

## 2. Gender Regulations

At first glance, the term “regulation” appears to suggest the institutionalization of the process by which persons are made regular. Indeed, to refer to regulation in the plural is already to acknowledge those concrete laws, rules, and policies that constitute the legal instruments through which persons are made regular. But it would be a mistake, I believe, to understand all the ways in which gender is regulated in terms of those empirical legal instances because the norms that govern those regulations exceed the very instances in which they are embodied. On the other hand, it would be equally problematic to speak of the regulation of gender in the abstract, as if the empirical instances only exemplified an operation of power that takes place independently of those instances.

Indeed, much of the most important work with feminist and lesbian/gay studies has concentrated on actual regulations: legal, military, psychiatric, and a host of others. The kinds of questions posed within such scholarship tend to ask how gender is regulated, how such regulations are imposed, and how they become incorporated and lived by the subjects on whom they are imposed. But for gender to be regulated is not simply for gender to come under the exterior force of a regulation.<sup>1</sup> If gender were to exist prior to its regulation, we could then take gender as our theme and proceed to enumerate the various kinds of regulations to which it is subjected and the ways in which that subjection

takes place. The problem, however, for us is more acute. After all, is there a gender that preexists its regulation, or is it the case that, in being subject to regulation, the gendered subject emerges, produced in and through that particular form of subjection? Is subjection not the process by which regulations produce gender?

It is important to remember at least two caveats on subjection and regulation derived from Foucaultian scholarship: (1) regulatory power not only acts upon a preexisting subject but also shapes and forms that subject; moreover, every juridical form of power has its productive effect; and (2) to become subject to a regulation is also to become subjectivated by it, that is, to be brought into being as a subject precisely through being regulated. This second point follows from the first in that the regulatory discourses which form the subject of gender are precisely those that require and induce the subject in question.

Particular kinds of regulations may be understood as instances of a more general regulatory power, one that is specified as the regulation of gender. Here I contravene Foucault in some respects. For if the Foucaultian wisdom seems to consist in the insight that regulatory power has certain broad historical characteristics, and that it operates on gender as well as on other kinds of social and cultural norms, then it seems that gender is but the instance of a larger regulatory operation of power. I would argue against this subsumption of gender to regulatory power that the regulatory apparatus that governs gender is one that is itself gender-specific. I do not mean to suggest that the regulation of gender is paradigmatic of regulatory power as such, but rather, that gender requires and institutes its own distinctive regulatory and disciplinary regime.

The suggestion that gender is a norm requires some further elaboration. A norm is not the same as a rule, and it is not the same as a law.<sup>2</sup> A norm operates within social practices as the implicit standard of *normalization*. Although a norm may be analytically separable from the practices in which it is embedded, it may also prove to be recalcitrant to any effort to decontextualize its operation. Norms may or may not be explicit, and when they operate as the normalizing principle in social practice, they usually remain implicit, difficult to read, discernible most clearly and dramatically in the effects that they produce.

For gender to be a norm suggests that it is always and only tenuously embodied by any particular social actor. The norm governs the social intelligibility of action, but it is not the same as the action that

it governs. The norm appears to be indifferent to the actions that it governs, by which I mean only that the norm appears to have a status and effect that is independent of the actions governed by the norm. The norm governs intelligibility, allows for certain kinds of practices and action to become recognizable as such, imposing a grid of legibility on the social and defining the parameters of what will and will not appear within the domain of the social. The question of what it is to be outside the norm poses a paradox for thinking, for if the norm renders the social field intelligible and normalizes that field for us, then being outside the norm is in some sense being defined still in relation to it. To be not quite masculine or not quite feminine is still to be understood exclusively in terms of one's relationship to the "quite masculine" and the "quite feminine."

