

2003

The Ideology of Genus & The Ghost of Heidegger

Maria Grahn-Farley

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Maria Grahn-Farley, *The Ideology of Genus & The Ghost of Heidegger*, 29 Brook. J. Int'l L. (2003).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol29/iss1/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE IDEOLOGY OF GENUS & THE GHOST OF HEIDEGGER[©]

*Maria Grahn-Farley**

SUMMARY	3
I. PURPOSE	5
II. ORGANIZATION OF THE ARTICLE	6
III. INTRODUCTION	6
IV. QUESTION & ANSWER.....	7
V. GHOST.....	10
VI. REGISTERED PARTNERSHIP	13
VII. CHILDREN	15
VIII. FEAR	18
IX. FALLEN TIME.....	24

© Copyright 2003, Maria Grahn-Farley; *Brooklyn Journal of International Law*.

* Maria Grahn-Farley, Visiting Scholar, Boston College Department of Sociology (2003-2004). Andrew W. Mellon Post-doctoral Fellow, University of California Humanities Research Institute's Sawyer Seminar Program on Redress in Social Thought, Law, and Literature (2002-2003). Visiting Adjunct Professor, Golden Gate University School of Law (2001-2002). Former member of the National Board of Rädga Barnen (Save the Children, Sweden). LL.M., Gothenburg University School of Economics and Commercial Law, Sweden. This Article has its origin in a talk presented at Duke University in the Fall of 2002. I want to thank Samuel R. Miller, Esq., Professor Lisa Yoneyama of the University of California at San Diego and Professor Judith Jackson Fossett of the University of Southern California for comments on previous drafts of this article. I want to thank Kathryn R. Schwartzstein and Andrew B. Smith for their research assistance. I want to thank the Boston College Department of Sociology for their hospitality. I also want to thank John C. Knapp, the Editor-in-Chief of the *Brooklyn Journal of International Law*, for his excellent editorial work. Finally, I want to thank my husband Anthony Paul Farley for his encouragement and support.

2	<i>BROOK. J. INT'L L.</i>	[Vol. 29:1
X.	GENUS.....	25
XI.	SIMILAR IS DIFFERENT	28
XII.	ABILITY	31
XIII.	LAID DOWN IN LAW	33
XIV.	CONTAINMENT	37
XV.	END STATION	38
XVI.	HUMAN	39
XVII.	CURE.....	41
XVIII.	CONCLUSION.....	41

SUMMARY

Homophobia is the end station on the line that runs through racism and sexism. If one follows the internal logics of the ideologies of racism and sexism to their end, one arrives at homophobia and the question of reproduction. This relationship between racism, sexism and homophobia does not mean that a person opposed to racism cannot be homophobic or sexist. It does not mean that a person opposed to sexism cannot be racist or homophobic. And it does not mean that a person opposed to homophobia cannot be both racist and sexist. The internal logic of the Ideology of Genus is a logic that finds its expression in racism, and sexism, and meets its point of implosion in the ideology of homophobia.¹

The way that racism, sexism and homophobia are inter-linked will be revealed to the reader who completes the journey through this Article. This Article follows three tracks that are each haunted by a fascist past and present. The first track follows the haunting spirit of the National Socialist Party in the work of Martin Heidegger.² Heidegger is chosen as the repre-

1. The word *genus* in a Heideggerian sense has the meaning of a class that can be subdivided into species. MARTIN HEIDEGGER, BEING & TIME 22 (H. 3) (John Macquarrie & Edward Robinson trans., 1962) [hereinafter HEIDEGGER, BEING & TIME]. For the convenience of readers with other editions, citations to Heidegger's Being & Time will include the page number in the Macquarrie & Robinson translation first, followed by the page numbers from the eighth (1957) German edition, marked "H" in parentheses.

