Discourses of Sexuality: Classical, Modernist and Post-Modernist

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Discourses of Sex: Classical, Modernist, Post-Modernist *

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Abstract. Discourses of sexuality, gender and sexual orientation are moving from the margins to the mainstream of legal theory, notably in the area of international human rights. Each of these three sets of discourses preserves its own history and ideals. Neither are they wholly distinct from each other, nor are they simply three concepts denoting the same thing. Each has remained quasi-autonomous – always related to, yet always stubbornly distinct from, the others. No one of these three discursive sites can be engaged without significant reference to the other two; nor does one site simply reduce to another. What do we mean, then, when we use one of these terms, and when we choose it instead of the other two? What relationships obtain among the three sites? This essay proposes not an exhaustive analysis of those relationships, but only an approach that might be followed were such a broader analysis to be undertaken. It is argued that these three sites correlate to three intellectual moments – classical, modernist and post-modernist – in the constitution of the human subject within international human rights law. As an initial matter, this correlation can be understood to be straightforward: discourses of sexuality correlated to classicism, discourses of gender correlated to modernism, discourses of sexual orientation correlated to post-modernism. Closer analysis, however, reveals a more complex set of relationships, in which each of the three sites corresponds to each of the three intellectual moments. None of the three sites is ‘pure’. Each retains an ongoing dialogue with the others and within itself.

1. Introduction

Discourses of sexuality, gender and sexual orientation are becoming permanent features of the legal landscape. Criminal law, property law, family law, employment law, social services law, children’s rights or civil liberties are some areas that have begun to incorporate them, in both international and do-

mestic legal systems. Yet what are the relationships among these three terms? Are they one and the same? Utterly distinct? Partially overlapping? If one and the same – ‘conjunctive’ – then why have such distinct discursive sites grown up around each term? If utterly distinct – ‘disjunctive’ – then why is it impossible to engage one without accounting for the other two? If partially overlapping, then which elements fall, respectively, inside and outside of the overlaps?

In order to appreciate the inter-relationships of these three sites, the following approach is proposed. First, each site is examined as, itself, an ensemble of its own ‘sub-discourses’: the discourse of sexuality as a set of sub-discourses of sexuality, the discourse of gender as a set of sub-discourses of gender, the discourse of sexual orientation as a set of sub-discourses of sexual orientation (Section 2). The relationships among the three discursive sites can then be understood in terms of the relationships among three sets of sub-discourses (Section 3). Among these sub-discourses, some specific sub-discourse can be identified within each site that most strongly distinguishes each site from the other two. Three discursive ‘poles’, as ideal types, are established, each representing a ‘polar’ sub-discourse that specifically distinguishes each site from the others (Section 4). Once the distinctness of each ideal type has been considered, the real work of examining the relationships among the three sites becomes an effort to move away from these poles – to begin to navigate between them, by considering each site not in its distinctness but rather in its overlap with the other two (Section 5).

The strategy, then, is to investigate the distinctness of the three sites, but for the purpose of understanding their ultimate inseparability. It is precisely in its distinctness from the other two sites that each site reveals its own lacunae. The hypothesis is that by understanding extreme or ideal positions (the term ‘extreme’ not necessarily denoting political or normative extremes, but only discursive extremes within the three sites that most strongly distinguish each site from the other two) we can better understand subtler ones. By gaining insight into the polar sub-discourses, we can then, by comparison, better appreciate those sub-discourses that do integrate the three sites in countless combinations. The result, it is hoped, will be insight into the ongoing dialogue always taking place within and among the three sites, revealing any distinctions among them to be always tentative, contingent and shifting.

International human rights law will provide a working legal canon. It will be suggested that the three polar sub-discourses of these sites can be correlated, respectively, to three intellectual moments in the development of human rights law: classical, modernist and post-modernist. These are moments only. They are not towering historical epochs, nor could they be, given that the contemporary international human rights movement is barely a half-century
old. Arguably, as a vintage post-Enlightenment project, the entire human rights movement might be called modernist, through its ideal of a Justice which is fully secular, rationalised, programmatic, meliorist, and applicable to all human beings as such, in a human-centred world. Yet the broad characterisation of international human rights law as modernist would eclipse the variety of divergent, contradictory intellectual strands that have shaped the movement. There is a classical moment to the human rights movement in its ‘neo-naturalism’, in its traditional characterisation of its norms as eternal and transcendental, a principle still often considered axiomatic if human rights are per se higher-law norms superseding contrary acts of states. Such status is suggested not only by traditional philosophies of human rights but also by positive-law instruments intended to be legally binding. At the same time, there is a post-modernist moment, in which both classical transcendentalism and modernist programatics break down. This triad does not imply any neat progression from one moment to the next. It does not mean that classical and modernist moments – discourses – have been displaced definitively by the post-modern. The post-modern does not annihilate; it interpolates. It re-casts great narratives as modest heuristics. Classicism, modernism and post-modernism all continue to thrive in international human rights law, each addressing the shortcomings of the others in an ongoing dialectic. Discourses of, respectively, sexuality, gender and sexual orientation will be examined as just one instance of that broader dialectic.

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3 Cf., e.g., the Universal Declaration of Human Rights, Art. 1. UN General Assembly Resolution 217A (III), 10 December 1948, U.N. Doc. A/810 at 71, in Brownlie op. cit., supra, at 21; UNCHR, op. cit., supra, at 1: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience . . .’. Cf. text accompanying n. 57 infra. Similar statements recur in numerous human rights instruments. See, generally, Brownlie and UNCHR.


6 See Section 4.3 infra.

2. The Three Discursive Sites

A phenomenological reflection on sexuality, gender and sexual orientation would no doubt question whether it is meaningful to speak of these three concepts as corresponding to three distinct facets of human experience.\(^8\) Certainly, such a tripartite distinction is neither self-evident nor static. That does not, however, make it meaningless or redundant. A phenomenological reflection might draw upon such a distinction as an heuristics in the culturally and linguistically constrained passage from experience to description of experience, without thereby investing the three concepts, or any working distinctions among them, with transcendental or extra-linguistic reality. Yet why three concepts? And why these three? Surely these three sets of discourses present, historically, rather recent, culturally contingent, ways of discussing their objects. With what legitimacy do we purport to examine the relationships among these three terms before it is even clear that they provide a legitimate starting point in themselves? If, for example, it turns out that distinctions among these three concepts cannot be maintained, that the three ostensibly different terms are sheer conventions – merely three ways of discussing the same thing – then any search for relationships among the three might turn out to be as arbitrary as the initial tripartite distinction itself.

The fact is, however, that, arbitrary though the distinction may be, the discourses of sexuality, gender and sexual orientation have tended each to retain a quasi-integrity, each interacting with the other two, yet steadfastly resisting sheer reduction to them or to larger discourses that would purport to encompass all three. Some distinctness of the three sites thus provides a valid, perhaps necessary, starting point, even if only to reach the conclusion that they cannot be maintained. The distinctness of the three sites will be examined in order to be dismantled. The purpose of the analysis is not to define three respective essences to the three discursive sites; not to reduce these sites to simple formulas (beware, then, of the apparent simplicity of relationships suggested by Table I in Section 5; the rather blander Tables 2 and 3 come closer to the truth of the matter), but rather just the opposite: to identify the quasi-autonomy of each site – which, as an historical matter, cannot be denied – but for the purpose of showing that any genuine autonomy cannot be sustained. This essay thus does not seek to examine the relationships among the phenomena of sexuality, gender and sexual orientation, but only, more modestly, among the discourses that, concededly with cultural and historical contingency, have been articulated around these

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phenomena in the post-Enlightenment West, remaining agnostic about any ultimate relationships between the former and the latter.

The three discursive sites of sexuality, gender and sexual orientation, are by no means three internally homogeneous clusters. Each site contains its own variety of sub-discourses, interacting with each other in their own dynamic relationships of conjunction, overlap or disjunction. Before examining the relationships among the three sites, then, it is important to consider each in its own right, turning first to the sexuality site (Section 2.1), then to the gender site (Section 2.2), then to the sexual orientation site (Section 2.3). However, these three brief summaries can note only that each site includes multiple sub-discourses, offering only sparse and cursory examples. They do not describe each of these in detail. Most of what is claimed is already well known. More detailed accounts are available in countless other sources, some of which are cited in the footnotes.

2.1. Sexuality

Sexuality as a subject of both fascination and taboo is as old as humanity itself. 19th-century Europe witnessed the emergence of the sciences of sexuality – biological, zoological, botanical, medical, psychiatric, psychoanalytic, behavioural – the 'sexologies' that have shaped current concepts of sexuality in Western, and increasingly global, sociology, politics and law. Each has emerged in harmony with, in rivalry with, or indifferent to the others.

Sigmund Freud, trained and practising in his early years as a physician, increasingly departed from a traditional medical approach, itself an ensemble of sub-discourses of sexuality. Crucial to this rupture was his theory of the unconscious engaged in complex interaction with conscious experience, at least partially knowable through techniques for interpreting personal narratives, patterns of speech, habits of behaviour or dreams. Psychoanalytic method developed its own set of sub-discourses, its own lexicon, much of which has become liturgical: polymorphous perversity, universal (or 'constitutional') bisexuality, phallic symbolism, castration anxiety, Oedipal complexes, latency, death wishes, to name just some of the more familiar components.11

11 Such theories are developed throughout the whole of Freud's work. See the Gesammelte Werke, op. cit., n. 10 supra.
Only a short time later, Alfred Kinsey launched another approach, distinct from either the medical or the Freudian approaches. It examined human sexuality on the basis of objective, physical acts, without significant reference to subjective or subconscious experience. His two groundbreaking works *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female* comprehensively analysed the sexual practices of Americans based on the responses of several thousand participants to surveys inquiring into their individual experiences. These studies challenged prevailing attitudes towards human sexual life. Although covering a broad range of sexual acts, including solitary masturbation, non-coital interactions ('petting'), and coital interactions (sexual intercourse), these studies are, today, particularly well known, and of continued significance, for their 'heterosexual-homosexual rating scale', now commonly known as the 'Kinsey scale'. Undermining the widespread view of homosexuality as aberrant, marginal and pathological, Kinsey argued that substantial portions of the population appeared to participate in at least some degree of homosexual activity at some point in their lives.