To claim that gender is a norm is not quite the same as saying that there are normative views of femininity and masculinity, even though there clearly are such normative views. Gender is not exactly what one "is" nor is it precisely what one "has." Gender is the apparatus by which the production and normalization of masculine and feminine take place along with the interstitial forms of hormonal, chromosomal, psychic, and performative that gender assumes. To assume that gender always and exclusively means the matrix of the "masculine" and "feminine" is precisely to miss the critical point that the production of that coherent binary is contingent, that it comes at a cost, and that those permutations of gender which do not fit the binary are as much a part of gender as its most normative instance. To conflate the definition of gender with its normative expression is inadvertently to reconsolidate the power of the norm to constrain the definition of gender. Gender is the mechanism by which notions of masculine and feminine are produced and naturalized, but gender might very well be the apparatus by which such terms are deconstructed and denaturalized. Indeed, it may be that the very apparatus that seeks to install the norm also works to undermine that very installation, that the installation is, as it were, definitionally incomplete. To keep the term "gender" apart from both masculinity and femininity is to safeguard a theoretical perspective by which one might offer an account of how the binary of masculine and feminine comes to exhaust the semantic field of gender. Whether one refers to "gender trouble" or "gender blending," "transgender" or "cross-gender," one is already suggesting that gender has a way of

moving beyond that naturalized binary. The conflation of gender with masculine/feminine, man/woman, male/female, thus performs the very naturalization that the notion of gender is meant to forestall.

Thus, a restrictive discourse on gender that insists on the binary of man and woman as the exclusive way to understand the gender field performs a *regulatory* operation of power that naturalizes the hegemonic instance and forecloses the thinkability of its disruption.

One tendency within gender studies has been to assume that the alternative to the binary system of gender is a multiplication of genders. Such an approach invariably provokes the question: how many genders can there be, and what will they be called?<sup>3</sup> But the disruption of the binary system need not lead us to an equally problematic quantification of gender. Luce Irigaray, following a Lacanian lead, asks whether the masculine sex is the “one” sex, meaning not only “the one and only,” but the one that inaugurates a quantitative approach to sex. “Sex” in her view is neither a biological category nor a social one (and is thus distinct from “gender”), but a linguistic one that exists, as it were, on the divide between the social and the biological. “The sex which is not one” is thus femininity understood precisely as what cannot be captured by number.<sup>4</sup> Other approaches insist that “transgender” is not exactly a third gender, but a mode of passage between genders, an interstitial and transitional figure of gender that is not reducible to the normative insistence on one or two.<sup>5</sup>

## Symbolic Positions and Social Norms

Although some theorists maintain that norms are always social norms, Lacanian theorists, indebted to the structuralism of Claude Lévi-Strauss, insist that symbolic norms are not the same as social ones, and that a certain “regulation” of gender takes place through the symbolic demand that is placed on psyches from their inception.

The “symbolic” became a technical term for Jacques Lacan in 1953 and became his own way of compounding mathematical (formal) and anthropological uses of the term. In a dictionary on Lacanian parlance, the symbolic is explicitly linked with the problem of regulation: “The symbolic is the realm of the Law which *regulates* desire in the Oedipus complex.”<sup>6</sup> That complex is understood to be derived from a primary

or symbolic prohibition against incest, a prohibition that makes sense only in terms of kinship relations in which various “positions” are established within the family according to an exogamic mandate. In other words, a mother is someone with whom a son and daughter do not have sexual relations, and a father is someone with whom a son and daughter do not have sexual relations, a mother is someone who only has sexual relations with the father, and so forth. These relations of prohibition are encoded in the “position” that each of these family members occupies. To be in such a position is thus to be in such a crossed sexual relation, at least according to the symbolic or normative conception of what that “position” is.

The consequences of this view are clearly enormous. In many ways the structuralist legacy within psychoanalytic thinking exerted a monumental effect on feminist film and literary theory, as well as feminist approaches to psychoanalysis throughout the disciplines. It also paved the way for a queer critique of feminism that has had, and continues to have, inevitably divisive and consequential effects within sexuality and gender studies. In what follows, I hope to show how the notion of culture that becomes transmuted into the “symbolic” for Lacanian psychoanalysis is very different from the notion of culture that remains current within the contemporary field of cultural studies, such that the two enterprises are often understood as hopelessly opposed. I also plan to argue that any claim to establish the rules that “regulate desire” in an inalterable and eternal realm of law has limited use for a theory that seeks to understand the conditions under which the social transformation of gender is possible. Another concern regarding the symbolic is that the prohibition of incest can be one of the motivations for its own transgression, which suggests that the symbolic positions of kinship are in many ways defeated by the very sexuality that they produce through regulation.<sup>7</sup> Lastly, I hope to show that the distinction between symbolic and social law cannot finally hold, that the symbolic itself is the sedimentation of social practices, and that radical alterations in kinship demand a rearticulation of the structuralist presuppositions of psychoanalysis, moving us, as it were, toward a queer poststructuralism of the psyche.