2. Heidegger's philosophy has come to symbolize a spiritualization of a Nazi ideology. See JACQUES DERRIDA, OF SPIRIT: HEIDEGGER AND THE QUESTION 39 (Geoffrey Bennington & Rachel Bowlby, trans., U. of Chicago Press 1989) (1987) [hereinafter DERRIDA, OF SPIRIT]. Heidegger himself explained his endorsement of the Nazi party, stating that it fulfilled the central theme of his own philosophy around the concept of historicity. See Thomas Sheehan, *Reading a Life: Heidegger and Hard Times* [hereinafter Sheehan], in THE CAMBRIDGE COMPANION TO HEIDEGGER 70, 85–86, 92 (Charles B. Guignon ed., 1993). The concept of historicity leads to the understanding that everything and everyone ought to be understood in their historical context. Historicity implies that history is embedded within the thing itself. See Dorothea Frede, *The Question of Being: Heidegger's Project* [hereinafter Frede], in THE CAMBRIDGE COMPANION TO HEIDEGGER, *supra* at 42, 43, 64. For a general introduction to Heidegger as a philosopher and as a member of the National Socialist Party, see Charles Guignon, *Introduction*, THE CAMBRIDGE COMPANION TO HEIDEGGER, *supra* at 1–41.

sentative of National Socialism in philosophy because he is one of the most influential intellectuals in contemporary thinking and also embraced National Socialism without apology, even upon his deathbed in 1976.³ The second track is the examination of the presence of Heidegger's ghost in the contemporary debate over the right of same-sex couples to adopt.⁴ The Swedish national debate over same-sex couples and adoption serves as an illustrative case study of the presence of the fascist ghost in the most unexpected arenas of civic life. The third track is the fable of the ghosts or spirits that haunted Heidegger himself. These are the *Wesen* of the Germanic folklore culture in which Heidegger was raised and lived.⁵ This Article will argue

3. The central place of Heidegger in modern thought is claimed by Heidegger himself as well as by others. He symbolizes a new era of thinking about humanity. See MAGDA KING, A GUIDE TO HEIDEGGER'S BEING & TIME 5 (John Llewelyn ed., 2001). Heidegger's philosophy has greatly influenced Continental and Spanish-American philosophy. See HERBERT SPIEGELBERG, THE PHENOMENOLOGICAL MOVEMENT: A HISTORICAL INTRODUCTION 336 (3d ed. 1994) [hereinafter SPIEGELBERG].

4. This Article is not about the racial and economic implications of members of one group or one part of the world adopting children from another group or another part of the world. For a discussion of the relationships between race, racism and the economic ability to adopt children and their implications for children and society, see Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L. J. 39 (1993).

5. It is possible to argue that Heidegger's compulsion to categorize can be traced back to Aristotle and his doctrine of categories. See Frede, *supra* note 2, at 44–45; Sheehan, *supra* note 2, at 80–81. I have chosen to trace Heidegger's categorizations and his fear of mis-categorization not to Aristotle but to a rural Germanic folklore belief in essences. I do not refer to philosophical anthropology, which has been attached to Heidegger's interest in "Man." Heidegger himself rejected the connection between his work and philosophical anthropology. See SPIEGELBERG, *supra* note 3, at 351. Instead of looking at Heidegger's search for Man, I am looking at his fear of the Other. I trace Heidegger's care for the correct classifications of the Essential to the folklore beliefs in *Wesen*.

What Heidegger calls *Wesen* has been translated into English as "essences." In German rural culture, *Wesen* is the generic term for the spirits that exist in the world, but occupy another dimension. They include elves, leprechauns and trolls. These *Wesen* are the spirits that haunted Heidegger and compelled him to search for *Dasein*, or the Human. Within the German rural culture there are more specific *Wesens*, some very local and others more widespread. Many of those *Wesen* masquerade as humans to seduce a human to enter their world, often by putting a spell on him or by appearing in front of

that the German folkloric belief in *Wesen*, such as elves, leprechauns, and trolls, was central to Heidegger's concept of *Dasein* and his fear of the Other.⁶ The author's method is to treat these as beliefs and not as *mere* metaphors. The three parallel tracks of this Article serve the author's intention to show that fascism is an ideology that is very much alive and present today.⁷

I. PURPOSE

The purpose of this Article is to show that the ghost of fascism is still haunting present-day social and legal discourse.

him in a vulnerable situation. It is almost always young men who are at risk of being seduced into the other world. For Heidegger, the ability to masquerade, or *Verstellen*, is a fundamental threat to the Human. See HEIDEGGER, BEING & TIME, *supra* note 1, at 60 (H. 36).