Within these burgeoning sub-discourses of sexuality, still further fragmentation occurred. In Freud's footsteps, for example, followed a plethora of disciplines more or less 'psychoanalytic' – the approaches of Abraham, Ferenczi, Anna Freud, Horney, Jones, Lacan, Rank, Reich, Reik, Sullivan or Winnicott, to name only a few – yet differing from Freud and from each other in some of their basic assumptions. Similarly, whilst Kinsey's two landmark works placed their emphasis on discrete sexual acts, some of the work of Kinsey's successors at the Kinsey Institute for Sex Research have attempted to use their investigative methods to introduce a broader number of less strictly somatic factors, including lifestyles, emotive experiences

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12 See text accompanying nn. 42–49 infra.
and interpersonal relationships.\textsuperscript{18} New schools, including phenomenological, depth-psychological, \textit{Gestalt} or humanist, emerged, and traditional, medical-psychiatric schools continued to develop as well. Common to these multiple sub-discourses of sexuality, however, was the ideal of explaining sex with objectivity and value-neutrality.\textsuperscript{19}

Few such sub-discourses within the discursive camp of sexuality ever simply disappear. They continue to be revised, re-formulated, re-discovered in complex interactions with each other. One might say that if the discourse of sexuality is a common \textit{langue}, then to each theory, arguably to each practitioner, there can be ascribed some \textit{parole},\textsuperscript{20} some distinct sub-discourse of sexuality. A similar observation will be seen to apply to discourses of gender and sexual orientation.

2.2. Gender

The discursive site of gender, too, encompasses multiple sub-discourses. History yields numerous examples, among various peoples, of reflections on differences in the dispositions or the social, economic or religious status of women and men. Yet only since the 19th century, and particularly since World War II,\textsuperscript{21} have Western countries witnessed the successive emergence of those distinct sub-discourses of gender, in the form of various feminisms, e.g., liberal-egalitarian, radical, communitarian, religious, socialist, Marxist, separatist, race-critical, 'third-world' or ecological, that have influenced new critical approaches to socio-legal scholarship.\textsuperscript{22} Like the sub-discourses of


\textsuperscript{19} See Section 4.1 infra.


sexuality, the sub-discourses of gender have generated spheres of inquiry encountering each other in complex processes of progression, mutation, merger, dissent, overlap or dissolution. Liberal-egalitarian approaches, for example, have emphasised parity in the norms and opportunities affecting women and men, largely assuming the equality of women and men for the purposes of specific legal, political or economic goals; although the oppression of women certainly requires specific attention, the ultimate justifications of the norms invoked are based not on the proper treatment of women per se, but rather on the equal treatment of human beings per se. Orthodox Marxist feminisms emphasise phenomena of class oppression, the family, for example, becoming a microcosm of society with its own ‘class struggle’. Other approaches reject either the equation of the sexes or their outright subsumption within a class-based theory, focusing on the distinctness of the sexes in historical and cultural perspective, and seeking political change geared towards the specific conditions and aspirations of women within each personal, social, political and economic context. These more contextual approaches have guided many of the themes of contemporary feminism, generating a rich spectrum of sub-discourses.

2.3. Sexual Orientation

The newest of the three discursive sites, as a distinct site, is that of sexual orientation. To a considerable degree, its roots can be traced to the other two sites. As a scientific, sexological discourse, it has developed largely from within the site of sexuality. As a discourse of political engagement, its inspi-

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23 A sampling of classic statements is included in Rossi, op. cit., n. 21 supra, Parts 1 and 2. Important contemporary versions have been embraced by some U.S. Supreme Court justices in a number of controversial cases. See, e.g., the opinion of Justice Marshall in Rostker v. Goldberg, 453 U.S. 57, 86 (1981) (dissenting from the Court’s decision to uphold compulsory military draft for males but not females); the opinions of Justices Brennan and Stevens in Michael M. v. Superior Court, 450 U.S. 464, 488, 496 (1981) (dissenting from the Court’s decision to uphold a state statutory rape law which punished the male but not the female party); the Court opinions in Califano v. Goldfarb, 430 U.S. 199 (1977) and 430 U.S. 313 (1977) (holding unconstitutional sections of national social security legislation providing lower levels of benefit to men than to women); the opinion of Justice Brennan in Kahn v. Shevin, 416 U.S. 351, 357 (1974) (dissenting from the Court’s decision to uphold a property tax exemption for widows but not widowers).


25 See, e.g., Barnett, op. cit., n. 22 supra, Chapter 6; Becker et al., op. cit., n. 22 supra, Chapters 2–4; Smith, op. cit., n. 22 supra, Chapters 1 and 6; Graycar and Morgan, op. cit., n. 22 supra, Chapter 3.

26 See, e.g., Bell et al., op. cit., n. 18 supra; Bell and Weinberg, op. cit., n. 18 supra; R. Isay, Being Homosexual: Gay Men and Their Development, Avon, New York, 1989; K. Lewes,
ration is drawn largely from the same social and political movements, such as anti-racist and anti-colonial struggles, to which much feminist discourse has been linked.\textsuperscript{27}

Dominant discourses within this site often have defined sexual orientation only in terms of a dichotomy of same-sex and opposite-sex attraction, treating issues of transsexualism, transgenderism and the like as separate – e.g., as issues of ‘identity’ (the person one feels oneself to be) rather than ‘orientation’ (the gender of the persons to whom one is attracted). A typical legal strategy has been to focus on equal rights for lesbians and gays, whilst rights for other sexual minorities,\textsuperscript{28} notably transsexual, would be pursued along separate lines. Yet if human rights issues are to be understood in the context of social attitudes, any such distinction between sexual orientation and identity becomes artificial.\textsuperscript{29} Traditional oppressive or prejudicial attitudes towards sexual minorities rarely draw fine distinctions among lesbians, gay men, bisexuals, pre-operative transsexuals, post-operative transsexuals, intersexuals and transgenderists. Although the pragmatics of legal strategy might in some cases favours distinct action for different kinds of sexual minorities, a more thoughtful understanding hardly can overlook the fact that sexual minorities, for all their different manifestations, are largely united in

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\textsuperscript{28} In light of historical and cross-cultural differences in the construction of sexual identity and orientation, it is desirable to use a term which, albeit as inclusive as possible, does not expand so broadly as to become vacuous or unworkable for purposes of positive international human rights law. In Heinze, op. cit., \textit{supra}, at 61, sexual minorities are defined as ‘people whose preferences, intimate associations, lifestyles, or other forms of personal identity or expression actually or imputedly derogate from a dominant normative-heterosexual paradigm.’ See, generally, id., at 50–58 and 253–257. On the concept of normative heterosexuality, see id., at 31–37. See also E. Heinze, “The Construction and Contingency of the Minority Concept”, in B. Bowring and D. Fottrell, eds., \textit{Minority and Group Rights in the New Millennium}, Kluwer, The Hague (forthcoming).

\textsuperscript{29} Heinze, op. cit., \textit{supra}, at 44–49; Heinze, op. cit., n. 28 \textit{supra}. 
the origins of their oppression, namely, their departure from specific norms governing sexual conduct.  

This observation is confirmed by analysis of cultures outside of the post-Enlightenment West, in which social, and corresponding linguistic, conventions do not necessarily divide along lines of identity, on the one hand, and orientation, on the other. Even in the West, as argued further in Section 4.3, the distinction, for other than strategic purposes, is questionable. The discursive site of sexual orientation, in its contemporary, Western form, might, then, have been dominated in recent decades by the discourse of lesbian and gay sexual orientation. However, increasingly, it has had to embrace a broader critique of sexual norms, and, in particular, of a normative or 'compulsory' heterosexuality that has consequences for all sexual minorities.

Like gender, the discursive site of sexual orientation, as a locus of social criticism and political advocacy, has divided into liberal-egalitarian, radical, communitarian, religious, socialist, race-critical and other sub-discourses. Egalitarian approaches have stressed legal parity, whereby sexual minorities are deemed to be 'just like' straights in their abilities to work, pay taxes, raise children and the like. Similarly, religious approaches, in the West, often stress the equality of sexual minorities 'in the eyes of God'. Marxist approaches, as in feminism, construe oppression of sexual minorities as a reflection of the broader class struggle. Deconstructionist approaches, as illustrated in recent debates between essentialism and social constructionism, have challenged the very plausibility of meaningful attributions of sexual identities or orientation in other than historically contingent ways. These are


32 See Heinze, op. cit., supra, at 33 n. 8.

33 See, e.g., on the emergence of various perspectives, D'Emilio, op. cit., n. 27 supra: Marotta, op. cit., n. 27 supra.

34 On 'strict egalitarianism' as a strategic and jurisprudential principle in the advocacy of rights of sexual minorities, see, Heinze, op. cit., supra, at 132-135.


seen not as natural or inherent but as being specific to historical and cultural contexts.37

3. Modes of Relationship among the Sites

Once each site has been understood as, itself, an ensemble of sub-discourses, its relationships with other discursive sites can be understood to derive from relationships among the sites’ respective sub-discourses. The second task is to consider the modes that such inter-site relationships can take. These are grouped here under two headings. The first heading encompasses the relationships among discourses within, or ‘internal’ to, the three sites (Section 3.1). The second heading encompasses the relationships between these three sites and discourses lying wholly or partly outside of, or ‘external’ to them (Section 3.2).

3.1. Relationships among the Internal Discourses

One can imagine three basic kinds of relationships among the three principle discursive sites.

A first possibility is conjunction, or total overlap, whereby any two sites, either expressly or implicitly, are subsumed by a sub-discourse of the third. In the sexuality site, for example, an orthodox psychoanalytic sub-discourse might be invoked to argue that gender and sexual orientation are already late, derivative epiphenomena of more primordial interactions of conscious and unconscious processes. Any discourse of gender or sexual orientation would thus be explained in terms of a more fundamental discourse of, e.g., id and superego. In the gender site, one might imagine a sub-discourse of patriarchy for which all problems of social or legal significance in the areas of sexuality or sexual orientation would be understood essentially as problems of male domination. In the sexual orientation site, a sub-discourse of sexual identities as sheer social constructions might similarly subsume any distinct discourse of sexuality or gender, the latter, like notions of sexual orientation, being seen as nothing but deconstructible conventions – historically contingent, con-

ceptually indeterminate and malleable. These three examples will be further examined in Section 4.

A second possible mode is greater or lesser degrees of overlap. Yet the notion of overlap presupposes prior or otherwise distinct elements of which overlap, as opposed to utter homogeneity, can be predicated – otherwise we would not be speaking of overlap at all, but rather of a uniform discourse. Thus it is useless to seek overlapping elements before identifying those elements themselves. Analysis of overlap is the end-point of the analysis, not its beginning.