To return to the incest taboo, the question emerges: what is the status of these prohibitions and these positions? Lévi-Strauss makes clear in *The Elementary Structures of Kinship* that nothing in biology

necessitates the incest taboo, that it is a purely *cultural* phenomenon. By “cultural,” Lévi-Strauss does not mean “culturally variable” or “contingent,” but rather according to “universal” laws of culture. Thus, for Lévi-Strauss, cultural rules are not alterable rules (as Gayle Rubin subsequently argued), but are inalterable and universal. The domain of a universal and eternal rule of culture—what Juliet Mitchell calls “the universal and primordial law”<sup>8</sup>—becomes the basis for the Lacanian notion of the symbolic and the subsequent efforts to divide the symbolic from both the biological and social domains. In Lacan, that which is universal in culture is understood to be its symbolic or linguistic rules, and these are understood to support kinship relations. The very possibility of pronomial reference, of an “I,” a “you,” a “we,” and “they” appears to rely on this mode of kinship that operates in and as language. This is a slide from the cultural to the linguistic, one toward which Lévi-Strauss himself gestures toward the end of *The Elementary Structures of Kinship*. In Lacan, the symbolic becomes defined in terms of a conception of linguistic structures that are irreducible to the social forms that language takes. According to structuralist terms, it establishes the universal conditions under which the sociality, that is, communicability of all language use, becomes possible. This move paves the way for the consequential distinction between symbolic and social accounts of kinship.

Hence, a norm is not quite the same as “symbolic position” in the Lacanian sense, which appears to enjoy a quasi-timeless character, regardless of the qualifications offered in endnotes to several of Lacan’s seminars. The Lacanians almost always insist that a symbolic position is not the same as a social one, that it would be a mistake to take the symbolic position of the father, for instance, which is after all the paradigmatically symbolic position, and mistake that for a socially constituted and alterable position that fathers have assumed throughout time. The Lacanian view insists that there is an ideal and unconscious demand that is made upon social life which remains irreducible to socially legible causes and effects. The symbolic place of the father does not cede to the demands for a social reorganization of paternity. Instead, the symbolic is precisely what sets limits to any and all utopian efforts to reconfigure and relive kinship relations at some distance from the oedipal scene.<sup>9</sup>

One of the problems that emerged when the study of kinship was combined with the study of structural linguistics is that kinship positions

were elevated to the status of fundamental linguistic structures. These are positions that make possible the entry into language, and which, therefore, maintain an essential status with respect to language. They are, in other words, positions without which no signification could proceed, or, in different language, no cultural intelligibility can be secured. What were the consequences of making certain conceptions of kinship timeless, and then elevating them to the status of the elementary structures of intelligibility?

Although Lévi-Strauss purports to consider a variety of kinship systems, he does so in the service of delimiting those principles of kinship that assume cross-cultural status. What is offered by structuralism as a “position” within language or kinship is not the same as a “norm,” for the latter is a socially produced and variable framework. A norm is not the same as a symbolic position. Moreover, if a symbolic position is more appropriately regarded as a norm, then a symbolic position is not the same as itself, but is, rather, a contingent norm whose contingency has been covered over by a theoretical reification that bears potentially stark consequences for gendered life. One might respond within the structuralist conceit with the claim, “But this is the law!” What is the status of such an utterance, however? “It is the law!” becomes the utterance that performatively attributes the very force to the law that the law itself is said to exercise. “It is the law” is thus a sign of allegiance to the law, a sign of the desire for the law to be the indisputable law, a theological impulse within the theory of psychoanalysis that seeks to put out of play any criticism of the symbolic father, the law of psychoanalysis itself. Thus, the status given to the law is, not surprisingly, precisely the status given to the phallus, where the phallus is not merely a privileged “signifier” within the Lacanian scheme but becomes the characteristic feature of the theoretical apparatus in which that signifier is introduced. In other words, the authoritative force that shores up the incontestability of the symbolic law is itself an exercise of that symbolic law, a further instance of the place of the father, as it were, indisputable and incontestable. Although there are, as Lacanians will remind us, only and always contestations of the symbolic, they fail to exercise any final force to undermine the symbolic itself or to force a radical reconfiguration of its terms.