For example, a man might be in the forest by himself and run into the *Skogsrå*, which resembles a female elf. The *Skogsrå* is a common *Wesen* in the author's home region in the north of Sweden. The *Skogsrå* in most cases appears in front of an unsuspecting man (usually a young man) when he is in the forest. She hides in the morning mist, preferring areas close to Bjork trees. The young man will think that she is a human being and will want to follow her. He falls in love with her. Once he is in her power, she will never let him go and he will have to exist in her dimension of the world.

6. The difference between a *Dasein* and a *Wesen* is that a human deteriorates (*Verfallen*), while a *Wesen* is a spirit and cannot *Verfallen*. For the importance of *Verfallen* in determining if an entity is of the genus "*Dasein*," see MARTIN HEIDEGGER, BEING & TIME, *supra* note 1, at 172 (H. 134). See also DERRIDA, OF SPIRIT, *supra* note 2, at 10 (discussing the non-Christian aspects of Heidegger's philosophy). For an in-depth study of Swedish and German *Wesen*, see the art-work by John Albert Bauer. Bauer was born in Jönköping, Sweden in 1882. His father was German and his mother was Swedish and he has painted the most beloved illustrations of Swedish and German *Wesen*. See JOHN ALBERT BAUER, IN THE TROLL WOOD (1978).

7. Bennington points out that the relationship between spiritualization and biology expands beyond the recognized framework of a Nazi ideology and into some aspects of humanism:

That if it seems undeniable that this theme of spirit is not unconnected with the question of Heidegger's Nazism, then we must be careful not simply to assume that a 'spiritualistic' Nazism is better than a biologicistic one, but careful too not to denounce it quickly as, say, a *cause* of that Nazism, in so far as Heidegger in fact shares this theme or motif with thinkers such as Husserl or Valéry, who could not be suspected of Nazi sympathies, and in fact shares it with humanism in general.

GEOFFREY BENNINGTON, *Spirit's Spirit Spirits*, in LEGISLATIONS: THE POLITICS OF DECONSTRUCTION 197 (1994) [hereinafter Bennington, *Spirit's*].

One way in which the ghost of fascism shows itself is in the rupture caused by the debate over same-sex couples and adoption. This debate reveals that under the surface of post-fascist society lurks the ghost of fascism.

II. ORGANIZATION OF THE ARTICLE

The format of this Article itself serves as a structure through which the Ideology of Genus is shown. The text tells the story in the form of a case study of the national debate in Sweden over same-sex couples' right to adopt children. The footnotes tell the story of the Ghost of Heidegger and the culture in which the debate over same-sex couples and adoption can become as heated and emotional as it has in Europe and the United States. The stories can be read separately or in concert because they are ideologically related in both form and substance.

III. INTRODUCTION

The belief in *genus* is the belief that the world can be subdivided into different categories, or *genera*, and that those categories are based on kinships within each category.⁸ The belief that the interactions between categories have to be controlled for there to be order in the world spiritualizes categorization itself, at which point it becomes the Ideology of Genus.⁹ This form of compulsive categorization of the world, justified by reference to a higher world order is a spiritualization of a compulsion: the spiritualization of categorization.¹⁰

8. See HEIDEGGER, BEING & TIME, *supra* note 1, at 22 (H. 3).

9. National Socialism under the spell of Heidegger followed a spiritualization of categorization. This Article is written from the perspective of a spiritualization of categorization itself. See Jamaica Kincaid, *In History*, 20 CALLALOO 1-7 (1997). Kincaid connects the categorization mania of Christopher Columbus when he arrived in the New World with that of Carl von Linné (1707-1778), when he arrived in the New World of Lappland, Sweden. The compulsion to categorize preceded the two New Worlds. It was the discovery of the two New Worlds that made categorization possible in the Heideggerian sense of constituting and being constituted through categorization.

10. The compulsion to categorize is conditioned upon the ability to do so. This is also how the Ideology of Genus is an ideology dependent on social hierarchy. See *generally* GARGI BHATTACHARYYA, TALES OF DARK-SKINNED WOMEN: RACE, GENDER AND GLOBAL CULTURE 71-72 (1998).

