

ORGANIZING AND ARGUING SEX AND GENDER

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She saw that this notion of the division of traits between the sexes had become so central to the story we tell ourselves of who we are, and how we came to be, that everything under the sun had been given a masculine or feminine character.

–Vivian Gornick, *The Solitude of Self:
Thinking about Elizabeth Cady Stanton*

INTRODUCTION

Organizing or litigating for any group involves defining and explaining its members to themselves and to others. Many people believe that their social, economic, and legal disadvantages are somehow related to a fundamental disparity between the ways they understand themselves (and understand one or more of the group identities they bear) and how others understand them. Improving matters seems therefore to require influencing these perceptions, but towards what? The frustrating reality is that even for any group's own members to develop a consistent, cohesive understanding of themselves there must be a recursive group process, requiring hard work and harder choices. The group members' individual, idiosyncratic, fluid, and occasionally internally inconsistent, senses of their own identities are continually in tension with the need for group cohesion. The clarity of purpose necessary for litigation is likewise in tension with the continual development and revision of group identity.

In this article I examine three (possibly related) conundrums that feminists and LGBTQI theorists, organizers, and litigators confront in explaining their constituencies to themselves and others:

I examine the conundrum confronting every group in the LGBTQI rainbow when it tries to present ideas about sex and gender that will both foster organizing the group itself and support liberatory aims to more diverse audiences. I do this in the course of describing the evolving theories of an early LGBTQI pioneer, Karl Heinrich Ulrichs.

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There, I discuss the distinctive pressures that his organizing and advocacy goals placed on claims he made about his constituency, and examine the choices he made.

I examine the choice whether to present a group's distinctive qualities as in-born or shaped by society and culture. I approach this in two ways. I begin by illustrating the strengths and weaknesses of Ulrichs's claim that his constituency's significant differences from "normal men" were inborn by showing how this probably necessary argument facilitated early sexologist Richard von Krafft-Ebing's co-optation of Ulrichs's ideas. Then I explore some determinants of feminist pioneer Mary Wollstonecraft's claim that most of the differences between men and women of her time were produced by myth and socialization rather than biology, contrasting this choice with Ulrichs's contrary approach.

And I examine the conundrum whether or not to present the constituency as "opposite" to some other group. Here again, I contrast Wollstonecraft with Ulrichs.

I examine these ideas with a lot of help from writings by three dead white Europeans: Mary Wollstonecraft, Karl Friedrich Ulrichs and Michel Foucault, each of whom made strikingly original contributions to understanding the connection between ideas about sex and ideas about gender.

I

MARY WOLLSTONECRAFT

Are differences between human males and females, and between what we call "masculine" and "feminine," inborn and invariable or acquired and mutable? This issue has been central to feminism at least since the late 18th century when Mary Wollstonecraft began *A Vindication of the Rights of Woman* by conceding men's "physical superiority" before comparing two alternative explanations for then-existing sexual differences in "the attainment of those talents and virtues, the exercise of which ennobles the human character[.]"¹ Nature was the straw man when she began her book at a high level of generality, writing: "either nature has made a great difference between man and man, or . . . the civilization which has hitherto taken place in the world has been very partial."² Applying this insight, her consistent position was that all differences in achievement between men and women (apart from achievements requiring physical strength) reflected not differences in innate capacity but rather civilization's partiality: the limitations upon women's expectations, educations, opportunities, employments, and rewards.³

1. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN: WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS* 18 (1792) [hereinafter WOLLSTONECRAFT].

2. *Id.* at 17.

3. *Id.* at 17 ("women in particular, are rendered weak and wretched by a variety of concurring causes[.]").

In *A Vindication*, Wollstonecraft was almost exclusively concerned with European women of her own class, the wives and daughters of manufacturers, businessmen, rentiers, and professionals, yet her argument that these women's native capacities were shaped by their circumstances, and to their detriment, is much more broadly applicable, as she herself asserted. Interpreting *A Vindication* at the same very high level of generality with which she began, it is clear that Wollstonecraft is reasoning her way towards understanding, and advocating for, conditions that would allow all women to reach and employ our full human potential. It should not be surprising therefore that her framing of the issues became, and remains, central to subsequent feminisms.

The various movements identified with one or more of the letters in LGBTQI (and its alternatives⁴) seek to create conditions for their constituencies' self-actualization just as successive waves and tendencies of feminism have done for theirs. Like feminisms, these movements must contend with attitudes and assumptions about sex and gender that support existing arrangements. Although, like feminisms, LGBTQI theories must deploy arguments that existing arrangements are neither inevitable nor immutable, they confront importantly different problems in doing so. Whatever disagreements they had about women's capacities, for both Wollstonecraft and her readers "woman" was a natural category with clear boundaries. Indeed, that assumption has only been seriously challenged in the past few decades. In contrast, for LGBTQI organizers and theorists, establishing a category to structure the constituency has been part of the work from the beginning, and so it remains.

II

MICHEL FOUCAULT

When was this "beginning"? In the first volume of his *History of Sexuality*, in 1976, Michel Foucault famously claims that 1870 marks the birth of homosexuality. Before then, Foucault says, the male who performed sex acts with another male was "nothing more than the juridical subject" who performed acts forbidden by "ancient civil or canonical codes."⁵ Afterwards, there was a "new specification of individuals" and he became

a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and a possibly mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.⁶

4. See, e.g., Wyatt Graham, *What Does LGBTQIIP2SAA Stand For?* (Dec. 29, 2017), <https://wyattgraham.com/what-does-lgbtqip2saa-stand-for/> [<https://perma.cc/PMP2-5H99>].

5. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME ONE: AN INTRODUCTION* 43 (Robert Hurley trans., Pantheon Books, 1978) [hereinafter, FOUCAULT].

6. *Id.*

This often-quoted paragraph has been as controversial as it has been influential. Some of the controversy results from reading the assertion that there was no homosexuality before 1870 to imply that society constructs individuals much as a sculptor might shape a figure of clay or wax, the innate qualities of the material perhaps influencing but certainly not determining the final product. (Richard Mohr provides an early example of this, mis-attributing to Foucault the idea that “individuals’ bodies are blank slates on which society writes a script, which the individual then reads to find out who he is.”⁷) Foucault, however, is not claiming that either people or their actions changed after 1870. Nor, as David Halperin has pointed out, is Foucault claiming either that before 1870 “there were no such things as sexual identities, only sexual acts,” or that although discourses about it may change, sexuality itself is “a timeless and ahistorical dimension of human experience.”⁸

Rather, Foucault’s claim is that, beginning approximately in 1870, a new discourse – new ways of discussing and of teaching – created systems of knowledge, systems of power, and ways of ordering and experiencing subjectivity that challenged older ones.⁹ Before 1870, the criminal courts and the church regulated sexual acts, with the actor merely the acts’ doer, their “juridical subject.” After 1870, an emerging medical establishment (doctors, psychiatrists, sexologists) began to assert authority over the same acts by attributing to the actors a “certain quality of sexual sensibility, a certain way of inverting the masculine and feminine in oneself.”¹⁰

Foucault picked 1870 to mark the beginning of this emerging discourse because in 1869 the neurologist Carl Friedrich Otto Westphal published an article about “contrary sexual sensations”¹¹ describing two cases: a woman who from childhood liked to dress as a boy and play boys’ games and who was attracted only to women, and a man who wanted to dress and act as a woman.¹² Foucault’s choice of 1870 is therefore accurate enough, provided we recognize that his interest was exclusively in discourses that enacted and established power: that is, in how the way one talks with and writes about people can affect one’s power specifically over them, and more generally. However, if we are searching for the very first introduction of the personage that Foucault attributed to Westphal – with his morphology, his indiscreet anatomy and his possibly mysterious physiology – whose “homosexuality,” as Foucault explains, “appears as

7. RICHARD MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 223 (1992).

8. DAVID M. HALPERIN, *HOW TO DO THE HISTORY OF HOMOSEXUALITY* 8–9 (2002).

9. FOUCAULT, *supra* note 5, at 50–55.

10. *Id.* at 43.