The authority of the theory exposes its own tautological defense within the fact that the symbolic survives every and any contestation of its authority. It is not only a theory, that is, that insists upon masculine and feminine as symbolic positions which are finally beyond all contestation and which set the limit to contestation as such, but one that relies on the very authority it describes to shore up the authority of its own descriptive claims.

To separate the symbolic from the social sphere facilitates the distinction between the Law and variable laws. In the place of a critical practice that anticipates no final authority, and which opens up an anxiety-producing field of gendered possibilities, the symbolic emerges to put an end to such anxiety. If there is a Law that we cannot displace, but which we seek through imaginary means to displace again and again, then we know in advance that our efforts at change will be put in check, and our struggle against the authoritative account of gender will be thwarted, and we will submit to an unassailable authority. There are those who believe that to think that the symbolic itself might be changed by human practice is pure voluntarism. But is it? One can certainly concede that desire is radically conditioned without claiming that it is radically determined, and one can acknowledge that there are structures that make desire possible without claiming that those structures are timeless and recalcitrant, impervious to a reiterative replay and displacement. To contest symbolic authority is not necessarily a return to the “ego” or classical liberal notions of freedom, rather to do so is to insist that the norm in its necessary temporality is opened to a displacement and subversion from within.

The symbolic is understood as the sphere that regulates the assumption of sex, where sex is understood as a differential set of positions, masculine and feminine. Thus, the concept of gender, derived as it is from sociological discourse, is foreign to the discourse on sexual difference that emerges from the Lacanian and post-Lacanian framework. Lacan was clearly influenced by Lévi-Strauss’s *The Elementary Structures of Kinship*, first published in 1947, approximately six years before Lacan uses the term.<sup>10</sup> In the Lévi-Straussian model, the position of man and woman is what makes possible certain forms of sexual exchange. In this sense, gender operates to secure certain forms of reproductive sexual ties and to prohibit other forms. One’s gender, in



this view, is an index of the proscribed and prescribed sexual relations by which a subject is socially regulated and produced.

According to Lévi-Strauss the rules that govern sexual exchange and which, accordingly, produce viable subject positions on the basis of that regulation of sexuality are distinct from the individuals who abide by those rules and occupy such positions. That human actions are regulated by such laws but do not have the power to transform the substance and aim of their laws appears to be the consequence of a conception of law that is indifferent to the content that it regulates. How does a shift from thinking about gender as regulated by symbolic laws to a conception of gender as regulated by social norms contest this indifference of the law to what it regulates? And how does such a shift open up the possibility of a more radical contestation of the law itself?

If gender is a norm, it is not the same as a model that individuals seek to approximate. On the contrary, it is a form of social power that produces the intelligible field of subjects, and an apparatus by which the gender binary is instituted. As a norm that appears independent of the practices that it governs, its ideality is the reinstituted effect of those very practices. This suggests not only that the relation between practices and the idealizations under which they work is contingent, but that the very idealization can be brought into question and crisis, potentially undergoing deidealization and divestiture.

The distance between gender and its naturalized instantiations is precisely the distance between a norm and its incorporations. I suggested above that the norm is analytically independent of its incorporations, but I want to emphasize that this is only an intellectual heuristic, one that helps to guarantee the perpetuation of the norm itself as a timeless and inalterable ideal. In fact, the norm only persists as a norm to the extent that it is acted out in social practice and reidealized and reinstituted in and through the daily social rituals of bodily life. The norm has no independent ontological status, yet it cannot be easily reduced to its instantiations; it is itself (re)produced through its embodiment, through the acts that strive to approximate it, through the idealizations reproduced in and by those acts.

Foucault brought the discourse of the norm into currency by arguing in *The History of Sexuality* (vol. 1), that the nineteenth century saw the emergence of the norm as a means of social regulation which is

not identical with the operations of law. Influenced by Foucault, the sociologist, François Ewald, has expanded upon this remark in several essays.<sup>26</sup> Ewald argues that the action of the norm is at the expense of the juridical system of the law, and that although normalization entails an increase in legislation, it is not necessarily opposed to it, but remains independent of it in some significant ways (“Norms” 138). Foucault notes that the norm often appears in legal form, that the normative comes to the fore most typically in constitutions, legal codes, and the constant and clamorous activity of the legislature (Foucault, “Right of Death and Power Over Life”). Foucault further claims that a norm belongs to the arts of judgment, and that although a norm is clearly related to power, it is characterized less by the use of force or violence than by, as Ewald puts it, “an implicit logic that allows power to reflect upon its own strategies and clearly define its objects. This logic is at once the force that enables us to imagine life and the living as objects of power and the power that can take ‘life’ in hand, creating the sphere of the bio-political” (“Norms” 138).

