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How to Bring Your Kids Up Queer: Family Law Realism, Then and Now

KRIS FRANKLIN* AND NOA BEN-ASHER**

Introduction

Paula Ettelbrick fought for us.¹

As a pragmatic and radical litigator,² Ettelbrick spent years trying to use a frequently uncomprehending and often outright hostile court system

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1. "Us" having an overlapping array of potential constituencies. LGBTQ+ community certainly. But also, probably, all those of any identity who are committed to liberatory change.

2. We note the irony here that some of these adjectives may at first blush appear contradictory, and that any of them could potentially be deployed as modifiers for the others. Real people are complex, and we believe Paula Ettelbrick's work exemplifies all these descriptions and many more.

to protect LGBTQ+ Americans.³ While her work took her into the many areas of law that touched queer lives, a special focus and passion of her advocacy was reserved for queer families.

Paula also tried to warn us.

In the absence of legal recognition for the families we construct, queer lives are rendered not just invisible but virtually nonexistent; we become legal strangers to our loved ones in ways that violently obliterate our lived realities.⁴

Ettelbrick wanted the law to recognize queer lives as they were actually experienced. In *Alison D. v. Virginia M.*, Ettelbrick (unsuccessfully) urged New York courts to respect the parenting relationship formed between a mother and the child she had been raising with her former female partner.⁵ In seeking visitation for the petitioner, who was not a biological or adoptive parent, Ettelbrick urged the courts to see and acknowledge the reality of

3. Ettelbrick spent more than 25 years in public life as a visionary LGBTQ+ advocate, working with a variety of organizations including Lambda Legal Defense and Education Fund, LAMBDA LEGAL, <https://www.lambdalegal.org/> (last visited Oct. 26, 2021); the National Center for Lesbian Rights, NAT'L CTR. FOR LESBIAN RIGHTS, <https://www.nclrights.org/> (last visited Oct. 26, 2021); the International Gay and Lesbian Human Rights Commission, now known as OutRight Action International, OUTRIGHT ACTION INT'L, <https://outrightinternational.org/> (last visited Oct. 26, 2021); the National Gay and Lesbian Task Force, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/> (last visited Oct. 26, 2021); and the Empire State Pride Agenda, which disbanded after 2015, see Jesse McKinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of Its Mission*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/nyregion/empire-state-pride-agenda-to-disband-citing-fulfillment-of-its-mission.html>. See *National Gay and Lesbian Task Force Mourns the Passing of LGBT Rights Leader Paula L. Ettelbrick*, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/national-gay-and-lesbian-task-force-mourns-the-passing-of-lgbt-rights-leader-paula-l-ettelbrick/> (last visited Nov. 13, 2021); David W. Dunlap, *Paula L. Ettelbrick, Legal Expert in Gay Rights Movement, Dies at 56*, N.Y. TIMES (Oct. 8, 2011), <https://www.nytimes.com/2011/10/09/nyregion/paula-l-ettelbrick-legal-expert-in-gay-rights-movement-dies-at-56.html>.

4. “Legal strangers” in the sense of having not defined and legally acknowledged familial connection. The lack of cognizable familial status can devastatingly deprive nonlegal parents from having any opportunity to raise or even see the children they thought of as theirs. See, e.g., *In re Z.J.H.*, 471 N.W.2d 202, 206–09 (Wis. 1991) (concluding that an intended lesbian mother who was not legally permitted to co-adopt with her former partner was not a “parent” within the meaning of state statutes), *overruled in part by In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

5. 572 N.E.2d 27 (N.Y. 1991), *overruled by Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016). “Unsuccessful” to the extent that Alison’s visitation was denied by the court fairly handily, absent exploration of its own precedents that might have led to a different outcome, *id.* at 30, but with a strong dissent raising those very precedents written by Judge Judith Kaye. *Id.* at 30–33 (Kaye, J., dissenting) (among other compelling points, analyzing the relevance of the court’s previous decision to grant family status to unmarried male partners to maintain rent-controlled housing after one partner died). For further discussion of Kaye’s dissent and the ultimate success of both Ettelbrick’s and Kaye’s reasoning, see *supra* p. 239, Andrew Schepard, *Judith S. Kaye: A Chief Judge for Families and Children*.

same-sex parents operating in a legal system in which only one of them was deemed an actual mother.

But achieving legal recognition often carries the costs of enforced normativity. Ettelbrick was rightly adamant that we seek legal change thoughtfully, with deep comprehension of what “winning” some of those fights might entail. In *Since When Is Marriage a Path to Liberation?*, one of the early and most notable articulations of the case against same-sex marriage, Ettelbrick urged those interested in gay liberation to consider the downsides of seeking marriage.⁶ One of the important costs, Ettelbrick argued, was that we would lose the radical and creative ways of living that had emerged outside of marriage.

Ettelbrick was also clear-eyed. She recognized that even while she favored more progressive initiatives instead of reifying marriage as the only (or best) way to recognize adult partnerships, when it came to children, the stakes required sharply drawn lines that unequivocally placed queer parents inside of them. Therefore, of necessity, lines were grounded in those parents’ intentions and functions, rather than resting purely on reproductive biology or the inadequate legal statuses that were then available.

The ensuing years have seen the legalization of same-sex marriage alongside expanded access to reproductive technologies and adoption.⁷ The shift toward greater acceptance of homosexuality has led, if not necessarily to less homophobia, at least to a time when legalized recognition of queer families is often taken for granted.⁸ We have apparently achieved the commonplace, sitcom-ready public acknowledgment of the Modern (Queer) Family.⁹ It is now presumed that queer people exist and that we are entitled to respect and dignity. It is no longer acceptable to discriminate

6. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 1, 10, reprinted in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757 (Mark Blasius & Shane Phalen eds., Routledge 1997) [hereinafter *Since When?*, with page references to the reprinted version].

7. Obergefell v. Hodges, 576 U.S. 644 (2015); *id.* apps. A & B at 681–86 (listing federal and state cases and state legislation on same-sex marriage that preceded the Supreme Court’s decision in *Obergefell*); Pavan v. Smith, 137 S. Ct. 2075 (2017); Movement Advancement Project, *Equality Maps: Foster and Adoption Laws*, FAM. EQUAL., <https://www.familyequality.org/resources/foster-and-adoption-laws/> (last visited Nov. 14, 2021).

8. What one of us has termed the “Ellen effect” (Kris Franklin, *The Rhetorics of Legal Authority: Constructing Authoritativeness, the “Ellen Effect” and the Example of Sodomy Law*, 33 RUTGERS L.J. 49 (2001)) can be traced directly to what the other of us has called “the metamorphosis of the legal homosexual” (Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J. L. & GENDER 243 (2014)).

9. Referencing the 2009–2020 ABC sitcom MODERN FAMILY, which centered on three related nuclear families with different compositions, including a gay couple raising a child together.

based on sexual orientation,¹⁰ separate children from their gay parents, or bully queer youth.

The project of garnering social and legal respect for the rich panoply of queer lives is ongoing and often successful. But the troubling effects of domesticated homogeneity that Ettelbrick predicted have also come to pass.

Eve Kosofsky Sedgwick showed us who might be targeted next, and why.

Around the same time that Ettelbrick was writing and litigating, Sedgwick was concerned with the growing medicalization of gender nonconforming children, especially boys.