11. *Id.* Although Foucault claims Westphal’s article was published in 1870, the citation generally given is: “Westphal, Karl. 1869. *Die conträre Sexualempfindung*. Archiv für Psychiatrie und Nervenkrankheiten 2 (1): 73–108. (Reprint in Hohman 1977).” See, e.g., HUBERT KENNEDY, *KARL HEINRICH ULRICH: PIONEER OF THE MODERN GAY MOVEMENT* 286 (2d ed. 2005) [hereinafter, KENNEDY].

12. Vern L. Bullough, *Introduction* to 1 KARL HEINRICH ULRICH, *THE RIDDLE OF “MAN-MANLY LOVE”: THE PIONEERING WORK ON MALE HOMOSEXUALITY* 25 (Michael A. Lombardi-Nash trans., Prometheus Books, 1994) [hereinafter Bullough, *Introduction* to RIDDLE].

one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul,”¹³ it is generally conceded these days that we need to go a little further back, to 1864.

III

KARL HEINRICH ULRICHS

In 1864, a Hanoverian lawyer named Karl Heinrich Ulrichs (using the pseudonym Numa Numantius) published two pamphlets, *Vindex* and *Inclusa*, introducing this “personage.”¹⁴ Carl Westphal quotes from *Inclusa* in his 1869 article,¹⁵ explicitly basing his account of the “contrary sexual sensations” on “Numantius’s” work.¹⁶ Ulrichs used this pseudonym to publish the first five (of his eventual twelve) pamphlets on the subject. In them, he argued that, for those “built like a male” but whose sexual drives are exclusively toward men (and who are “horrified by any sexual contact with women”), strong sexual attraction to other males was natural, inborn, and moral. Ulrichs named this personage the Urning, and juxtaposed him to his physically indistinguishable but sexually mirror-image brother, whom he named the Dioning. (The Dioning’s sexual drive is exclusively toward women, and he feels “horrified by any sexual contact with men.”¹⁷) Ulrichs argued that because the Urning’s sexual desires were inborn, he should be neither stigmatized nor punished for them. Persecuting Urnings for “man-manly” love was as senseless as “punishing hens for laying eggs instead of chicks.”¹⁸

Although so far I’ve introduced just a bit of it, I already long to abandon Ulrichs’s clunky nomenclature in favor of more familiar modern terms. Alas, that would obscure the fecund multiplicity of his ideas and defeat my purpose in discussing Ulrichs’s work at all. As will become clear, Ulrichs’s theories had remarkable plasticity. The “Urning” is not a single type of person but a succession of them, none exactly a homosexual, nor precisely a gay man, nor truly transgender (in any of its meanings¹⁹), although he is like each of these in some ways. Equally, a Dioning is not exactly a heterosexual, nor a straight guy, nor cis-gendered: each of these misses important parts of him. Perhaps “queer” comes closest to what Ulrichs was getting at with the Urning, but the virtue of

13. FOUCAULT, *supra* note 5.

14. KARL HEINRICH ULRICHS, *VINDEX: SOCIAL AND LEGAL STUDIES IN MAN-MANLY LOVE* (1864) and *INCLUSA: ANTHROPOLOGICAL STUDIES ON MAN-MANLY LOVE* (1864), both republished in translation, along with Ulrichs’s ten other pamphlets on the subject, in 1 *THE RIDDLE OF “MAN-MANLY LOVE”*: THE PIONEERING WORK ON MALE HOMOSEXUALITY 31–95 (Michael A. Lombardi-Nash trans., Prometheus Books, 1994) [hereinafter, ULRICHS, RIDDLE].

15. KENNEDY, *supra* note 11, 135–38 (2d ed. 2005).

16. Bullough, *Introduction* to RIDDLE, *supra* note 12 at 25 (Westphal “based his assumptions on Ulrichs’ theories, citing the early work of Ulrichs on Urnings”).

17. 1 ULRICHS, RIDDLE, *supra* note 14, at 34.

18. *Id.* at 35.

19. See, e.g., Erin Calhoun Davis, *Situating “FLUIDITY”*: (Trans) Gender Identification and the Regulation of Gender Diversity, 15 GLQ: A J. OF LESBIAN AND GAY STUDIES 97–130 (2009).

that category is its capacious inclusiveness whereas Ulrichs's ideas were meant to be precise.

Although it is impossible to know all of Ulrichs's motivations for beginning to publish these pamphlets, trying to protect himself and people like him from criminal prosecution or punishment was certainly one of them. Beginning in 1813, influenced by the theories of Anselm von Feuerbach that criminal prohibitions could only be justified by harm to either private or state rights, a few of the German states (including Ulrichs's home, Hanover) had reformed their criminal laws by removing penalties for consensual sexual activities between adults.²⁰ However, most, including Prussia, retained laws with comprehensive prohibitions and harsh punishments. By 1864, when Ulrichs published *Vindex* and *Inclusa*, Prussia was in the process of extending its hegemony over the other German states (except Austria). This included, at first, merely influencing their criminal codes, but ultimately it involved imposing Prussian law. Ulrichs's pamphlets were part of his effort to forestall recriminalization of sexual touchings between men. (Perhaps because the laws did not punish sex between women, Ulrichs's work was almost exclusively concerned with people whose physical form was either male or what he called "male hermaphrodite."²¹ Nevertheless, he did hypothesize the possible existence of "a sex of persons built like females having a woman-womanly sexual desire, i.e., having the sexual direction of men," and later briefly acknowledged their existence and named them Urningins.²²)

Ulrichs began his arguments against re-criminalization by renaming the category of men prosecuted, in order to counter the prevailing belief that men who did these forbidden acts preyed upon boys. As he explains: "I believe I had to create a new expression because the word *Knabenliebe* [literally "boy-love"], which has been widely used, leads to the misinterpretation that Urningins are really attracted to boys, when actually they are attracted to young men (*puberes*)."²³ Although his understanding of the Urning's nature otherwise undergoes considerable change,²⁴ Ulrichs always definitively limits Urningins' interests to mature young men.²⁵

20. Martin Dannecker specifies Baden, Bavaria, Brunswick, and Hanover, in THEORIES OF HOMOSEXUALITY 34 (David Fernbach trans., 1981). Ulrichs, however, says that only Bavaria entirely decriminalized "man-manly love" but that Württemberg, Hanover, and Brunswick did so partially. 1 ULRICHS, RIDDLE, *supra* note 14, at 38.

21. 1 ULRICHS, RIDDLE, *supra* note 14, at 53–54.

22. *Id.* at 81, 162; 2 ULRICHS, RIDDLE, *supra* note 14, at 365.

23. 1 ULRICHS, RIDDLE, *supra* note 14, at 34 (bracketed explanation is the translator's). "*Puberes*" is Latin, a masculine plural meaning "the men, the adult male population". *Puberes*, Cassell's New Latin Dictionary (D.P. Simpson ed., 5th ed. 1968); *accord Puberis*, LATIN LEXICON, available at https://latinlexicon.org/search_latn.php (same translation and contrasting *puberes* with *adulescens*, *ephebus*, i.e. "adolescents.")

24. *See, e.g.*, 1 ULRICHS, RIDDLE, *supra* note 14, at 67–69. *See also* text accompanying notes 52–65, *infra*.

