state is not a singular entity, defined by structure or function, but an array of agencies, legislatures, and courts relying on practices, laws, and norms that operate—often at cross-purposes—at every level of government. This is a very obvious Foucauldian point, of course, but both trans rights advocates and scholars in trans studies have been approaching the problem of sex classification as if it were a problem of sex definition—as if the government would want its policies based on the correct definition of sex. If we could just have a rational discussion with these very well-meaning policymakers, so goes this influential line of thinking and politicking, and convince them that the correct definition of sex is really gender identity, then all would be right with the world.


Let me explain the particular event that led me to rethinking this approach. In the aughts, I was part of a group of trans advocates and public health officials trying to change New York City’s policy on birth certificates. At the time, the city’s policy was to issue amended birth certificates to trans people who had had “convertive surgery,” which meant genital surgery. But the new birth certificate would be issued without a box for sex classification. The person would be neither M nor F. We wanted a gender identity standard, and we wanted the sex classification to appear on the certificate. When our proposal was circulated among other city agencies, however, it was shot down. Each agency had its own definition of sex that they wanted to keep. The city’s Department of Corrections wanted to define sex based on genitals, agencies that provided drug rehabilitation beds were resistant as well, while the Department of Homelessness Services was slowly moving toward a gender identity standard. New York State policies in other domains multiplied the contradictions: a trans woman could relatively easily change the M to an F on her license, but she would probably be housed in a men’s prison if she were incarcerated. As a result, our neat, clean, evidence-based approach to the problem had no traction. This led me to realize that for these various apparatuses of governing, sex was malleable, dependent on the particular remit of the agency. Sex was not a property to be classified according to some ideal, but rather something to be defined based on what it accomplished for a particular governing rationality. Having identity documents that accurately represented the people who carried them around aided state apparatuses interested in surveilling and tracking populations. That is why DMV policies on sex reclassification were generally the easiest to change. But until Obergefell, judges in the United States at the appellate level had been much more likely to classify trans men and women—regardless of how many ID documents they’ve changed—according to their sex assigned at birth. The institution of marriage is a tool of social policy in the service of turning populations into peoples. From social welfare programs to immigration laws to laws concerning descent and lineage, marriage and family law have long been a cornerstone of a range of nation-building efforts. Before the ban on same-sex marriage was found unconstitutional in Obergefell, when trans people’s rights to inheritance or parentage were contested, the decisions usually found that one’s sex as assigned at birth governed who one could legally marry. The exclusion of transgender people from this institution was necessary because our different reproductive capacities laid bare the fact that marriage secures legal relationships between one generation and the next, not biological ones. (A chapter of my book focuses on the trans marriage and parenting cases.)

38 Paisley Currah, Sex Is as Sex Does: Transgender Identity and the Politics of Sex Classification (forthcoming).
States then are not rationally organized hierarchies, with every little piece adding up to a universal directive across jurisdictions, agencies, and functions. They are all over the place. Just as sex is. In some ways, this resonates with what Aeyal said earlier about the messiness of gender identifications and sexual desires, and the limits of a simplistic identity model. These political and legal situations are complicated not only by the particularities of one’s identity that fail to conform to neatly drawn lines, but also by the particularities of the agency in question. We need to understand at a much more historical and granular level what states are, what they do, and the effects of manifold rules, laws and policies on sex. Demanding uniform criteria for sex classification across all forms and levels of government assumes that sex does the same thing in every location.

Just as sex has no essence, neither does the state. We need to let go of the large-scale accounts of both that assume a sameness to sex or a singular rationality to state actors, decisions, and projects. This is not to suggest that the liberal option of reforming sex classification policies or the more radical demand that states get out of the business of governing sex classification be abandoned. But it is to suggest that we need to understand what sex does for states and their apparatuses before we can move on to dismantling the larger structures that caused the category to be baked into our legal architectures in the first place.