In *How to Bring Your Kids Up Gay*, Sedgwick observed that shortly after homosexuality was removed as a disorder from the Diagnostic and Statistical Manual of Mental Disorders (DSM), a new disorder appeared: “gender identity disorder of childhood.”¹¹ The industry of self-proclaimed experts determined to “fix” effeminate boys to make them more masculine—lest they become gay adults (or gay adults of the “wrong” kind)—was determined to solve the problem of variant gender expression.¹² The desire to repair this gender problem in kids, observed Sedgwick, was unfortunately shared by both medical experts and some insiders in the gay community who preferred certain kinds of gays (masculine) to others (“sissies,” drag queens, etc.).¹³

Ettelbrick wanted the state to recognize families that do not perpetuate heterosexist hierarchies. She worried about what entering the *institution* of marriage would do to us, even while she fought tirelessly to achieve legal recognition of queer families.¹⁴ Sedgwick wanted to make room for free

10. Many states and municipalities have passed laws guaranteeing civil rights protections based on sexuality and gender identity. See *State Public Accommodation Laws*, NAT’L CONF. STATE LEGISLATURES (June 25, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>; *Sex and Gender Discrimination in the Workplace*, NAT’L CONF. STATE LEGISLATURES (Aug. 12, 2021), <https://www.ncsl.org/research/labor-and-employment/gender-and-sexdiscrimination.aspx>. The U.S. Supreme Court has found that the prohibition in Title VII of the Civil Rights Act of 1964 on employment discrimination “because of . . . sex,” 42 U.S.C. § 2000e-2, bars discrimination based on sexual orientation or gender identity. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

11. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, reprinted in EVE KOSOFSKY SEDGWICK, *TENDENCIES* 154, 156–57 (1993) (originally published in 29 SOC. TEXT, 1991, at 18) [hereinafter *Bring Up Gay*] (citing AM. PSYCHIATRIC ASS’N, DSM-III 265–66 (1980) [hereinafter DSM-III]; see *infra* note 68 and accompanying text).

12. See *Bring Up Gay*, *supra* note 11, at 156–59.

13. See *id.*

14. Including legal recognition for both adult partnership relationships and parent-child ties. See *infra* Part I.

expression of gender and sexuality at all ages. She was worried about what an uncritical approach to gender and sexual expression would do, and she rightly predicted that it could harm those kids who directly challenged the gender rigidity and binary imbued with sexism and embedded in culture.¹⁵

In the current moment, in the year 2021, in which the lives of actual transgender kids are increasingly serving as the conceptual battlegrounds in the most recent culture wars,¹⁶ we affirm that both were right! The last three decades have seen important legal progress and have protected some otherwise-vulnerable families and individuals. But we have also dropped some balls and made some sacrifices.

Perhaps Ettelbrick did not foresee the *exact type* of queer family that would come under attack in 2021. We are speaking of an otherwise “unqueer” family that chooses to support and love its gender variant child.¹⁷ It is for this reason that we add Sedgwick’s insights to the fight for the lives of those children, a fight that Ettelbrick would surely urge us to engage today.

This Article, in honor of Ettelbrick’s enormous contributions to family law, examines new sites of conflict for which the work of both thinkers is fundamental. We apply what we believe to be Ettelbrick’s core emphasis on having legal structures recognize the reality and lives of queer people—what we call “family law realism”—to the current social and legal struggles that are unfortunately being fought upon the bodies of transgender identified children and youth. We recommend that current advocates and lawmakers follow Ettelbrick’s exemplary model of seeking to ground law in lived realities, in service of Ettelbrick’s prescient goals for liberation of queer individuals and families.

I. Paula (1989)

In our imaginary interviews with the documentary subjects whom we can sadly no longer query, we pose a matching series of questions about

15. See *infra* Part II.

16. See, e.g., *Consider This: How Anti-Trans Bills Evoke the Culture Wars of the 90s*, NPR (May 27, 2021), <https://www.npr.org/2021/05/24/999902366/how-anti-trans-bills-evoke-the-culture-wars-of-the-90s>; Frank Bruni, *Republicans Have Found Their Cruel New Culture War*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/opinion/sunday/transgender-rights-republicans-arkansas.html>.

17. For thoughtful analysis of the legal consequences when parents fail to agree about means of supporting gender expansive children, see Marie-Amelie George, *Exploring Identity*, 55 FAM. L.Q. 1 (2021) (concluding that “[c]ourts should award custody to the parent who supports the child’s gender identity exploration”).

the goals and paths of liberation. To the greatest extent possible, we let their own words form a response.

A. What Does Queer Liberation Mean to You?

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations. It is a way of dealing with the world by diminishing the constraints of gender roles, which have for so long kept women and gay people oppressed and invisible. Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society. Gay liberation is inexorably linked to women's liberation. Each is essential to the other.

As a lesbian, I am fundamentally different from non-lesbian women. That's the point. Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as "Mrs. Attached-To-Somebody-Else." Nor do I want to give the state the power to regulate my primary relationship.¹⁸

For Ettelbrick, queer people and our families differ from straight counterparts in that we "push the parameters of sex, sexuality, and family."¹⁹ In her era, queer families were mostly disregarded by legal institutions. Same-sex adult partnerships had little recourse to legalization,²⁰ and because children could have at most only one male and one female parent, queer families raising children usually had no way to include other parents.

As a lesbian movement lawyer, then, Ettelbrick's queer liberation unquestionably *had* to include protecting queer people within the state.

18. *Since When?*, *supra* note 6, at 758.

19. Roy Rivenburg, *Divided over Gay Marriage*, L.A. TIMES (Mar. 12, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-12-et-rivenburg12-story.html> (quoting Ettelbrick).

20. Save for the domestic partnership registrations that were available in a few jurisdictions. They gave limited legal status to registrants but could not convey the panoply of benefits automatically available to all married couples and some nonmarried heterosexual partnerships. Like many progressive activists, Ettelbrick believed many of those benefits should be widely available irrespective of relationship status, Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & POL'Y 107, 139 (1996) [hereinafter *Family Recognition*], yet much of her work was devoted to seeking protections for individuals in same-sex relationships that would be automatically afforded to similar opposite-sex couples. *See id.* at 122–25 (discussing the troubling case of a lesbian who suffered a severe brain injury and was for years blocked by her family of origin from being cared for by her partner).

Seeking queer liberation thus demanded strategic use of family law doctrines and courts, but not automatically the full embrace and recognition within the narrowly limited imaginations of traditional family forms.

Her own commitment to that proposition was deeply informed by her work as an advocate and consultant in cases in which a female same-sex couple coparented a child, but after a breakup, the biological mother limited or denied contact between her former partner and the child.²¹

The experiences of lesbians having children cannot be addressed by trying to fit them into a family law system that is so resolutely heterosexual in its structure and presumptions.²²

Establishing legal recognition of lesbian-headed families requires us to start with the premise that both lesbian parents, the biological and non-biological alike, must be recognized as full legal parents for all purposes related to custody and visitation.²³

Ettelbrick acknowledged that we are not able to live safely within a legal system that does not see or understand queer families. She observed with alarm that there is something ineffective and reductionist in trying to secure rights and recognition simply by analogizing queer family forms to their heterosexual counterparts. It either does not work or loses something in translation.

[W]e must start with the fact that the very basic experiences of lesbians with regard to parenting are different from those of men and heterosexual women.²⁴

[T]he concept of equality in our legal system does not support differences; it only supports sameness. The very standard for equal protection is that people who are similarly situated must be treated equally. To make an argument for equal protection, we will be

21. See Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 514 (1993) [hereinafter *Who Is a Parent?*].

22. *Id.*

23. *Id.* at 546–47 (adding: “In a lesbian family context, biology must be separated from the determination of who is a parent. In custody or visitation disputes with the non-biological mother, where both have clearly agreed to share parenting, the biological lesbian mother should not have the legal advantage solely because of the legal privilege that her genetic link provides her.”).

24. *Id.* at 515.

required to claim that gay and lesbian relationships are the same as straight relationships. To gain the right, we must compare ourselves to married couples. . . . The thought of emphasizing our sameness to married heterosexuals in order to obtain this “right” terrifies me. It rips away the very heart and soul of what I believe it is to be a lesbian in this world.²⁵

Queer liberation, then, is a tricky path. It means fitting the law around our lives as we experience them and want them to be, rather than transmogrifying the way we live to meet flattened social or legal expectations.

