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Comment:  
Seductions of Modern Culture

Angela P. Harris*

I

In Sources of the Self, Charles Taylor explores the stories about “identity” that frame both our fictions and our philosophy. In his view, modern culture is engaged in a long series of disputes between two different sets of stories about selves. There is the self as a free, disengaged subject, an autonomous, rational individual capable of knowing itself and mastering the universe without the intercession of God, a being that desires liberty above all else; and there is the “expressivist” self, committed to the truth of inward emotion and intuition, finding depth and meaning in nature and in the epiphanies produced by great art. In a complex historical account, Taylor locates the source of these two different kinds of stories in “the great intramural debate of the last two centuries, pitting the philosophy of the Enlightenment against the various forms of Romantic opposition.”

These two different traditions shape not only the stories we tell about our individual identities, but also the stories we tell about collective identities: the stories that take the form of histories. Benedict Anderson, looking for the source of modern nationalism and its power over people across the globe, describes the nation as an

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* Professor, University of California-Berkeley School of Law (Boalt Hall). I would like to thank Ellen Pader, for listening to me talk this essay through and giving me an anthropological perspective. All mistakes, of course, remain mine.


2. Taylor describes contemporary, “modern” culture as engaged in a long series of disputes “between what appear to be the demands of reason and disengaged freedom, and equality and universality, on one hand, and the demands of nature, or fulfillment, or expressive integrity, or intimacy, or particularity, on the other.” Id. at 101.

3. Id.
"imagined community." A nation is a story, made technically imaginable through the material transformations that capitalism and colonialism have wrought around the globe, but receiving its emotional power from the way it brings the Enlightenment and Romantic understandings together in a compelling way. A nation is made up of bearers of individual rights who consent to come together and be represented by a government. But the modern nation that thus symbolizes liberty and consent also represents a “people,” drawn together out of an immemorial past and moving into a limitless future, guided by their common destiny that is precious precisely because it is fortuitous—unwilled and unchanged but uniquely their own.

In Bowers v. Hardwick, Justice White, writing the opinion of the Court, tells such a story about America as a nation. Indeed, White’s opinion can be seen as the formulation of an “official nationalism”—a nationalism promoted by the state that represses alternative stories among its citizenry for the purpose of maintaining the power of current elites. His opinion draws skillfully on both the Enlightenment vision of the nation as a social contract and the Romantic vision of the nation as a people to tell a story that makes gays and lesbians national and constitutional outsiders.

White roots the constitutional protection of fundamental rights both in the necessity to protect the people’s liberty through limitation on governmental (and particularly judicial) power, and in respect for America’s unique history and traditions as a nation:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government, the Court has sought to

5. As Anderson puts it:
   > With the ebbing of religious belief, the suffering which belief in part composed did not disappear. . . . What then was required was a secular transformation of fatality into continuity, contingency into meaning. As we shall see, few things are better suited to this end than an idea of nation. If nation-states are widely conceded to be “new” and “historical,” the nations to which they give political expression always loom out of an immemorial past, and, still more important, glide into a limitless future. It is the magic of nationalism to turn chance into destiny.
   
   Id. at 11-12.
7. See Anderson, supra note 4, at 101 (defining official nationalism as “an anticipatory strategy adopted by dominant groups which are threatened with marginalization or exclusion from an emerging nationally-imagined community”). Elsewhere, Anderson refers to official nationalism as “a means . . . for stretching the short, tight skin of the nation over the gigantic body of the empire.” Id. at 86.
8. For a similar conclusion, see Kenneth Karst, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 201-10 (1989); see also id. at 204 (“The Supreme Court has placed the stamp of legitimacy on Georgia’s official exclusion of gays and lesbians from full membership in the community.”).
identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, it was said that this category include those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven States in the Union had criminal sodomy laws. In fact, until 1961, all fifty States outlawed sodomy, and today, twenty-four states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. 9

In this Symposium, Robert Morris and Francisco Valdes challenge White's official nationalism.10 They do so by telling counterhistories: histories that make the inclusion of gays and lesbians in the American nation imperative, a matter of justice, rather than "facetious." Morris directly takes on the official nationalism of *Bowers*. Against the Court's attempt to identify "this nation's history and tradition" solely with the history and tradition of the European immigrants who constituted the original thirteen colonies, Morris reminds us that the nation known as America includes the Hawaiian people. Indeed, Morris points out that acknowledgment of and respect for the history and traditions of native Hawaiian people is embedded in United States law: the "Hawaiiana Clauses" of the state

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10. Anderson's case studies of official nationalism indicate that its purpose is usually to conceal the discrepancy between "nation" and "state": to conceal the existence of multiple nations living within the bounds of a single state.

In almost every case, official nationalism concealed a discrepancy between nation and dynastic realm. Hence a world-wide contradiction: Slovaks were to be Magyarized, Indians Anglicized, and Koreans Japanified, but they would not be permitted to join pilgrimages which would allow them to administer Magyars, Englishmen, or Japanese. The banquet to which they were invited always turned out to be a Barmecide feast.

*Anderson, supra* note 4, at 110.
of Hawai‘i. Morris argues that “our American ‘traditions and collective conscience,’” therefore, includes not only the traditions of Puritans, Greeks, and Romans, but also the traditions of indigenous Hawaiians.11 More specifically, Morris argues that the aikāne relationships among native Hawaiian people both before and after the invasion of Captain Cook provide an appealing model for the rearticulation and legalization of contemporary same-sex marriage, in Hawai‘i and possibly elsewhere.12

Francisco Valdes presents a more indirect, but ultimately more sweeping, challenge to Justice White’s narrative of the American nation. Where Justice White views the homophobia of our national culture as a precious heritage to be preserved, Valdes sees it as a threat to the nation’s highest Enlightenment ideals of equality, autonomy, and liberty. Valdes’ counter-history tells the story of “Euro-American hetero-patriarchy”: the sex/gender system contemporary Americans imagine to be immutable and universal (fixed either by human biology or by the Word of God). Focusing on those ancestors Western Civilization most likes to claim—the ancient Greeks—and then examining the influence of Judeo-Christian ideology, Valdes shows that our current sex/gender system is historically, not biologically or divinely, constructed. Valdes’ historical survey is meant not only to show that the transformation of our sex/gender system is possible, but that it is necessary in the name of “the vaunted ideals of equality and liberty that this nation purports to embrace and uphold.”13 Where Morris draws on the Romantic sources of White's official nationalism to argue that “our nation’s” traditions are not what the Court claims they are, then, Valdes draws on its Enlightenment sources to argue that those traditions can and should be altered.