In contrast to the total blending of conjunction, or the partial blending of overlap, the third possibility is disjunction, whereby a sub-discourse within each of the three sites would exclude the other two sites, rendering its site irreconcilable with the other two. On the one hand, this mode seems to be the least useful or plausible. There are few serious, comprehensive sub-discourses within any of the three sites that can utterly exclude the other two sites in any sustained way. On the other hand, it is precisely by virtue of this simplicity and artificiality that the mode of disjunction recommends itself in an early stage of analysis. This mode presents a set of three extreme (again, discursively extreme, and not necessarily politically or ideologically extreme) or ideal types: if we can locate some sub-discourse within each site that, if not utterly excluding the two other sites, nevertheless most strongly appears to distinguish its site from the other two, then it is precisely through a process of subsequent correction and nuancing that we can move towards the mode of overlap, and therewith towards the variety and complexity of discourses of sex. For each discourse, then, recourse to a postulated mode of disjunction will generate three extreme poles in the discourse of sex, three polar sub-discourses that most strongly distinguish each site from the other two. These polar discourses will serve not so much as representatives of their respective sites but as whipping boys – points from which other sub-discourses within each site have often departed in order to provide fuller, richer discourses of sex. Subsequent analysis, then, will consist of a movement from each pole towards the others, in order to account for the diversity and subtlety of sub-discourses within all three sites.

One irony, although, on closer reflection, not much of an irony at all, is that, for all three sites, the apparent opposition of the modes of conjunction and disjunction is purely formal and schematic, not substantive. In reality, disjunctive sub-discourses are conjunctive sub-discourses; disjunction is the same thing as conjunction. For no sub-discourse within any of the three sites truly can be understood to be irrelevant to the other two sites. Appearing, per-

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38 The term ‘overlap’ is used in this essay to signify only a mode of partial overlap, as distinguished from total overlap (conjunction) or total non-overlap (disjunction).
haps, to bypass ('disjoin') the other two sites, a disjunctive sub-discourse in fact collapses ('conjoins') these into itself. Thus the orthodox-psychoanalytic sub-discourse of sex, the anti-patriarchal sub-discourse of gender, or the deconstructionist sub-discourse of sexual orientation, just mentioned as examples of conjunction, i.e., of subsumption by each site of the other two, can also be formulated as examples of disjunction, i.e., of dismissal by each site of the other two. This proposition will be explained as each discursive site is examined in turn. For the time being, we will allow a naive assumption of disjunction. In retrospect it will be seen that there is no other starting point for this analysis, given that, on the one hand, overlap, by definition, cannot provide a starting point, and, on the other hand, the extremes of conjunction and disjunction in fact amount to the same thing.

3.2. Relationships between Internal and External Discourses

Before proceeding any further, however, it is useful to raise one last preliminary point. Relationships of conjunction, overlap and disjunction are considered here only with respect to the three discursive sites among themselves. The same relationships, however, obtain between the discourses of sex and other discourses, rendering the boundaries between the former and the latter somewhat arbitrary. For example, reference already has been made to Marxist feminism as a sub-discourse of feminism. The orthodox Marxist canon, however, can be understood as a discourse, or set of sub-discourses, articulated largely outside of any of the discourses of sex. Were it not for Engels's Ursprung der Familie, it itself a highly illuminating but probably not indispensable component of the fundamental doctrines of historical materialism, specific analysis of sexuality, gender or sexual orientation would be, at best, perfunctory in orthodox Marxism – some might say it is perfunctory even with Engels's work – and by no means accounted for in any comprehensive or systematic way, aside from a broader class perspective. Orthodox Marxism thus represents a discourse, or set of sub-discourses, articulated external to any specific discourse of sex, yet purporting to account for issues fundamentally related to sex.

There is nothing transcendental in the distinction between discourses internal and external to the three sites. It is adopted here only to allow greater focus on the three discursive sites of sex, without denying the relevance of other discourses to any or all three of these sites. Other external discourses provide further examples. Jungian analytic psychology, for example, would tend to subsume discourses of sex within the more fundamental structures.

of the collective unconscious. Various schools of metaphysics or theology would subsume the three concepts within broader concepts of natural or divine order. No analysis of the discourses of sex can be complete, then, without attention to concepts external as well as internal to the three sites delineated here. Nevertheless, some working distinction between the internal and external appears sufficiently plausible to allow the present analysis to be limited to the internal level.

Similar to the distinction between internal and external levels is the distinction between Western and non-Western discourses of sex. Obviously, the sites of sexuality, gender and sexual orientation, as elaborated within the post-Enlightenment Western world, provide only a limited set of understandings of sex. No account of the discourses of sex can be complete without broader spatial (cross-cultural) and temporal (historical) perspectives. Nevertheless, the increasing influence of the post-19th century, Western tradition in sociology, law and politics cannot be denied. These are, themselves, sufficiently rich and complex to justify a more exclusive focus within the limited scope of the present analysis.

4. The Polar Sub-Discourses

The third task is to approach as closely as possible the pole of disjunction within each of the three sites by identifying, or reconstructing, sub-discourses within each site that most distinguish each from the other two. It follows from the characterisation of each site as an ensemble of sub-discourses that the polar sub-discourses isolated here in no way represent their respective sites as a general matter. The three polar sub-discourses are not to be understood as privileged, more authentic or more reliable versions of their respective sites. They are not intended as summaries of each site. Each site contains important sub-discourses that do not resemble, or indeed that deliberately reject, their site's polar sub-discourse. The polar sub-discourses are examined respectively for sexuality (Section 4.1), gender (Section 4.2) and sexual orientation (Section 4.3), and are summarised on Table 1 in Section 5.1.

4.1. Sexuality

The scientific ideal of the traditional sexologies stems from an aspiration to understand sex not in normative, moralistic or theological terms of good or evil, innocence or sin, but in a neutral, empirical language, which would observe and explain sexual phenomena without passing moral judgement.

40 Jung's basic theories, like Freud's, are articulated throughout a substantial corpus. See the Gesammelte Werke, Walter, Zürich, 1995.
(Of course, it is the word 'ideal' which must be emphasised here. Certainly, medical, psychiatric, psychoanalytic and other clinical practices dealing with sex have at times been laden with normative assumptions about sickness, health and cure.) Freud and Kinsey both provide examples. Although various interpretations can be given to both men's works – Freud especially is no doubt one of the most interpreted thinkers of all time – it is only very narrow, literal-orthodox readings that are of interest for the purposes of locating polar sub-discourses to function as discursive extremes, as whipping boys. Whilst Freud and Kinsey approach sexuality from two utterly different perspectives, a concededly narrow, but nevertheless plausible and historically significant, reading can be constructed which would show them to be linked in important respects. It is precisely their differences in approach that make them useful examples. In particular, there is a reading according to which both can be construed to contain significant elements of universalism (the concept of 'universalism' understood, here, to denote a universal aspiration or pretension, regardless of actual universal truth or applicability.)

Although issues of gender and sexual orientation arise in orthodox Freudian theory, both are treated as derivatives of the more fundamental interplay of unconscious drive and conscious restraint that is assumed to be present in all human beings. Male and female Oedipus complexes, for example, signify not merely differences between masculinity and femininity, but also subsumption of both within universalist formulas. Polymorphous perversion, universal bisexuality or phallic symbolism similarly provide literal-orthodox Freudian psychoanalytic theory with universals from which particular experience ensues. Not only gender or sexual orientation, but cultural difference among subjects generally lack any primacy. Culture, gender and sexual orientation do not so much determine as they are determined by more fundamental, universal factors. This does not mean that Freud's theories allow no room for alternative, less literal or orthodox, constructions, but only that leading tenets of Freudian psychoanalysis do plausibly allow the construction of a universalist sub-discourse of sexuality.

A comparable universalist sub-discourse can be constructed from Kinsey's work, despite the very different method employed. Kinsey develops a rigorous empiricism that would attempt to eschew significant interpretative criteria altogether. Differences based on gender, socio-economic background or culture are clearly acknowledged; not, however, for the purpose of exploring irreducible differences, but rather for the purpose of elaborating a model of general applicability, a comprehensive portrait of humanity, a delineation of individual difference only within a universal grid. Once a range of relevant cultural factors have been noted, including sex, age,

41 See Heinze, op. cit., supra, at 162–169.
race, geographic background, rural-urban background, religious background, occupation, economic status, education, recreational interests, family background, and psychological as well as biological sexual experience, the goal then becomes 'to standardize the data' in order to discern 'percentages of incidence, with frequency distributions, graded scales of attitudes, intensities of response, and other questions of degree ...'. Difference and variety are by no means ignored, but rather are translated into measurable, quantifiable criteria – to the extent possible. Beyond that extent, these criteria, on the study's own terms, cannot be taken into account.

For example, Kinsey notes that '[t]he city boy's failure to understand what life can mean to a boy who is raised on a farm, and the farm boy's idea that there is something glamorous about the way in which the city boy lives, apply to every avenue of human activity, including the sexual'. Yet these rural-urban differences are then given effect only to the extent that they increase or decrease the frequency with which specific acts occur, viz., masturbation, nocturnal emissions, petting to climax, pre-marital intercourse, intercourse with prostitutes, marital intercourse, homosexual outlet and animal contacts. Factors such as age, marital status, social and educational level and religious background are treated in similar ways. Qualitative, as opposed to sheer quantitative, exploration of difference becomes irrelevant to the strictly empirical framework developed. The possibility of cross-cultural difference is acknowledged, indeed implied in the works' titles; yet there is no suggestion that, were other cultures to be studied, fundamentally different concepts might be required. There is no distinct, irreducible discourse of male identity or female identity or heterosexual, bisexual or homosexual identity (let alone, say, transsexual, transgender or intersexual identity – these phenomena, concededly, having been less examined in Kinsey's day than they have been in more recent years) which would probe such identities in other than quantitative terms. Such an examination can have no place in the framework developed. The veracity of Kinsey's model rests on its implication of overall validity despite differences of culture, background, gender or sexual identity or orientation. The heterosexual-homosexual rating scale, for example, might, on one reading, be said to be about nothing but sexual orientation; and the studies as a whole are sufficiently refined to have yielded

44 Id., at 73.
45 Id., at 449.
48 See, e.g., op. cit., n. 13 supra, at 4.
separate studies for men and for women. Yet even these seeming intrusions from the two other sites in no way deflect the model from a universal vocation entailing formal disjunction with distinct discourses of gender or sexual orientation. In its 1950s context, Kinsey’s model might have served to ‘prove’ homosexuality; on its own terms, however, it does not prove homosexuality any more than it proves heterosexuality. It seeks no qualitatively different set of concepts to speak of these two, or of any of the spectrum of putatively ‘intermediary’ sexualities. Similarly, the differences in gender become mere differences in fact, yielding two separate studies, but requiring no distinct conceptual apparatus.