[W]e have no choice but to propose solutions and guidelines . . . that reflect our experiences, rather than trying to fit ourselves into the already confusing matrix of heterosexual family rights. . . . The courts should not judge us otherwise.²⁶

[M]arriage and biological relationships are merely one form of family and should not be the sole determinants for whether a family receives legal privileges and benefits.²⁷

Access to benefits and privileges should be guided by a desire to fulfill the purpose for which those benefits are provided, not by rigid definitions of family.²⁸

B. What Is the Primary Obstacle to Queer Liberation?

“Marriage is a great institution . . . if you like living in institutions,” according to a bit of T-shirt philosophy I saw recently.²⁹

For Ettelbrick, the primary obstacle to queer liberation is a two-headed beast: the legal violence of having families invisible to the state and, alternatively, efforts to become visible to the state that accomplish immediate gains but limit or destroy the queer liberation project.

25. *Since When?*, *supra* note 6, at 758–59.

26. *Who Is a Parent?*, *supra* note 21, at 553.

27. *Family Recognition*, *supra* note 20, at 119.

28. *Id.* at 139.

29. *Since When?*, *supra* note 6, at 757.

Given the imprimatur of social and personal approval which marriage provides, it is not surprising that some lesbians and gay men among us would look to legal marriage for self-affirmation. After all, those who marry can be instantaneously transformed from “outsiders” to “insiders,” and we have a desperate need to become insiders.

. . . Everything would be quite easy and very nice.

So why does this unlikely event so deeply disturb me? First, marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation. . . . Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.³⁰

Abandoning efforts to expand possibilities for family formation and recognition in favor of traditionalist spousal recognition for some could limit possibilities for all by omitting those that did not conform. Seeking marriage is the ultimate obstacle to queer liberation.

Yet the danger in having no legal status for queer families loomed heavily. It had painful emotional consequences,³¹ it had grave legal consequences,³² it harmed the many children being raised by parents whom the law deemed strangers.³³ Therefore, Ettelbrick urged, as long as the fight is necessary, we must continue to pursue legal protections for

30. *Id.* at 757–58.

31. *Id.* at 759 (“Undoubtedly, whether we admit it or not, we all need to be accepted by the broader society. That motivation fuels our work to eliminate discrimination in the workplace and elsewhere, fight for custody of our children, create our own families, and so on. The growing discussion about the right to marry may be explained in part by this need for acceptance.”).

32. *Who Is a Parent?*, *supra* note 21, at 517–18 (“Virtually all family-related laws presume that family members are heterosexual and most assume that the family has as its base two people who are married. While these laws fail to account for most families, they particularly ignore the deeply committed and loving relationships of many of the approximately twenty-five million lesbians and gay men who live in this country, many of whom are in committed partnerships. Nor does the law in any but the rarest cases recognize the millions of children who live with their lesbian or gay parents and their partners.”); *see also* *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting) (“[T]he impact of today’s decision [to deny visitation] falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial for their development.”).

33. *Who Is a Parent?*, *supra* note 21, at 553. (“These concerns are not just for ourselves, but for our children, who have been rendered legal ‘nonentities’ by these decisions.”).

LGBTQ+ families. But we must always also do so on our own terms, rather than through anti-liberatory strategies such as legal marriage.

The lesbian and gay community has laid the groundwork for revolutionizing society's views of family.³⁴

The work of queer liberation advocates in Ettelbrick's mold then and now is to teach our society and our legal system to *see* queer families as they emerge in the real world, and to advocate for their protection and freedom.³⁵ We will propose that Brandon, a self-described Missourian, Christian, and father of four, may be an illustrative example of such families today.

C. How Should We Pursue Queer Liberation?

If the laws change tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships?³⁶

Justice for gay men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships.³⁷

To pursue Ettelbrick's liberation, we must seek legal definitions of families based on how they operate and how they are conceived by those within them.³⁸ This means insisting on legal and social recognition for queer families as they are truly constituted.

We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's view of family.³⁹

34. *Since When?*, *supra* note 6, at 760.

35. *Family Recognition*, *supra* note 20, at 138 ("Family definition advocates have successfully shifted society's view of lesbians and gay men from an emphasis solely on the sexual aspects of their relationships to an acceptance of their familial bonds.").

36. *Since When?*, *supra* note 6, at 760.

37. *Id.* at 758.

38. *Family Recognition*, *supra* note 20, at 156 ("Attributing legal and cultural significance to functional family relationships serves many valid purposes.").

39. *Since When?*, *supra* note 6, at 761.

The law must be developed according to the perspectives and experiences of lesbians, in much the same way that some advocate that it be developed to fit the experiences of women and people of color. As part of the evolving “outsider jurisprudence,” a lesbian family law jurisprudence must continue to emerge. The experiences of lesbians having children, and the method by which the law responds, must stand apart from heterosexual experience.⁴⁰

We should not narrow that vision just to protect the easiest, most analogizable and traditional kinds of queer families.⁴¹

The fight for justice has as its goal the realignment of power imbalances among individuals and classes of people in society. A pure “rights” analysis often fails to incorporate a broader understanding of the underlying inequities that operate to deny justice to a fuller range of people and groups.⁴²

Besides, “rights” ≠ what’s right. They might be overlapping or even congruent categories, of course, but are not automatically so. And “rights” come from a fundamentally individually focused analysis—my right to practice my religion without undue interference, my right to vote, my right to eat cheeseburgers even if they are bad for me. “What’s right,” in Ettelbrick’s formulation, is a more encompassing search for justice. And justice is inherently a more collective and comparative framework.

40. *Who Is a Parent?*, *supra* note 21, at 514–15.

41. The strategy of using initially narrow entries to advance rights through litigation has certainly worked in some circumstances, but often at real cost. In New York, for example, the 2003 passage of civil rights protection based on sexual orientation (the Sexual Orientation Non-Discrimination Act, usually called SONDA, *see The Sexual Orientation Non-Discrimination Act (“SONDA”),* N.Y. ATT’Y GEN., <https://ag.ny.gov/civil-rights/sonda-brochure>), failed to explicitly incorporate protection based on gender identity. Executive, Civil Rights, Education–Discrimination Based on Sexual Orientation, ch. 2, 2002 N.Y. Laws 48. Although over time state agencies interpreted the law to prohibit discrimination based on gender identity, it took another 13 years—10 of which annually saw bills passed by the Assembly but then stalled in the New York Senate—for the Gender Expression Non-Discrimination Act (GENDA) to be adopted. *See* Nick Morrow, *New York Passes Gender Expression Non-Discrimination Act & Protections Against Conversion Therapy*, HUM. RIGHTS CAMPAIGN (Jan. 15, 2019), <https://www.hrc.org/news/historic-ny-legislature-passes-gender-expression-non-discrimination-act-ban>; *NYS Human Rights Law Protections for Gender Identity & Expression*, N.Y. DIV. HUM. RIGHTS, <https://dhr.ny.gov/genda> (last visited Nov. 15, 2021); *Legislative Memo: Gender Expression Non-Discrimination Act (2019)*, NYCLU, <https://www.nyclu.org/en/legislation/legislative-memo-gender-expression-non-discrimination-act-2019>.

42. *Since When?*, *supra* note 6, at 758.

In setting our priorities as a community, we must combine the concept of both rights and justice. At this point in time, making legal marriage for lesbian and gay couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct the power imbalances between those who are married (whether gay or straight) and those who are not. Thus, justice would not be gained.⁴³

.....

.... Those closer to . . . power in this country are more likely to see marriage as a principle of freedom and equality. Those who are more acceptable to the mainstream because of race, gender, and economic status are more likely to want the right to marry. It is the final acceptance, the ultimate affirmation of identity.⁴⁴

So, in Ettelbrick's formulation (and ours), normative solutions like marriage, that primarily benefit those who already have comparatively more privilege, cannot be truly liberatory. We must look for broader notions of justice.