AG: In light of Paisley’s comments, we could productively paraphrase Marx’s statement in “On the Jewish Question,” about civil rights granting people freedom of property but not freedom from property. Similarly, much of current advocacy strategies aim for freedom of gender (even as we see the backlash to this movement in the U.S. and elsewhere). But can we instead achieve or conceive freedom from gender? The same goes for sexuality: should we envision freedom from sexuality, or perhaps also freedom from sexuality? Now again, many people may be attached to their identities as LGBT—any of these letters as well as others in the alphabet soup—as empowering, and rightly so. But can we think beyond these divisions? The question about “freedom from” identities (rather than freedom of) is of special relevance regarding gender identity, as the state regulates and catalogues gender in a way that it does not do with sexuality. So in reply to Paisley’s point on various forms of recognition, I would prefer if the state pulled out altogether from gender.

In Israel, the population registry lists peoples’ “nationality” and “religion.” These markers used to appear on ID cards. While no longer on IDs, most human rights advocates would like to see the markers excised from the registry altogether. Why not want the same with gender? People can still be attached to their religion without state recognition, as the U.S. case has shown.

Of course, so many public institutions depend on the gender division, more than those depending (today) on religious division. But can we do without state recognized/sanctioned gender? Should legal reform’s aim be to allow changes in the gender

registration system based on will, or to abolish it altogether? Obviously, the abolishment of the state’s designation of gender would mean that some institutions, like the military, would transform dramatically. Does such a vision offer a promise for women and trans people? Is this a vision of “undoing gender” or perhaps just of separating gender and the state? I would like to think such a move is a step for undoing gender hierarchies, but arguably getting the state out of the gender business could come with the loss of recognition and protections that trans people and women want and need. In any case, these questions go to the heart of queer dilemmas about affirming identities or deconstructing them. We want to affirm discriminated identities but also deconstruct them given their role in maintaining the binary sex/gender/sexuality order.

In my work, I look at how law maintains heteronormative order in the face of queer realities. In the “gender impersonation” cases I mentioned earlier, the people involved lead queer lives, with ambiguous and dynamic gender identities and sexualities. The judicial pronouncements could not contain these queer realities and tried to impose heteronormative order; for example, by refiguring these cases as ones of lesbians pretending to be heterosexual men in order to sexually deceive heterosexual women. But the identifications, intimacies and desires of these cases belie such a simple, static read. The same can be said of libel cases in Israel, in which courts held individuals liable when they said or implied someone is gay who was ostensibly not gay. In these cases, the law impresses its will to know (by identifying heterosexuals apart from and above homosexuals), maintains binary gender and sexual order, and punishes crossing the divides.

III. studies

JF: This is a perennial question for the activist scholar, but I am going to ask it anyway in part because you both, as intellectual, political and quite public defenders of gender, sexual, and ethnic minorities, have been so successful in forging necessary paths for our movements.

In your recently published The Writing on the Wall: Rethinking the International Law of Occupation (2017), Aeyal, you discuss how scholarly parsing of “occupation,” or the legal academic debates regarding qualifying conditions of colonial occupation, can become so far removed from oppression as to be irrelevant or worse for facts on the ground. Paisley has written that he sees his advocacy and scholarship as imbricated and mutually enabling, even as the former may appear more identitarian and minoritizing while the latter leans more constructivist and universalizing.

40 Judith Butler, Undoing Gender (2004).
41 See supra note 3.
43 See Foucault, supra note 7.
Can you say a little bit about the relationship between your advocacy and your scholarship? Might you give an example of when the former motivated or militated against the latter, or vice versa?

**AG:** Let me start with a story. When the Israeli Supreme Court was deciding whether same-sex marriages performed abroad would be counted under the country’s population registry, I attended the oral arguments.\(^{44}\) Outside the courtroom, I said to the lawyer representing some of the petitioners, “Don’t you think gay people have enough troubles already, and now we will also have to get married?” When the oral argument took place, this lawyer started his arguments by saying he met me upon arrival at the court and I asked him that question. I cringed in my seat: the joke was for him, not for the justices!