25. *See, e.g.*, 1 ULRICHS, RIDDLE, *supra* note 14, at 62 (between 18 and 26); *c.f. id.* at 68, 88; *but see* 2 ULRICHS, RIDDLE, *supra* note 14, at 360, 362 (Mannlings occasionally attracted to men between

Ulrichs' arguments that the Urnings' love was not immoral, and his arguments that Urnings ought not to be prosecuted or punished by the law, were related but distinct. Both relied on presenting the Urning as a natural human variation, identical to Dionings in some ways but mirror opposites in others. To prove that Urnings' love was moral,²⁶ Ulrichs emphasized Urnings' similarity to Dionings. He compared Urnings' love to the love of a man for a woman: both are natural and necessary to a full life;²⁷ involve profound emotional as well as physical connection;²⁸ have uplifting and spiritual components;²⁹ and may inspire a "bond" that is a lifelong commitment.³⁰ As he wrote, "The [Uranian love drive] is, indeed, inborn in the Urning, as the Dionian is in the Dioning; and it is, indeed, comprised of nothing but true love, the same as Dionian love. For that reason, it is just as noble, just as pure, filling the heart with just as much courage and strength . . ."³¹

In contrast, to prove that Urnings should not be criminally prosecuted or punished, Ulrichs emphasized their differences from Dionings. He explained that all human fetuses had both male and female potential for at least twelve weeks after conception, developing one potential and suppressing the other later in gestation. Ulrichs hypothesized that an Urning's embryological development was analogous to that of an "hermaphrodite,"³² giving him an inborn sexual orientation and an equally inborn gender identity that, although not manifest before puberty, were biologically fixed from before birth and fully natural for him.³³ A fetus developed into an Urning when its "female germ" for desire and gender developed along with its "male germ" for physical shape and function, their opposites being suppressed.³⁴ "Hermaphroditism of the soul" may have been a metaphor for Foucault, but for Ulrichs it was a literal truth, the foundation of all his theories about Urnings and of his arguments on their behalf.

Ulrichs's fight against re-criminalization of sexual acts between men was comprehensive. He did far more than publish pamphlets. He also corresponded with his readers about their lives and incorporated their responses into his later works. He wrote and submitted unsolicited pro bono amicus briefs on behalf of men charged with having, or attempting to have, sex with other men, or being punished for having done so. He argued in them that the prosecution should

13 and 19, and Weiblings to men between 30 and 36; for an explanation of the terms Mannling and Weibling, see text accompanying nn.59–60, *infra*. Ulrichs emphasized that "any sexual inclination to males below the age of puberty [is] unhealthy." 2 ULRICHS, RIDDLE, *supra* note 14, at 362.

26. 1 ULRICHS, RIDDLE, *supra* note 14, at 202–06.

27. 2 ULRICHS, RIDDLE, *supra* note 14, at 510–12.

28. 1 ULRICHS, RIDDLE, *supra* note 14, at 62.

29. *Id.* at 62–64.

30. *Id.* at 207–16.

31. *Id.* at 202.

32. *Id.* at 54–57, 163–72.

33. *Id.* at 35.

34. *Id.* at 55–58.

have the burden of proving that the accused was not an Urning, because the law was meant only to punish unnatural acts and, for the Urning, the acts were natural.³⁵ He drafted bylaws for a proposed, but unrealized, organization of Urnings.³⁶ He repeatedly attempted to get the Congress of German Jurists (of which he was a member) to decriminalize Urnings' lovemaking by abolishing penalties for all those sexual acts between consenting adults that were prompted by "in-born love."³⁷ Unsuccessful there, he later attempted to influence the new penal code for the short-lived North German Confederation in the same direction.³⁸ He even founded a magazine for Urnings, publishing a first issue before its publisher discontinued the periodical.³⁹

On the strength of his writings and other activities, and of his many public acknowledgments that he himself was an Urning, Ulrichs has been credited with inspiring the rise of the world's first gay rights movement.⁴⁰ (He has with equal justice been credited with inventing the complementary idea of heterosexuality.⁴¹) But notice this: in order to assimilate Urnings to any modern conception of gay men, you have to ignore a lot of Ulrichs's ideas about them.⁴² Ulrichs presents Urnings' sexual orientation and gender identity as blended and interdependent, while contemporary LGBTQI movements have been at considerable pains to keep these ideas separate.⁴³ Urnings may seem gay if you focus on their strong sexual attraction and capacity for deep romantic love for same-bodied persons, but they seems trans if you focus on their equally inborn, uncomfortable,⁴⁴ sense of themselves as gendered "opposite" to what would be conventionally expected of persons with their bodies, and their manifestation of that "opposite" gender in manner, gesture, interests, occupation, avocation, and dress.

35. KENNEDY, *supra* note 11, at 84–85, 176–77; 1 ULRICHS, RIDDLE, *supra* note 14, at 42–48.

36. KENNEDY, *supra* note 11, at 90–92.

37. 1 ULRICHS, RIDDLE, *supra* note 14, at 261–71; KENNEDY, *supra* note 11, at 92–93, 111–19.

38. KENNEDY, *supra* note 11, at 154–61, 187–88.

39. *Id.* at 180–87.

40. See, e.g., Liam Stack, *Overlooked No More: Karl Heinrich Ulrichs, Pioneering Gay Activist*, N.Y. TIMES (Jul. 1, 2020), <https://www.nytimes.com/2020/07/01/obituaries/karl-heinrich-ulrichs-overlooked.html?searchResultPosition=6> [<https://perma.cc/R4HC-9LB8>]; see also Bullough, *Introduction* to RIDDLE, *supra* note 12, at 21; MARTIN DANNECKER, *THEORIES OF HOMOSEXUALITY* (David Fernbach trans., 1981).

41. See JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 51 (1995).

42. I am indebted for this insight to Jennifer Levi.

43. According to Jennifer Levi in private conversation and correspondence in August 2021, movement work has generally divided sexual orientation and gender identity, in contrast to Ulrichs's model. The common movement insistence on identifying even "queer" people as cisgender or transgender reinforces the conclusion that sexual orientation and gender identity are still being kept as discrete identifiers. See also *Sexual Orientation*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation>; *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/Z4LG-STKS>].

44. 1 ULRICHS, RIDDLE, *supra* note 14, at 92–93.

IV

FIVE IMPORTANT THINGS ABOUT URNINGS

The Urning as Ulrichs describes him has five forensically significant characteristics: (1) Urnings could be found in all times, in all places, in all cultures.⁴⁵ (2) All of his defining qualities were inborn, “congenital” in the sense of a “sexual, organic, and mental inheritance, not an inherited disease.”⁴⁶ Moreover, they were a “permanent predisposition of [his] soul, not subject to conscious decision, inextinguishable and immutable.”⁴⁷ (3) Because an Urning, like a Dioning, is attracted only to his “opposites,” all varieties of Urning (and Ulrichs eventually identified many) share an utter inability to experience either true love or sexual fulfillment with a woman. (Ulrichs did recognize the existence of “Uranodionings,” persons of “undecided orientation,” glossed by his translator as “bisexuals,” but, because they were not exclusively attracted to their “opposites,” he saw them as completely different from both Urnings and Dionings.⁴⁸) (4) Although Urnings are physically indistinguishable from Dionings, in their desires and interests the two were “opposite,” which for Ulrichs meant that an Urning’s desires and interests were indistinguishable from a woman’s. (5) Even before puberty awakens an Urning’s sexual drives, the feminine soul that developed from his female sexual-desire germ can be discerned in his feminine actions, tastes, interests, and incapacities.

A. Urnings: (i) Inborn And (ii) Ubiquitous

The Urnings’ first two characteristics – that they were born not made, and that they are, and have been, ubiquitous, existing within biology but outside of history and culture – construct the Urning as a natural human category much as Wollstonecraft assumes women are a natural human category. On that basis, Ulrichs makes arguments recognizably like Wollstonecraft’s in *A Vindication*: Urnings were subordinated to and misjudged by the dominant group – which, for both writers, is, roughly, the group of what we might now call patriarchal and cis-gendered straight men – and Urnings’ deficiencies were a reaction to the limitations upon imposed upon them.⁴⁹ Wollstonecraft argued that, properly understood, women were being mistreated, their human potential stunted and wasted; Ulrichs’s arguments for freeing Urnings from social disabilities and legal punishments were remarkably similar.