IV. QUESTION & ANSWER

In the Spring of 2002 the *Riksdag*, the Swedish Parliament, was both the sender and the receiver of the question: Should it be possible for same-sex couples to adopt children?¹¹ The Parliament, the legislative branch of the state, created with their question-answer routine a legitimacy to legislate.¹² This circular process of legitimacy is made possible by its artificial separation of the body that asks and the body that answers.¹³ The answer that came back was, yes, same-sex couples should be able to adopt children.¹⁴

11. The Swedish language does not have a comparable term to “same-sex.” The term “homosexual couple” is used to communicate the same meaning. The term “homosexual” in the context of the Swedish national debate is not necessarily a way of referring to a person’s sexual identity but rather to a construction of a couple.

12. Pierre Schlag has called this process “The Empty Circles of Liberal Justification.” See Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997).

13. Bennington describes this process of legitimating and separating as fundamental to the concept of citizenship:

The citizen does not pre-exist the sending of this letter, but is created by it: ‘sovereign’ and ‘subject’ are Rousseau’s names for the sender and the addressee of the legislative letter, and ‘citizen’ the name which implies that the structure of the law allows the identity of sender and addressee to be asserted...The citizen sends himself the law, and in this sending names himself as citizen....

Geoffrey Bennington, *Postal Politics and the Institution of the Nation*, [hereinafter Bennington, *Postal Politics*] in LEGISLATIONS: THE POLITICS OF DECONSTRUCTION, *supra* note 7, at 240, 249.

14. For an international discussion of same-sex couples and adoption, see William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate*, 31 MCGEORGE L. REV. 641 (2000); Nicholas J. Patterson, *Development: Recent Events in International Law: The Repercussions in the European Union of the Netherlands’ Same-Sex Marriage Law*, 2 CHI. J. INT’L L. 301, 301 (2001) [hereinafter Patterson]; Scott C. Seufert, *Going Dutch? A Comparison of the Vermont Civil Union Law to Same-Sex Marriage Laws of the Netherlands*, 19 DICK. J. INT’L L. 449 (2001). For an American discussion of same-sex couples and adoption, see David Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001); Amy Joy Galatis, Note, *Can We Have a “Happy” Family? Adoption by Same-Sex Parents in Massachusetts*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 7 (2001); Elizabeth Kristen, Recent Development, *The Struggle for Same-Sex Marriage Continues*, 14 BERK. WOMEN’S L.J. 104, 109 (1999); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 267 (2002).

What does it mean to question, or rather to formulate and then ask the question: *Should same-sex couples legally be able to adopt children?* It is not possible to ask the question without also leaving room for an answer. The question also determines the range of the answers that it is possible to give.¹⁵ To make this into a question is to act unethically, to essentially question someone's humanity. It is to make the question of adoption an ethical question within a highly unethical and unquestioned questioning of humanity itself. In this case it was the Parliament committing an act of "outing,"¹⁶ without having to take the responsibility for the act because it was disguised in the form of a question-answer routine.¹⁷

More broadly, to question who may adopt is to question who is really (or fully) human, and to question this is to begin a dis-

Interestingly, after the United States Supreme Court struck down state laws that had made sex between people of the same sex a crime in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), conservatives immediately began calling for legislation defining marriage as exclusively between a man and a woman. See, e.g., Cyber News Service, *Conservatives Pledge to Defeat Supporters of Same-Sex Marriage* (Oct. 03, 2003), available at <http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200310\CUL20031003b.html>). The question allowed Justice Scalia to answer in dissent:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as Scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

Id. at 2488 (Scalia, J., dissenting). President Bush also responded by saying, "I believe marriage is between a man and a woman, and I think we ought to codify that one way or another. And we've got lawyers looking for the best way to do that." CNN.com, *Bush Wants Marriage Reserved for Heterosexuals* (July 31, 2003), available at <http://www.cnn.com/2003/ALLPOLITICS/07/30/bush.gay.marriage>.

15. According to Heidegger, both the question and the answer are sprung out of the same moment. Heidegger writes, "Every inquiry is a seeking [*Suchen*]. Every seeking gets guided beforehand by what is sought." HEIDEGGER, *BEING & TIME*, *supra* note 1, at 24 (H. 5).