In a way, this story tropes on the metastory about the relationship between critical engagement and activism. I was and am critical of same-sex marriage but also thought we should win in court.

To return to the tension between affirming and deconstructing “gay” (or “lesbian,” or . . . ), I suppose within legal activism/liberal legalism it is easier (and more tempting) to do the affirming work. To just say equal rights should be accorded and so forth. But can we queer up our activism, including our legal activism? There are so many outstanding models of queer activism outside law,\(^ {45}\) but we should also think how to make queer arguments within law. For example, and to take an easy case, might we make the arguments for equality based on difference and diversity rather than normativity? Recall Justice Kennedy’s words in *Obergefell* that LGBT people’s “hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”\(^ {46}\) I would not want to see us endorse this argument for same-sex marriage, one that reinforces normative hierarchies of intimacy. Another example: the first major case on same-sex couples rights in Israel involved a flight attendant who wanted his partner to get the same spousal benefits—free airline tickets—that different-sex couples received.\(^ {47}\) Now, after the attendant won in the Supreme Court, the question of normalization arose. I would suggest that a principled commitment to equality (and in reference to the +1 idea I mentioned before) would portend that each flight attendant should receive a free ticket that he can use if: he is single and does not have a partner; if he has ten partners (the airline shouldn’t give him ten; he will get one and choose); or even if he is happily married to his same-sex spouse but would actually

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\(^{45}\) On queer activism in Israel, see, e.g., Amalia Ziv, Performative Politics in Israeli Queer Anti-Occupation Activism, 16 GLQ 537 (2010).

\(^{46}\) See Obergefell, supra note 36, at 2608.

rather give the ticket to someone else. Now that would be a queerer and better way to think about equality, rather than demanding that same-sex couples receive the same benefits as different-sex couples, so long as they fit the homonormative model.\textsuperscript{48}

But you asked about the occupation. This is another challenge, for in the Israeli context LGBT rights are often appropriated for government propaganda, to argue Israel upholds liberal democratic norms. Many readers will be familiar with this as “pinkwashing.”\textsuperscript{49} Now the problem becomes: how do you advocate for LGBT rights without lending yourself to this appropriation and without being complicit in presenting yourself as the poster boy for Israeli “democracy”? On the other hand, I reject the line of thought that reduces any LGBT rights/activism (in Israel and elsewhere) to “pinkwashing.” I have read claims, for example, that LGBT pride in Israel is only about pinkwashing. Well it is also about that, but not only about that. It is also about community activism and empowerment. What I see in the reductive forms of the pinkwashing critique is a reduction of the meaning of all LGBT rights activism to pinkwashing—which is absurd. I expanded on this more than I can here in my Columbia Human Rights Law Review article.\textsuperscript{50}

\textbf{PC:} I agree with Aeyal—we need to resist strategies that embed assimilationist arguments, though I’m not against a politics based on recognition \textit{per se}. If people want to get married (I did) or have government agencies issue them identity documents that reflect their gender identity (I have those papers), I obviously don’t have a problem with that. But I draw the line at arguments for inclusion that will have immediate negative effects on others. So, for example, implicitly supporting the idea that health insurance is best distributed through families, or that surgery should be the criterion for gender recognition.

As to the relationship between activism and scholarship—it’s a perennial question, but an important one, and let me give what is for many the perennial response, which is to turn to the insights of Critical Race Theory, specifically Kimberlé Crenshaw’s observation that when it comes to the categories it is possible to do two things at once. We can challenge the unjust effects of being in that category, and we can look deeper into the processes that produced the category in the first place.\textsuperscript{51}

To illustrate this with the issue of sex classification, I certainly believe that state decisions on sex classification have real effects on individuals and that those effects are unjust. Having the wrong sex designation creates obstacles to full and equal participation

\textsuperscript{48} See Duggan, supra note 29.