For Ewald, this raises at least two questions, whether, for instance, modernity participates in the logic of the norm and what the relation between norms and the law would be.<sup>12</sup> Although the norm is sometimes used as synonymous with “the rule,” it is clear that norms are also what give rules a certain local coherence. Ewald claims that the beginning of the nineteenth century inaugurates a radical change in the relationship between the rule and the norm (“Norms” 140), and that the norm emerges conceptually not only as *a particular variety of rules*, but also as *a way of producing them*, and as *a principle of valorization*.

In French, the term *normalité* appears in 1834, *normatif* in 1868, and in Germany at the end of the nineteenth century, we get the normative sciences (which, I gather, gets carried forward in the name of the division at the contemporary American Political Science Association meetings called “normative political theory”); the term “normalization” appears in 1920. For Foucault as well as Ewald, it corresponds to the normalizing operation of bureaucratic and disciplinary powers.

According to Ewald, the norm transforms constraints into a mechanism, and thus marks the movement by which, in Foucaultian terms, juridical power becomes productive; it transforms the negative restraints of the juridical into the more positive controls of normalization; thus the norm performs this transformative function. The norm thus marks

and effects the shift from thinking power as juridical constraint to thinking power as (a) an organized set of constraints, and (b) as a regulatory mechanism.

## Norms and the Problem of Abstraction

This then returns us to the question not only of how discourse might be said to produce a subject (something everywhere assumed in cultural studies but rarely investigated in its own right), but, more precisely, what in discourse effects that production. When Foucault claims that discipline “produces” individuals, he means not only that disciplinary discourse *manages* and *makes use of them* but that it also *actively constitutes them*.

The norm is a measurement and a means of producing a common standard, to become an instance of the norm is not fully to exhaust the norm, but, rather, to become subjected to an abstraction of commonality. Although Foucault and Ewald tend to concentrate their analyses of this process in the nineteenth century and twentieth century, Mary Poovey in *Making a Social Body* dates the history of abstraction in the social sphere to the late eighteenth century. In Britain, she maintains, “The last decades of the eighteenth century witnessed the first modern efforts to represent all or significant parts of the population of Britain as aggregates and to delineate a social sphere distinct from the political and economic domains” (8). What characterizes this social domain, in her view, is the entrance of quantitative measurement: “Such comparisons and measurement, of course, produce some phenomena as normative, ostensibly because they are numerous, because they represent an average, or because they constitute an ideal towards which all other phenomena move” (9).

Ewald seeks a narrower definition of the norm in order to understand its capacity to regulate all social phenomena as well as the internal limits it faces in any such regulation (“Power” 170–71). He writes:

what precisely is the norm? It is the measure which simultaneously individualizes, makes ceaseless individualisation possible and creates comparability. The norm makes it possible to locate spaces, indefinitely, which become more and more discrete, minute, and at the same time makes sure that these spaces never enclose anyone in such a way as to create a nature for them,

since these individualising spaces *are never more than the expression of a relationship*, of a relationship which has to be seen indefinitely in the context of others. What is a norm? A principle of comparison, of comparability, a common measure, which is instituted in the pure reference of one group to itself, when the group has no relationship other than to itself, without external reference and without verticality. ("Norms" 173, my emphasis)

According to Ewald, Foucault adds this to the thinking of normalisation: "normative individualisation is not exterior. The abnormal does not have a nature which is different from that of the normal. The norm, or normative space, knows no outside. The norm integrates anything which might attempt to go beyond it—nothing, nobody, whatever difference it might display, can ever claim to be exterior, or claim to possess an otherness which would actually make it other" ("Norms" 173).

Such a view suggests that any opposition to the norm is already contained within the norm, and is crucial to its own functioning. Indeed, at this point in our analysis, it appears that moving from a Lacanian notion of symbolic position to a more Foucaultian conception of "social norm" does not augment the chances for an effective displacement or resignification of the norm itself.