B. Urnings: (iii) Inability To Have Sex With Women

The Urnings’ third characteristic – the inability to have sex with women – reflects Ulrichs’s acceptance of the idea, apparently prevalent when he wrote

45. See, e.g., *id.* at 61–62, 77.

46. *Id.* at 35–36.

47. 2 ULRICHS, RIDDLE, *supra* note 14, at 379.

48. 1 ULRICHS, RIDDLE, *supra* note 14, at 161, 167, 173–74.

49. *Id.* at 120–21.

and hardly unknown even now, that true love can only exist between “opposites.” It follows that, because an Urning’s experience of his own gender and of his sexual desires are female, he is incapable of feeling either love or desire for a woman: no woman could be an Urning’s “opposite.” His incapacity supports what we would now call an argument from necessity. Ulrichs understands sexual connection to be a literal magnetic force, necessary for health, comparable in importance to mother’s milk for an infant.⁵⁰ He argues that forbidden sexual touchings by an Urning should not be prosecuted, because the sexual connection necessary to the Urning’s life can only be achieved with a man.⁵¹

C. Taking Attraction Between “Opposites” Very Seriously

But with which men might an Urning lawfully make this connection? As Ulrichs first describes them, although sex between an Urning and a Dioning might be lawful for the Urning, for the Dioning it must be unnatural, devoid of healthful magnetic force, and distasteful. The implication that the Dioning partner could therefore be justifiably prosecuted could not be ignored. Furthermore, if the sex were wrong for the Dioning, shouldn’t the Urning be prosecuted for forcing or corrupting his partner? Ulrich calls this dilemma “the Uranian Conflict.”⁵² Under its pressure, he repeatedly revises his account, first of Dionings’ natures and then of Urnings’.

In his earliest pamphlets, Ulrichs waivers between two unsatisfactory partial solutions: He claims both that the Urning’s need for Dioning sexual magnetism could be fully satisfied by non-genital contact (presumably less unnatural and distasteful for his partner), and that genital sex with an Urning would be “objectively” natural to a Dioning however “subjectively” distasteful it might be.⁵³ Although Ulrichs vehemently rejects the destabilizing implication that an Urning’s sexual relations with a woman might also be objectively natural,⁵⁴ the threat that idea represents impels him to revise his description of the Dioning in his third pamphlet, *Vindicta*.

D. Dionings 2.0

In *Vindicta*, Ulrichs replaces the young adult Dioning’s exclusive attraction to women with an “inherited ability . . . to consent to sexual pleasures with women, Urnings, and . . . hermaphrodites with the sexual appetites of women.”⁵⁵ This makes a Dioning’s consent to having sex with an Urning subjectively “an indifferent matter” rather than distasteful. Although the Dioning would not enjoy any magnetic benefits from the sex, because it was not against his nature

50. *Id.* at 39, 48, 138–40, 177–78, 198–99; see also Bullough, *Introduction* to RIDDLE, *supra* note 12, at 22.

51. 1 ULRICHS, RIDDLE, *supra* note 14, at 139–40.

52. See *id.* at 221–38.

53. *Id.* at 47, 62–65.

54. *Id.* at 157–58.

55. *Id.* at 115.

it also would not be morally wrong.⁵⁶ This change to Dionings strengthens the partners' arguments against prosecution: their sexual relations remain necessary to the Urning's survival and are no longer unnatural for the Dioning. Ulrichs argues that even a Dioning who sells his favors to an Urning should not be punished: like a wet-nurse or a convalescent nurse, he deserves to be praised and paid.⁵⁷ However, this argument's tendency to undermine the analogy Ulrichs has built between Urnings' love for Dionings and respectable Dionings' marriages⁵⁸ leads him next to also reconsider the Urning.

E. Urnings 2.0

In his fourth pamphlet, *Formatrix*, Ulrichs finally resolves the Uranian Conflict by radically revising his account of Urnings, proliferating sub-types and weakening their mirror-resemblance to Dionings. As he acknowledges, his thinking has been changing in response to the information he has been receiving from self-identified Uranian readers of *Vindex* and *Inclusa*. Ulrichs now recognizes two "distinct classes" within the larger category of Urnings: one masculine ("Mannlings") and the other feminine ("Weiblings").⁵⁹ After conforming his embryological speculations to this result, he hesitantly concludes that the Mannling and the Weibling may be sufficiently "opposite" to love one another. Inevitably, "a thousand intermediaries" proliferate – including one at the precise midpoint between Mannlings and Weiblings ("Zwischenurnings") – each with a specific "opposite" to which he is exclusively attracted. (The masculine Mannling is drawn exclusively to beardless and smooth young Urnings with long curly hair and feminine gestures; the feminine Weibling to large, bearded, and muscular Urnings; and the intermediate Zwischenurning to the "chap" who is just beginning to grow a beard, is muscular and handsome but has beautiful eyes, lips, and cheeks.⁶⁰)

F. Competing Perspectives: Advocate And Organizer

Ulrichs's struggles to resolve the Uranian Conflict were shaped by his dual roles as advocate and organizer. When he was advocating for individual criminal defendants or against re-criminalization of sex between men, Ulrichs needed arguments that showed punishing Urnings to be deeply unjust. For this purpose, he needed the Urning to be a personage, a form of being – not merely the juridical subject of forbidden acts – whose sexual needs and behavior could be assimilated as closely as possible to respectable Dionings'. For this purpose, the Urning's sexual orientation must be just as natural, as moral, as unthreatening, as a Dioning's. If Germans already believed that normal men were attracted to women because women were their "opposite sex," then the Urning, too, must

56. *Id.* at 115–17.

57. *Id.* at 123; *cf. id.* at 223, 230, 232.

58. *Cf. id.* at 214–15, 234–35.

59. *Id.* at 175–77.

60. *Id.* at 307–11.

be immutably attracted to an opposite. This is the Urning of *Vindex* and *Inclusa*.

But as an organizer, and especially one organizing a group that had not previously perceived itself as such, Ulrichs needed to draw in as many as he could of those who, having read *Vindex* and *Inclusa*, identified themselves as Urnings. These are the Urnings of *Formatrix*: the Mannlings, the Weiblings, and their thousand intermediaries, each with an immutable inborn sexual orientation to an “opposite” among fellow Urnings.

G. Three More Sub-Types

Ulrichs completely embraced the idea that only opposites naturally attract; it is fundamental to his theories at every level. By asserting that, although Urnings’ gender identities and sexual orientations might vary considerably, each one would always love an “opposite,” Ulrichs was just able to preserve this tenet. In contrast, his recognition that Uranodionings – those who feel both romantic and sexual love “in a double direction” – were also “natural” posed a serious threat to the coherency of his ideas.

Ulrichs met this threat by describing three additional sorts of person who have sex with both men and women: a second variety of Uranodioning, and both a Dioning and an Urning whose sexual behavior was incongruent with his inborn nature. All three are, although superficially similar to the Uranodioning, much less disruptive to Ulrichs’s theories. The new variety of Uranodioning Ulrichs called “disjunctive.” Unlike the original model (now specified as “conjunctive”), who is genuinely attracted at every level to both men and women, the Disjunctive Uranodioning feels romantic and sexual love for masculine men but merely sensual attraction (not true love) for women.⁶¹ The new Dioning, whom Ulrichs called the “Urianaster,” is truly attracted to women but, in their absence, has sex with other men.⁶² The new Urning is “virilized,” a Mannling who, either to avoid social condemnation or for the laudable purpose of fathering children, has overcome his inborn horror of taking the sexual initiative with women. (He experiences less horror, perhaps none at all, if the woman takes the initiative.)⁶³ Taken together, these three reduce the count of Conjunctive Uranodionings far below their apparent number.