16. The use of the word "outing" has a double meaning in this Article. It refers to "coming out of the closet," meaning to become public about being gay or lesbian. It also relates to the literal meaning of something being "aired." See *The American Heritage Dictionary* 882 (2d ed. 1985).

17. The German word *verstellen* is translated as "to disguise" in the English translation of Heidegger's *Being & Time*. See HEIDEGGER, *BEING & TIME*, *supra* note 1, at 60 (H. 36).

course about ethics in the space of the unethical. The moment that the question of someone's humanity is asked, a space for a definition of the non-human is also created.¹⁸ This space or void calls out to be populated by those who do not qualify as humans, all those whose humanity has been denied by the senders and the receivers of the question that created the space for the non-human.¹⁹ To question someone's humanity by locating the question inside the "law-room" also raises the question of the ethics of law.²⁰

The pretext for the debate about same-sex couples and adoption was two-fold: it was about children and it was about being granted entrance. This Article will argue that it was not about children and it was not about entrance. Instead of being about children, it was about a fear of contamination. Instead of being about entrance, it was about containment.

This Article takes Sweden as its starting point, but it addresses a wider cultural span, namely a Germanic cultural fear of contamination.²¹ As expressed by Heidegger, this fear of contamination, leads to an obligation to show oneself clearly.²²

18. When a question is given space, that is, a pause is made for an answer to be given, the question gives the direction of the answer. See HEIDEGGER, *BEING & TIME*, *supra* note 1, at 27 (H. 7).

19. See Bennington, *Postal Politics*, *supra* note 13, at 248–49.

20. In Swedish, the closed legal space of a legal paragraph within a code is called a *Lagrum*, which literally means "law-room." It is within this law room that the legal drama regarding the question of same-sex couples and adoption is being played out, at the same time that the political drama is being played out in the Swedish Parliament. For a discussion on how the confinement of the politically undesired takes place in law through the law room, see generally Maria Grahn-Farley, *The Law Room: Hyperrealist Jurisprudence & Postmodern Politics*, 36 *NEW ENG. L. REV.* 29 (2001) [hereinafter Grahn-Farley, *The Law Room*].

21. Sweden belongs not only to the Germanic language family but it also belongs to a Germanic cultural *Geschlecht*. This Article does not refer to Germanic culture as a geographical definition but as an intellectual project — one that is highly political and ideological. Parts of Germany were under Swedish rule between 1648 and 1721 and Sweden is still strongly influenced by a Germanic culture. For a comment on the Germanic influences on Nordic legislation and legal tradition, see Kevät Nousiainen & Johanna Niemi-Kiesiläinen, *Introductory Remarks on Nordic Law and Gender Identities*, in *RESPONSIBLE SELVES, WOMEN IN THE NORDIC LEGAL CULTURE* 1, 18 (Kevät Nousiainen et al. eds., 2001).

22. Heidegger's use of symptom and disease to understand masking and identity is neither random nor careless. For Heidegger it is evil for things to

V. GHOST²³

This is the story of a Ghost.²⁴ A Ghost that everyone thought was forever gone, or gone forever.²⁵ Lately there have been ru-

appear to be what they are not. Contamination, for Heidegger, comes from being close to something that appears to be something that it is not. Thus, it is bad simply for something to not be what it seems to be:

[P]henomena are the totality of what lies in the light of day or can be brought to the light – what the Greeks sometimes identified simply with entities. Now an entity can show itself from itself [*von ihm selbst her*] in many ways, depending in each case on the kind of access we have to it.

HEIDEGGER, BEING & TIME, *supra* note 1, at 51 (H. 29).

Heidegger draws a comparison between the symptoms of a disease [*Krankheiterscheinungen*] and the entity that shows itself; the symptoms are not the disease, nor is the entity that shows itself its essence. The symptoms guide the doctor to an understanding of the disease, even if the disease itself cannot be seen. The symptoms are just the appearance of the disease itself. *See* HEIDEGGER, BEING & TIME, *supra* note 1, at 52 (H. 29).