These Freudian and Kinseyan polar sub-discourses illustrate how the conjunctive and disjunctive modes turn out to be one and the same. Whether these polar sub-discourses of sexuality utterly ignore or utterly subsume the distinctness of gender and sexual orientation becomes a vacuous inquiry. They do both. By doing one they do the other. Such characterisations need not be understood as condemnatory or anachronistic, unduly dismissing approaches that were revolutionary in challenging traditional attitudes and practices. Certainly, distinct discourses of gender or sexual orientation could not claim the status or stage of development in Freud’s or Kinsey’s day that they claim today. The point, however, is that these polar sub-discourses are difficult to reconcile with the other two sites, qua distinct sites, even in theory. Reconciliation becomes possible only when movement is made away from these narrow, literal or orthodox readings, away from these polar sub-discourses, so as to permit the overlap of sub-discourses among the three sites that more readily takes divergent experience into account.

It is in their universalism and transcendentalism that these Freudian and Kinseyan polar sub-discourses can be called classical. Within the terms of the Freudian sub-discourse, the elements of sexuality become dispositive laws of human nature; within the terms of the Kinseyan sub-discourse, they become dispositive facts of human conduct.49 For all their supposed threat to ideals of rationality,50 these sub-discourses are strongly rationalist. Kinsey’s em-

50 Legendary in the case of Freud, who, in a famous passage, ranks the revolutionary character of the theory of the unconscious as nothing less than successor to the two previous revolutions of, respectively, Copernicus and Darwin, all three constituting assaults on traditional visions of humanity as an essential or privileged creation, and, in the case of the psychoanalytic revolution, as distinguished from all other creatures by virtue of an essential rationality. See Vorlesungen zur Einführung in die Psychoanalyse, No. 18 (1917), op. cit., n. 11 supra, Vol. XI, 1940, 282, 294–295. Kinsey’s rather more modest approach precludes him from making any such grand claim in so many words. Yet the reports leave little doubt about Kinsey’s confidence in the significance of his research as a blow to those conventional
Empiricism relies on statistical models claiming high degrees of mathematical precision. Freud, whilst avoiding such strict empiricism, never abandons the ideal of scientific stature for psychoanalysis. The combination of classicism and rationality entails in both cases a naturalist epistemology. Nature is seen to yield elements of human behaviour amenable to direct observation and inscription within comprehensive analytical systems.

This naturalist epistemology is reflected in the role of law and politics. Although Freud adheres to the desirability of treatment for severe psychoses, the paradigm psychoanalytic method particularly characteristic of his work aims more at understanding than at action, let alone systematic social transformation. The only thing to ‘do’ is to bring into consciousness, and in that way to accept, that which has been repressed. Whilst grounded in individual experience, this attitude is maintained in Freud’s broader analyses of civilisation. Writing in a turn-of-the-century Europe brimming with theories of global alienation and oppression, Freud instead places humanity on his divan and pleads only for us to acknowledge and contemplate a never fully resolvable dialectic of mass ‘discontent’. Despite a clear assault on conventional morality, and on specific unenlightened legal or political practices, there is no proposal for systematic political or social engagement. Kinsey, too, whilst challenging dominant attitudes, takes no position on comprehensive political reform, which would be out of place given the terms of the inquiry. For both men, any transformative aspiration is left to the intellectual rather than to the political sphere. Recommendations for reform remain strictly at the level of specific laws or practices within a liberal-democratic framework. Science, and thereby nature, are consulted for guidance only in introducing specific correctives, such as abolishing criminal punishments for certain sexual acts, or eliminating discrimination. The political stance characteristic of these polar sub-discourses is the promotion of knowledge, and of freedom mores that would diminish the role of sexuality as opposed to the role of reason in human experience. Cf. Ernst and Loth, op. cit., n. 15 supra.

52 See, e.g., Freud’s Selbstdarstellung, op. cit., n. 10 supra, at 84–85.
53 This is not to say that Freud’s theory is necessarily contradictory on this point. Freud envisages not the replacement of rationality, not the assertion that rationality is sheer illusion, but rather the re-foundation of that rationality which had been characterised in the Cartesian tradition as free and lucid. Freud’s dialectic of id and superego is an ongoing dialectic of irrationality and rationality in which neither component is eliminated. See, e.g., Das Unbehagen in der Kultur (1930), op. cit., n. 11 supra, Vol. XIV, 1940, 421.
54 Id.
55 Not to confuse the import of Freud’s theories with his personal views, which, on some issues, appear to have been socially progressive. Cf., e.g., Heinze, op. cit., supra, at 165, text accompanying n. 38.
through knowledge, not the programmatic reform of political institutions. If any political program can be read into these polar sub-discourses at all, it is one of abstract, individual liberation – and then not so much from political or economic forces as from ignorance and intolerance. These Freudian and Kinseyan polar sub-discourses represent classical, liberal theories offered to liberal society in the marketplace of ideas. If only by implication, they affirm a classical, secular, liberal-democratic political framework, to which they, as an historical matter, presumably owe the very possibility of their authors' freedoms of research and expression.

The liberalism of this sphere finds a familiar anchor in the international human rights canon. Certainly, notions of collective and group identity have acquired increasing importance in the international human rights movement. Yet the Urtext of the contemporary international canon, the Universal Declaration of Human Rights (UDHR), emphasises the abstract, individualistic concept of classical liberalism. Although economic, social and cultural rights are included along with civil and political rights, they retain an abstract individual character. The Universal Declaration assumes a rights discourse as appropriate to the interests of all persons, and suggests no ways in which certain persons or groups might require other approaches, either within or beyond the bounds of that rights discourse, for the vindication of their interests. Preambular Paragraph 5 speaks of "the dignity and worth of the human person": the person at the most individual level of human organisation. Preambular Paragraph 1, alternatively, speaks of the "inherent dignity ... of all members of the human family", yet this highest, most abstract level of human organisation, bypassing any intermediary collectivity or category, simply reduces to the lowest. The document's substantive provisions retain this individualistic emphasis. Although not incompatible with intermediary, collective identities, the Universal Declaration makes no mention of them. The classicism of the Universal Declaration is manifest in its similarly quasi-apolitical aspiration to guarantee a "core" of inherent rights to all persons "regardless" of the structure of the political system within which they live, hence without the necessity of transforming that structure any more than is required by such a "minimum" guarantee. (Whether this quasi-apoliticism is in fact feasible, or even meaningful, has been a subject of considerable


57 See n. 3 supra.

debate.\textsuperscript{59}) Any specific protections of sexual life would be encompassed by traditional provisions pertaining, e.g., to privacy, marriage and family life, conscience, free distribution and receipt of information, or health care.\textsuperscript{60}

4.2. Gender

Contemporary discourses of gender date as far back as, arguably farther back than, those of sexuality\textsuperscript{61}; yet observers have noted a period of dormancy between the earlier and the contemporary movements. Whilst Freud and Kinsey certainly spawned popular and scholarly resistance, their discourses, by the second half of the 20th century, had become, if only by default, canonical – in Freud's case, certainly within two decades of his death, in Kinsey's case almost immediately – not because they were universally embraced, but because they had become fixed points of reference. By contrast, Elizabeth Cady Stanton and Susan B. Anthony, and a good generation or two following them, were long gone before any detailed, canonical discourse of gender could be said to have taken hold. Only from the 1960s do we witness its (re-)emergence with sufficient resilience to become both a standard and a distinct discourse of sex.\textsuperscript{62}

If the polar sub-discourses of sexuality trace their origins to the doctor's office and the academy, those of gender have sprung largely from grass-roots agitation for political change. Unlike the polar sub-discourses of sexuality, those of gender are rooted in a long-standing tradition of expressly and broadly political engagement. In the United States, for example, early women's rights activists tended to take their cues not from doctors or universities but from the abolitionist movement, in which many had played leading roles,\textsuperscript{63} then later from other social movements, such as those for workers' or children's rights.\textsuperscript{64} If our initial task, then, is to sift through the multiple and diverse feminisms in search of that which is most 'distinct' –

\textsuperscript{59} Cf., e.g., Steiner and Alston, op. cit., n. 4 supra, at 658-676.
\textsuperscript{60} UDHR Arts. 12, 16, 18, 19 and 25. In terms of treaty instruments, a particularly developed case law has arisen from the European Convention on Human Rights. See n. 103 infra. Cf., e.g., D.J. Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, Butterworths, London, 1995, Chapters 8, 9, 11 and 13.
\textsuperscript{61} See, e.g., Bryson, op. cit., n. 21 supra, Chapters 1–2; Rossi, op. cit., n. 23 supra. Part 1.
\textsuperscript{62} Millet, for example, characterises the period from 1930–1960 as 'the counterrevolution' – a period largely dominated by affirmative reaction against feminism. Op. cit., n. 21 supra, Chapter 4. But cf. Rossi, op. cit., n. 23 supra, at 615–621.
\textsuperscript{63} See, e.g., De Beauvoir, op. cit., n. 21 supra, at 163; Millet, op. cit., n. 21 supra, at 92, 111–113.
\textsuperscript{64} See, e.g., Millet, op. cit., n. 21 supra, at 121–123; N. Taub and P. Williams, "Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure?", in Smith, op. cit., n. 22 supra, at 48.
not necessarily ‘better’ or ‘worse’ or more or less ‘authentic’, but simply that which most palpably has distinguished discourses of gender from those of sexuality or sexual orientation – it is largely on the basis of feminism’s expressly political, programmatic character that this can be done. Whilst the polar sub-discourses of sexuality embrace a lexicon of value-neutrality, those of gender reject any such pretence: historically, their whole purpose has been normative engagement.65

Those sub-discourses which most distinguish gender from the sites of sexuality or sexual orientation can be described, for present purposes, as ‘programmatic feminism’. Whilst the polar sub-discourses of sexuality inscribe individual experience within universalist frameworks formulated in naturalist, apolitical terms, programmatic feminism elaborates a framework of systemic and comprehensive political, economic and social change. It is immanently prescriptive. Whilst the polar sub-discourses of Freud and Kinsey are discourses of self-realisation through an understanding and acceptance of the way things are, ‘advocating’ at most only a classical, liberal politics of individual freedom, the polar sub-discourses of programmatic feminism are discourses of integral transformation, fundamental rejections of the way things are. If the polar sub-discourses of sexuality are classical-universalist, mere observation of the world sufficing to yield knowledge of it, the polar sub-discourse of programmatic feminism is modernist-historicist: genuine possibilities for human fulfilment are achieved not through mere understanding of the world, but only in the active project of transforming it; not through mere observation of human subjects, but through assertion of human agency in a comprehensive project of re-making the constitution of the human subject and human society. The human being is not merely a locus of laws and facts governing the natural world, but rather a formative agent acting within, and holding the potential to reshape, the social and political world. The polar sub-discourse of programmatic feminism presupposes a determinate end point, an ‘after’ society qualitatively superior in its fundamental social and political organisation to the ‘before’ society.