[Gay marriage] will not address the underlying unfairness that allows businesses to provide discounted services or goods to families and couples—who are defined to include straight, married people and their children, but not domestic partners. Nor will it address the pain and anguish of the unmarried lesbian who receives word of her partner's accident, rushes to the hospital and is prohibited from entering the intensive care unit . . . solely because she is not a spouse or family member. Likewise, marriage will not help the gay victim of domestic violence who, because he chose not to marry, finds no protection under the law to keep his violent lover away.⁴⁵

We must insist that a family's functionality matters. Through advocacy inside and outside of the courts, the legal system should adjust to appreciate

43. *Id.*

44. *Id.* at 758–59.

45. *Id.* at 760.

and give legal force to lives as they are lived, rather than forcing upon us a soulless torsion toward acceptability in the search for state approval.⁴⁶

We call Ettelbrick's compelling impetus "family law realism."⁴⁷ Family law realism is consistent with—but broader than—the functionalist legal arguments Ettelbrick deployed in her time. She argued for the realism of adult partnerships even when they were nonsexual or non-monogamous, or their nature had been deliberately obscured by the necessities of the closet.⁴⁸ She insisted that gay parents with no biological or legal connection to their children⁴⁹ nonetheless stand *in loco parentis* in ways the state should recognize in law.⁵⁰

46. See *Who Is a Parent?*, *supra* note 21, at 526 (approving of the N.Y. Court of Appeals' reasoning in *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989), finding a sufficient family relationship between two male partners to maintain continued family residence in a rent-controlled apartment after the named tenant died) ("The court rejected a narrow interpretation of the term, finding that 'family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order' and that individuals should not be evicted from their apartments on the basis of 'fictitious legal distinctions or genetic history. . . .' Rather, the court proclaimed that it must give effect to the legislative purpose of preventing sudden eviction and in doing so, interpreted the term 'family' in a manner consistent with 'the reality of family life.'").

47. The notion of family law realism builds squarely upon the functional family definitions for which Ettelbrick advocated. But it is, we believe, potentially a usefully different conceptual framework. We find the idea deeply intriguing, but fully developing the theory exceeds the scope of this project devoted to celebrating Ettelbrick's unique vision and profound contributions to the development of current law.

48. *Family Recognition*, *supra* note 20, at 121, 123.

49. At least prior to the availability of second-parent adoption, which was very much the world Ettelbrick was operating within. Advocacy by the then-named Lesbian Rights Project in the 1980s and Nancy Polikoff's groundbreaking article *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990), brought the concept of multiple parents of the same gender into the legal conversation, but the widespread availability of granting legal parentage without having to terminate the rights of an existing parent of the same gender did not become widespread until the 21st century. And, of course, the existence of same-sex marriage now confers presumptively joint parenting upon spouses and therefore obviates second-parent adoptions for some families. See *supra* notes 7–9 & accompanying text.

50. *Who Is a Parent?*, *supra* note 21, at 523–24 ("Though [Alison D.] was the first time in the country that a state's highest court would be asked to recognize the relationship created by two lesbians with their child, prior holdings in New York courts supported Alison's argument that functional parental relationships should be recognized. Under the common law doctrine of *in loco parentis*, New York's courts, like many others, had recognized that one who assumes the obligations of a parent acquires the relative rights and responsibilities of a parent. In conferring standing, New York courts have looked at the length of time the adult lived in the home with the child, whether the adult provided support for the child's welfare, or simply whether the petition for visitation shows patently that the child's interests were best served by continuing the relationship.").

Ettelbrick's family law realism astutely recognized the profound differences between legal acknowledgment of adult partnerships and the parent-child relationships she was involved in protecting. Ettelbrick wrote during a time when living together without marriage, or opting to enter legalized domestic partnerships (for everyone, not just same-sex couples), was an available option for some.⁵¹ She understood that adults may choose relationships with clear knowledge of the consequences. By contrast, parent-child relationships included minors with little say in their own familial circumstances, who could be devastated by the legal nonrecognition of a parent.

Ettelbrick's litigation attempted to bridge the chasm between legal stranger and legal parent. However, her overarching message was more expansive and ambitious. She wanted courts to comprehend and protect families that existed in real life, with children or without.

Though the term “parent” refers to a specific family relationship, the functional indicia that a court would look for to give it legal effect are similar to what the *Braschi* court found itself capable of doing to define family: emotional commitment, financial support, and living in the same household. The “reality of family life” must certainly include the equally valid view that not all children are the biological children of the parents caring for them.⁵²

For Ettelbrick, the same principles could just as easily apply to the legal recognition of adult partnerships even without marriage.⁵³ The objective of Ettelbrick's family law realism was to use the queer family as part of a larger effort toward liberation—for queers, certainly, but also for the benefit of everyone else. Through her legal efforts to protect queer families, Ettelbrick sought to redefine or “queer” our family law. As Ettelbrick explained:

51. See generally Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 185–206 (2005) (detailing the pro and con fight for legal status for domestic partnerships).

52. *Who Is a Parent?*, *supra* note 21, at 528 (discussing *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989)).

53. *Since When?*, *supra* note 6, at 760–61 (“The domestic partnership movement has been . . . important . . . insofar as it validates non-marital relationships. . . . It is crucial, though, that we avoid the pitfall of framing the push for legal recognition of domestic partners (those who share a primary residence and financial responsibilities for each other) as a stepping stone to marriage.”).

The goals of lesbian and gay liberation must simply be broader than the right to marry. Gay and lesbian marriages may minimally transform the institution of marriage by diluting its traditional patriarchal dynamic, but they will not transform society. They will not demolish the two-tier system of the “haves” and the “have nots.” We must not fool ourselves into believing that marriage will make it acceptable to be gay or lesbian. We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society.⁵⁴

II. Eve (1991)

A. What Does Queer Liberation Mean to You?

That’s one of the things that “queer” can refer to: the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone’s gender, of anyone’s sexuality aren’t made (or *can’t be* made) to signify monolithically. The experimental linguistic, epistemological, representational, political adventures attaching to the very many of us who may at times be moved to describe ourselves as (among many other possibilities) pushy femmes, radical faeries, fantasists, drags, clones, leatherfolk, ladies in tuxedos, feminist women or feminist men . . . or . . . people able to relish, learn from, or identify with such.⁵⁵

In an essay that has become a foundational text in queer theory, Sedgwick offered various possibilities opened up by the term “queer.” In her conception, “queer” means self- and relational identifications that playfully or ironically defy clear and strict alignments between our sex, gender, and sexuality.⁵⁶ The term can be seen as an invitation to challenge traditional restrictive expectations that those with male bodies identify as men, behave in masculine ways, and erotically desire (and reproduce with) the perceived opposite.⁵⁷ But queer identities are not only about gender and sexuality, and “a lot of the most exciting work around ‘queer’ spins

54. *Id.* at 761.

55. Eve Kosofsky Sedgwick, *Queer and Now*, reproduced in THE ROUTLEDGE QUEER STUDIES READER 3, 8 (Donald E. Hall & Annemarie Jagose, eds., 2012).

56. *Id.*

57. *Id.*

the term outward along dimensions that can't be subsumed under gender and sexuality at all: the ways that race, ethnicity, postcolonial nationality criss-cross with these and other identity-constituting, identity-fracturing discourses. . . ."⁵⁸

For Sedgwick, one liberatory potential involving “queer” lies in its potential for *first person* articulations.

A word so fraught as “queer” is—fraught with so many social and personal histories of exclusion, violence, defiance, excitement—never can only denote; nor even can it only connote; a part of its experimental force as a speech act is the way in which it dramatizes locutionary position itself. . . . “Queer” seems to hinge much more radically and explicitly on a person's undertaking particular, performative acts of experimental self-perception and filiation. A hypothesis worth making explicit: that there are important senses in which “queer” can signify only *when attached to the first person*. One possible corollary: that what it takes—all it takes—to make the description “queer” a true one is the impulsion to use it in the first person.⁵⁹

Here, Sedgwick's hypothesis that queer identity should be self-articulated can be put in productive conversation with Ettelbrick's notion of “queer.” In fact, Paula performs Eve's version of queer liberation by turning to the first person after defining queer more broadly (as “pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society”⁶⁰). Ettelbrick grounds her passionate entreaty against seeking the right to same-sex marriage in her own first-person account of her personal queerness.