Both Morris and Valdes reject the official nationalism of Bowers on behalf of sexual minorities, but they refuse to do so as “homosexuals”—the identity constructed for them within modern culture and maintained in Justice White’s narrative. “The homosexual,” as James Baldwin has argued, exists within the dominant American narrative as a fantasy object, a screen upon which “heterosexuals” throw their unadmitted fears and desires.14 Seeking

12. Id. at 111-12.
“equality” as homosexuals—as the shadowy mirror image of heterosexuals—would only perpetuate hetero-patriarchy, the system of power that keeps both “women” and “homosexuals” “in their place.”15 Indeed, Morris and Valdes write primarily not on behalf of a group at all, but rather on behalf of a value. For Morris, that value is “love”; for Valdes, it is “desire.” Morris shows that traditional Hawaiian families were created primarily by love, not blood, and that the government itself was infused with “aloha spirit.” In his view, respect for this “political economy of love” requires that Hawai‘i grant same-sex marriages legal recognition.16 Valdes seeks to secure “legal recognition and protection of human desire for intimacy and affection, independent of [instrumentality],”17 and speaks of “a reconsideration of the constitutional worth of eros.”18 Both Morris and Valdes want to bring law to the defense of love and desire: to turn law from a protector of the status quo into an “engine” of social change.19

Morris and Valdes, therefore, do not seek legal rights within the existing sex/gender system, but rather transformation of the system altogether. And, appropriately, both authors make alliances across traditional boundaries of social classification. Morris allies gays and lesbians with native Hawaiians, hoping that “modern homogamy modeled on the original Hawaiian standard may do two things at once: . . . fit well within the statutory structure of marriage, and . . . redefine the power dynamics within a marriage as well as within the

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15. Thus, Valdes’ decision to use the word “queer” rather than “homosexual” is significant. Rather than “homosexuals,” Valdes uses the broader term “sexual minorities” to designate those people who transgress the cultural rules of sex, sexual orientation, and gender. Valdes, supra note 133, at 163 n.8. When speaking of political mobilization, Valdes again rejects the term “homosexual” in favor of the word “queer,” which for him signifies a conscious commitment to dismantling hetero-patriarchy. Id. at 164 n.10. Valdes has elsewhere explicated the concept of queerness as a political identification at some length. See Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Culture, 83 CAL. L. REV. 1, 346-50 (1995).

17. Valdes, supra note 13, at 209.
18. Id.
19. See Morris, supra note 11, at 121 (describing Hawaiiana Clauses as “primary and massive engines for social change”); Valdes, supra note 13, at 163 (arguing knowledge of historical construction of hetero-patriarchy may help “change law from an instrument of sex/gender oppression to an engine for sex/gender liberation”).
larger family, in the Hawaiian sense." Valdes urges coalition building between feminists and queers: "Simply put, Feminist and Queer critiques of law and society share common interests because conflationary hetero-patriarchy... works for the joint subjugation of women and sexual minorities."

This refusal to seek "equality" as defined by hetero-patriarchy is significant; it would have been easy to insist that the rights of homosexuals be equal to the rights of heterosexuals and thus be pulled into the long debate about "sameness" and "difference" that has long trapped liberal feminists. To refuse this lure of "equality" as defined by hetero-patriarchy is an important—and subversive—move. Nonetheless, both Morris and Valdes are seduced in a different way by the traditions that Justice White's official nationalism draws on so effectively. Some degree of seduction, of course, is necessary if change is going to occur at all. Lawyers must use the legal language they have, and even revolutionaries cannot hope to somehow step outside their cultures. Morris and Valdes, as social critics, must walk a fine line, undermining the very traditions they draw upon. But by seemingly failing to notice some of the limitations of the language of modern culture, Morris and Valdes run the risk of stumbling over them themselves. In Morris' case, it is the traditional Western arrogance toward the Other that emerges from between the lines of his text to threaten his argument. In Valdes' case, an Enlightenment faith in the Western subject's power to perceive and to remake itself leads to an unwarranted optimism about social change.

II

Whereas Valdes accepts "Euro-American hetero-patriarchy" as "our" system, but argues that we should reform it, Morris refuses to claim it in the first place. To Morris, Hawaiian culture should be central to an understanding of "our" culture. Morris admits that native Hawaiian "law, custom, usage, language, and tradition... do not derive their authority or lineage from Greek, Roman, Judeo-Christian, European norms, or Puritan ethics." But in his view, native Hawaiian practices have a stronger claim to being part of "our" tradition than do the practices of these traditionally "Western" cultures: "The nations from which those norms and ethics came are not a geographical, juridical, or political part of the United States,

20. Morris, supra note 11, at 156.
21. Valdes, supra note 13, at 211.
22. For a thoughtful discussion of this point, see Brian Fay, Critical Social Science: Liberation and Its Limits 159-64 (1987).
23. Morris, supra note 11, at 107.
while Hawai‘i is.” 24 And Hawaiian history shows that “homosexuality and homosexual relations between persons (aikāne) were not marginalized or denigrated in Hawai‘i.” 25 Rather, “homosexual relationships were political, egalitarian, chiefly, and usual.” 26

Morris’ narrow goal is to contest the Hawai‘i Supreme Court’s treatment of the privacy argument in *Baehr v. Lewin*, 27 the same-sex marriage case currently on remand from the Hawai‘i Supreme Court for a determination of whether any compelling state interest exists sufficient to deny same-sex couples a marriage license. 28 For Morris, the Hawaiiana Clauses require that same-sex marriage be permitted in the state of Hawai‘i, and perhaps, through analogy and comity, in other jurisdictions as well. 29 More broadly, Morris seeks to undermine the official nationalism of *Bowers v. Hardwick*. Although the *Baehr* court never cited *Bowers* in its opinion, it relied upon the *Bowers* “traditions and collective conscience” test of privacy in rejecting privacy as a ground for legalizing same-sex marriage. 30 By bringing native Hawaiian traditions to the center of “our” traditions and collective conscience—thus rewriting *Bowers*—Morris hopes to provide a “stronger and independent foundation for the analysis and expansion of *Baehr*.” 31 Morris hopes that the study of native Hawaiian customs and values will contribute to a legal and social approach to marriage that would focus on “how families are formed and how they function,” not on “petty and unresolvable inquiries into whether ‘homosexuality’ is or is not ‘immutable,’ or whether ‘homosexuals’ are or are not a ‘suspect class.’” 32 Most broadly, Morris argues that the Hawaiiana Clauses “provide, or ought to provide, both the strategic and rhetorical critique that makes possible our rational thought about homogamy.” 33 “If we will let it,” Morris says, “the Hawaiian value system can lead us out of the heterosexist morass of modern culture.” 34

Morris’ challenge to Justice White’s official nationalism is exciting in its insistence that indigenous peoples be taken seriously as part of

24. Id.
25. Id. at 111.
26. Id.
27. 852 P.2d 44 (Haw. 1993).
28. Morris, supra note 11, at 106.
29. Id. at 109-10.
30. Id. at 110 n.21 (citing Christopher Keller, *Divining the Priest: A Case Comment on Baehr v. Lewin*, 12 LAW & INEQ. J. 483 (1994)).
31. Id. at 109.
32. Id. at 159.
33. Id. at 121.
34. Id. at 111.
the nation’s “We the People.” But the history he tells to support his challenge involves several problems of cultural translation between premodern Hawai‘i and contemporary America that he either fails to acknowledge or dismisses as trivial. As Eric Cheyfitz has noted, American imperialism “historically has functioned (and continues to function) by substituting for the difficult politics of translation another politics of translation that represses these difficulties,” a repression accomplished through both textual and literal violence. 35 Morris’ failure to give us a history that takes the politics of translation seriously, and his repression of the complexity and subtlety of the problems involved, threatens to do violence to his otherwise laudable goals.