The Urianaster has an additional, much more important, function. He is the scapegoat driven beyond community boundaries into the wilderness, sacrificed to make the rest of the flock safe. In the first section of *Vindex*, Ulrichs definitively excludes one damaging stereotype (lovers of boys) from his educational, forensic, and organizational work by renaming the category he is sponsoring as “Urnings.”⁶⁴ Identifying and naming the Urianaster does the same work, this time capturing the threatening stereotype of the libertine who corrupts and ex-

61. *Id.* at 312.

62. *Id.* at 315, 317–18.

63. 2 ULRICHS, RIDDLE, *supra* note 14, at 381–82.

64. 1 ULRICHS, RIDDLE, *supra* note 14, at 34.

plotts his partners merely to achieve his own gratification⁶⁵ and isolating it from the Urning (whose love is spiritual as well as physical, potentially enduring, its gratification health-giving). Both fit objects for condemnation and punishment, the boy-lover and the Urianaster are by definition not Urnings.

H. Urnings: (iv) Inner Femininity

The Urnings' fourth forensically significant characteristic is their own inner femininity.⁶⁶ This has at least three dimensions. In *Formatrix*, Ulrichs is at pains to distinguish between two of these: the "feminine sexual orientation" (i.e., desire for men) that all Urnings share, and whether each Urning's sexual desires are "passive" or "active," or both.⁶⁷ Dispelling a reader's misunderstanding, Ulrichs explains that where an Urning falls on the axis between Mannlings and Weiblings in physical form and self-presentation is completely unrelated to where he falls on the axis between active and passive. Ulrichs nowhere explains what he means by "active" and "passive." My educated guess is that "active" means "penetrates" and "passive" means "is penetrated."⁶⁸ The possibility that an Urning might be either active or passive makes Urnings different both from women (who invariably have passive drives) and from men (who invariably have active drives).⁶⁹

The third dimension to Urnings' inner femininity is the "behavior with companions, in manners, facial expressions, and gestures" that may break through their superficial and socially-imposed masculine "performance." As children, Urnings prefer girls' occupations, games, and toys (especially dolls) to boys' (disliking tin soldiers, throwing snowballs, and pin-the-tail-on-the-donkey). As children, they enjoy sewing, knitting, and crocheting; as adults they may be known for their "quite professional" knitting and ability to hang drapes. As children, they wish they could dress in girls' soft, smooth clothing, colored ribbons, and scarves; as adults, they call one another by feminine nicknames ("Laura" or "sister"), and may set their hair in curls, wear dresses, and pad their chests and hips, or just have their vests tailored in "feminine" fabrics.⁷⁰ Urnings share women's incapacities as well: like women, some Urnings cannot whistle although all Dionings can.⁷¹ I think whether these traits seem convincingly natural and inborn, as Ulrichs asserts they are, may depend upon whether the reader recognizes their gendering as historically and culturally specific, an insight

65. 2 ULRICHS, RIDDLE, *supra* note 14, at 381–82.

66. *See, e.g.*, 1 ULRICHS, RIDDLE, *supra* note 14, at 58–61.

67. *Id.* at 172–74.

68. *See, e.g.*, MICHEL FOUCAULT, THE USE OF PLEASURE: VOLUME TWO OF THE HISTORY OF SEXUALITY 216–25 (Robert Hurley trans., 1985). Because Ulrichs acknowledges that women sometimes take the sexual initiative while insisting that they are never "active," it is clear that "active" does not mean initiating sex. *See*, 2 ULRICHS, RIDDLE, *supra* note 14, at 381–82.

69. 1 ULRICHS, RIDDLE, *supra* note 14, at 173.

70. *Id.* at 58–60, 153.

71. *Id.* at 152.

probably easier for someone not imbedded in Ulrichs's particular historical and cultural moment.

I. Urnings: (v) Inborn Discomfort

Urnings' fifth forensically significant characteristic is "a certain feeling of discomfort in one's own body, a certain dissatisfaction of the feminine soul with the body with the male form in which it is enclosed. . . ."⁷² For Ulrichs, that "every Urning is born with this discomfort" is "the greatest proof" that the Urning's nature is inborn. It is a mark of these claims' importance that he protects them from challenge by noting that, although this discomfort is invariably felt by all Urnings, it "does not come into conscious awareness in every case." Many Urnings lose and then forget their discomfort as they "gradually become accustomed to being raised as men"; some are "more or less consciously aware" of their discomfort; a few are always "quite unaware" of what Ulrichs nevertheless confidently asserts is their inborn discomfort with their own bodies. Here we can see Ulrichs subordinating his wish to be true to his understanding of himself and to his readers' revelations to forensic necessity.

V

ULRICH'S LEGACY

Ulrichs had hoped that by writing about Urnings he would protect them from their adversaries in legislatures, criminal courts, and churches. But if he aspired to create a discourse that enacted and established power, he failed. His legal briefs, if they were read at all, persuaded nobody; his attempts at preserving, or restoring, laws favorable to Urnings were successful only in occasionally having his ideas heard or read, but never acted upon.⁷³ His greatest measurable successes were in influencing two other kinds of writers: men we now see as gay pioneers, like John Addington Symonds,⁷⁴ Edward Carpenter,⁷⁵ and Magnus Hirshfeld,⁷⁶ and, ironically, early sexologists like Richard von Krafft-Ebing.⁷⁷

72. *Id.* at 92–93.

73. KENNEDY, *supra* note 11, at 107–19, 154–61; Bullough, *Introduction* to RIDDLE, *supra* note 12, at 24–25.

74. John Addington Symonds letter to Edward Carpenter, February 7, 1893, published in John Addington Symonds, *Male Love: A Problem in Greek Ethics and Other Writings* 152 (John Lauritsen, ed. 1983) (Ulrichs "must be regarded as the real originator of a scientific handling of the phenomenon").

75. *See, e.g.*, EDWARD CARPENTER, *THE INTERMEDIATE SEX: A STUDY OF SOME INTERMEDIATE TYPES OF MEN AND WOMEN* 16–38 (1908) (emphasizing gay, and minimizing trans. aspects of the Urning).

76. KENNEDY, *supra* note 11, 255–56; *see* [Translator's] Acknowledgments, 1 ULRICH'S, RIDDLE, *supra* note 14, at 19 (Hirshfeld reprinted Ulrichs's pamphlets, slightly abridged, in 1898).

77. Hubert Kennedy, *Review Article: Research and Commentaries on Richard von Krafft-Ebing and Karl Heinrich Ulrichs*, 42 *J. OF HOMOSEXUALITY* 165, 166 (2001) (Richard von Krafft-Ebing acknowledged to Ulrichs that, "It was the knowledge of your writings alone that induced me to the study of [homosexuality]."); KENNEDY, *supra* note 11, at 70–71.