As a lesbian, *I* am fundamentally different from nonlesbian women. That's the point. Marriage, as it exists today, is antithetical to *my liberation* as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as “Mrs. Attached-To-Somebody-Else.” Nor do I want to give the state the power to regulate *my* primary relationship.⁶¹

58. *Id.*

59. *Id.* at 8–9.

60. *Since When?*, *supra* note 6, at 758.

61. *Id.* (emphasis added).

The power of queer liberation for both thinkers, it seems, is a defiance of institutional expectations that confine our lived experiences—and in understanding that particular, always specific, first-person owning of defiance as an act of queer liberation.

B. What Is the Primary Obstacle to Queer Liberation?

Queer liberation can be curtailed by systems of (scientific, legal, religious, or other) knowledge that view nonharmful human sexual behavior as pathological, illegal, or immoral. A system in which adult homosexuality is considered *normal* while effeminacy in boys is considered *abnormal* is suspicious. This insight was as critical in the 1980s, when Sedgwick was writing, as it is today.

One of the most interesting aspects—and by interesting I mean cautionary—of the new psychoanalytic developments is that they are based on *precisely* the theoretical move of distinguishing gender from sexuality. This is how it happens that the *depathologization* of an atypical sexual object-choice can be yoked to the *new* pathologization of an atypical gender identification.⁶²

In *How to Bring Your Kids Up Gay* Sedgwick offers a devastating critique of what she calls “revisionist psychoanalysis, including ego-psychology” and its influence on the “American Psychiatric Association’s much-publicized 1973 decision to drop the pathologizing diagnosis of homosexuality from its next Diagnostic and Statistical Manual (DSM-III).”⁶³

A key obstacle to queer liberation, according to Sedgwick, is maintaining a bright line conceptual distinction between “gender” and “sexuality.”⁶⁴ As students of law, gender, and sexuality learn early, the foundational distinction between “gender” and “sexuality” can have liberatory effects.⁶⁵ Yet this same conceptual distinction also backfired when revisionist psychiatrists and others utilized it to wage war on effeminate boys.⁶⁶ Thus, shows Sedgwick, the category of those who are presumed mentally ill shifted from *all* homosexuals (concerning sexuality) to effeminate boys

62. *Bring Up Gay*, *supra* note 11, at 158.

63. *Id.* at 155.

64. *Id.* at 158.

65. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

66. *Bring up Gay*, *supra* note 11, at 156.

(concerning gender).”⁶⁷ Effeminate boys, writes Sedgwick, are “the abject that haunts revisionist psychoanalysis. The same DSM-III that, published in 1980, was the first that did not contain an entry for ‘homosexuality,’ was also the first that did contain a new diagnosis, numbered (for insurance purposes) 302.60: ‘Gender Identity Disorder of Childhood.’”⁶⁸

This replacement, Sedgwick sharply observes, is in fact homophobia dressed in more fashionable clothes. As societal understanding of homosexuality was gradually shifting in the 1980s from “abnormal” to “normal,” now healthy (read “normal”) gender development for boys was understood as one thing: masculine.⁶⁹

[F]emininity, in a person with a penis, can represent nothing but deficit and disorder

For [the representative psychiatric revisionists], then, the first, imperative developmental task of a male child or his parents and caretakers is to get a properly male Core Gender Identity in place as a basis for further and perhaps more flexible explorations of what it may be to *be* masculine. . . .⁷⁰

The result is a new hierarchy of healthy/unhealthy homosexuality: “Revisionist analysts seem prepared to like some gay men, but the healthy homosexual is one who (a) is already grown up, and (b) acts masculine.”⁷¹

67. *Id.*

68. *Id.*; see also *id.* at 156–57 (“Nominally gender-neutral, this diagnosis is actually highly differential between boys and girls: a girl gets this pathologizing label only in the rare case of asserting that she actually is anatomically male (e.g., ‘that she has, or will grow, a penis’); while a boy can be treated for Gender Identity Disorder of Childhood if he merely asserts ‘that it would be better not to have a penis’—or alternatively, if he displays a ‘preoccupation with female stereotypical activities as manifested by a preference for either cross-dressing or simulating female attire, or by a compelling desire to participate in the games and pastimes of girls.’”) (quoting DSM-III, *supra* note 11, at 265–66).

69. *Id.* at 159 (“One serious problem with this way of distinguishing between gender and sexuality is that, while denaturalizing sexual object-choice, it radically *renaturalizes* gender. . . . To place a very early core-gender determinant (however little biologized it may be) at the center of that process of consolidation seems to mean, essentially, that for a nontranssexual person with a penis, nothing can ever be assimilated to the self through this process of consolidation unless it can be assimilated *as masculinity*. . . . ‘This naturally occurring [!] fit between the male social world and the boy’s inner object world is the juvenile phase-specific counterpoint to the preoedipal child’s relationship with the mother.’”) (citation omitted).

70. *Id.* at 160.

71. *Id.* at 156.

This distinction between “healthy” and “unhealthy” is resurfacing today around the bodies and gender of transgender children, as we will discuss below. Building on these same ideas of the revisionist “experts” that Sedgwick criticized three decades ago, conservative politicians today perpetuate and reproduce cultural gender anxiety and moral panics about what healthy gender in children means.

C. How Should We Pursue Queer Liberation?

Sedgwick offers two strategies for queer resistance that can be employed today in response to attacks on gender-variant kids.

1. INTERRUPTING THE MORAL DISCOURSE OF SEXUALITY

A more understandable reason [for gays overlooking attacks on gender-variant boys] . . . is the conceptual need of the gay movement to interrupt a long tradition of viewing gender and sexuality as continuous and collapsible categories—a tradition of assuming that anyone, male or female, who desires a man must by definition be feminine; and that anyone, male or female, who desires a woman must by the same token be masculine.⁷²

Queer liberation for Sedgwick does not only mean liberation *of queers*. It is about liberating our own minds and institutions from limiting structures of thought and meaning. Sedgwick knew that so long as “experts” and societal institutions such as psychiatrists and courts favor cisgender and heterosexual adults as ideal “healthy” outcomes, paths of potential aberration from these outcomes would be treated negatively. The *anxiety* about gender of children is none other than a manifestation of the presumption that “straight is good” and “gay is bad.”

The renaturalization and enforcement of gender assignment is not the worst news about the new psychiatry of gay acceptance, however. The worst is that it not only fails to offer, but seems conceptually incapable of offering, even the slightest resistance to the wish endemic in the culture surrounding and supporting it: the wish that gay people *not exist*.⁷³

72. *Id.* at 157.

73. *Id.* at 161; *see also id.* (“There are many people in the worlds we inhabit . . . who have a strong interest in the dignified treatment of any gay people who may happen already to exist. But the number of persons or institutions by whom the existence of gay people is treated as a precious desideratum, a needed condition of life, is small.”).

Dignity is not a liberatory value, hints Sedgwick.⁷⁴ It does not compete on the moral spectrum of “good” sexuality versus “bad” sexuality; it often manifests in rhetoric of pity. We do not want dignity as pity. Queer liberation ought to pursue a development in morals at a societal level in which it is an affirmative moral *good* to promote gayness.

[A]dvice on how to help your kids turn out gay, not to mention your students, your parishioners, your therapy clients, or your military subordinates, is less ubiquitous than you might think. . . . [I]n the United States, at any rate, most sites of the state, the military, education, law, penal institutions, the church, medicine, and mass culture enforce it all but unquestioningly, and with little hesitation at even the recourse to invasive violence.⁷⁵

Books and therapeutic strategies that seek to prevent young males from effeminacy are “a train of squalid lies. The overarching lie is the lie that they are predicated on anything but the therapists’ disavowed desire for a nongay outcome.”⁷⁶

If, for Sedgwick, the obstacle for queer liberation is the force of institutions that reproduce old moral-religious condemnation through fresh and new vocabularies (e.g., “gender identity disorder”), a liberatory pursuit must *flip those truths on their head* by insisting that gay is an affirmative good.