23. This Article searches for an answer to the question that was never asked, or what Derrida calls the book that was never written, by Heidegger. The book that was never written would have given an answer to the question of “*Was heisst der Geist?*” DERRIDA, OF SPIRIT, *supra* note 2, at 14. This question is really two: What is called a spirit? And what does spirit call up? At the core of Heideggerian thought is the notion that embodiment shapes the *world-in-which-you-are*, as well as who you are through that world. This core is expressed in the double entendre, “*Was heist der Geist?*” *Id.*

For another ghost story, see Maria Grahn-Farley, Book Review, *A Ghost is Haunting Europe*, 24 MICH. J. INT'L L. 169 (2002) [hereinafter Grahn-Farley, *A Ghost*]. The metaphor of the Ghost is inspired by Jacques Derrida's view on the “spirit” in the work of Martin Heidegger. Derrida calls it “the metaphysical ghost, the spirit of another spirit.” DERRIDA, OF SPIRIT, *supra* note 2, at 24.

24. On the relationship between Heidegger and the Spirit, Derrida remarked:

[I]f the thinking of *Geist* and of the difference between *geistig* and *geistlich* is neither thematic nor athematic and if its modality thus requires another category, then it is not only inscribed in contexts with a high political content, as I have just said rapidly and rather conventionally. It perhaps decides as to the very meaning of the political as such.

DERRIDA, OF SPIRIT, *supra* note 2, at 6. Bennington comments on the relationship between Heidegger and Derrida, as it is expressed in Derrida's *Of Spirit*, by describing Derrida as the Ghost of Heidegger. *See* Bennington, *Spirit's*, *supra* note 7, at 196–97.

25. After the Second World War, people never really bothered to figure out which of the two interpretations of the invisibility of the Ghost was correct. It

mors that the Ghost or its spirit²⁶ had returned to haunt the European national elections.²⁷ In the Spring of 2002 more than

did not matter as long as no one had to run into the Ghost. Western Europe after the War thought that democracy had won and that this victory was to be permanent. This was confirmed with the fall of the Berlin Wall. Yet, as Bauman suggests, democracy is a circle of translation between the private sphere of one's life as an individual and the public spheres of one's life within a society.

Democracy is a 'circle of translation.' When translation stops, democracy ends. Democracy cannot, without betraying its nature, recognize any translation as final and no longer open to negotiation. You can tell a democratic society by its never fully quelled suspicion that its job is unfinished: that it is not yet democratic enough.

ZYGMUNT BAUMAN, *THE INDIVIDUALIZED SOCIETY* 201–02 (2001).

26. Jacques Derrida suggests that the very fact that Heidegger is not connected to, or interpreted as writing about, the spirit as a central theme in his work causes suspicion. Derrida argues that:

Because this suspicion appears absurd, because it carries in it something intolerable, and perhaps too because it moves towards the most worrying places in Heidegger's itinerary, discourses, and history, people avoid in their turn speaking *of spirit* in a work which nonetheless lets itself be magnetized, from its first to its last word, by that very thing.

DERRIDA, *OF SPIRIT*, *supra* note 2, at 3. Derrida continues by observing that this is the very problem with the Ghost, or the spirit, of the work of Heidegger. *Id.* at 5. Derrida argues that, in a way, Heidegger "spiritualizes National Socialism." *Id.* at 39. James Bernauer connects the "spiritualization" of Nazism to a wider spiritual search in Germany at the time. James Bernauer, *Sexuality in the War against Jews: Perspectives from the Work of Michel Foucault*, in *CONTEMPORARY PORTRAYALS OF AUSCHWITZ*, 211, 214 (Alan Rosenberg, James R. Watson & Detlef Linke eds., 2000).

27. A ghost is haunting Europe today, the ghost of fascism. The European elections have been haunted by fascist political success. The Swedish Evening Press, *AFTONBLADET*, writes that the French election in April 2002 was a disgrace to the democratic system. Jean-Marie Le Pen, the well-known French fascist, convicted of promoting Hitler propaganda, qualified for the presidential election. *Jean-Marie Le Pen är ett anfrätt gammalt lik* [Jean-Marie Le Pen is an old eroded corps], *AFTONBLADET*, Monday, Apr. 22, 2002. One of Le Pen's better known positions is his definition of the Holocaust as a "detail of history." *Shock Success for French Far Right*, BBC NEWS WORLD EDITION, Apr. 22, 2002, available at <http://news.bbc.co.uk/2/hi/europe/1942612.stm>.