Even before these problems of translation are addressed, we might ask whether Morris’ legal argument accomplishes what he thinks it does. Morris believes that he can destroy the power of Bowers’ official nationalism if he can show that the Court erred in footnote 6 of its opinion when it included Hawai‘i in the list of 32 states that had criminal sodomy laws in 1868, the year the Fourteenth Amendment was ratified. To this end, Morris shows that Hawai‘i at the time had recently gone through several legal and political regimes (some of dubious legitimacy), so that the law in force was unclear; that Hawaiian prosecutions for sodomy were few and far between; and that understanding the law in force requires an understanding not only of its English but its Hawaiian text, since Hawaiian was and is an official language of the state of Hawaii. But this critique, though persuasive, does not alter the legal force of Justice White’s history. Justice White’s point was not that all states had criminal sodomy laws in 1868. Unanimity is not necessary to find that there was a national “tradition” of criminalizing sodomy; even a mere two-thirds majority, presumably, would still be evidence of a tradition. Thus, it is hard to see how the Court’s erroneous characterization of Hawaiian law caused it to “unwittingly incorporate a body of law and language that is very nearly the antithesis of its holding—a body of law that largely deconstructs the premises upon which that holding is based.” 36 Morris’ leaps between the American national tradition and the tradition(s) of the state of Hawai‘i, between excoriating the Bowers Court and exhorting the Baehr court, are often confusing.

These problems aside, however, there remain the questions of translation. Morris’ tools for allying contemporary same-sex marriage with traditional Hawaiian culture are what he calls the “Hawaiiana

36. Morris, supra note 11, at 123.
Clauses," a cluster of Hawai'i state constitutional and statutory texts. Morris writes:

The Hawaiiana Clauses require the cessation of all prohibitions against homogamy both because they are now part and parcel of our American "traditions and collective conscience," and also because the Clauses, themselves, view such equality as inherent among human individuals. The Hawaiiana Clauses suggest that if the "traditions and collective conscience" standard is to be used, it must not be used selectively on the side of homophobia. Because privacy is context- and tradition-sensitive, the Clauses require a leap back over time, back over all of the nineteenth century, over the first written statutes and constitutions, over the advent of the Calvinist missionaries and all other non-Hawaiians, to 1778, a pre-literate point when Hawai'i was pure Hawai'i.

In order to get to this point, we must conduct a far-ranging and multifarious "inquest on the past." 37

An "inquest" is a legal investigation typically performed on the occasion of a death: presumably, in this case, the death of the past. But three problems of translation emerge upon the undertaking of this inquest. First, how can we be certain about our translation of the practices of aikane across the lines of power as well as language that separated European traders and missionaries from the indigenous people of Hawai'i in the eighteenth century? Second, how can we reliably translate these practices from their own context to that of the present? And third, is there something in this process of translation that assumes not just the disappearance of the past, but of the Hawaiians themselves?

To what extent can we understand how aikane lived and loved one another—what they meant to one another? This question is particularly acute if, as he says, Morris seeks a "pure" Hawai'i, an oral culture untouched by European hands; and his own evidence frequently undermines the clarity and certainty of the story he tells. Morris insists that the relationship between aikane was egalitarian 38—although he also argues that a standard feature of such relationships was that "a person is rescued from filth and degradation, or raised in social status." 39 He tells us that there were both male and female aikane—although his stories are exclusively about men. He tells us that traditional Hawaiian culture had no systems of sexual hierarchy, whether based on gender or on dichotomies like active-passive and dominant-recessive—"whatever other seeming similarities

37. Id. at 111.
38. Id.
39. Id. at 145.
the aikāne relationships may have to these other institutions [representing homogamy in other cultures]. Yet, the density of his discussion about the social rankings generated by the terms kapu and noa raises questions about their possible influence on intimate relationships. Finally, he tells us that the relationship between aikāne was (homo)sexual, although some of the sources he cites indicate a debate over that question.

Morris initially acknowledges the problems of sources and interpretation, only later to brush them aside. Yet, particularly when dealing with an oral culture, these problems can be acute. As Arnold Krupat notes of Native American literature, to produce a “text” about an oral culture that can then be mined for information requires the work of both transcribers and translators. At each of these points—transcription and translation—there may be errors, misunderstandings, slippages; and these problems, universal to all acts of translation, become much more serious when the encounter between two different languages and two different modes of cultural reproduction is also an encounter between colonizer and colonized.

Morris is explicit about the efforts of Western missionaries to destroy native Hawaiian culture in the name of “civilization” and Christianity, and about Hawaiian resistance:

[It was the “kinship network,” the “relations,” that many missionaries realized was the stumbling block to “submissive wifely behavior.” They believed that “true family feeling” did not exist among the Hawaiians, and that the Hawaiian kin system was “predatory.” Hence, they turned their attention to the political and economic structures of Hawaiian society, including those

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40. Id. at 155.
41. See id. at 152-54.
42. See id. at 127-28. Morris also notes the complexity of this issue in his discussion of whether aikāne committed “sodomy.” Id. at 129.
43. See id. at 127-28.
45. Gyan Prakash illustrates the problem with reading archival documents on the abolition of sati, the Hindu widow sacrifice in the early nineteenth century:

The historian encounters these records . . . as evidence of the contests between the British “civilizing mission” and Hindu heathenism, between modernity and tradition, and as a story of the beginning of the emancipation of Hindu women and about the birth of modern India. This is so because . . . the very existence of these documents has a history that entails the use of women as the site for both the colonial and the indigenous male elite’s constructions of authoritative Hindu traditions. The questions asked of accumulated sources on sati—whether or not the burning of widows was sanctioned by Hindu codes, did women go willingly to the funeral pyre, on what grounds could the immolation of women be abolished—come to us marked by their early nineteenth-century history. The historian’s confrontation today with sources on sati, therefore, cannot escape the echo of that previous rendezvous.

related to land, which they believed undermined the fundamental reforms they were sent to effect.\textsuperscript{46}

To the missionaries, Hawaiian kinship relations and relations to “property” were wrong, “improper,” insufficiently civilized, and insufficiently “manly”—and in need of drastic alteration.\textsuperscript{47} In particular, the missionaries devoted themselves to making Hawaiian kin relationships “proper” by imposing the concept of Christian marriage upon Hawaiians.\textsuperscript{48} The Hawaiians were aware of this, and there is some evidence that they responded by concealing their actions and beliefs from the \textit{haoles}.\textsuperscript{49}

Yet Morris does not take the next step of wondering how the missionaries’ assumption of European superiority, with its distaste for—if not horror of—the Hawaiian way of life might have pervaded the very documents we now rely on for knowledge of traditional aikāne lives. Morris concedes that there were massive problems for the missionaries, not only in trying to translate the concept of “sodomy” as a sin, but in trying to translate the concept of “marriage” itself.\textsuperscript{50} He approvingly cites Maivan Clech Lâm, who describes “a bad fit between Western and Hawaiian concepts, a certain ‘linguistic noncalibration,’ ambivalence, and uncertainty.”\textsuperscript{51} But Morris does not address to what extent our own understanding of aikāne may be altered by this ambivalence, uncertainty, and possibly outright distortion. He treats the attempt to trace a history of sodomy prosecutions as hopelessly tainted by its documentation by the colonizers, but not so our own attempt at tracing aikāne relationships.