Three decades later, we believe the next conceptual step is long overdue: So long as *cisgenderism* is considered a desired outcome, queer resistance must firmly ask, “why?” More specifically, why is cisgender a “good” outcome in children and adults and transgender a “bad” one? By showing that the preference for cisgender kids (and adults) is only a moral preference (sometimes conveniently dressed in the language of medical science), queer liberationists today can follow the path laid out by Sedgwick. By defending families who choose to love their children, not to “fix” or “cure” them, queer litigators and activists today follow the path of family law realism laid out by Ettelbrick.

74. One of us has developed this argument in the context of the dignity-full same-sex marriage cases in the Supreme Court. See Ben-Asher, *supra* note 8, at 245.

75. *Bring Up Gay*, *supra* note 11, at 161.

76. *Id.*

2. LIBERATING THE CONCEPTS OF “GENDER” AND “SEXUALITY”⁷⁷

That one woman, *as a woman*, might desire another; that one man, *as a man*, might desire another: the indispensable need to make these powerful, subversive assertions has seemed, perhaps, to require a relative de-emphasis of the links between gay adults and gender nonconforming children.⁷⁸

Like Ettelbrick, Sedgwick understood well the siren pull of a pragmatic scaling back of queer ambitions to achieve more immediate gains. But, also like Ettelbrick, she warned against conceding too much ground in that effort.⁷⁹ Instead, Sedgwick insisted that attacks on nonnormative sexuality and nonnormative gender are inextricably intertwined.⁸⁰

Sedgwick called for critical self-reflection in how feminist and queer thinkers, lawmakers, and activists think about the distinction between gender and sexuality.⁸¹ This insight is critical. It is wrong-headed to view the increasing rights of lesbians, gays, and bisexuals as unconnected to social and legal anxieties about transgender and gender nonconforming children and youth. The legal recognition of same-sex marriage and the attacks on transgender children are both episodes in one story, and Sedgwick was worried about the plotline:

There is a danger, however, that that advance [in acceptance of male adult homosexuals] may leave the effeminate boy once more in the position of the haunting abject—this time the haunting abject of gay thought itself. This is an especially horrifying possibility if—as many studies launched from many different theoretical and political positions have suggested—for any given adult gay man, wherever he may be at present on a scale of self-perceived or socially ascribed masculinity (ranging from extremely masculine to extremely feminine), the likelihood is disproportionately high that he will have a childhood history of self-perceived effeminacy, femininity, or non-masculinity.⁸²

77. *Id.* at 163–64.

78. *Id.* at 157.

79. *Id.*

80. *Id.*

81. *Id.* at 159–161.

82. *Id.* at 157–58.

The point is that the rejection of the effeminate boy is often a rejection of a young-object self, and a gay-affirming narrative that rejects the effeminate boy

would represent more than a damaging theoretical gap; it would represent a node of annihilating homophobic, gynephobic, and pedophobic hatred internalized and made central to gay-affirmative analysis. The effeminate boy would come to function as the open secret of many politicized adult gay men.⁸³

Now that marriage equality has been achieved, a new gender panic has become a central front in the culture wars. For many conservatives, the war over the “soul of America” now depends on how society treats effeminate boys, drag queens, and transgender men and women.

III. Michelle (2019)

Drag Queen Story Hour is essentially when creepy adults spend time with children to indoctrinate them on controversial theories about sex and diversity.⁸⁴

Three decades have passed since Eve and Paula warned and mourned.

Imagine two scenes from the recent past. In one, Michelle, a 35-year-old drag queen, sits in a public library in San Francisco reading a story, say *Happy Pig Day* by Mo Willems, aloud to a group of young children and their parents. The story features two best friends, Piggie (a pig) and Gerald the Elephant, who realize (with great joy and relief) that Gerald can celebrate Pig Day even though he is not pink, does not have a snout, and does not say “oink oink.”⁸⁵ The children clap, sing “happy pig day,” and discuss the lessons of the book with Michelle, their parents, and each other.

Now imagine a second scene. It is September 5, 2019. The Institute for Human Ecology (IHE) of the Catholic University of America hosts two high-profile conservative journalists, David French and Sohrab Ahmari,

83. *Id.* at 158.

84. Gabe Kaminsky, *I Went to Drag Queen Story Hour in Washington, DC, So You Don't Have To*, *FEDERALIST* (July 13, 2021), <https://thefederalist.com/2021/07/13/i-went-to-drag-queen-story-hour-in-washington-dc-so-you-dont-have-to/>.

85. See MO WILLEMS, *HAPPY PIG DAY* (2011).

for a debate about the present and future of conservatism in America.⁸⁶ Ahmari represents a strand of new conservatives who view contemporary society as suffering from severe moral decay caused by liberal ideas and institutions.⁸⁷ French represents a more moderate (Reagan-Era) conservatism that tolerates, without celebrating, diversity, pluralism, and First Amendment rights but tries to influence the “soul of America” through personal examples of moral virtue and church-going.⁸⁸ The debate is hostile, and the two clearly do not see eye to eye on the main issues.

Of all the issues facing conservatives in the Trump presidency, an era in which children were separated from their parents and locked in cages,⁸⁹ Muslims were banned entrance to the United States,⁹⁰ and a few months later hundreds of thousands of Americans would die in a pandemic,⁹¹ one thing French and Ahmari debated for over 30 minutes (!) and could not agree on was precisely *how dangerous* to the country *Drag Queen Story Hour* was, and what should be done about it.⁹²

Drag Queen Story Hour was created in 2015 in San Francisco with the mission of offering “diverse, accessible, and culturally-inclusive family programming where kids can express their authentic selves and become bright lights of change in their communities.”⁹³ The vision is “a world where kids can learn from LGBTQ+ herstories and experiences to love themselves, celebrate the fabulous diversity in their communities, and stand up for what they believe in and each other.”⁹⁴

86. The debate, moderated by conservative *N.Y. Times* columnist Ross Douthat, is available at Inst. of Hum. Ecology, *Cultural Conservatives: Two Visions Responding to the Post-Liberal Left*, YouTube (Sept. 5, 2019), <https://www.youtube.com/watch?v=fAG28K0nGAU&t=560s> [hereinafter *Cultural Conservatives*].

87. *Id.*

88. The former thought Donald Trump was not a terrible president. The latter thought he was a disaster for conservative culture and politics. *Id.*

89. See Nick Miroff, ‘Kids in Cages’: It’s True That Obama Built the Cages at the Border. But Trump’s ‘Zero Tolerance’ Immigration Policy Had No Precedent, *WASH. POST* (Oct. 23, 2020), https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61_story.html.

90. See *Timeline of the Muslim Ban*, ACLU WASH., <https://aclu-wa.org/pages/timeline-muslim-ban>.

91. Will Stone, *As Death Rate Accelerates, U.S. Records 400,000 Lives Lost to the Coronavirus*, NPR (Jan. 19, 2021), <https://www.npr.org/sections/health-shots/2021/01/19/957488613/as-death-rate-accelerates-u-s-records-400-000-lives-lost-to-the-coronavirus>.

92. To be clear, both conservative thinkers were troubled by it; they only differed somewhat on the degree of attention and outrage that the matter warranted.

93. *About*, DRAG QUEEN STORY HOUR (last visited Oct. 12, 2021), <https://www.dragqueenstoryhour.org/about/>.