\textsuperscript{51} Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1296-99 (1991); on integrating critical race theoretic insights into transgender legal advocacy, see also Currah, Transgender Rights Imaginary, supra note 5, at 250-54.
in whatever egalitarian ideal of social and civic life one holds. As an activist, I have no
problem using the language of rights and recognition in particular contexts. I pulled up
every old saw about belonging and popular sovereignty in meetings with legislators. I have
sat on agency advisory committees and worked with officials to change standards for sex
reclassification, relying heavily on a medical model in the process (although a model that
uses the authority of medical knowledges to argue against requiring body modification for
sex reclassification). As a political theorist, I have suggested that the goal of recognition
leaves intact the power of state actors to decide who gets what, and that ending the ability
to use sex to distribute resources, rights, and privilege should be a priority for the
movement. I have labored to understand, at the most mundane and micro levels of
governmentality, what sex is doing and how that doing is imbricated with other systems of
social stratification. I hold both positions simultaneously and don’t see them as
incommensurate. Instead, I see them as inhabiting different time frames, or moving at
different speeds: the short-term objective of recognition in order to alleviate the material
problems of misclassified individuals in the here and now, and a long-term project that is
necessarily less identitarian and more universalist, that looks at how sex classification figures
into the reproduction of capital, race, and nation.

When one is intervening as an advocate, the empirical animates the theory in ways
that make me remember what theory is for—not to perform cleverness for colleagues and
markets, but to help figure things out. I can read every Foucault lecture series back to front
and front to back more than once; I can teach Tim Mitchell’s article disassembling the
notion of the unitary state every semester, and I can know, intellectually, that sex operates
as a technology of government. But that all seems remote when I’m sitting across from a
policymaker who tells my group that our proposal to make gender identity the standard for
sex classification won’t work because sex works differently in different agencies.

**JF:** You both have issued so many terrific lines of provocation through our key terms. I
was unsure at which juncture to follow up except, like “this just in!” broadcast interruptions,
I was writing my follow-up question when the story broke that the Trump administration
may propose to federally redefine gender more narrowly based on birth genitals. This, of
course, is a strike at the transgender community; but it is at once a strike against the Obama
administration doing exactly what Paisley said earlier is not his political priority: using Title
IX’s guarantee of sex nondiscrimination to “make gender nonconformity more intelligible
vis-à-vis the categories already recognized by legal structures.” In that sense, the Trump
administration’s proposal is also a reinstallment of sex inequality, insofar as violence and
harassment based on sex stereotyping and gender nonconformity, and even some cases of

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53 Erica L. Green et al., “Transgender” Could Be Defined Out of Existence Under Trump Administration,
nistration-sex-definition.html).
sexual assault, may prove harder to classify as unlawful sex discrimination under Title IX.

But the question I had thought I would ask you was about violence; the question inspired partly by a graduate student I advise, Matt Shafer, whose dissertation genealogizes the concept. I notice, Aeyal, that when you write of colonial violence, you refer to phenomena like dispossession, impoverishment, and acts of physical brutality.\textsuperscript{54} Paisley, when you write of colonial violence, you refer to phenomena like erasure, misrecognition, and the imposition of Western categories. Following Gayatri Spivak, you catalogue the “epistemic violence”\textsuperscript{55} that occurs when more powerful actors from the North or West overwrite and thereby under-describe local formations of gender and sexuality.\textsuperscript{56} So I had wanted to ask you about these different kinds of violences, and how we might think them together in relationship to sexual justice.