Women’s rights instruments in the international human rights corpus, such as the International Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW)66 and, more recently, the Beijing Declaration and Platform for Action,67 contain strong elements of programmatic feminism. (Although the Beijing instrument is not legally binding, it is difficult to

65 See, e.g., Bryson, op. cit., n. 21 supra, at 1.
doubt the likelihood of its playing a significant role in the next century as a
guide to the interpretation and implementation of women’s rights agreements
and initiatives.) Certainly, these documents are not in every respect transfor-
mative, as they do not seek to overturn the institutions of international or
domestic law, but rather attempt to work within these. To that degree, they do
not represent the more extreme pole that one would find among theories seek-
ing thoroughly to abolish extant institutions of statist government. However,
within positive law, international or domestic, the terms of these instruments
nevertheless rank among the most transformative. It is for this reason that the
concept of ‘programmatic feminism’ rather than ‘radical feminism’ is used
to define the polar sub-discourse of gender. The concept of ‘radical femin-
nism’ may in fact include different, even mutually irreconcilable theories of
patriarchy.68 The concept of ‘programmatic feminism’ suggests an attempt,
as strongly reflected in the CEDAW and Beijing instruments, to effectuate
specific fundamental changes whilst suspending acceptance of any definitive
theory of patriarchy – particularly significant when non-Western women’s
circumstances must be taken into account.69

Indicative of the thoroughly programmatic and transformative nature of
these instruments is the degree – farther than in any other instruments, with
the possible exception of children’s rights instruments70 – to which distinc-
tions between, on the one hand, ‘negative’ civil and political rights, and, on
the other hand, ‘positive’, social, economic and cultural rights, are collapsed
in order to extend women’s rights to every area of life to which they are
relevant. By contrast, the international Convention Concerning Indigenous
and Tribal Peoples in Independent Countries,71 for example, whilst poten-
tially imposing substantial material sacrifices on States parties, does so only
with respect to discrete, autonomous or quasi-autonomous populations. It
thus suggests a traditional, treaty-law solution to a traditional problem of
international law: although not, in an orthodox sense, governing relations
between two ‘sovereigns’, it defines the relationship of one collectivity to an-
other. Neither in its sweep nor in its symbolism does it require the magnitude
of systemic and intrinsic change found in the women’s rights instruments,
which envisage fundamental restructuring of conditions not between soci-
eties but within societies. The International Convention on the Elimination

68 See, e.g., Smith, op. cit., n. 22 supra, at 5.
69 See, e.g., Bryson, op. cit., n. 21 supra, at 5.
70 See G. van Bueren, ed., International Documents on Children, Martinus Nijhoff, Dord-
drecht, 1993; G. van Bueren, The International Law on the Rights of the Child, Martinus
71 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO
Convention No. 169 (1989), in Brownlie, op. cit., supra, at 303; UNCHR op. cit., supra, at
471.
of All Forms of Racial Discrimination (CERD)\textsuperscript{72} places burdens on states to achieve largely integrationist\textsuperscript{73} goals, and thus holds potential for substantial change within many societies; yet even this instrument would not generally penetrate the personal and private spheres as profoundly as do the women's rights instruments, which address in detail, for example, the status of women in the home and their relationships with parents,\textsuperscript{74} husbands\textsuperscript{75} or children.\textsuperscript{76} Although numerous other instruments require or urge strong political and financial commitments on the part of states, none (with, again, the possible exception of children's rights) go to such lengths to set forth in such exacting detail a regime so directly affecting an entire population in virtually every area of private as well as public life.\textsuperscript{77} Of course, the point of such comparisons is not to reach final assessments about which instrument is the 'most' radical, but only to underscore the status of the women's instruments as strongly programmatic exponents of a cluster of instruments, all of which are already solidly transformative. Inscription within a system encompassing other strongly programmatic regimes does not diminish, but rather reinforces the programmatic character of the women's rights instruments.

As is invariably the case with such instruments, particularly in the still struggling area of human rights, it is crucial to the institutional legitimacy of the women's rights documents that they meticulously be shown to be grounded in established international norms. Each document thus frequently refers to classical norms of equality. Yet that is also where any neutral, liberal impulse appears to end. In the context of the whole of each instrument, this liberal egalitarianism appears more formulaic than fundamental; not so much dispositive as irrelevant - a grounding in the human rights orthodoxy for purposes of recognition within that orthodoxy. The overriding ideal in the CEDAW and Beijing instruments is not for a woman to be able to be like a man, but to be able to be herself, to realise her full potential, and only in

\textsuperscript{72} UN General Assembly Resolution 2106 A (XX), adopted 21 December 1965, entered into force on 4 January 1969, in Brownlie, op. cit., supra, at 148; UNCHR, op. cit., supra, at 52.

\textsuperscript{73} See in particular Preambular Paras. 1, 2 and 3, and Art. 2(e).

\textsuperscript{74} Relationships with parents are affected in particular by those provisions which bear strongly upon the circumstances of girl children and young women, such as, to name only two examples, those concerning education, CEDAW Art. 10, Platform for Action, Arts. 69–88, or marriage, CEDAW Art. 16, Platform for Action, Arts. 39, 71, 93, 107, 259, 263, 268, 274, 277.

\textsuperscript{75} Again, of obvious relevance would be, for example, provisions concerning marriage, as well as employment, CEDAW, Art. 11, Platform for Action, Arts. 150–180.

\textsuperscript{76} Provisions concerning, for example, marriage and employment, affect the entire household economy, including responsibility for child rearing. See n. 75 supra.

that formal sense to be ‘equal’ to men. The goal is empowerment of women as such, and not merely the equalising of men’s prerogatives. Although both instruments make numerous references to the equal rights of men and women, they refer, as prime justification for that equality, not to the broad problems of unequal treatment of the sexes, but rather, somewhat more narrowly, to that of unequal treatment of women. The passages that refer to humanity in universal language are few and rather abstract. They furnish little of the instruments’ substantive content. Their emphasis is not on ‘the human’ generally but on specific circumstances affecting a specific portion of humanity.78 Nor is this surprising. As a strategy for maximum change within positive law it is, arguably, essential, and occurs in many instruments focusing on specific human rights issues, such as, for example, the peoples’ and minorities rights instruments.

Thus, for example, CEDAW Preambular Paragraph 6 cites the concern that ‘extensive discrimination against women continues to exist’79; Preambular Paragraph 7 affirms that ‘discrimination against women violates the principles of equality of rights and respect for human dignity .... ’80 This emphasis is maintained throughout the document. Article 1 limits the document’s explicitly defined terms, and thus, by implication, the document’s conceptual focus, to ‘discrimination against women’.81 Article 4(1) provides that ‘temporary special measures [‘affirmative action’] aimed at accelerating de facto equality between men and women shall not be considered discrimination.’82 Yet, given a time frame terminating only at the point ‘when the objectives of equality of opportunity and treatment have been achieved’, the temporary nature of such measures may be a matter of some speculation. CEDAW is not, in these respects, different from several other leading international instruments concerning, e.g., racial, ethnic and other forms of discrimination.83 Parity with these other instruments only confirms the women’s instruments’ programmatic and transformative character.

79 Emphasis added.
80 Emphasis added.
81 Emphasis added.
82 See, e.g., Meron, op. cit., n. 82 supra, at 63. Cf. Smith, op. cit., n. 22 supra, at 8, ‘[T]o agree that if women are “different” (i.e., different from men) they will require “special treatment” is to assume a male or patriarchal standard of what normal treatment is’.
As the two instruments themselves suggest, sex discrimination need not, by definition, be translated solely as women's rights. Nevertheless, it is predominantly from the perspective of women's rights that these instruments do approach it. Questions of human sexuality generally, or of sexual orientation specifically, at best derive from, and arguably are negated by, this categorical approach. The instruments implicitly essentialise categories of human beings, in this case men and women, and limit their scope to one category. For example, whilst exhaustive attention is devoted to various areas of sexuality and sexual health, explicit reference to the rights or needs of some women to assume or explore sexualities other than those dictated by prevailing normative-heterosexual paradigms is omitted. The omission is undoubtedly attributable, at least in some measure, to the strategic choice to avoid provoking governments that, even without such a controversial provision, might maintain only lukewarm attitudes towards women's rights or might fear adverse reactions at home. Such pragmatic considerations are not without merit. Of significance here, however, is not the merit but rather the significance of such a choice. In the realm of positive law it is difficult simultaneously to affirm and to challenge the existence of a category that is germane to the innovation sought – the category in this case being 'women'. The question then arises whether the very attribution of 'womanhood', like that of racial or ethnic identity, to an entire class of humanity comports a determinate, prescriptive set of qualities that each member of that is deemed to possess. If not, the category is empty. If so, then women not possessing those qualities fail to be represented by the category, and are thus excluded by it. Even if norms governing sexual identity and orientation were omitted for strategic reasons, the result is a portrait of women as requiring equal opportunities for personal development only within, rather than expressly beyond, a normative-heterosexual paradigm. This is a portrait of women as essentially heterosexual.

84 CEDAW Art. 5(a), for example, enjoins States Parties to undertake 'to modify the social and cultural patterns of conduct of men and women' (emphasis added). Cf. Preambular Para. 14 and Arts. 2(f) and 10(c). Cf. Heinze, op. cit., supra, at 14, text accompanying n. 62.

85 Cf., on the potential for exclusion where human categories are invoked in human rights instruments, Heinze, op. cit., n. 28 supra.

86 Cf., e.g., J. Butler, Gender Trouble, Routledge, New York, 1990, 22: 'The internal coherence or unity of either gender, man or woman ... requires both a stable and oppositional heterosexuality. That institutional heterosexuality both requires and produces the univocity of each of the gendered terms that constitute the limit of gendered possibilities within an oppositional, binary gender system. This conception of gender presupposes not only a causal relation among sex, gender, and desire, but suggests as well that desire reflects or expresses gender and that gender reflects or expresses desire. The metaphysical unity of the three is assumed to be truly known and expressed in a differentiating desire for an oppositional gender – that is, in a form of oppositional heterosexuality'.
some might say greater than the sensitivity of, say, equal access to education, employment or health services (although one might dispute this hierarchy) – outright rejection of normative heterosexuality can be seen as going too far in dismantling the very concept of womanhood. Whilst theoretical feminism can, and in some schools does, reject the essential category of womanhood, it is difficult for programmatic feminism to do so whilst so unequivocally affirming the distinct interests of women.87

To the extent that the category of womanhood must be maintained, issues of importance to the problem of sex are understood more specifically – by implication, if not expressly – as problems of patriarchal oppression. As with the polar sub-discourses of sexuality, programmatic feminism reveals a polar sub-discourse in which disjunction is simultaneously conjunction. Theorists of programmatic feminism would not necessarily deny distinct loci of concern within the sphere of sex but outside of the programmatic project. Nevertheless, at the polar sub-discursive extreme, that project defaults to a disjunctive mode through the absence of any specific reference to these other areas, or of any lexicon which could account for them.