94. *Id.*

In the debate, Ahmari portrays Drag Queen Story Hour not only as the ultimate symptom of a corrupt civilization, but also as signaling the failure of “consensus conservatism.”⁹⁵ New conservatism is necessary, claims Ahmari. By supporting freedom of speech and expression that is viewpoint neutral, he explains, consensus conservatives such as David French have allegedly enabled the moral catastrophe manifested in Drag Queen Story Hour.⁹⁶ It is now time for the new conservatives to cure this moral decay.⁹⁷

Ahmari is not alone. His panicked response to Drag Queen Story Hour has been echoed across conservative circles. A columnist for the *Washington Times* has characterized it as “perhaps the most potent image for what’s gone wrong in America. . . . This is called aiding and abetting.”⁹⁸ The fear is clear: “Not long ago, a sexually confused man in women’s clothing peddling homosexual propaganda to small children would have prompted calls to the police. Instead, it’s cool to be neutral or even applaud.”⁹⁹ Republican Tricia Flanagan, who ran unsuccessfully for

95. *Cultural Conservatives*, *supra* note 86. For clear articulation of “Consensus Conservatism,” see generally Sohrab Ahmari et al., Various, *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus> (“Yet more than two years later, we speak with one voice: *There is no returning to the pre-Trump conservative consensus that collapsed in 2016*. Any attempt to revive the failed conservative consensus that preceded Trump would be misguided and harmful to the right. We give credit where it is due: Consensus conservatism played a heroic role in defeating Communism in the last century. . . . At its best, the old consensus defended the natural rights of Americans and the ‘transcendent dignity of the human person, as the visible image of the invisible God’ (Pope John Paul II, *Centesimus Annus*) against the depredations of totalitarian regimes. But even during the Cold War, this conservatism too often tracked the same lodestar liberalism did—namely, individual autonomy. The fetishizing of autonomy paradoxically yielded the very tyranny that consensus conservatives claim most to detest.”).

96. *Cultural Conservatives*, *supra* note 86. David French’s response is that while he does not like drag queen story hour, it is not a cultural emergency. It is not an inherent threat to society. There are bigger issues for conservatives to worry about. And, perhaps most importantly, First Amendment protections must apply to it, or else liberals will curtail religious speech when they can. *Id.* at 16:25.

97. In a recently published book, Sohrab Ahmari further elaborates his critique of the “modern ethic of the body, according to which our bodies and our embodied relationships are open to being remade, rewritten, or reconfigured according to our desires. Our true selves, in this view, are immaterial entities housed—or trapped—inside our bodies. One clear expression of it is the modern account of gender, which is premised on a rupture between who we are interiorly and the sexed bodies we receive from nature.” SOHRAB AHMARI, *THE UNBROKEN THREAD: DISCOVERING THE WISDOM OF TRADITION IN AN AGE OF CHAOS* 223 (2021); see also *id.* at 241 (“So what do we owe our bodies? Are they just fleshly vessels, which can be manipulated or even discarded in service to the mental or spiritual selves they contain?”).

98. Robert Knight, ‘*Drag Queen Story Hour*’ Shows What’s Gone Wrong in America, WASH. TIMES (Oct. 11, 2019), <https://www.washingtontimes.com/news/2019/oct/11/drag-queen-story-hour-shows-whats-gone-wrong-in-am/>.

99. *Id.*

election to the U.S. Senate, has said: “If American tax dollars can be used to pay for 3–8-year-olds to watch this PBS Drag Queen Story hour, then I demand equal tax dollars go to also read them Bible stories.”¹⁰⁰

The threat here is exactly what Sedgwick suspected: the fear that drag queens in all of their embodied effeminacy would facilitate the making of queer kids.¹⁰¹ Legal scholar Adrian Vermeule articulated this sex panic in a critique of Supreme Court reproductive freedom jurisprudence:

The claim, from the notorious joint opinion in *Planned Parenthood v. Casey*, that each individual may “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” *should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after*.¹⁰²

To be clear, Law Professor Adrian Vermeule, in a piece published in the year 2020 by a respectable magazine, is referring here to the Supreme Court’s decision to uphold the right of women to terminate an unwanted pregnancy, established in 1973 in *Roe v. Wade*.¹⁰³ The idea that individuals may define their own concept of existence, he claims, is “abominable” and “beyond the realm of acceptable.” The correct meaning of life, existence, and the universe is found in the teachings of the Catholic Church. Siding with Ahmari, Vermeule continues,

So too should the libertarian assumptions central to free-speech law and free-speech ideology—that government is forbidden to judge the quality and moral worth of public speech, that “*one man’s vulgarity is another’s lyric*,” and so on—fall under the ax.¹⁰⁴

100. Seren Morris, *Backlash for Drag Queen Story Time on PBS Station for Children Aged 3 to 8*, NEWSWEEK (May 21, 2021), <https://www.newsweek.com/backlash-pbs-drag-queen-story-time-children-1593605>.

101. Knight, *supra* note 98 (“Apart from the effect on their innocent souls, some of these kids may go on to develop gender dysphoria and be ‘treated’ with puberty-blocking drugs. Some may even, tragically, have healthy body parts surgically removed and regret it when it’s too late. . . . The whole thing is insane, immoral and should elicit more than Dukakis-style neutrality and societal co-dependence.”).

102. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> (emphasis added) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

103. 410 U.S. 113 (1973).

104. Vermeule, *supra* note 102.

So powerful is the pull of gender variance, apparently, that it must be eliminated at its source of personal self-definition. It seems that, at least in the minds of some conservative thinkers, the farcical Queer Nation chant of the 1990s was not a lighthearted protest jab but rather a terrifying threat: They are not only here, and queer, but they really *are* coming for your children.¹⁰⁵

IV. Brandon (2021)

I'm a lifelong Missourian. I'm a business lawyer. I'm a Christian. I'm the son of a Methodist minister. I'm a husband. I'm the father of four kids, two boys, two girls, including a wonderful and beautiful transgender daughter. Today happens to be her birthday. I chose to be here. She doesn't know that. She thinks I'm at work.

One thing I often hear when transgender issues are discussed is, I don't get it. I don't understand. I would expect some of you to have said that and feel the same way. I didn't get it either for years. For years, I would not let my daughter wear girl clothes. I did not let her play with girl toys. I forced my daughter to wear boy clothes and get short haircuts and play on boys' sports teams. Why did I do this? To protect my child. I did not want my daughter or her siblings to get teased. Truth be told I did it to protect myself as well. I wanted to avoid those inevitable questions as to why my child did not look and act like a boy.¹⁰⁶

105. A variant on the chants “We’re here, we’re queer, we’re fabulous!” or “We’re here, we’re queer, get used to it” that were prominent in Queer Nation “visibility actions” of the early 1990s.

106. Boulware’s testimony can be viewed online at ACLU, *Missouri Dad Testifies Against Trans Youth Athlete Ban*, YOUTUBE (Mar. 15, 2021), <https://www.youtube.com/watch?v=h60YLGDJ6n0>; full text of the speech is available at Neil Pasricha, *Mississippi Testimony by Brandon Boulware*, NEIL.BLOG, <https://www.neil.blog/full-speech-transcript/mississippi-testimony-by-brandon-boulware> (last visited Oct. 12, 2021) [hereinafter Boulware Testimony]. After it was tweeted by the ACLU, Boulware’s testimony garnered almost seven million views in just a few days. Andrea Salcedo, *Missouri Dad’s Testimony Against Transgender Sports Ban Goes Viral: ‘Let Them Have Their Childhoods,’* WASH. POST (Mar. 18, 2021), <https://www.washingtonpost.com/nation/2021/03/18/missouri-father-transgender-bill-video/>.

Brandon Boulware, a father of four, testified in front of Missouri state legislators in the spring of 2021,¹⁰⁷ delivering a speech about his transgender daughter as he urged lawmakers not to pass a ban on trans student-athletes.

As a prescient 2019 article pointed out, the war on transgender rights had “reached a new low,” as conservatives were now “going after kids.”¹⁰⁸

In Ettelbrick’s and Sedgwick’s era, LGBTQ+ people primarily came out as adults, often only after years of internal torment. Openly queer children were the exception rather than the norm. Consequently, the struggles of queer liberation were contested primarily among adults.¹⁰⁹ In the 2020s, the rise in queer-identified and gender-nonconforming youth has dramatically shifted the locus of debate.¹¹⁰

Kids are the newest, and most vulnerable, queers.¹¹¹ And while some gender variant kids face hostility, repression, and intrafamilial violence,¹¹² sometimes their loudest allies are their straight parents and other family members who are willing to challenge themselves to grow.