Even assuming that we have access to the meaning of aikāne as it existed in “pure Hawai‘i,” the problems of translation continue when we try to translate that complex set of social practices to the present-day state of Hawai‘i. Morris himself gives an indication of the problems of translating “fundamental” (to Enlightenment subjects) constitutional concepts such as “due process” and “equal protection” into Hawaiian: He notes that not only is there a considerable gap between the English and the Hawaiian, but that Hawaiian translations differ dramatically from one another.\textsuperscript{52} Eric Cheyfitz analyzes a similar problem from the Native American context—translating the seemingly simple concept “sale of property”:

\begin{itemize}
  \item \textsuperscript{46} Morris, supra note 11, at 156 (citations omitted).
  \item \textsuperscript{47} Id. at 125.
  \item \textsuperscript{48} Id. at 156.
  \item \textsuperscript{49} Id. at 130.
  \item \textsuperscript{50} Id. at 129-30.
  \item \textsuperscript{51} Id. at 123 (citing Maivan Clech Lâm, The Kuleana Act Revisited: The Survival of Traditional Hawaiian Common Rights in Land, 64 WASH. L. REV. 233 (1989)).
  \item \textsuperscript{52} Id. at 141-43.
\end{itemize}
We can only talk about the sale of property [between the English and Indians in the United States colonial period] if, like the deeds themselves, we talk about these cases exclusively in English terms. For from the Indians' perspective there was in the first place no place to translate (to use the legal terminology from Blackstone). That is, the land that the Indians negotiated to share with the English was in Algonquian, or kin-ordered, terms not alienable in individualized places that could be traded in a market economy. The Indians' land, then, was unfenced, which is not to say that it wasn't marked or bounded, that is, placed, but only to say that from the contemporary Western perspective... these boundaries were "open" and "shifting," and from the perspective of the English colonists they were virtually invisible or untranslatable. The problem here, it seems to me, is not the translation of the reasonable into the "arbitrary" (or vice versa); the notion that English ideas of place were arbitrary or "abstract"... in contrast to Indian conceptions risks placing the Indians back in the natural world as noble savages (all naming is arbitrary or abstract, that is, cultural, when one thinks of it in terms of some unmediated natural realm). Rather, the problem is how does one translate ideas of place grounded in conceptions of communal or social labor into ideas of place grounded in the notion of identity? The problem is not... how does one translate radically different systems of property into one another. But can one translate the idea of place as property into an idea of place the terms of which the West has never granted legitimacy? 53

Morris also refers to some problems in translating the concept of aikāne. For example, should aikāne translate into "marriage" or some form of "adoption"? Morris notes that in the nineteenth century adoption was frequently used as a legal translation of aikāne, 54 but an aikāne might also be considered an "unranked brother," introducing an "ethic of siblingship." 55 Morris says that "as part of the extended family, an aikāne might be interchangeably designated as a relative." 56 Yet Morris refers to aikāne in the nineteenth-century probate case Estate of Kami'i simply as "homogamous lovers." 57 Might not a more appropriate goal than homogamy simpliciter be some hybrid legal form that incorporated conceptions of "ramage" or ma—a new legal form that would allow friends as well

53. CHEYFITZ, supra note 35, at 57-58.
54. Morris, supra note 11, at 135, 146.
55. Id. at 135. Perhaps the best way to think about an aikāne relationship is as adoption and marriage combined.
56. Id. at 136.
57. Id.
as lovers, groups of three or more as well as couples, to become legal family? The story of 'Umi, which Morris tells us most Hawaiianists agree is "paradigmatic," shows that 'Umi had at least three aikāne. Should the laws of bigamy be altered in order to accommodate the new aikāne marriage? Morris also argues that rights of gathering on land and sea and rights pertaining to administration and government were tied up with aikāne relationships. If all of these practices are a seamless web, shouldn't legalizing the aikāne relationship involve much more than simply granting same-sex couples a marriage license? Of course, Morris is right that cultures must change with material and political conditions, and that the aikāne relationships of today cannot be the same as those prior to contact with Europeans. But it is jarring to see this complex web of relationships involving love, friendship, kinship, land, sea, and government deftly reduced to "homogamy." Yet Morris seems confident that despite these difficulties, the existence of aikāne in traditional times not only permits, but requires modern-day same-sex marriage—nothing less, and nothing more.

The third problem of translation is the question of indigenous resistance to translation itself. Morris with approval quotes Anthony Kronman: "We must respect the past because the world of culture that we inherit from it makes us who we are." But whose "we" is this? Morris defends with vigor and outlines with care his translation of native Hawaiian practices of aikāne, and passionately argues that the Hawaiiana Clauses require that these practices be accommodated by present-day law. He emphasizes that "Hawaiian culture finds ways to re-instantiate itself in modern forms but with traditional (i.e., pre-1778) values. . . . Deference paid by lawmakers to Hawaiian values and traditions honors this method of cultural survival. With respect to homogamy, true respect for Hawaiian traditions necessitates finding a legal way for it and heterogamy to co-exist." But for whose benefit? Morris notes that under article XII, section 7 of the state constitution, the Hawaiian customs and rights that must be respected must not only be somehow tied to the use of the land, but are "limited to the protection of Hawaiian tradition by and for Hawaiians only." But a statute, Hawai'i Revised Statutes section 1-1, "protects Hawaiian tradition without limits according to person or class. Thus, it appears that Hawaiian tradition must be upheld for

58. Id. at 146.
59. Id. at 132.
60. Id. at 157 (quoting Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1066 (1990)).
61. Id. at 141.
62. Id. at 139.
Hawaiians and non-Hawaiians alike.” This statement is not only doubtful statutory interpretation; it is also troubling politics. Morris’ reading of the Hawaiiana Clauses appears to defend native Hawaiian culture only to appropriate it for the benefit of non-Hawaiians. Morris argues that the Baehr court’s views of the relationship between homosexuality and privacy “flies in the face of traditional Hawaiian usage and the facts of the case.” He argues that if oral testimony is acceptable to prove native Hawaiian customs and traditions regarding land use in a particular area, “then testimony about the practice of homogamous relationships should be acceptable for the plaintiffs in a homogamy petition.” He does not tell us, however, whether these plaintiffs would or should be native Hawaiians. Again, Morris’ quick dismissal of the possibility that the Hawaiiana Clauses are specifically for native Hawaiians bespeaks a willingness to turn translation into appropriation.

Morris never discusses the relationship between the Hawaiiana Clauses and the present-day Hawaiian people. Indeed, Morris tells us almost nothing at all about the lives of present-day Hawaiian people. For example, do aikāne still exist today? Sometimes he hints that aikāne relationships end around mid-nineteenth century, and he speaks of them in the past tense. Elsewhere, he writes that the recognition of Hawaiian customs and practices under the Hawaiiana Clauses requires “the establishment of the practices as of 1778 and that they have been continued by the Hawaiians,” suggesting that the existence of contemporary aikāne relationships is crucial. Finally, at one point he simply asserts that “aikāne persons and relationships continue to this day, hidden, if at all, because of modern homophobia, not because their validity or Hawaiianness has died out.” Yet we finish the article not knowing any more than these hints and suggestions about how “the Hawaiian people themselves” presently understand these relationships. Surely this is an important issue if aikāne marriage is to be legally recognized.