Ulrichs sent copies of his early pamphlets to Krafft-Ebing because he saw him as a potential ally.⁷⁸ Indeed, Krafft-Ebing did agree with Ulrichs that criminal prosecution and punishment of men who had sex with other men was wrong, but his aim was not liberatory. Instead, Krafft-Ebing was explicitly in contest with legal authorities, on behalf of medicine, for control over a spectrum of unruly and disfavored sexual expressions, and with considerable success. His *Psychopathia Sexualis*, first published in 1886, went through twelve editions and was widely, and durably, influential.⁷⁹ It categorizes homosexuality with the “antipathic sexual instincts”⁸⁰ and links it to “degeneracy,” a progressively debilitating inherited condition⁸¹ that renders its unfortunate sufferers legally irresponsible but nevertheless requires their removal “from society for life, but not as a punishment.”⁸²

Krafft-Ebing relied heavily on Ulrichs’ work to describe the personage Krafft-Ebing variously called a homosexual or one of its synonyms: an invert, or an urning.⁸³ Familiar with Ulrichs’s first six pamphlets,⁸⁴ Krafft-Ebing paraphrases Ulrichs’ description of the Urning to describe the homosexual.⁸⁵ He wholeheartedly accepts Ulrichs’s definitional exclusion of boy lovers.⁸⁶ He shares Ulrichs’s belief that men and women are “opposites,” embedding that notion in synonyms he uses for homosexual and homosexuality, “invert” and “sexual inversion.” He agrees that although homosexual behavior could be acquired, when same-sex desire is inborn it is unchangeable, often evident very early, and sometimes manifest even before puberty in an affinity for girls’ games, occupations, and dress.⁸⁷ He agrees also that homosexuality is found in other cultures and eras, even sometimes valorized (although he presents any positive account as special pleading by homosexuals, such as Plato, themselves.⁸⁸) Significantly, therefore, Krafft-Ebing adopts Ulrichs’s positioning of the Urning as universally present, within biology but outside of history or culture. This positioning functions for Krafft-Ebing much as it did for Ulrichs,

78. KENNEDY, *supra* note 11, at 70.

79. RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (Franklin S. Klaf trans., 12th ed. 1965) [hereinafter KRAFFT-EBING].

80. *Id.* at 186.

81. *Id.* at 187–88, 223–24, 295–98.

82. *Id.* at 335.

83. *Id.* at 185–307.

84. *See e.g., id.* at 222, 224 n.86 (citing first six pamphlets).

85. *Id.* at 221 (“The essential feature of this strange manifestation of the sexual life is the want of sexual sensibility for the opposite sex, even to the extent of horror, while sexual inclination and impulse toward the same sex are present. At the same time, the genitals are normally developed, the sexual glands perform their functions properly, and the sexual type is completely differentiated.”).

86. *Id.* at 241–42 (“The sexual desire of mature homosexuals, *in contradistinction to old and decrepit debauchees, who prefer boys (and indulge in pederasty by preference), seems never to be directed to immature males.* Only for want of better material, and in case of violent passion, does the urning become dangerous to boys.”) (italics in original).

87. *Id.* at 223, 294, 296–97.

88. *Id.* at 224.

making his claims seem more important and more persuasive in every way: stronger, better-grounded, more scientific.

Where Krafft-Ebing differs from Ulrichs, he usually does so to further his project of pathologizing homosexuality in order to medicalize its management. Contrary to Ulrichs's assertion that Urnings' sexual orientation is "congenital" only in the sense of a "sexual, organic, and mental inheritance, not an inherited disease,"⁸⁹ Krafft-Ebing is emphatic that homosexual feelings are "a functional sign of degeneration," usually characterized by abnormally strong sexual and emotional responses, and sometimes by "psychical anomalies (brilliant endowments in art, especially music, poetry, etc., by the side of bad intellectual powers or original eccentricity)."⁹⁰ Inverted sexual desires are invariably associated with some form of mental illness: neuroses, neurasthenia, mental degeneration to idiocy or moral insanity, and insanity of a degenerative character.⁹¹

Because Krafft-Ebing presents same-sex desire as strange, anomalous, and abnormal,⁹² he does not need the elaboration of types and sub-types that Ulrich develops to give the Urning a lawful partner. Krafft-Ebing uses only three of these subtypes (without employing Ulrichs's terms for them) – the Urianaster, the conjunctive Uranodioning, and the Urning of *Formatrix* – classifying them as acquired homosexuality, congenital "psycho-sexual hermaphroditism" (i.e., bisexuality), and congenital homosexuality,⁹³ respectively.

Neither does Krafft-Ebing describe the homosexual as having what is, for Ulrichs, indispensable: an inborn discomfort with his own body. For Ulrichs, that discomfort is "the greatest proof" that the Urning's nature is inborn. In contrast, Krafft-Ebing relies exclusively on case studies and the concurrence of medical authorities to demonstrate that homosexuality is congenital.⁹⁴ Although his dependence on Ulrichs' methods (organizing and analyzing his subjects' unchallenged accounts of their own lives) and on many of Ulrich's conclusions is heavy, Krafft-Ebing does not attribute to urnings a discomfort that most themselves disclaimed.

VI

ULRICH'S RADICAL INNOVATIONS

Before Ulrichs published *Vindex*, Western tradition treated sexual touchings between men as licit or illicit according to criteria that applied equally to touchings between a man and a woman,⁹⁵ such as the parts of the body involved,⁹⁶ the

89. 1 ULRICH'S, RIDDLE, *supra* note 14, at 35–36.

90. KRAFFT-EBING, *supra* note 79, at 223, 230 ("In fact, in all cases of sexual inversion a taint of a hereditary character may be established.").

91. *Id.* at 223.

92. *Id.* at 187, 221.

93. *Id.* at 188–90, 221.

94. *See id.* at 221–24.

95. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 93 n.2 (1980) [hereinafter BOSWELL]; *see also* VERN BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 380–84 (1976).

relative status of the partners, and whether the sexual drama conformed to sex role stereotypes current at the time when, and in the place where, it occurred.⁹⁷ Ulrichs's innovations, in *Vindex* and its successors, turned a mere doer of particular forbidden acts, an habitual sinner or criminal, into a life form with a singular nature.⁹⁸ He accomplished this astonishingly radical transformation with two moves: (1) he focused on the actor's gender identity and the sex of his partner, rather than on their sexual touchings, and (2) he posited both the actors' desires and their gender identities to be inborn and immutable.

Ulrichs's ideas had some marked forensic and organizational strengths. The elaboration of his two moves (especially the corollary to the second that Urnings have existed everywhere and at every time humans have existed) and even the clunky nomenclature and proliferating sub-types, gave Ulrichs's theories seriousness, interest, and memorability. Readers who deplored him and rejected his conclusions might suppress his work but could not ignore it.⁹⁹ Readers who recognized their own feelings and experiences in the Urning eagerly wrote Ulrichs about themselves so that his next pamphlet would more accurately reflect their lives. Probably, they were heartened by news that interests and tendencies which had always caused them shame and fear had been proven to be both natural and beneficial for their kind of human being.

For both his forensic and organizational purposes, Ulrichs likely did need to present some of the Urnings' characteristics as biological facts, always and everywhere the same. The theory that Urnings's desires had biological origins challenged established understandings that sex between men should be classified as a sin or a crime. But any persuasiveness that assertions of their universality conferred on Ulrichs's theories came with a serious vulnerability, common to all categories presented as "natural," to all claims that a group has an essence which remains the same in all eras and cultures. In principle, this vulnerability could be exploited by anyone who dares to re-imagine the category's unvarying essence. Mary Wollstonecraft does exactly this in *A Vindication* when, accepting only Jean-Jacques Rousseau's premise that women do share a common nature,

96. See BOSWELL, *supra* note 95, at 182–83; Jean-Louis Flandrin, *Sex in Married Life in the Early Middle Ages: the Church's Teaching and Behavioral Reality*, in WESTERN SEXUALITY: PRACTICE AND PRECEPT IN PAST AND PRESENT TIMES 120–21 (Philippe Aries et. al. eds, 1985) (anal intercourse, fellatio, and cunnilingus all forbidden to married couples in fifteenth century Christian Europe).

97. See Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073, 1081–89 nn.60–93 (1988) and sources cited. See also MICHEL FOUCAULT, THE USE OF PLEASURE: VOLUME TWO OF THE HISTORY OF SEXUALITY 220 (Robert Hurley, trans. 1985) (in classical Greece, acceptable sexuality involved domination of the "feminine" partner by the "masculine" partner); MICHEL FOUCAULT, THE CARE OF THE SELF: VOLUME THREE OF THE HISTORY OF SEXUALITY 189–90 (Robert Hurley, trans. 1986) (In republican Rome, acceptable sexual partner for a male citizen was a woman or a slave of either sex); Jean-Louis Flandrin, *op. cit.*, *supra* note 96 at 120–21 (discussing acceptable positions for intercourse, and rationales for their acceptability, in fifteenth century Christian Europe).