In 2001, "Right-wing billionaire Silvio Berlusconi [was] elected prime minister of Italy, a post he held briefly in 1994." Online NewsHour, *Winning Italian Style: The Italian Election*, ONLINE NEWHOUR, May 15, 2001, available at http://pbs.org/newshour/bb/europe/jan-june01/italy_5-15html. The biggest fear about Berlusconi is that he now controls 90 percent of Italy's media. He

a few people found themselves staring straight into the eyes of the Ghost. The European national elections all followed the same trend toward an increased support for nationalist right-wing political parties.²⁸ Heidegger, at a similar moment in another time and in another place, decided to embrace the National Socialist spirit of Germany in 1933.²⁹ Moments like these both inspire and force people to make life choices.³⁰ The choice

himself owns the three largest television stations, and as Prime Minister he controls the state-owned media as well. *Id.*

The 2002 election in the Netherlands introduced a new phenomenon in European politics. "Results [of the election] show the newly formed anti-immigrant party of murdered Dutch politician Pim Fortuyn finished second in yesterday's voting." Breffni O'Rourke, *The Netherlands: the ghost of Pim Fortuyn haunts Dutch elections*, EU BUSINESS, May, 16 2002, available at <http://www.eubusiness.com/news/stories/811/81075.html>.

The EU even imposed political sanctions on Austria for including the fascist political Freedom Party in the coalition ruling government. *EU Mission Hold Talk in Austria*, BBC NEWS July 28, 2000, available at <http://news.bbc.co.uk/1/hi/world/europe/855893.stm>.

Every major European city has seen angry male Neo-Nazi youth marching up and down the streets. The Swedish extremist right-wing party *Sverige Demokraterna*, the Swedish Democrats, gained 76,300 votes in the National Election of 2002. The fear is that they will gain 15% in the next National Election. This party is mostly supported by the youth and retired, older people. Their most important message is to "keep Sweden Swedish." See, *I Sveriges Namn* [In the Name of Sweden], DAGENS NYHETER, Sep. 28, 2002, available at <http://www.dn.se/DNet/road/Classic/article/0/jsp/print.jsp?&a=59907>. Their anger is primarily directed against immigrants, but they also have a deeply-rooted sexist ideology. *Id.*

28. *Id.*

29. Heidegger found himself embraced by and at the same time embracing Nazism around the time of the Nazi Party revolution of 1933.

[F]ollowing the burning of the Reichstag building on February 27, 1933, Hitler got the Parliament to suspend the German Constitution and replace it with a permanent state of emergency, under which fundamental civil liberties such as freedom of speech and assembly and privacy of the mails were canceled. Within a week of that (March 7) Hitler arrested all eighty-one of the Communist deputies who had been duly elected to the Reichstag the day before and confined them to the newly opened concentration camps. On March 23, the Reichstag passed the Enabling Act, giving Hitler plenipotentiary lawmaking powers, and with that the Nazi dictatorship was born.

Sheehan, *supra* note 2, at 84–85.

30. Heidegger joined the *National Socialist German Workers Party* on the symbolic date of May 1st (the Worker's Day and a socialist holiday). The next day, Hitler arrested hundreds of labor leaders and threw them into concentra-

was either to break free from the spell of the Ghost by ceasing to believe in it, or to remain under its spell, to forever run from it and thus to be forever haunted.³¹ Ghosts are immortal.³² The only way to get rid of a Ghost is to not believe in it. To not believe in a Ghost is to end the story before it begins.³³

VI. REGISTERED PARTNERSHIP

In 1994 Sweden became one of the first countries in the world to adopt laws giving same-sex couples the possibility of legally formalizing their relationships.³⁴ The registered partnership was intended to give to same-sex couples the same legal status given to different-sex couples who decide to legally formalize their relationships through marriage.³⁵ This “separate but equal” legislative system included a major exception to the principle of equality: the right to adopt children was excluded for same-sex couples.³⁶ There are always exceptions to the rule “separate but equal.” Without the exceptions it is only equal and not separate.³⁷ It is the separate that makes unequal possible. The separate masquerades in the equal.

tion camps. Heidegger was at the time the Rector of Freiburg University where he introduced and enforced the Nazi racial-cleansing laws. See Sheehan, *supra* note 2, at 85–86.