There are two points here. One is the question of political coalition: Morris’ argument would be more persuasive if in fact there were a present-day practice of aikāne among native Hawaiians, and if native Hawaiians and non-Hawaiian gays and lesbians in Hawai‘i were working together to gain legal recognition of these relationships.

63. Id.
64. Id. at 149.
65. Id. at 150.
66. Id. at 135, 139.
67. Id. at 155.
68. Id. at 148.
69. Id. at 141.
There is only a suggestion of such a coalition at the end of the article. The second point is suggested by the first: What story does Morris' argument tell about the relationship between America as a nation and Hawai'i as a nation?

For the problems of translation here do not involve cultures within a single nation. Hawai'i did not join the United States by consent; it was conquered and its people assimilated by force. And this conquest has not been forgiven and forgotten. The contemporary Hawaiian sovereignty movement constitutes another powerful challenge to Justice White's official nationalism in Bowers—a denial of the assumption that "we" are now a single "nation." Yet in accepting Justice White's challenge to articulate the traditions and collective conscience of "our Nation," Morris potentially puts himself at odds with the sovereignty movement and repeats the incorporation of native Hawaiians into the United States. In Morris' vision, traditions and customs that belonged to the native Hawaiian nation are to be taken and transformed for the benefit of the American nation. Morris does not address the implications of this appropriation for the Hawaiian sovereignty movement, or for Hawaiian cultural integrity more generally. Rather the Hawaiian nation becomes the State of Hawai'i.

Morris' own language tends to obscure these difficult issues of assimilation and separatism. Morris argues for a revival of aikāne practices on behalf of equality, not between Hawaiians and non-Hawaiians, but as "inherent among human individuals." In a lengthy footnote, Morris approvingly cites Christopher Keller's use of Enlightenment language to describe "God-given 'inalienable rights' which exist for every person" and describes the Hawaiian materials as having much to say about "the nature of being human." This language of universal humanism is itself culture-bound: It is the language of the Enlightenment. It is also a language that obscures questions of power and consent by assuming them away, by soothingly insisting that we are all just "human beings" and therefore no problems of translation exist.

70. Id. at 158.
71. A vibrant Hawaiian sovereignty movement exists today, as Morris acknowledges at the end of the article. Id.
72. For an argument suggesting a very different legal approach to native Hawaiian cultural practices—that the courts constitute an important site for "cultural performance," and that native Hawaiians should have access to the courts as native Hawaiians—see Eric Yamamoto, Courts and the Cultural Performance: Native Hawaiians' Uncertain Right to Sue in Federal and State Courts, 16 U. Haw. L. Rev. 1 (1994).
73. Morris, supra note 11, at 111.
74. Id. at 110 n.21.
75. Id.
But the problems of translation do exist; one response to them is indigenous resistance to the very project of translation. Cheyfitz notes that nineteenth-century Indians resisted translation, and that this resistance—an insistence on the importance of that which cannot be translated—has been key to maintaining Indian cultural integrity in the twentieth century. Even when the translation project is no longer undertaken for the purpose of reforming indigenous culture, but for reforming our own, there may be problems. “Even if we were to disavow the attempt to make other societies into our property, vowing only to get to know them better in order to reform the institution of property in our own, we would remember, as Levi-Strauss does, that the history of this knowledge, the history of anthropology, cannot be separated from the history of the West’s appropriation of these societies.” Indeed, one of the persistent manifestations of cultural imperialism for Native Americans in the twentieth century has been the White craze for all things Indian.

76. CHEYFITZ, supra note 35, at 137-40.
77. Id. at 52. Arnold Krupat makes a similar point with respect to literary criticism across cultures (which he calls “ethnocriticism”):

For all that ethnocriticism wishes to engage on an equal footing with Native literary practice, it cannot help but do so in a context of vastly unequal power relations. Thus, for all that the ethnocritic may decently and sincerely attempt to inquire into and learn from the Otherness of ongoing Indian literary performances, the sociopolitical context being what it is, she or he cannot help but threaten to swallow, submerge, or obliterate these performances. This is not to say that nothing can be done; but good-will or even great talent alone cannot undo the current differential power relations between dominant and subaltern cultural production.

78. For an argument that “New Age” attempts to appropriate Indian ceremonies, traditions, and spiritual concepts constitute a form of attempted cultural genocide, see Ward Churchill, A Little Matter of Genocide and Spiritual Hucksterism, in Fantasies of the Master Race: Literature, Cinema and the Colonization of American Indians 187, 215 (M. Annette Jaimes ed., 1992). Wendy Rose connects the contemporary fad of White poets and spiritualists for presenting themselves as “shamans” directly to the discipline of anthropology, which has located Indian culture solely in the past, removed from the lives of present-day Indians and understood best by White experts. “If, as the academics would have it, Indians ‘no longer really know’ or at least lack access to their traditions and spirituality (not to mention land tenure), then it follows that they are no longer ‘truly’ Indian. If culture, tradition, spirituality, oral literature, and land are not theirs to protect, then such things are free for the taking.” Wendy Rose, The Great Pretenders: Further Reflections on Whiteshamanism, in The State of Native America: Genocide, Colonization, and Resistance 403, 407 (M. Annette Jaimes ed., 1992).

The poet Leslie Marmon Silko sees the project of “reforming” the Indians through destroying their spiritual world view as involving not only missionary work but the incursion of English words for things—the possibility of translation itself. In the beginning, she writes, “the people shared a single clan name.” But the fifth world had become entangled with European names; the names of the rivers, the hills, the names of the animals and plants—all of creation suddenly had two names: an Indian name and a white name. Christianity separated the people from themselves; it tried to crush the single clan name, encouraging each person to stand alone, because Jesus Christ would save only the individual soul; Jesus Christ was not like the Mother who loved and cared for them as her children, as her family. . . . The old instinct had always been to gather the feelings and opinions that were scattered through the village, to gather them like willow twigs and tie them into a single prayer bundle that would bring peace to all of them.
Imperialism does not always involve gunboats; it can also wear the smiling face of universal humanism. In this context, Morris' failure to acknowledge the possibility of conflict between native Hawaiians and Hawai'i state gays and lesbians over the proper interpretation of the Hawaiana Clauses is deeply problematic.

Let me be clear. I am not arguing that political coalitions cannot or should not exist between native Hawaiians and gays and lesbians. I am not arguing that translation in this context is impossible or inherently imperialist—that these groups today are as utterly foreign to one another and burdened by the same relations of power as were the native Hawaiians and the missionaries in the nineteenth century. Nor would I argue that because "pure Hawai'i" cannot be recovered, contemporary law should make no effort to preserve and maintain those traditions that persist, or that are reinvented for a new generation. The translation Morris argues for is possible, and perhaps even "devoutly to be wished." The problem is that the politics of translation, in order to be surmounted, must first be openly set forth, in all their complexity and delicacy; and this Morris has not done.