98. Cf. FOUCAULT, *supra* note 5, at 43.

99. See KENNEDY, *supra* note 11, at 155–56 (law reform commission, directed to consider Ulrichs' ideas, writes and then deletes paragraph refusing to do so); see also KENNEDY, *supra* note 11, at 135–44.

she rejects his claim that (as she translates and quotes him), “woman ought to be weak and passive, . . . she was formed to please and to be subject to [man]; and . . . it is her duty to render herself agreeable to her master”¹⁰⁰ in favor of her own, that women are rational creatures whom mis-education have made weak and foolish.

Krafft-Ebing exploits the same sort of vulnerability that Wollstonecraft uses to repudiate Rousseau’s claims for his own, different, purpose: co-optation. Krafft-Ebing’s move is simple and powerful: he accepts the universality of the type and many of its details, but replaces their positive, exculpatory, and liberatory implications with pathology. For one example, Krafft-Ebing accepts that homosexuality is inborn but replaces Ulrichs’s embryological hypotheses with his own (equally unsupported) heritable degeneracy hypothesis.¹⁰¹ For another, Krafft-Ebing accepts that homosexuals could be intensely aroused by a man’s slightest touch, but replaces Ulrichs’s claim that this is a beneficial magnetic effect proving Uranian nature to be inborn¹⁰² with the assertion that this “abnormally powerful feeling of lustful pleasure” is the result of “*neurasthenia* which manifests itself essentially in irritable weakness of the ejaculation centre.”¹⁰³

A. Evelyn Hooker’s Intervention

Ulrichs recognizes the dangers posed by pathologizing the Urning and meets them directly,¹⁰⁴ initiating a struggle that, at least in the United States, continued for well over one hundred years.¹⁰⁵ Ulrichs’s strategy, like Krafft-Ebing’s, was to insist upon, and elaborate, his preferred version of the Urning’s essence. A struggle like that, waged by assertion and counter-assertion, might have gone on indefinitely. In the United States, the impasse was eventually broken by Evelyn Hooker, Ph.D.¹⁰⁶ In the 1950’s, she gave a series of projective tests to a sample of gay men and a control group of straight men and, on the basis of double-blind evaluations of the results made by a panel of experts, “determined that homosexual and heterosexual men could not be distinguished from each

100. WOLLSTONECRAFT, *supra* note 1 at 138–39 (emphasis omitted) (Wollstonecraft’s quotation is from JEAN-JACQUES ROUSSEAU, EMILE, OR ON EDUCATION (1762)).

101. KRAFFT-EBING, *supra* note 79, at 222 (“Ulrichs failed, however, to prove that this certainly congenital and paradoxical sexual feeling was physiological, and not pathological.”).

102. 1 ULRICH, RIDDLE, *supra* note 14, at 62–63.

103. KRAFFT-EBING, *supra* note 79, at 223 [italics in original].

104. *E.g.*, 1 ULRICH, RIDDLE, *supra* note 14, at 35–36.

105. The idea that homosexuality is one normal variety of human sexuality has achieved acceptance very gradually; the American Psychiatric Association formally adopted this position in 1973. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980). And thirty years later the Supreme Court implicitly did so in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”) *rev’g. Bowers v. Hardwick*, 478 U.S. 186 (1986).

106. See Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHNIQUES 17 (1957).

other on the basis of standard psychological tests, and that a similar majority of the two groups appeared to be free of psychopathology.”¹⁰⁷ Unquestionably, using empirical evidence to counter unsupported assertion is a strong move, if labor-intensive.

VII

COMPARING WOLLSTONECRAFT AND ULRICHS

There are some immediately-apparent important differences between Mary Wollstonecraft and Karl Ulrichs that undoubtably account for many of the differences between their approaches to their work. Their writings were separated by roughly 80 years (*A Vindication* was published in 1792; Ulrichs’s pamphlets spanned 1864-79¹⁰⁸). When she wrote *A Vindication*, Wollstonecraft was living in her native England and she wrote in English. While Ulrichs wrote his pamphlets, he was moving among his native Hanover and several other German states, all of them contemporaneously being consolidated into a single country (not always peacefully), and he wrote in German.

Nevertheless, maybe Ulrichs and Wollstonecraft have enough in common for some useful comparisons to be made: Each was a member of a disfavored group defined largely by its members’ relationship to men. Trying to improve the lot of the group’s members, to free them from their oppressions, each wrote and published enduringly influential work. Both are recognized as pioneers of movements that, eventually, achieved many of the changes they had aspired to bring about (along with many they never dreamed of). Indeed, both of them have strong (if not undisputed) claims to have actually invented these movements.

A. Inborn Or Culturally-Imposed?

Because of the similarities, two fundamental differences between their argumentative strategies stand out. One is that Ulrichs’s pamphlets present most of the Urnings’ differences from Dionings as immutable and inborn. In contrast, *A Vindication* insists that, apart from physical strength and its effects, women’s differences from men are *not* inborn: they have been produced by mistreatment and subordination; they both can and should be changed.¹⁰⁹ These distinctive

107. Brief for American Psychological Association and American Public Health Association as Amici Curiae Supporting Respondents, *Bowers v. Hardwick*, 478 US 1039 (1986) (No. 85-140), 1986 WL 720445, at *9-*10 (summarizing Hooker’s work and other authorities, and concluding, “extensive psychological research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment.”).

108. The twelfth pamphlet, *Critische Pfeile*, was published in Stuttgart in 1879. See KENNEDY, *supra* note 11, at 203.

109. Surprisingly, Wollstonecraft discusses reproduction only tangentially. She seems to consider it—as distinct from primary responsibility for childrearing—a relatively minor difference between men and women. As an Enlightenment thinker, she is mostly focused on whether they have different capacities for Reason, and as a believing Christian on whether women’s lives permit them to develop the moral qualities necessary for salvation.

strategic choices shaped the early history of both movements. When, eventually, the strategies were challenged, the pioneers' decisions continued to shape the terms of disagreement. Even now that both movements have long histories filled with many different leaders, theories, debates, competing goals, fractures, and reconfigurations, the question whether to claim particular traits to be in-born or not retains salience.

Unlike Wollstonecraft, whose group ("women") had been recognized as one for a very long time, Ulrichs needed to invent his group before he could either advocate for or organize it. His prospective fellow group members already existed, of course, but to the extent they had a collective identity in either their own consciousness or that of the surrounding society, it was as sinners and criminals, doers of forbidden deeds, not as personages, as forms of life. To secure its recognition, to bolster its acceptance as an entity, Ulrichs needed to make strong claims about the group: about its genesis (from an unusual but not diseased embryological process); its morality (the spiritually uplifting dimension of its members' love); its harmlessness to society (especially to boys, to whom group members were, definitely and by definition, not attracted); its members' exculpatory needs (for healthful magnetic connection); and its members' reassuring similarities to ordinary men (sharing their exclusive attraction to their opposites and capacity for true love with them). Notice two things about this list: first, Ulrichs chose every item on it; second, all of the items are positive and reassuring, and most of them have been designed specifically to counter an existing stereotype.

Wollstonecraft neither did, nor could, invent her group. Whether her readers agreed or disagreed with her claims *about* women, none of her contemporaries would argue that "women" were not a distinct form of human life, anatomically and physiologically similar to one another but different from "men." In this way, Wollstonecraft's path was much easier than Ulrichs's.