But then the Trump memo happened (even if, as of this writing, gender has not been genitalized across federal programs), which reminded me of Robert Cover’s famous argument, that judges and other legal actors enact violence on others through their words and their interpretation of others’ words.\textsuperscript{57} To whatever degree an electoral calculation, the proposal to genitalize gender by scaling back interpretations of federal policy and case law synthesizes law as epistemic erasure (illocutionary violence) and law as amplifying vulnerability and exposure to harm (perlocutionary violence). This is a long way of asking: how do you understand violence in relation to movements for gender and sexual justice, and is violence the appropriate political or rhetorical frame to understand both the Trump administration’s proposal of gender definition as well as its other policy directives against transgender people (for example, the proposal to ban transgender people from the U.S. military)?

\textbf{PC}: I have no problem describing Trump’s plan to reverse Obama-era policies on sex reclassification as violence. When state actors assign a sex based on genitals, or sex assigned at birth—and the Trump memo reportedly would define sex as assigned at birth, forever unchangeable\textsuperscript{58}—and that sex assignment does not match an individual’s gender identity, that is violence. And this violence is not just on the level of misrecognition. As Cover observed, words have material effects.\textsuperscript{59} Changing the rules for reclassification, even only in federal agencies, has the potential to go far beyond sex discrimination claims, although that is bad enough. If Trump were successful, those rules could affect the delivery of

\textsuperscript{54} See generally Aeyal Gross, The Writings on the Wall: Rethinking the International Law of Occupation (2017).


\textsuperscript{56} See, for example, Susan Stryker & Paisley Currah, Introduction, 1 TSQ 1, 7-8 (2014); Susan Stryker & Paisley Currah, General Editors’ Introduction, 1 TSQ 303, 303-05 (2014).

\textsuperscript{57} Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601 (1986).

\textsuperscript{58} Green et al., supra note 53.

\textsuperscript{59} Cover, supra note 57, at 1609-10.
transition-related health care, the housing of federal prisoners, the ability of trans people to obtain passports reflecting their gender. All these proposed rule changes will ultimately be adjudicated by the courts, which might reach different conclusions about what sex is than the views held by Vice President Pence or the Family Research Council. But yes, this sort of violence is both epistemic and has real material effects. It is critical then for legal advocates to take Trump at his word, and to prepare arguments against the proposed federal redefinition of gender.

The point I want to emphasize, though, is that there are two different historical stories to consider, one very recent and one centuries-old. We have the movement for transgender rights emerging at the tail end of the women’s and GLB rights movements—trans and gender nonbinary people fighting discrimination, drawing attention to hate crimes, and demanding identification that describes us accurately. Mirroring this progressive movement, of course, is the right-wing anti-transgender campaign to depict us as sexual predators, as frauds, as pathological. This movement, and the Trump memo, is propelled by transphobia.

But we should not lose sight of the much longer and deeper history of sex as a legal status. Since early modern times and the slow rise of the modern administrative state, distinctions between men and women have been a tool of juridical power. Sex classification has been enmeshed in governing, and distinguishing between men and women for distributive purposes—like marriage, inheritance, social security—has been baked into state architectures. Napoleon needed a sex-differentiated census so he could keep track of the number of boys and men each village should produce for his army. Before jurisdictions and agencies started to reform policies, trans people were residual to the categories as defined.\(^6^0\)

The effect of being the constitutive outside of the naturalized M-F binary is the violence of erasure. What is vital to keep in mind here is that it is not one huge coherent violence, but many little cuts, as there is not one but many governing rationalities.

These two narratives are braided together. When policymakers—especially judges, who helpfully explain their rationales at length—consider the sex reclassification claim of a transgender person, they’ll often address the larger ramifications of changing policies on normative gender structures. For example, writing in 1992 about “the possibility” of a transgender man being inseminated after he had been reclassified as male by his government, a judge of the European Court of Human Rights warned that “[t]he whole of civil law and inheritance law could be thrown into confusion.”\(^6^1\) Conversely, the political momentum of the movement for transgender rights and equality is outsized, given the relatively small percentage of the population that can be described as transgender or gender nonbinary, partly because transgender issues call traditional gender arrangements into question. (That’s why trans people are often cast as gender revolutionaries—to great