4.3. Sexual Orientation

Whereas a quasi-distinct historical emergence can be attributed to the other two sites, the site of sexual orientation most clearly has arisen out of these. Only recently has a distinct discourse of sexual orientation emerged. Of the three sites, that of sexual orientation has most urgently required an understanding of subjectivity as malleable, contingent, ruptured and unstable. The most distinctly characteristic sub-discourse of this site is post-modernist. Whilst the polar sub-discourse of sexuality posits an undifferentiated, universal human subject; and whilst the polar sub-discourse of gender posits differentiated, categorical subjects (men and women); the polar sub-discourse proper to the site of sexual orientation requires a concept of the human subject that is simultaneously multiple and fragmented, over-abundant and indeterminate.

Consider an example. For the classical sub-discourses of sexuality, that *homo sapiens* with a penis is, as a fact of nature, a human being of the male sex. For the modernist sub-discourses of gender, it is, as a fact of culture, man the oppressor – fundamentally different in historical and cultural situation from woman. For the post-modernist sub-discourse of sexual orientation, it is not necessarily either, although it may be both, depending on the broader story being told about it within a specific context. It may be a

pre-operative transsexual: biologically male but psychologically female. It may be a post-operative transsexual: biologically female but psychologically male. And what if the post-operative transsexual male declines to adopt a materially reconstructed penis – does he have a penis psychologically but not biologically? Is a psychological penis less ‘authentic’ than a biological one? It may be a transgenderist: biologically male but psychologically male, sometimes, and female, sometimes. It may be an intersexual, its biologically male sex organs penis not excluding biologically female ones.88 It may be asexual, its biological penis having no psychological presence.89 It may be a (biological) woman wearing a plastic dildo – conceptually troublesome only where some assumption has, again, already been made about authenticity of experience, such that one object-experience (‘flesh’) counts as real whilst the other (‘plastic’) does not.90 The phallus is no longer simply the erotic desideratum of Freudian man or the oppressive sword of patriarchal man; although it may, depending on the story constructed around it, be either or both. It is, rather, not without etymological irony, a multi-dimensional semiotic system. The phallus is a semiosis. Similar observations might be made about the womb or the clitoris, about masculinity and femininity, about sexual attraction and repulsion, or about dominance and submission. With the polar, post-modernist sub-discourse of sexual orientation, all of sex comes to appear as constructed. ‘Nature’ and ‘culture’, ‘biology’ and ‘sociology’, are narratives – discourses with their own sub-discourses. The post-modernist sub-discourse of sexual orientation becomes an ensemble of sub-discourses about an ensemble of sub-discourses.

The emergence of discourses of sexual orientation out of discourses of sexuality and gender can be seen, then, not only as historical but as dialectical. In essentialising human subjectivity through a discourse of the human being, the classical, polar sub-discourses of sexuality negate diverse subjectivities. Responding to this negation, the modernist, polar sub-discourses of gender posit a different subjectivity: the woman as distinct from the male-constructed human. This negation of the negation conserves the concept of the human being but rejects the assumption of a universal human essence. Thus articulating


89 See Heinze, op. cit., supra, at 47 n. 89.

90 Cf. Butler, op. cit., n. 86 supra, at 25: ‘There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very “expressions” that are said to be its results’. Cf. also J. Greenberg’s discussion of bodies as interpreted and constructed rather than natural entities, op. cit., n. 87 supra, at xxi–xxii.
a concept of the human being which can accommodate diverse subjectivities, however, this negation of the negation itself becomes a negation. It negates essences by postulating essences. It merely replaces universal essences, of the human, with categorical essences, of womanhood and manhood. Recall that the UDHR’s concept of a ‘human family’, in its non-categorical abstraction, merely reduced to the abstract individual. Yet that same concept holds the alternative possibility of an affirmatively anti-categorical conception of subjectivity, a possibility negated by essential categories of womanhood and manhood. The transition from a non-categorical to an anti-categorical sub-discourse of subjectivity, of humanity, cannot be effectuated through a simple return from an essentialist sub-discourse of the categories ‘woman’ and ‘man’ back to the essentialist sub-discourse of a simply non-categorical ‘human’. Whilst the non-categorical sub-discourse simply ignores categories, the anti-categorical sub-discourse is anti-categorical insofar as it specifically negates categories. And just as the modernist sub-discourse of gender negates not the idea of the human per se, but only of the idea of a human essence, likewise it is itself negated not in its idea of categories per se, but only in its idea of categories as essences. The classical and the modern sub-discourses, however, can proceed no further on their own terms. If the negation of categorical essences by classical sub-discourses takes the form of a universal, human essence, and the negation of that universal, human essence by modernist sub-discourses takes the form of a categorical essence, then neither can negate the other whilst at the same time being negated by the other. Only a discourse that negates the negation of each can survive the negation of both (the genitive preposition ‘of’ being understood dually in each case, both as that which negates each sub-discourse and as that which each sub-discourse negates). Post-modern humanity is human, but not essentially human; divided into categories, but not essential categories. The post-modern subject is the non-categorically categorical non-human human.

This post-modern dialectic follows no teleological scheme. It yields no ultimate resolution. The dialectic is not completed by yielding the human subject as a plenitude. It remains unstable and open-ended. The non-categorically categorical non-human human marks only the beginning of an inquiry, not the end of one. It is there that a genuine dialectic, a hermeneutics of the human subject, can begin.

If the classical sub-discourse of sexuality is universalist and the modernist sub-discourse of gender is categorical, then the post-modern sub-discourse of sexual orientation is deconstructionist, collapsing distinctions between nature and culture, neutrality and engagement, description and prescription, the normal (normative) and the aberrant, authenticity and inauthenticity, identities and acts. The queer becomes normal, thus the normal becomes queer. The
post-modernist sub-discourse of sexual orientation is the discourse of ‘queer theory’.

If the classical sub-discourse of sexuality is a product of traditional liberalism and ‘human’ sciences, and the modernist sub-discourse of gender a product of 1960’s-style activism, then the post-modern sub-discourse of sexual orientation is the child of globalisation, the epoch of the disintegration of pristine categories of race, ethnicity, nationality or statehood in a world where identities are partial and multiple, concocted, labile and shifting. It is multicultural, multi-layered, at the level of the nation, the state, the collectivity, the individual, the subjectivity. If the classical sub-discourse of sexuality is a discourse of freedom within existing political structures, and the modernist sub-discourse of gender a discourse of transformation of those structures in a progression from the inferior (‘before’) to the superior (‘after’) society, then the post-modernist sub-discourse of sexual orientation is a discourse of ‘transmogrification’: an endless parade from one grotesque, hence normal, identity to the next; from the abnormally normal to the inauthentically authentic to the unnaturally natural to the irrationally rational to the involuntarily voluntary. The post-modernist sub-discourse of sexual orientation is by no means shorn of transformative power, given its subversive animus; however, it is equivocal about all-too-straightforward or systematic notions of progress or improvement. The post-modernist sub-discourse of sexual orientation is not unequivocally political or apolitical; it is maverick, deflated, strategic, situational, ad hoc. It requires both classical and modernist moments, without which it may falter in showing why any state of affairs would be better than another (the post-modern perspective is indeed subject to the criticism of being intrinsically conservative in its inability to take an unequivocal stance); but it radically redefines these two moments.

As with the polar sub-discourses of sexuality and gender, it is not difficult to see how the polar sub-discourse of sexual orientation subsumes extreme positions of disjunction and hence conjunction. The post-modernist sub-discourse of sexual orientation swallows the others, all the more powerfully as it does not simply negate them. It does not posit sexuality or gender as ‘really something else’ because it undermines any such distinction between reality and appearance. All discourse is inter-textual, mongrel and interpolated.

It is little surprise that this sub-discourse which troubles the concept of the stable or unified legal subject equally troubles the concept of ‘human’ or ‘natural’ or ‘inherent’ rights accruing to such a subject. It is perhaps no coincidence that rights of sexual minorities continue to have little or no status in international human rights law. Whilst, along classical lines, racial or ethnic

identities have been constructed upon 'concrete' concepts based on 'natural', 'organic' links; whilst, along modernist lines, women's identities have been constructed upon – ultimately equally 'concrete' – concepts of patriarchal dominance and thereby gender duality; positive law has a harder time with identities that cannot be constructed along such uniform and stable lines: what model of identity can, with the same degree of simplicity and uniformity, account for gay men, lesbians, bisexuals, pre-operative transsexuals, post-operative transsexuals, transgenderists, intersexuals, asexuals, heterossexuals who may not conform to a prevailing normative-heterosexual code, as well as countless other people, within and beyond Western cultures, who may be in need of protections under positive law but do not recognise these contemporary Western labels? It is perhaps no coincidence that, whilst post-modern scepticism about legal subjects and their concomitant rights only with great difficulty can find a place in positive human rights law, at the same time sexual minorities only with great difficulty can find a place in positive human rights law. Any successes in positive law have been derivative: sexual orientation is recognised not as a distinct category – just as 'natural', hence just as constructed – as the categories of race, ethnicity, religion, language or gender, but rather only to the degree that they can be subsumed – dismissed – by some extant discourse, under generic concepts of privacy, discrimination, free expression, free association, and such like.

Accordingly, unlike the polar sub-discourses of sexuality and gender, that of sexual orientation has no direct analogue in positive international law. It becomes, instead, a re-interpretation of analogues correlative to other discourses. One can only postulate the kind of comprehensive status that would, on the one hand, encompass the divergent identities at issue whilst, on the other hand, respecting the orthodoxies governing the drafting of international human rights instruments, as I have suggested in Sexual Orientation: A Human Right. The model Declaration proposed therein, deliberately drafted in accordance with the prevailing conventions of the international legal corpus, by implication moulds the identities of sexual minorities (which are, by convention, defined along entirely Western lines, despite an acknowledgement of the inadequacy of such parameters) by drawing upon classical-liberal as well as modernist-programmatic norms. Whilst the classical and modernist

92 Heinze, op. cit., n. 28 supra.
93 Heinze, op. cit., supra, Chapter 10.
94 Id., Chapter 12.
95 Id., at 266–270.
96 Id., at 270–271.
97 Id., Chapter 15.
98 Id., Chapter 3.
99 Id., Chapter 15.
discourses correlated, respectively, to two distinct, defining branches of human rights law, the post-modernist correlates only to an *ad hoc* adaptation of these, resulting in a mere photocopy of extant instruments. Whilst discourses of human rights subjects – be they defined by race, ethnicity, religion, language, gender or some other category – can be seen in a *post-modern* perspective, as constantly defying the very notions of legal subjectivity that they embrace in order to gain at least that quantum of recognition pre-requisite to their effectively defying anything, no discourse of human rights can be expressly, self-consciously *post-modernist* and at the same time strictly obey the conventional orthodoxy of the international human rights corpus. The post-modernist discourse of positive law necessarily remains meta-discursive. The post-modern subject remains, in the pursuit of rights, ever strategic.