Part of the difficulty, perhaps, stems from the two hats Morris wears throughout his article—the historian's and the lawyer's. American constitutional law assumes one nation, one tradition; it assumes a world in which there are no meaningful problems of translation. As a lawyer, Morris correctly marshalls his evidence and presents it in the most convincing light: eliding uncertainty, ambiguity, difficulties of translation; assuming one nation and one tradition. Yet his legal argument gains much of its strength from its reliance upon history as an ally. And a historian dealing with questions of cultural difference in a colonial context must strive to acknowledge and to undermine the very culture-boundedness that makes the lawyer's argument so persuasive and certain. The historian must, that is, deal

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But now the feelings were twisted, tangled roots, and all the names for the source of this growth were buried under English words, out of reach. And there would be no peace and the people would have no rest until the entanglement had been unwound to the source. LESLIE MARMON SILKO, CEREMONY 68-69 (1977), quoted in CHEYFITZ, supra note 35, at 138.

79. Rose connects the White appropriation of Indian customs and practices out of context explicitly with the rhetoric of universal humanism:

"In the construction at hand, those who embrace the Euro-derivation of "universal knowledge" are considered by definition to be the normative expression of intellectual advancement among all humanity. They are "citizens of the world," holders of "the big picture," having inherent rights to impose themselves and their "insights" everywhere and at all times, with military force if need be. . . . The phenomenon is integral to Euroamerican culture, transcending all ideological boundaries demarcating conservatism and progressivism; a poster popular among science fiction readers of both political persuasions shows a 15th-century European ship sailing a star-map and asks: "What would have happened if Ferdinand and Isabella had said no?"

Rose, supra note 78, at 407.

80. Morris, supra note 11, at 159.
seriously with the problems of language, culture, and power that emerge from the encounter between native Hawaiians and Europeans. Not to do so is to commit the worst sort of “law-office history.”

As Cheyfitz notes, to insist there are no problems of translation is itself a familiar tactic of imperialism. In seeking to minimize these complex and difficult problems—in letting the lawyer win out over the historian—Morris is seduced by the official nationalism he sets out to defeat.

III

Valdes succumbs to a different, and far less dangerous, seduction of modern culture. Valdes uses history, not to sketch a tradition different from our own, but to investigate how our culture came to take the shape it does. By proving that our sex/gender system is “socially constructed,” he hopes to show that it can and should be altered to further our nation’s Enlightenment ideals. His history is valuable both as an analysis of “Euro-American hetero-patriarchy” and as a demonstration of its culture-boundedness. But his unquestioning faith in our ability (and willingness) to alter our own culture once we are shown its flaws is subject to question.

Valdes skillfully enlists both Enlightenment and Romantic values to subvert Euro-American hetero-patriarchy. The more developed prong of his attack is the one that appeals to Enlightenment values: rationality as a method and liberty as a goal. Valdes diligently works to subject the peculiar, unruly, and perfectly queer rules of the contemporary sex/gender system to rationality. He first disaggregates “sex,” “gender,” “sexual orientation,” and “sexuality.”

81. See CHEYFitz, supra note 35, at 105. Cheyfitz writes:
In the beginning, as preamble to and constitution of the act of dispossession, we find the activity of colonization as translation, both in the sense of conversion from one language into another and in a metaphorical or transferred sense. In this case, however, translation means precisely not to understand others who are the original (inhabitants) or to understand those others all too easily—as if there were no questions of translation—solely in terms of one’s own language, where those others become a useable fiction: the fiction of the Other.

Id.

82. Like Morris, Valdes sometimes looks to indigenous cultures as a source for the critique and reform of our own. In several footnotes, he praises the “Native American” sex/gender system as superior to Euro-American hetero-patriarchy in many respects. See, e.g., Valdes, supra note 13, at 204 n.156. By “the Native American sex-gender system,” Valdes primarily means the Zuni practice of berdache, about which he has written elsewhere. See Valdes, supra note 15, at 209-44. The bulk of this article is, however, not devoted to understanding and transplanting Zuni or other Native American practices, but rather to exploring the history of “Western” culture.

83. Sex is defined as “the physical attributes of bodies.” Valdes, supra note 13, at 164.

84. Gender is defined as “personality attributes and socio-sexual roles that society understands to be ‘masculine’ or ‘feminine’ and which society ascribes on the basis of sex.” Id.

85. Sexual orientation is defined as “the inclination of sexual or affectional interests and desires among humans, as directed toward members of the same sex, the other sex, or both
Valdes then literally maps the "conflation" (the term itself subtly suggesting a rational reality distorted by ideology) of the first three terms, using a diagram to show how the contemporary American sex/gender system "constructs sex as the determinant of gender, conceptualizes gender as the social dimension of sex, and treats sexual orientation as the sexual performance of gender." On the basis of this conflation, Valdes convincingly argues that "sexual orientation discrimination" is always already "sex discrimination," and thus antidiscrimination law will be incomplete until it reaches legal discrimination against sexual minorities. He also persuasively shows that this very "conflation"—the persistent tendency of these concepts to slide into one another, to be taken to represent one another, to mutually reinforce one another—ensures the stability of the system, by presenting a seamless web of ideology to the subjects it constructs.

But Valdes seeks to go further—not only to dissect Euro-American hetero-patriarchy but to dispel any pretense that it is natural, normal, and necessary. To do so, Valdes analyzes the classical sex/gender system to show how, despite dissimilarities, it laid the foundation for our own. Valdes' history of classical Greek sexual culture, and the Greco-Roman and Judeo-Christian cultures that followed it, is a teleological one, full of "proto" systems that slowly but inexorably through the centuries lock into place to produce today's sex/gender system. It is also a functionalist history: Cultural practices, including sexual ones, emerge, persist, and then dissolve, all in obedience to their usefulness in holding a society together. This story does not even try to understand these cultures as the people living in them did. But Valdes is not interested in these cultures for their own sake. He is resolutely "present-ist": The point of his history is to talk about the present, to show that our sex/gender system is not divinely or biologically required, but was shaped by a particular history and thus "socially constructed." He hopes that his presentation of the historical record will provide an "impetus for sex/gender reform."
This reform involves, apparently, the making of wise "policy" by social engineers. Valdes recommends, for example, that "it would behoove law and policy makers, and society more generally, to apply the lessons that this historical and comparative record offers." Valdes thus energetically uses Enlightenment values against modern culture itself: He presents himself both as the scientific debunker, dispelling myths of "Naturality, Normality, and Morality," along with associated claims of "Necessity" or "Utility," and as the enlightened and rational policymaker, ready to institute practical reforms.

But Valdes supplements his Enlightenment arguments with unexpectedly Romantic ones. Rather than supporting the abolition of Euro-American hetero-patriarchy in the name of increased autonomy, liberty, equality, or efficiency, as one might expect, he relies on a different value: "desire." The problem that seems to him foremost is that in the long history of Euro-American hetero-patriarchy, desire is never valued for its own sake, but solely for the "instrumental" purposes to which it can be put. It is the very functionality of the various sex/gender systems throughout Western history that Valdes finds objectionable; and it is not ultimately liberty or equality that Valdes wants us to respect, but desire "as such."