In the work of Pierre Macheray, however, one begins to see that norms are not independent and self-subsisting entities or abstractions but must be understood as forms of action. In "Towards a Natural History of Norms," Macheray makes clear that the kind of causality that norms exercise is not transitive, but immanent, and he seeks recourse to Spinoza and Foucault to make his claim:

To think in terms of the immanence of the norm is indeed to refrain from considering the action of the norm in a restrictive manner, seeing it as a form of "repression" formulated in terms of interdiction exercised against a given subject in advance of the performance of this action, thus implying that this subject could, on his own, liberate himself or be liberated from this sort of control: the history of madness, just like that of sexuality, shows that such "liberation," far from suppressing the action of norms, on the contrary reinforces it. But one might also wonder if it is enough to denounce the illusions of this anti-repressive discourse in order to escape from them: does one not run the risk of reproducing them on another level, where they cease to be naive but

where, though of a more learned nature, they still remain out of step in relation to the context at which they seem to be aiming? (185)

By maintaining that the norm only subsists in and through its actions, Macheray effectively locates action as the site of social intervention: "From this point of view it is no longer possible to think of the norm itself in advance of the consequences of its action, as being in some way behind them and independent of them; *the norm has to be considered such as it acts precisely in its effects* in such a way, not so as to limit the reality by means of simple conditioning, but in order to confer upon it the maximum amount of reality of which it is capable" (186, my emphasis).

I mentioned above that the norm cannot be reduced to any of its instances, but I would add: neither can the norm be fully extricated from its instantiations. The norm is not exterior to its field of application. Not only is the norm responsible for producing its field of application, according to Macheray (187), but *the norm produces itself in the production of that field*. The norm is actively conferring reality; indeed, only by virtue of its repeated power to confer reality is the norm constituted as a norm.

## Gender Norms

According to the notion or norms elaborated above, we might say that the field of reality produced by gender norms constitutes the background for the surface appearance of gender in its idealized dimensions. But how are we to understand the historical formation of such ideals, their persistence through time, and their site as a complex convergence of social meanings that do not immediately appear to be about gender? To the extent that gender norms are *reproduced*, they are invoked and cited by bodily practices that also have the capacity to alter norms in the course of their citation. One cannot offer a full narrative account of the citational history of the norm: whereas narrativity does not fully conceal its history, neither does it reveal a single origin.

One important sense of regulation, then, is that persons are regulated by gender, and that this sort of regulation operates as a condition of cultural intelligibility for any person. To veer from the gender norm is to produce the aberrant example that regulatory powers (medical, psychiatric, and legal, to name a few) may quickly exploit to shore up the rationale for their own continuing regulatory zeal. The question

remains, though, what departures from the norm constitute something other than an excuse or rationale for the continuing authority of the norm? What departures from the norm disrupt the regulatory process itself?

The question of surgical “correction” for intersexed children is one case in point. There the argument is made that children born with irregular primary sexual characteristics are to be “corrected” in order to fit in, feel more comfortable, achieve normality. Corrective surgery is sometimes performed with parental support and in the name of normalization, and the physical and psychic costs of the surgery have proven to be enormous for those persons who have been submitted, as it were, to the knife of the norm.<sup>13</sup> The bodies produced through such a regulatory enforcement of gender are bodies in pain, bearing the marks of violence and suffering. Here the ideality of gendered morphology is quite literally incised in the flesh.

Gender is thus a regulatory norm, but it is also one that is produced in the service of other kinds of regulations. For instance, sexual harassment codes tend to assume, following the reasoning of Catharine MacKinnon, that harassment consists of the systematic sexual subordination of women at the workplace, and that men are generally in the position of harasser, and women, as the harassed. For MacKinnon, this seems to be the consequence of a more fundamental sexual subordination of women. Although these regulations seek to constrain sexually demeaning behavior at the workplace, they also carry within them certain tacit norms of gender. In a sense, the implicit regulation of gender takes place through the explicit regulation of sexuality.

For MacKinnon, the hierarchical structure of heterosexuality in which men are understood to subordinate women is what produces gender: “Stopped as an attribute of a person, sex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality. Gender emerges as the congealed form of the sexualization of inequality between men and women” (*Feminism Unmodified* 6–7).

If gender is the congealed form that the sexualization of inequality takes, then the sexualization of inequality precedes gender, and gender is its effect. But can we even conceptualize the sexualization of inequality without a prior conception of gender? Does it make sense to claim that men subordinate women sexually if we don’t first have an idea of what men and women are? MacKinnon maintains, however, that there is no

constitution of gender outside of this form of sexuality and, by implication, outside of this subordinating and exploitative form of sexuality.