Wollstonecraft's challenge was her readers' assumption that they already knew all about "women." After Ulrichs named "Urnings," but before he described them, they were a blank slate upon which he could write what he wished, but "women" already had a long history and an established (mostly negative) reputation: not as mere criminal or sinners, but as daughters of Eve. The received wisdom, *A Vindication* tells us, was that women are frivolous and weak, ignorant and petty, incapable of true morality because they are incapable of using reason, fit at best only to obey their fathers, marry young, and then obey their husbands while bearing and raising their children.¹¹⁰

Theoretically, Wollstonecraft could have tried to co-opt the idea that "woman" has an unvarying essence by boldly re-imagining her as essentially strong and rational. But for that tactic to have succeeded in 1792, mere assertion would have been insufficient. Readers might accept almost any claim about

110. See WOLLSTONECRAFT, *supra* note 1 at 39–40, 45–46, 48, 55, 57, 74–78, 94, 100, 116, 253–54, 313, 326–29, 337.

a new, previously unrecognized, group, but not about one so ancient and familiar.¹¹¹ Those negative characterizations were well-entrenched then; they have not been thoroughly routed even now. Moreover, she agreed with them.

Wollstonecraft's revolutionary escape from this trap involved a paradoxical comparison with another group made foolish and tyrannical by their circumstance, hereditary rulers.¹¹² If women were feckless, foolish, tyrannical to children and servants, prejudiced and unreasoning, merely ornamental at best, they were so only because they had been made so, against their true rational natures.¹¹³ She attributed women's weaknesses and failings to the crippling and self-fulfilling effect of an education premised on their supposedly inborn limitations.¹¹⁴ Were girls properly reared, given exercise for body and mind,¹¹⁵ and women treated more generously and justly, their true natures as strong rational beings would assert themselves.¹¹⁶ In modern terms, Wollstonecraft was an equality feminist, arguing that women have capacities the equal to men's and should be given commensurate opportunities and rewards.

Wollstonecraft's well-chosen remedy was education. If girls were properly educated,¹¹⁷ they would be fit to be rational wives and mothers¹¹⁸ or, for the few who did not marry or were widowed, able to enter professions like medicine, midwifery, or teaching, or to run a business—any occupation, that is, except those like soldiering requiring a man's physical strength.¹¹⁹ And in fact, almost as if following her design, if in painfully slow stages, each generation of women since (by demonstrating who they were and what they could do) has prepared the way for the next.

B. "Opposite" Sexes?

The second striking difference between Ulrichs's pamphlets and *A Vindication* is that the pamphlets' arguments require accepting the idea – toxic for

111. Wollstonecraft's use of "woman," and her claims about her society's understanding of "women," are rhetorical oversimplifications effacing embodied and socially constructed differences, including intersections with other groups (especially poor women and women of color), weakening Wollstonecraft's analysis in ways that jar modern readers. Her decision to re-imagine "women's" unvarying essence, rather than to challenge Rousseau's premise that all women share one, simplified and focused her arguments but not without this cost.

112. WOLLSTONECRAFT, *supra* note 1 at 101–07.

113. *Id.* at 331 ("[H]ow can women be just or generous, when they are the slaves of injustice?").

114. *See, e.g., id.* at 45–47, 96–98, 204–07, 275–312.

115. *See, e.g., id.* at 76–77.

116. *See, e.g., id.* at 247 ("It is vain to expect virtue from women till they are in some degree independent of men . . .").

117. *Id.* at 275–312 (preferably, educated in mandatory publicly-supported coeducational day schools from ages five to nine, after which they would be sorted into vocational or academic tracks according to ability—and, probably, social class); *see also* WOLLSTONECRAFT, *supra* note 1 at 242.

118. *Id.* at 254 ("[S]peaking of women at large, their first duty is to themselves as rational creatures, and the next, in point of importance, as citizens, is that, which includes so many, of a mother."), 265 ("To be a good mother—a woman must have sense, and that independence of mind which few women possess who are taught to depend entirely on their husbands.").

119. *Id.* at 90–93, 258–60.

Wollstonecraft¹²⁰— that only opposites naturally attract. If man and woman are complementary in Ulrichs’s strong sense, the world divided between them and their roles rigidly prescribed, then man’s superior physical strength will always make woman’s portion whatever man doesn’t want.¹²¹

Complementarity is an idea with a long and notorious history, not entirely concerning relations between men and women. Whenever a human attribute or capacity is divided into two complementary parts, with each half belonging permanently to one of a pair of mutually-exclusive groups (although both parts are necessary to a fully functional life), we can confidently predict that the arrangement will not benefit members of the subordinate group. The weaker group of the pair (the poor, the colonized, the enslaved, the female) will be left with whatever tasks, duties, disabilities, and roles the more powerful group does not want, compelled to behave in ways that benefit the stronger at the expense of the weaker. Wollstonecraft sees this very clearly in *A Vindication*; her responsive proposal to establish a publicly-supported national scheme of coeducation is another way in which she is an equality feminist.

Why doesn’t Ulrichs also see complementarity—the Urning’s exclusive attraction to his “opposite”—as a trap? I suggest three related reasons. First, as a man in a patriarchal country, he was used to having complementarity work for his benefit. Although he identified as a member of a third sex, he read as a man to the people around him. He was deemed to have the necessary qualities to get an education, enter and practice a profession, control his own earnings, live independently, travel, write, and publish. Second, where standard male/female complementarity chafed, his revised version of it – based on the Urning’s composite identity – let him choose from both sides of the menu: male reason, forthrightness and active sex drive along with a preference for soft colorful fabrics and sex with men. Ulrichs, and the Urnings he constructed, lost nothing by embracing complementarity. Third, he understood how potentially disruptive his solution to the Uranian Conflict (that is, his recognition that Urnings’ gender identities and sexual orientations vary widely) could be to the rigid sex roles sustaining his society’s patriarchal hierarchy. By insisting that each Urning was exclusively attracted to his “opposite,” he hoped to contain that risk.

These days, the idea that there are only two sexes has lost its inevitability, perhaps even some of its respectability, and this tends somewhat to undermine the idea that “the” two sexes are opposites.¹²² Here in the developed West we are much more familiar with a weaker version of gendered complementarity. In

120. See, e.g., *id.* at 289 (“[M]arriage will never be held sacred till women, by being brought up with men, are prepared to be their companions rather than their mistresses . . .”).

121. Cf., e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J. concurring in affirmance of Illinois courts’ refusal to admit married woman to practice law, because women’s “natural and proper timidity and delicacy . . . unfits [them] for many of the occupations of civil life” and “indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”).

122. See, e.g., CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* (2010) (critically examining claims about differences between men’s and women’s brains).

this version, the dominant partner in a couple may exercise the privilege Ulrichs invented for Urnings (selecting his own traits, interests, precise gender identity, and role from the full menu), while his partner responds by supplying whatever complements that selection has made necessary. Nevertheless, even today there is plenty of writing and talking that presupposes human possibility to be portioned into two equal and opposite parts, separate from but necessary to one another. Indeed, to the extent there is anything else, I think we are indebted to Mary Wollstonecraft and Karl Heinrich Ulrichs, and to the many others their work inspired or influenced.

Thus, in three short centuries, we have moved from the hegemonic and simplified models of human gender and sexual possibility that Wollstonecraft and Ulrichs both challenged and adapted to their own ends, to a marketplace filled with many complex, nuanced, and contested ideas about them. The tensions between the individual, fluid, and occasionally contradictory senses of themselves that people who identify themselves as women or on the LGBTQI rainbow (or both) are willing to organize around, and the needs of litigation on their behalf for a clear, simple, and strong story remain. The claim that a trait is immutable and inborn is most useful as a premise supporting the argument that that no punishment should attend when the trait is expressed, but it also renders the trait more vulnerable to unsympathetic recharacterization. The idea that only opposites attract, even in its weakened contemporary form, continues to be revelatory to some and anathema to others.