Thus, Valdes deplores the way in which Greek sexuality maintained its social relations: "Greek regulation of social life in general, and sexual relations in particular, was instrumental because it used sex, gender, and sexuality to reinforce class-based and sex-based power distributions. . . . Sexual desire thus became a commodity used more for the re-production of the society than for the reproduction of the species." And again, "The Greek system of formalized cross-sex and same-sex unions thus channeled the sexual desires of its inhabitants to re-produce its ideology even as it reproduced its population." "Institutionalized paiderastia, like the institution of the family in the cross-sex context, thereby marshalled desire to serve the Greek society's sex/gender ideology."

Summing up, Valdes says the historical record underscores how "[d]esire is socially and legally devalued unless it is imbued with the instrument of ideology." He finds a constant theme throughout history in "the suppression of of sexual desires that do not serve specific ideological goals." Valdes finds this "devaluation of

91. Id. at 209.
92. Id. at 203-04.
93. Id. at 180.
94. Id. at 182.
95. Id. at 188.
96. Id. at 170.
97. Id. at 194.
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desire” intact in modern-day American law, which protects sexuality only insofar as it serves state goals such as preserving hetero-patriarchy itself in the institution of marriage. Indeed, of all the cultures Valdes reviews “the Euro-American model is the most instrumental (and repressive) sex/gender regime.” Valdes maintains that “contemporary law fails to recognize the worth of non-instrumental desire or intimacy.” Rather, “the human desire for erotic contact and intimacy has been exploited for its instrumental potential in the construction of society and its internal sex/gender borders.”

This instrumentality is deeply troubling to Valdes, but it is not clear why. Perhaps Valdes is only attacking the instrumental use of desire to create and punish certain groups, as Euro-American hetero-patriarchy creates and punishes “women” and “sexual minorities.” But Valdes’ repeated use of the word “instrumental,” always a rhetorical club, suggests that he sees the alliance of desire with cultural stability as inherently problematic. He argues that “the failure to recognize desire as intrinsically valuable can be harmful because it permits dominant forces to assess and govern the desires of all in self-serving fashion.” Here, Valdes—despite his stance as rationalist social reformer—seems to argue that there is something wrong with instrumentality itself. He concludes, “The pending task, therefore, is securing legal recognition and protection of human desire for intimacy and affection, independent of social goals as filtered through dominant sex/gender ideology”, and he calls for “the revaluation of desire, pleasure, and intimacy as intrinsically important aspects of human life . . .”

It is unclear what Valdes means by his call to value desire, pleasure, and intimacy for their own sake, if this represents an attack on the use of desire for instrumental purposes altogether. Translated into legal terms, however, this would seem to require more than simply extending the protections of anti-discrimination law to sexual minorities. Would his protection of desire as such mean that sexuality could never be restrained, no matter what or who might be harmed in its expression? Would sexuality be protected like the free exercise of religion—respected except when the majority found it simply too incomprehensible or dangerous?

98. Id. at 170-72.
99. Id. at 207.
100. Id. at 172.
101. Id. at 206.
102. Id. at 172.
103. Id. at 209.
104. Id. 
Valdes identifies gender as the linchpin for the joint oppression of women and sexual minorities. Perhaps he would join with Bob Connell in imagining the Romantic as well as Enlightenment benefits of a genderless world:

First there are more players in the game. The "equal opportunity" argument that sex discrimination wastes human resources is, with all its limitations, correct—and can be extended far beyond the issue of employment. Second, the free reworking of gender relations which are at present strongly constrained, and psychological and cultural patterns at present strongly stylized, geometrically increases the possibilities of experience and invention. Hermaphroditism or androgyny is hardly even a beginning. Third, and perhaps most important, the emotional dimensions of life that are opened up for exploration in a sexually equal society are more complex than those of our own society because of the greater possibilities of creation and diversity. Love between equals is no less passionate than love under the star of gender inequality. It will be differently passionate as the business of protection and dependence is dispensed with. These themes in relationships will perhaps be replaced by the excitement of the unknown and unpredictable, and of constructing futures that are genuinely without preordained limits.

Valdes's counter-history effectively uses the values of modern culture to undermine modern cultural practices. His use of Enlightenment rationality and Romantic expressivism to analyze and reject Euro-American hetero-patriarchy is forceful and persuasive precisely because of its very rootedness in, as he puts it, "the vaunted ideals of equality and liberty that this nation purports to embrace and uphold." In his vision of a radically unconstrained, liberated sexuality unconnected to relations of power, as well as in his vision of a rational culture able and willing to remake itself once its ideologies are exposed as myths rather than the "natural, normal, and necessary," Valdes paints an attractive picture of the world as we might like it to be. It is a picture both derivative and subversive of Justice White's official nationalism.

Yet his account, in holding modern culture fast to its own values, also overlooks its limits. Here, the feminist example is instructive. Feminists have been arguing ever since the Declaration of the Rights of "Man" that women, too, have a claim on those God-given, natural,

105. Id. at 210.
107. Valdes, supra note 13, at 205.
inalienable rights; and they have constructed their arguments using the very tools of logic and rationality that the Enlightenment used against despotism. Yet if it were reason alone that held women in chains, those chains would have long ago burst asunder. Thus, the example of feminism suggests that ignorance is not all there is at stake. The problem is also one of power. As Eve Kosofsky Sedgwick puts it, “powerful people don’t have to be acute or right.” Sedgwick suggests that a calculated ignorance—a deliberate refusal to know—is an instrument of power; and this in turn suggests that those who benefit from Euro-American hetero-patriarchy may not simply defer to Valdes’ analysis. As all good lawyers know, the burden of proof is key to the outcome of a case. As long as those who benefit from hetero-patriarchy impose that burden on its challengers, Valdes’ painstaking effort to defeat the myths of Naturality, Normality, Morality, and Utility may be met with simple denial.

So the deeper question here is about power. For even if we are convinced by Valdes’ demonstration that our sex/gender system is “socially constructed,” what happens next? Feminists have also traditionally focused on the social construction argument, but it is not clear why, as Sedgwick notes:

To the degree—and it is significantly large—that the gay essentialist/constructivist debate takes its form and premises from, and insistently refers to, a whole history of other nature/nurture or nature/culture debates, it partakes of a tradition of viewing culture as malleable relative to nature: that is, culture, unlike nature, is assumed to be the thing that can be changed; the thing in which “humanity” has, furthermore, a right or even an obligation to intervene. This has certainly been the grounding of, for instance, the feminist formulation of the sex/gender system described above, whose implication is that the more fully gender inequality can be shown to inhere in human culture rather than in biological nature, the more amenable it must be to alteration and reform. I remember the buoyant enthusiasm with which feminist scholars used to greet the finding that one or another brutal form of oppression was not biological but “only” cultural! I have often wondered what the basis was for our optimism about the malleability of culture by any one group or program. At any rate, never so far as I know has there been a sufficiently powerful place from which to argue that such manipulations, however triumphal the ethical imperative behind them, were not a right that belonged to anyone who might have the power to perform them.  

109. Id. at 41-42.
Power does not give up without a fight. Particularly if our society finds Euro-American hetero-patriarchy so useful to maintaining the power of its elites, why would the law turn suddenly to protect even subversive sexualities? If all societies we know of enlist sexuality in the pursuit of cultural reproduction, why would ours suddenly stop? Valdes' call for the legal protection of all sexualities for their own sake seems overly optimistic.