My child was miserable. I cannot overstate that she was absolutely miserable. Especially at school. No confidence, no friends, no laughter. I honestly say this, I had a child who did not smile. We did that for years. We did that against the advice of teachers, therapists,

107. The proposal was offered as an amendment to H.R. 1141, 101st Leg. 1st Reg. Sess. (Mo. 2021) (Amend. 2, introduced Apr. 20, 2021). See Charles Dunlap, *Amendment Seeks Transgender Athlete Ban Before End of Missouri’s Legislative Session*, COLUMBIA DAILY TRIB. (May 10, 2021), <https://www.columbiatribune.com/story/news/politics/state/2021/05/10/missouri-legislature-transgender-athlete-ban-added-scholarship-bill-chuck-basye/5021693001/> (the anti-trans amendment eventually passed after extensive debate, though the bill itself was stalled amid contentious debate on other grounds).

108. Laura Thompson, *The Conservative War on Transgender Kids Has Reached a New Low*, MOTHER JONES (Dec. 4, 2019), <https://www.motherjones.com/politics/2019/12/the-conservative-war-on-transgender-rights-has-reached-a-new-low/>.

109. Though, of course, not exclusively. For just one example of early queer youth activism, note Aaron Fricke’s successful lawsuit to bring his male date to his high school prom. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980).

110. For just one recent example of news reports addressing the ever-earlier age of when kids come out, see Marisa Fox, *Kids Are Coming Out Earlier Than Ever—Here’s How to Give Them the Support They Need*, HEALTH (May 18, 2021), <https://www.health.com/mind-body/lgbtq-health/kids-coming-out>.

111. Of course, many children who come out as transgender, nonbinary, gay, or many other identities do not identify as “queer.” We want to be respectful of this, and we use the term “queer” here in correlation with the ways Eve and Paula understood the term in the 1980s.

112. For recent statistics showing the alarming rates of discrimination, bullying, and violence faced by queer youth, see the Trevor Project’s *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2021/?section=ResearchMethodology>.

and other experts. I remember the day everything changed for me. I'd gotten home from work and my daughter and her brother were on the front lawn. She had sneaked on one of her sister's play dresses and they wanted to go across the street and play with the neighbors' kids. It was time for dinner I said, "Come in." She asked can she go across the street. I said, "no." She asked me if she went inside and put on boy clothes, could she then go across the street and play. It's then that it hit me, my daughter was equating being good with being someone else. I was teaching her to deny who she is. As a parent, the one thing we cannot do, the one thing is silence our child's spirit.

And so on that day my wife and I stopped silencing our child's spirit. The moment we allowed my daughter to be who she is, to grow her hair, to wear the clothes she wanted to wear, she was a different child. I mean it was immediate. It was a total transformation. I now have a confident, a smiling, a happy daughter. She plays on a girl's volleyball team. She has friendships. She's a kid.¹¹³

In recent years, anti-trans-kid hysteria has become a key organizing strategy for those who (depending upon your degree of cynicism) aim to instantiate traditional conceptions of gender,¹¹⁴ reinvigorate the perpetual culture wars,¹¹⁵ or exploit the issue as a proven-effective political fundraiser.¹¹⁶

113. Boulware Testimony, *supra* note 106.

114. See Marie-Amélie George, *False Claims of Protecting Children Are Fueling Anti-Trans Legislation*, WASH. POST (July 6, 2021), <https://www.washingtonpost.com/outlook/2021/07/06/false-claims-protecting-children-are-fueling-anti-trans-legislation/> ("The current wave of anti-transgender legislation is grounded in a long-standing narrative that LGBTQ individuals and rights are dangerous to children. Yet, that claim has been false for a half century, and remains so today.").

115. See Shay Ryan Olmsted, *The New Wave of Anti-Trans Legislation Is Based on Very Old Arguments and Ideas*, WASH. POST (June 14, 2021), <https://www.washingtonpost.com/outlook/2021/06/14/new-wave-anti-trans-legislation-is-based-very-old-arguments-ideas/>. ("[C]ontemporary anti-trans messaging is still based on the same underlying assumptions that employers long used to justify firing transgender workers: that trans people are threatening and that trans women aren't women. These assumptions have always been unfounded, harmful and false.").

116. See LZ Granderson, *Hurting Transgender Kids to Shore Up the Republican Base*, L.A. TIMES (May 12, 2021), <https://www.latimes.com/opinion/story/2021-05-12/transgender-laws-bans-youth-school-sports-lawsuit> ("The real sick thing about all of this is we have state legislatures willing to hurt democracy, dismiss mental health, even target elementary school children all in an effort to mobilize and monetize the country's prejudices and worst fears.").

Amid the disturbing prospect of ongoing legislative attempts to regulate middle school soccer teams¹¹⁷ and overrule doctors' decisions regarding the continuity of children's health care,¹¹⁸ though, we detect a small glimmer of hope. Even as the locus of conservative efforts to restrain queer expression is being enacted upon the literal bodies of these queer kids, someone, sometimes, is pushing back. Tales of heterosexual, traditional, and/or politically conservative parents standing up for their queer/trans kids abound in the media.¹¹⁹

I came here today as a parent to share my story. I need you to understand that this language, if it becomes law, will have effects on real people. It will affect my daughter. It will mean that she cannot play on the girls' volleyball team, or dance squad, or tennis team. I ask you, please don't take that away from my daughter, or the countless like her who are out there. Let them have their childhoods, let them be who they are. I ask you to vote against this legislation.¹²⁰

At least for some, then, the new queer family has become . . . the *family* of the queers. It is easy for us, whose world was shaped by Paula, Eve, and all they represent, to support and love these queer children. But it is not our love they need. Across the country, despite initial shock or terror, parents such as Brandon and his spouse, siblings, grandparents, aunts, and uncles are taking giant leaps, transforming themselves, their worlds, their faiths, and their communities, by standing with their child. These families act not from theory, but from love.

Attorneys, together with doctors, therapists, and scholars, have already begun to offer these families resources and protections via family law,

117. By preventing trans girls from participating in sports. Around the country, experts counted at least 25 bills from 11 states aimed at preventing trans girls from participating in sports in the 2021 legislative session alone. For ongoing and updated tracking of such initiatives, see *Legislative Tracker: Anti-Transgender Student Athletics*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/student-athletics/> (last visited Nov. 13, 2021).

118. By prohibiting gender-affirming therapies, including puberty-blockers, hormone supplementation, or surgical confirmation. See *Legislative Tracker: Anti-Transgender Medical Care Bans*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/medical-care-bans> (last visited Nov. 13, 2021).

119. See, e.g., Jo Yurcaba, "*It's Not Safe*": Parents of Transgender Kids Plan to Flee Their States as GOP Bills Loom, NBC NEWS (Apr. 19, 2021), <https://www.nbcnews.com/feature/nbc-out/it-s-not-safe-parents-transgender-kids-plan-flee-their-n1264506> (recounting the story of Kimberly Shappley, outlining the Christian minister's choice to move from a small Texas hometown to Austin in search of a more welcoming environment for her trans child, and preparations to move out of the state if Texas's proposed anti-trans policies became law).

120. Boulware Testimony, *supra* note 106.

civil rights laws, and other legal domains. These efforts will hopefully someday result in laws that reflect the rich and gorgeous fullness of their lives. Paula Ettelbrick laid out the way for today's queer family lawyers to strive for that:

As the cultural vision of family incorporates those who love and care for one another, strict adherence to formal definitions will only obstruct the broader social policy of supporting family nurturance, caretaking and commitment. . . . So long as couples, both straight and gay, continue to fall in love, live together and raise children together, the need to continue broadening the vision of family beyond the structures of marriage and biology will exist.¹²¹

121. *Family Recognition*, *supra* note 20, at 152.