Nowhere do these difficulties appear more dramatically than in the cases on transsexuals' rights. Within the European Court of Human Rights, the recent progression of cases from *van Oosterwijck v. Belgium*101 to *X, Y and Z v. UK*102 carries special significance for concepts of the legal subject. The *van Oosterwijck* case was the first to reach the Court. Having been denied a post-operative change in civil status by the Belgian authorities, the applicant, claiming that such denial amounted to a violation of his right to privacy, sought relief under Article 8 of the European Convention on Human Rights (hereinafter ECHR). Without a change in civil status, which generally includes forenames as well as an indication of the individual's sex, the transsexual faces complicated and humiliating situations every time he or she must present proof of birth or identity, or other vital data. Refusal to grant such a change causes interminable difficulties for transsexuals seeking, for example, to marry, work, or claim various social benefits. In countries that issue uniform identity papers, this entails compulsory exposure of an intimate aspect of private life to strangers even in such everyday situations as postal or bank transactions. Finding that it lacked jurisdiction, the Court might in fact have welcomed this opportunity to avoid altogether having to adjudicate such complex and unfamiliar issues.105

100 Id., at 50–53. Cf. Heinze, op. cit., n. 28 supra.
102 Judgment of 22 April 1997, provisional text.
104 These issues are discussed by the Court in greater detail in the subsequent cases, discussed below.
105 Professor Cohen-Jonathan, for example, doubts whether the Court lacked jurisdiction, finding this resolution of the case 'strange'. "Respect de la vie privée et familiale", 5 Juris Classeur, Fasc. 6521, 3, 4; La Convention européenne des droits de l'homme, Economica, Paris, 1989, 116.
The Court resisted still, this time on the merits, in the Rees v. U.K.\textsuperscript{106} and Cossey v. U.K.\textsuperscript{107} cases. The applicants, both British nationals, sought to have official documents, in particular birth records, rectified to reflect their current sex. Yet the United Kingdom is unlike continental jurisdictions. It has no unified and comprehensive system for recording civil status. Instead, records of births, deaths, and marriages, like administration of passports, driving licenses, and other official documents, are organised separately. A certain number of documents, such as passports or driving licenses, can be changed with little difficulty, thus allowing transsexuals a certain degree of formal recognition. Formal documents can be issued reflecting modification of fore- or surnames, as well as of titles (Mr., Mrs., Ms., Miss).\textsuperscript{108} Birth records, however, which the British government describes as recording only historical facts, cannot be modified to reflect sexual re-assignment surgery. Accordingly, post-operative transsexuals' marriages are not legally valid, and transsexuals are likely to encounter difficulties in specific situations where birth records may be requested, including application for certain types of employment or pension benefits.\textsuperscript{109} Nevertheless, finding that this relative flexibility had in both cases prompted the United Kingdom 'to meet the applicant's demands to the fullest extent that its system allowed',\textsuperscript{110} the Court found no violation of the Convention.

Although separated by only five years, the transition from Rees to Cossey might nevertheless be seen as an interval during which some genuine evolution in knowledge and attitudes had occurred. Rees commanded a comfortable majority of twelve votes against three on the Article 8 privacy claim. Adjudication of that same claim in Cossey sharply divided the Court between a ten member majority and an eight member minority. The Rees Court ruled unanimously against finding a violation of the Article 12 right to marry. Yet four Article 8 dissenters in Cossey found a violation of that right as well.\textsuperscript{111} Rees produced only the one, rather prudent, dissenting opinion of Judges

\textsuperscript{106} Judgment of 17 October 1986, Series A no. 106.
\textsuperscript{107} Judgment of 27 September 1990, Series A no. 184.
\textsuperscript{108} Rees, at 10, 16; Cossey, at 9.
\textsuperscript{109} Rees, at 10-12, 16; Cossey, at 9-12.
\textsuperscript{110} Rees, at 17. The Court reasoned that requiring further recognition would create a positive obligation for the United Kingdom to undertake comprehensive administrative changes in an area in which European States were still conceded a high degree of domestic discretion – in particular, to abandon the system of birth registration as a record of sheer historical fact. Such changes ‘would impose new duties on the rest of the population’. Id., at 17-18. But see the dissenting opinion of Judges Bindschedler-Robert, Russo and Gersing, at 21-22, denying that certain changes, such as a modification of the birth certificate, would pose a burden. See also Cossey, at 15-17, and dissenting opinions, at 20-44.
\textsuperscript{111} At 18. See dissenting opinions of Judge Martens, at 22-41 and of Judges Palm, Foighel and Pekkanen, at 42-44.
Bindschedler-Robert, Russo and Gersing. Judges Bindschedler-Robert and Russo reaffirmed that opinion in Cossey, this time, however, joined by the far more vigorous dissents of Judges MacDonald and Spielmann, Judges Palm, Foighel and Pekkanen, and one of the most exhaustive plaidoyers in the history of the Court, the opinion of Judge Martens.

The more remarkable transition, however, is the subsequent one from Cossey to B. v. France – a period of less than one year during which the Court utterly changed direction. Or did it? It is no coincidence that the very question of what the Court had in fact decided was nebulous in B. v. France, or rather in this transition from Cossey to B. v. France (both cases involved male-to-female transsexuals), where the very nature of the legal subject before the Court became enmeshed with the question of the rights accruing to that subject. Was that subject a woman? Wholly a woman? Partially a woman? Did it make biological sense to ask? Did it make psychological sense to ask? Did it make legal sense to ask? Did it make moral sense to ask – did the very asking suggest a diminution of the human dignity of the person involved, of that person’s own assertion of sexual identity? Did these four sets of criteria – biological, psychological, legal, moral – necessarily converge? If not, which should govern? Did the subject before the Court have the personal authority to make an autonomous and conclusive determination? Or did the authority rather fall to the expertise of nineteen judges to say, in essence, ‘The determination as to whether you are a woman or a man lies not with you – not with what you claim to be or to feel – but with us; it is for us to say what you are’?

The Rees Court had accepted with little discussion an essential distinction between biological and psychological sex. The opinion of the three dissenting judges did not challenge it and was not incompatible with it. This assertion of ambiguity supported the Court’s recognition of a margin of appreciation on the part of national authorities to determine transsexuals’ rights. In Cossey, however, several judges expressly challenged this distinction, considering it legally invalid regardless of any scientific validity. Judge Martens called the chromosomal standard ‘completely irrelevant’ to the interests at stake, pleading instead for recognition of personal autonomy and of the ‘intellectual, spiritual and emotional bonds’ that transsexuals are capable of

112 The late Judge Gersing was no longer a member of the Court.
113 Judgment of 25 March 1992, Series A no. 232-C.
114 At 16.
115 At 33.
116 At 24.
forming subsequent to sex reassignment surgery.\textsuperscript{117} Judges Palm, Foighel and Pekkanen took a similar view.\textsuperscript{118}

When, not a year later, submissions were made to the Court in \textit{B. v. France} challenging the scientific basis of the distinction between biological and psychological sex on the grounds that transsexualism did indeed, at least in some cases, appear to have a biological basis,\textsuperscript{119} the Court, far from bridging the divides that had arisen in \textit{Cossey}, found itself in a state of even further disarray. France, like Belgium, maintained an integrated, ‘all or nothing’ system of civil status registration, uniform for all identity, social welfare, and related documents. Certain modifications which could be effectuated freely in the United Kingdom, such as change of forenames, were possible in France, if at all, only through judicial procedures and within narrow limits.\textsuperscript{120} Whereas at least some of the transsexual’s everyday business could be transacted without harassment or humiliation in the United Kingdom, the same was not true of France. Thus in \textit{B. v. France} the Court held that France would have to create easier access to certain changes in civil status. It observed that several options were open, and declined to prescribe the precise form that such changes should take.\textsuperscript{121} Whether this judgment departed from \textit{Rees} and \textit{Cossey} at all remains as uncertain today as it was for the judges who decided the case.\textsuperscript{122} For sure, the prospect that the decision might amount to an overruling of \textit{Rees} and \textit{Cossey} was not missed by the judges.\textsuperscript{123} Three deemed it an overruling on its face.\textsuperscript{124} And it is the rare doctrine indeed that is overruled less than a year after having been reaffirmed.

The Court’s ambivalence reached its pinnacle in the dissenting opinion of Judge Pinheiro Farinha. Dismissing the applicant’s own claims, Judge Pinheiro Farinha spoke instead of an applicant ‘whom I will not refer to in the feminine, as I do not know the concept of social sex and I do not recognise the rights of a person to change sex at will’.\textsuperscript{125} This utterance cries out in brutal terms the conflict that has characterised the cases on transsexualism all

\begin{footnotes}
\footnote{117}{At 33.}
\footnote{118}{At 43.}
\footnote{119}{At 48.}
\footnote{120}{Cohen-Jonathan, “Respect de la vie privée et familiale”, op. cit., n. 105 supra, at 6.}
\footnote{121}{At 54. It thus retained, in keeping with the \textit{Handyside} case, judgment of 7 December 1976, Series A no. 24, a ‘margin of appreciation’ for individual State discretion.}
\footnote{122}{See concurring opinion of Judge Walsh, at 75. But see this text accompanying nn. 124 and 125 infra.}
\footnote{123}{See dissenting opinions of Judge Matscher, at 60; Judge Pettiti, at 63; Judge Finheiro Farinha, at 61; and Judges Valticos and Loizou, at 67.}
\footnote{124}{See dissenting opinions of Judge Pinheiro Farinha, at 61; and Judges Valticos and Loizou, at 67.}
\footnote{125}{At 61 (emphasis added).}
\end{footnotes}
along: the Court finds itself unable to reach a cogent determination on what the subject of human rights is. If it can convince itself of the 'fact' that that subject is a woman, then the application of the corresponding norms becomes straightforward. If it can convince itself of the 'fact' that that subject is a man, then the application of the corresponding norms is straightforward. The case is anything but straightforward, however, as the identity of the legal subject before the Court no longer can be travestied as a question of fact. The process of ascertaining the 'facts' to which the applicable norms would be applied is itself thoroughly norm-driven. The legal subject thus remains indeterminate and narratively conceived. Those who, like Judge Pinheiro Farinha, embrace a narrative of biologically determined manhood and womanhood, from which no psychological experience, no act of will, and no surgical intervention can derogate, will constitute the legal subjects of Cossey and B. v. France as men. Those who, like Judge Martens, dismiss that narrative in favour of a discourse of psychological experience and personal autonomy, will constitute those legal subjects as women.