In proposing the regulation of sexual harassment through recourse to this kind of analysis of the systematic character of sexual subordination, MacKinnon institutes a regulation of another kind: to have a gender means to have entered already into a heterosexual relationship of subordination; there appear to be no gendered people who are outside of such relationships; there appear to be no nonsubordinating heterosexual relations; there appear to be no nonheterosexual relations; there appears to be no same-sex harassment.

This form of reducing gender to sexuality has thus given way to two separate but overlapping concerns within contemporary queer theory. The first move is to separate sexuality from gender, so that to have a gender does not presuppose that one engages sexual practice in any particular way, and to engage in a given sexual practice, anal sex, for instance, does not presuppose that one is a given gender.<sup>14</sup> The second and related move within queer theory is to argue that gender is not reducible to hierarchical heterosexuality, that it takes different forms when contextualized by queer sexualities, indeed, that its binariness cannot be taken for granted outside the heterosexual frame, that gender itself is internally unstable, that transgendered lives are evidence of the breakdown of any lines of causal determinism between sexuality and gender. The dissonance between gender and sexuality is thus affirmed from two different perspectives; the one seeks to show possibilities for sexuality that are not constrained by gender in order to break the causal reductiveness of arguments that bind them; the other seeks to show possibilities for gender that are not predetermined by forms of hegemonic heterosexuality.<sup>15</sup>

The problem with basing sexual harassment codes on a view of sexuality in which gender is the concealed effect of sexualized subordination within heterosexuality is that certain views of gender and certain views of sexuality are reinforced through the reasoning. In MacKinnon's theory, gender is produced in the scene of sexual subordination, and sexual harassment is the explicit moment of the institution of heterosexual subordination. What this means, effectively, is that sexual harassment becomes the allegory for the production of gender. In my view, the sexual harassment codes become themselves the instrument by which gender is thus reproduced.

It is the regulation of gender, argues legal scholar Katherine Franke, that remains not only uninterrogated in this view, but unwittingly abetted. Franke writes:

What is wrong with the world MacKinnon describes in her work is not exhausted by the observation that men dominate women, although that is descriptively true in most cases. Rather, the problem is far more systematic. By reducing sexism to only that which is done to women by men, we lose sight of the underlying ideology that makes sexism so powerful . . . . The subordination of women by men is part of a larger social practice that creates gendered bodies—feminine women and masculine men. (“What’s Wrong With Sexual Harassment?” 761–62)

The social punishments that follow upon transgressions of gender include the surgical correction of intersexed persons, the medical and psychiatric pathologization and criminalization in several countries including the United States of “gender dysphoric” people, the harassment of gender-troubled persons on the street or in the workplace, employment discrimination, and violence. The prohibition of sexual harassment of women by men that is based on a rationale that assumes heterosexual subordination as the exclusive scene of sexuality and gender thus itself becomes a regulatory means for the production and maintenance of gender norms within heterosexuality.<sup>16</sup>

At the outset of this essay, I suggested several ways to understand the problem of “regulation.” A regulation is that which *makes regular*, but it is also, following Foucault, a mode of *discipline and surveillance* within late modern forms of power; it does not merely constrict and negate and is, therefore, not merely a juridical form of power. Insofar as regulations operate by way of norms, they become key moments in which the ideality of the norm is reconstituted, its historicity and vulnerability temporarily put out of play. As an operation of power, regulation can take a legal form, but its legal dimension does not exhaust the sphere of its efficaciousness. As that which relies on categories that render individuals socially interchangeable with one another, regulation is thus bound up with the process of *normalization*. Statutes that govern who the beneficiaries of welfare entitlements will be are actively engaged in producing the norm of the welfare recipient. Those that



regulate gay speech in the military are actively engaged in producing and maintaining the norm of what a man or what a woman will be, what speech will be, where sexuality will and will not be. State regulations on lesbian and gay adoption as well as single-parent adoptions not only restrict that activity, but refer to and reenforce an ideal of what parents should be, for example, that they should be partnered, and what counts as a legitimate partner. Hence, regulations that seek merely to curb certain specified activities (sexual harassment, welfare fraud, sexual speech) perform another activity that, for the most part, remains unmarked: the production of the parameters of personhood, that is, making persons according to abstract norms that at once condition and exceed the lives they make—and break.