annoyance of some trans people who do not see their gender as in any way exceptional.)
The Trump administration’s efforts to undo every good policy regarding trans people—from attempting to narrow the definition of sex in education, healthcare and non-discrimination policies to the ban on transgender people in the military—is the federal version of the trolling we have seen in red states for some years now. It does feel like we are in a new political moment, one in which transgender and nonbinary people have been brought to the fore and enrolled as a proxy in a revanchist backlash against the achievements of second and third wave feminisms. But in the long view, I do not think this culture war redux will uniformly stop the progress that the movement has achieved.

AG: Yet another Trump travesty news item appeared as I was reflecting on my answer to your question, Joe: at the administration’s insistence, a commitment not to discriminate based on sexual orientation and gender identity has been taken out of a tripartite U.S./Canada/Mexico agreement. I wonder: do we actually miss the state appropriation of LGBT rights now that it may be fading, at least in the American context? Arguably that sort of state cooptation entailed some real promise of rights protection alongside the pinkwashing. In my article on homoglobalism, I mentioned the fragility and contingency of state endorsement of LGBT rights. For example, homoglobalism strengthened under the Obama administration’s pro-gay advocacy in the United Nations. But with this change of policy in the U.S., the formidability and future of gay rights is decidedly unclear.

Part of the need for queer-as-critique analysis is to consider these kinds of questions: what do we win and what do we lose by the states’ and international institutions’ embrace of LGBT rights? Is it better to have an Obama administration which embraces those rights, an embrace which entails cooptation and pinkwashing, or a Trump administration that rejects those rights? I know this may sound quite crude and unnuanced, but actually nuance requires we consider these questions. Some, including Scott Long, criticized the U.N. Security Council’s support for LGBT rights as empty rhetoric that will amount to nothing, or worse than nothing. Now, when the U.S. will not, during the Trump administration, take a leading role in support of LGBT rights in the U.N., are we better or worse off? What do we do when we recall that the emergence of homoglobalism is fragile, and dependent upon political and temporal contingencies? I want us to think about how these contemporary and regressive developments affect our assessment about working with and garnering recognition from state institutions.


63 Gross, supra note 1.


JF: I am impressed by how quickly the transgender community and their supporters pushed back against the Trump memo under the sign #WontBeErased. The “Wont” (won’t) is productively indeterminate I think, for in one sense it recognizes a hard truth of state recognition: gender seems more a legal construct than a social one at the moment, and if the state declares gender is genitals, this betrays not the force of genitals but the force of the state, Paisley’s point about demythifying the “state” notwithstanding. And yet “Wont” also signifies “cannot,” denying the constitutive power of law President Trump claims for it. This indeterminacy allows Jennifer Finney Boylan to write in the New York Times that “she was surprised to learn on Sunday morning that I do not exist,” and Chelsea Manning to say, the very next day, “[L]aws don’t determine our existence—*we* determine our existence.”

In no small part because of Judith Butler, we are inclined to think about sexual and gender minority oppression in terms of erasure, invisibility, being made unthinkable or unintelligible. But of course there is also subordination, exploitation, humiliation, demonization. Practices of the latter are often put in service of the former, say by demonizing transgender people to deny their dimensionality, their humanity.

How ought we to think—now—about this vexed question of wishing to be recognized, of wanting to count for something: as a rights-bearing citizen, or as a protected class, say, under state, federal or even international law? Aeyal, I wonder if your queer-as-critique might give us some tools to better craft our demands from institutions, and to avow the power of the state to either facilitate or impede gender or sexual flourishing without overstating the state’s power to confer identity? Or to put this impossibly, and to accept Paisley’s invitation to think beyond law as juridical: what is your queer theory of the state?