Still further fragmentation of the legal subject arises in X, Y and Z v. the United Kingdom. In that case, a female-to-male transsexual had, since 1975, lived as a man and, since 1979, had 'lived in a permanent and stable union' with a woman (applicant 'Y'), who, in 1992, bore the couple a child through artificial insemination. When the British authorities failed to allow X's registration as Z's father, the applicants brought a claim under Article 8 of interference with their private and family life. The Court acknowledged the existence of a de facto family unit based on substantive interpersonal ties, of which, indeed, it spoke in largely supportive terms. Noting the diversity of attitudes and practice throughout Europe regarding artificial insemination, however, the Court found that the United Kingdom was entitled to a wide margin of appreciation in determining the legal recognition of family relationships in this area. If the Court is willing to deny de jure familial status to a unit that it freely recognises as a sound de facto family unit, it can only be because some higher norm or ideal must be served. The de jure status must maintain its own, quasi-autonomous integrity, independent of social realities, even if this means maintaining the fragmentation of an actual family unit recognised as sound. This rationale is more clearly illustrated by Judge Pettiti who, in a concurring opinion, argues that post-operative transsexuals do not all have the same 'aptitude' for family life as non-transsexuals, despite his acknowledgment, along with the Court, that such was not the case at hand.

126 At §13 (provisional text).
127 At §12 (provisional text).
128 At §46 (provisional text); see generally §§45–52.
129 At §44 (provisional text).
The unity and integrity of this legal ideal of the family is thus conceivable correlative to the fragmentation of the legal subject who does not fulfill that ideal. Each defines the other. Under the totality of the Court’s decisions from van Oosterwijck to X, Y and Z, that legal subject is perhaps a man, perhaps a woman, perhaps both, perhaps neither (i.e., ‘intermediary’), perhaps self-determining, perhaps non-self-determining.

The limits of the post-modern legal subject, the dangers of a subjectivity whose rights can be determined only through a process of its own fragmentation, are illustrated in this line of cases. The transsexual comes to these cases seeking the maximum relief that the Convention can afford. This effort embraces classical claims of privacy, respect for family life, non-discrimination, and the like, but also modernist interpretations of those rights, which would construe them as requiring not simply government non-interference in a private realm distinct from the public, but also positive government support. Yet the purely classical construction of these rights as ‘negative’ rights ‘to be let alone’ fails to provide for the full range of the transsexual’s needs; and the modernist construction presupposes a thoroughgoing endorsement of transsexualism which the Court is unwilling to impose upon the State. The fragmentation of rights which then ensues can be justified only on the basis of a correspondingly fragmented, post-modern legal subjectivity to whom those rights accrue. Whilst positive law may continue to evolve so as, in time, to realise full rights for transsexuals or even all sexual minorities (although such a prediction certainly would be debatable), the question will remain whether this history nevertheless will continue to symbolise more generally the post-modern legal subject as the non-categorically categorical non-human human, simultaneously challenging categories, such as gender, race, ethnicity, nationality, religion or language, as well as non-categories, such as the ‘human family’ or the abstract individual. As legal subjects, we are all transsexuals.

5. Construction and Deconstruction

The three polar sub-discourses, then, allow the construction of versions of each discursive site that most strongly distinguish each site from the other two (Section 5.1). Again, as these polar sub-discourses do not generally represent or summarise their sites, the more important task consists in deconstructing these characterisations of each site by examining overlaps among the sites in a way which more fully characterises the discursive variety and subtlety of all three sites (Sections 5.2 and 5.3).
Table 1.

<table>
<thead>
<tr>
<th>Polar sub-discourse</th>
<th>Orthodox sexology</th>
<th>Programmatic feminism</th>
<th>Queer theory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discursive site</td>
<td>sexuality</td>
<td>gender</td>
<td>sexual orientation</td>
</tr>
<tr>
<td>Intellectual moment</td>
<td>classical</td>
<td>modernist</td>
<td>post-modernist</td>
</tr>
<tr>
<td>Historical genesis</td>
<td>Freud, Kinsey</td>
<td>1960s</td>
<td>globalisation</td>
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<tr>
<td>Perspective</td>
<td>universalist</td>
<td>categorical</td>
<td>deconstructionist</td>
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<tr>
<td>Goal</td>
<td>individual freedom</td>
<td>socio-political</td>
<td>‘transmogrification’</td>
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<tr>
<td></td>
<td>through understanding</td>
<td>through engagement</td>
<td></td>
</tr>
<tr>
<td>Identity</td>
<td>human beings</td>
<td>women and men</td>
<td>indeterminate and</td>
</tr>
<tr>
<td></td>
<td>(the human family)</td>
<td>(the identity group)</td>
<td>fragmented multiplicities</td>
</tr>
<tr>
<td>(Legal) subject</td>
<td>the autonomous</td>
<td>the female and the male</td>
<td>the non-categorically</td>
</tr>
<tr>
<td></td>
<td>individual</td>
<td>(gender)</td>
<td>categorical non-human</td>
</tr>
<tr>
<td>Politics</td>
<td>individual, integrationist, classical liberal</td>
<td>global reformist</td>
<td>locus shifting, situational, <em>ad hoc</em>, ‘contextual’</td>
</tr>
<tr>
<td>Method</td>
<td>enlightenment</td>
<td>empowerment</td>
<td>strategy</td>
</tr>
<tr>
<td>Epistemology</td>
<td>naturalist</td>
<td>historicist</td>
<td>aesthetic (<em>‘textual’, ‘narrative’</em>)</td>
</tr>
<tr>
<td>Target</td>
<td>conventional morality</td>
<td>patriarchy</td>
<td>essentialism</td>
</tr>
<tr>
<td>Dialectic</td>
<td>convention v. liberation</td>
<td>nature v. nurture / sex v. gender</td>
<td>essentialism v. social</td>
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<td></td>
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<td>constructionism</td>
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<td>Legal texts</td>
<td>UDHR</td>
<td>CEDAW, Beijing</td>
<td>ECHR case law</td>
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<td></td>
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<td>Declaration</td>
<td>on transsexualism</td>
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</tbody>
</table>

5.1. **Coupling**

The three polar sub-discourses can be delineated as presented in Table 1.

5.2. **First Decoupling**

Having constructed this schema of three polar sub-discourses within each discursive site, the real work of examining overlap then consists not in further elaborating this schema but in dismantling it. A further elaboration could only become a dismantling. The three polar sub-discourses of, respectively, sexuality, gender and sexual orientation, correspond to the three conceptual moments, respectively, of classicism, modernism and post-modernism; yet overlap of the three discursive sites can be observed in the disaggregation of these respective pairings. Table 1 thus provides only an archaeology of the relationships among the three sites. As suggested in Table 2, a slightly
more nuanced view might be ascertained once these three initial dualisms are de-coupled and multiple pairing is allowed.

Of course, fields F1, F5 and F9 simply represent the polar sub-discourses already discussed. This, however, leaves six additional fields, which, themselves, represent but points of departure for further dismantling, and thus for an ever subtler enunciation of sub-discourses. Each of these nine fields represents vast areas about which much could be (indeed has been, albeit in different terms) written. The scope of the present study allows such a schema to be examined only in the most cursory terms. Yet two general observations can be made which might provide some insight into how a more detailed analysis would proceed. First, all three discourses have traversed all three conceptual moments. Discourses of sexuality have known the more politically transformative idioms of modernism (F2) as well as the more deconstructionist idioms of post-modernism (F3); discourses of gender have known classical, liberal-egalitarian or universalist (F4) as well as post-modernist (F6) versions; and that sub-discourse of sexual orientation known as queer theory itself developed out of already flourishing gay discourses of liberal-egalitarianism (F7) and root-and-branch transformative politics (F8). Second, as sub-discourses from each site converge upon a post-modernist idiom – the extent of such convergence still, perhaps, an open question – they

130 One example of F2 sub-discourses would be sexual liberation movements sometimes associated with some early utopian socialists or with such post-Freudians as Wilhelm Reich or Herbert Marcuse. These sub-discourses present sexuality less as a subject of scientific investigation and more as an element of social transformation through engaged human agency. Sexuality is not a static ‘given’ but rather a force that can be realised fully only in an ethically as well as erotically transformed society.

131 This field would include, for example, contemporary work inspired by phenomenological or Lacanian approaches.

132 See n. 23 supra.


134 See n. 27 supra.

135 See n. 27 supra.
also inevitably blend with each other. The post-modernist sub-discourse of sexual orientation indeed provides a decisive impetus for a post-modernist sub-discourses of sex and gender; the result, however, is a discursive arena in which clear distinctions among the concepts of sexuality, gender and sexual orientation no longer make sense. They provide, at best, points of emphasis, and not clear-cut distinctions. Deconstructed concepts of sexual orientation necessarily entail deconstructed concepts of sexuality and gender; or, more precisely, deconstructed concepts of sexuality, gender and sexual orientation all necessarily entail each other. Accordingly, fields 3, 6 and 9 might just as easily be understood as one large field (indeed, one which threatens to swallow the other six fields), demarcated mostly for purposes of emphasis.

5.3. Second Decoupling

These nine discursive fields represent only an initial articulation of overlap. Further overlap occurs. Classical discourses of sexuality feed modernist discourses of sexual orientation, post-modernist discourses of gender continue to interact with classical theories of sexuality, and the possibilities go on. If each field were correlated, in turn, with each one of the others, 81 additional discursive fields would result, which, added to the original 9, would produce 90, as suggested in Table 3.

Table 3.

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<td>F78</td>
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<td>F9</td>
<td>F82</td>
<td>F83</td>
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<td>F87</td>
<td>F88</td>
<td>F89</td>
<td>F90</td>
</tr>
</tbody>
</table>

If fields F1 through F2 were each coupled with two of the others, more than 700 discursive fields would result. Moreover, each field can host a variety of sub-discourses\(^{136}\); and overlaps take place to different degrees; and, of course, having tentatively suspended examination of external (political,

\(^{136}\) This is the reason why each field can be coupled with itself, viz., F1 with F1, F2 with F2, and so forth.
sociological, anthropological, psychological, economic, theological, Marxist, Jungian...) discourses, it is clear that these must be re-introduced, although their number could be determined in many different ways.

The number of possible overlaps is, then, indeterminate. The schema is complete once it has dissolved.