There is a second, deeper problem of power at issue here: the power of culture itself. Valdes, seeking the destruction of Euro-American hetero-patriarchy through legal reform, places himself within the venerable tradition of "legal normativity": that mode of scholarship undertaken by "sovereign individual subjects who choose their own discursive positions and thought processes and announce these positions within a self-sufficient and weightless medium of communication." This tradition, of course, is the Enlightenment tradition of the subject that is both completely self-knowing and possessed of the ability to remake itself. But there are doubts these days about whether this tradition accurately represents our power over ourselves, both as individuals and as a collective. In this critical view, Euro-American hetero-patriarchy is not simply a set of ideas that can be set aside if its holders agree to do so. It is a mode of life: written into our bodies, our unconscious, our perceptions, our relations of production as well as our relations of power. In this view, it is really revolution that Valdes is calling feminists and queers to, not "reform;" and it is a revolution that forces us to turn ourselves inside out, to try to abandon a way of seeing and thinking about the world that is not external to us, but rather part of the fiber of our being. If this is the case, then far more than the knowledge that something is "socially constructed" is necessary for us to carry out this revolution successfully.

Lastly, if it is correct that "social construction" cuts both ways—that we are not only the constructors of our culture, but that we are in turn constructed by it—then it becomes hard to imagine even sexuality itself as Valdes seems to imagine it, free of any social "regulation." As Judith Butler puts it:

[S]exuality cannot be summarily made or unmade, and it would be a mistake to associate "constructivism" with "the freedom of a subject to form his/her sexuality as s/he pleases." A construc-

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110. Pierre Schlag, Normativity and the Politics of Form, 139 U. PA. L. REV. 801, 892 (1991). This language, of course, is common to all types of "liberal," or "modernist," critique based on the notion that oppression results from ignorance and that education will consequently lead to liberation. For a careful analysis, criticism, and defense of this kind of critique, see generally FAY, supra note 22.

tion is, after all, not the same as an artifice. On the contrary, constructivism needs to take account of the domain of constraints without which a certain living and desiring being cannot make its way. And every such being is constrained by not only what is difficult to imagine, but what remains radically unthinkable: in the domain of sexuality these constraints include the radical unthinkability of desiring otherwise, the radical unendurability of desiring otherwise, the absence of certain desires, the repetitive compulsion of others, the abiding repudiation of some sexual possibilities, panic, obsessional pull, and the nexus of sexuality and pain. \textsuperscript{112}

Butler asks, "[H]ow do we pursue the question of sexuality and the law, where the law is not only that which represses sexuality, but a prohibition that \textit{generates} sexuality or, at least, compels its directionality?"\textsuperscript{113} Thus, whereas Valdes sees social and state power as only repressive, squashing a natural and independent desire and sexuality, Butler suggests that law—power, taboos, prohibitions—is also somehow productive of sexuality itself. In this view, to try to remove relations of power from sexuality is futile: Sexuality is a creature of power, perhaps even domination. The task, then, would not be to "free" sexuality from regulation, but to seek to alter the forms of that regulation, and to reduce the systematic damage that our forms of regulation inflict upon certain groups; not to pursue a negative liberty that will at last leave the subject free to desire in a vacuum absent all constraint, but a positive liberty that seeks to subject all its necessary prohibitions to critical scrutiny.

IV

I have described the source of trouble in each article in this symposium as a "seduction" by modern culture. Morris is seduced by the notion of one nation indivisible, bound by consent rather than coercion. Valdes risks being seduced by the promise of absolute liberty: to celebrate a sexuality free of instrumentalism, and to change the sex/gender system by an act of will. Viewed in a larger context, however, modern culture is not their enemy but their friend. Both articles work effectively within the modern political tradition of opening up for public debate practices and values formerly taken for granted, even unarticulated.

Conservatives like to imagine that gay and lesbian activists, like feminists and antiracist people of color, simply wish to discover and

\textsuperscript{113} \textit{Id.} at 95.
cling to prefabricated “identities” determined by victim status and/or genetics. But both articles in this Symposium show something quite different at work. Morris and Valdes open up to critical scrutiny some of the dominant narratives that tell us in modern society who “we” are. In the process, they force us to be conscious of those narratives—to defend or attack them, but no longer to unthinkingly live by them. Far from cherishing preexisting identities, Morris and Valdes seek to make new identities possible by placing the old ones in an unfamiliar and disturbing light.

The sociologist Bennett Berger argues that this trend toward increasing critical public scrutiny of practices formerly considered noncontroversial or nonpolitical is a characteristic feature of large, liberal democratic societies. The clash of different ways of life—what Bennett calls “subcultures”—forces a new self-consciousness about one’s own culture; and even when dominant practices and ideologies remain dominant, the very fact that they have had to be articulated and defended alters them irrevocably.

One of the consequences of conflict between subcultures is that the assumptions that render routine social practices as “cultural” [by which Berger means “unquestioned”] elements of dignified and meaningful ways of life get revealed. And once revealed, they become arguable. When that happens, some of the relationships between conventional culture and the status or power of social groups is also revealed. . . . The genie is out of the bottle; Pandora’s box is open; Humpty Dumpty falls off the wall. . . . What was but no longer is taken for granted can never again be blithely assumed. Rather, “backlashes” and other efforts to restore the authority of traditional “mainstream” culture or some status quo ante must be argued for.114

From this perspective, Morris’ attack on Justice White’s official nationalism is flawed primarily by Morris’ failure to be sufficiently self-conscious. Morris is right to bring the assumption that “Our Nation” is monocultural into critical scrutiny, to show how Justice White’s account of American culture suppresses Hawaiian traditions. His error is in failing to recognize the full implications of his own analysis: the risk his counter-narrative runs of performing that suppression yet again. In contrast, Valdes’ strategy is both simple and devastating. To gather formerly unconsidered practices together, to show them to be systematically connected, and to give them a name—“Euro-American hetero-patriarchy”—is already to disrupt the status quo. Yet Valdes goes even further, not only giving this system

a name but its own history. In so doing, Valdes does not, as I have pointed out, ensure that the system will fall. But to force us into self-consciousness about the sexual practices we are used to thinking of as natural, normal, or necessary is already to achieve a subtle victory.

Taking this wider view, then, both articles work with, rather than against, modernity. The modern society we live in is one in which not only "the personal" is political, but also practices and values of every sort. The conservative response to these trends is to decry "political correctness," to fear the loss of a common culture, and to mourn the good old days of hegemony. But the clock is unlikely to turn back. And the United States, after all, was founded not only on the unquestioned domination of eighteenth-century Anglo-Saxon culture over all others, but also on the dream of liberal democracy: a society built on tolerance, open debate, and even social struggle. The best hope of liberalism remains the hope that this commitment to critique can itself form the core of a common culture. As Berger puts it:

What holds us together, then, may in retrospect be a common culture, but if so, it is a common culture forged in a here and now by the bargains we have struck, the compromises we have achieved, and, where we have failed, by the demonstrations we have mounted, the social movements we have spawned, the wars we have fought, the victories we have won, the defeats we have suffered, and even, perhaps, the corruptions we are left with.115

115. Id. at 52-53.