AG: I think this question takes me back to Janet Halley’s point I discussed before. By asking the state to recognize our relationships (or our identities), we concede, as it were, the state’s recognitive power. In an era of regression in LGBT rights, where we see that progress narratives are untrue, that things do not always get better over time, we have to revisit critique. For once conferred the power of recognition, the state, by the same token, is conferred the power to denigrate or delegitimate our lives, our sex, our relationships. I don’t think Obergefell will be overturned soon and I think that on a historical/generational scale we may still prove victorious, but we cannot deny recent setbacks or fully appreciate yet their scope. (And we see growing hostility to LGBT rights not just in the U.S. but in the


68 Butler, supra note 40, at 35, 130, 156.

69 Halley, supra note 16.
current coalition government in Israel and then of course more “heteronationalism” in Russia, Hungary, Poland and some states in Africa). So I guess the lesson is: yes, the state has power and we often need it and it’s fine and necessary to demand rights from it. Without its recognition of my relationships, I could face many hardships. But we should also think beyond the state. This means turning to the state for recognition pragmatically, but without accepting that its policies constitute our relationships, or our lives. In a case on same-sex inheritance rights in Israel, one of the judges wrote that same-sex couples do not need recognition from the state, for the couples exist without its recognition. Rather, they need legal recognition of their equal rights. So is a queer theory of the state actually an anarchist theory of the state? I have to leave this question to someone who knows more about anarchism than I, but I think such a theory should be one that does not postulate state recognition as constitutive of who we are (or who we refuse to be!), but instead appreciates, albeit critically, how the conferral of rights can and must be used instrumentally. By appealing for rights from the state, we should not accept that our relationships, identities, and gender(s) depend on the state for their existences. These phenomena do not get their validity from the state. Or at least we should not accept that they do.

PC: When I talk about demythifying the state, I am not suggesting that state power is not real; I am suggesting that it is fragmented. The reason that I use “sex” and not “gender” when I write about sex classifications gets at this point directly. The only thing we can say for sure about what sex means is what a particular state actor says it means. Unlike the definitions held by individuals or circulated by activists (trans or anti-trans) and researchers, state decisions about what sex means are backed by the force of law. When you are arrested for "false personation," when your parental relationship with your children is permanently severed, when your marriage is declared void, when you arrive at your polling place only to be denied the right to vote, when you lose your benefits as a surviving spouse—all because of what a judge or a policy or an identity document says your sex is—then the definition matters. For my purposes here, sex is not a thing, a property, or a trait but the outcome of decisions backed by legal authority.

While I would hesitate to draw too sharp a line, there is a difference between sexual orientation and gender identity when it comes to recognition. With sexuality, the law has tended to regulate relationships through the ban on same-sex marriage and the selective enforcement of sodomy laws. With respect to gender identity, the scrutiny falls on the individual—theyir body, their gender identity, the history and present configuration of their genitals. This is a bit of an overgeneralization, no doubt, but it does point to the inability of the concept of homonormativity to fully capture the necessity of a trans politics of

recognition. In the United States, *Lawrence v. Texas*\(^{71}\) and *Obergefell v. Hodges*\(^{72}\) changed everything—they made the domestication of queer lives possible. From that point of relative security, LGB people could assimilate or resist or do a bit of both. But M and F classifications are still baked into policies and laws, as I said earlier. So unlike *Obergefell* and *Lawrence*, there is no decision that will result, in one fell swoop, in getting state apparatuses at all levels of government out of the business of saying what sex you are. As a result, many trans and gender nonbinary people are caught up in the pursuit of a “thumbs up” from state agencies. While people on the queer left can easily eschew marriage, it is not so easy for trans people to forego a driver’s license or passport. State recognition seems much more constitutive of trans identity that it ever did for sexual orientation.

**JF:** Thank you both so much for all your insights, and for all your scholarship and advocacy on behalf of gender and sexual minorities.

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\(^{72}\) *Obergefell*, supra note 36.