31. Instead of breaking free from the spell of the Ghost, Heidegger broke free from Edmund Husserl, his Jewish mentor and the person whose position at Freiburg University he inherited. See Sheehan, *supra* note 2, at 85. For an argument that Heidegger was not that involved in the enforcement of the anti-Semitic laws and regulations at the University that caused the suspension of Husserl and other Jewish professors in 1936, see SPIEGELBERG, *supra* note 3, at 346.

32. Ghosts do not deteriorate; their inner being remains the same. This ability to *verfallen* is, according to Heidegger, a determining characteristic of *Dasein's* Being. See HEIDEGGER, *BEING & TIME*, *supra* note 1, 172 (H. 134).

33. The Ghost can only be destroyed by returning “to the origin before the origin, earlier even than the beginning.” DERRIDA, *OF SPIRIT*, *supra* note 2, at 83.

34. *Lag om registrerat partnerskap* [Law on Registered Partnership], *S.F.S. 1994:1117* (June 23, 1994), effective Jan. 1, 1995 (Swed.) [hereinafter Registered Partnership Law].

35. *Id.*, at Kap. 3:1.

36. *Id.*, at Kap. 3:2.

37. There was another example of “separate and almost equal” in 2000 when the Netherlands changed its laws from registered partnership to marriage, so that there would be no differences between married couples, different-sex or same-sex. However, an exception to this equality was made regard-

“Separate but equal” is one method of oppressing what has been made different through the Ideology of Genus. Assimilation is another such method, but there the difference is masquerading in the similar.³⁸

In Swedish law there are four main forms of recognized coexistence between two individuals living intimately with each other. In the first two instances, people can live together without taking any legal steps to formalize their relationship. The property of different-sex couples living together under conditions similar to married couples is regulated by *Lag om sambors gemensamma hem* [Law on Cohabitant's Common Households].³⁹ This law regulates different-sex couples and their collective property within the relationship and in case of a separation. The other law regulating the property of same-sex couples living together under conditions similar to married couples is *Lag om homosexuella sambor* [Law on Same-Sex Cohabitants].⁴⁰ This law regulates same-sex couples and their collective property within the relationship and in case of separation. Both of these relationships are less regulated and have fewer consequences than a relationship formalized through law.

The legal means through which people living together formalize their relationship is, for different-sex couples, marriage.⁴¹ For same-sex couples it is registered partnership.⁴² The most contested difference between the legal situations of couples that have married and couples that have registered their partner-

ing international adoption: Same-sex couples can adopt within the Netherlands but not internationally. See Patterson, *supra* note 14, at 301.

38. Heidegger argues that the concept of equality is only needed when it is not the same, because when something is the same, only one is needed; the same is then the same with itself. See MARTIN HEIDEGGER, *IDENTITY AND DIFFERENCE* 26 (Joan Stambaugh trans., U. of Chicago Press 2002) (1957) [hereinafter HEIDEGGER, *IDENTITY AND DIFFERENCE*].

39. *Lag om sambors gemensamma hem (sambolen)* [Law on Cohabitants' Common Household], *S.F.S. 1987:232* (May 14, 1987) (Swed.) [hereinafter Cohabitant's Law].

40. *Lag om homosexuella sambor* [Law on Same-Sex Cohabitants], *S.F.S. 1987: 813* (June 18, 1987), effective Jan. 1, 1988 (Swed.) [hereinafter Same-Sex Cohabitants Law].

41. *Äktenskapsbalken* [The Marriage Code]. *S.F.S. 1987:230* (May 14, 1987), effective Jan. 1, 1988 (Swed.) [hereinafter Marriage Code] at *Kap.* 4:3 p. 1-3.

42. Registered Partnership Law, *supra* note 34, at *Kap.* 1:8.

ships has been the fact that married couples can adopt children but registered partners cannot.

VII. CHILDREN

It is well established in domestic and international law that the best interest of the child should be of paramount importance in all decisions concerning that child.⁴³ Sweden is a party to the UN Convention on the Rights of the Child.⁴⁴ Almost all adoptions in Sweden are international adoptions, except the ones that occur when a biological parent re-marries and the new partner adopts the child as his or her own.⁴⁵ This is why the question of adoption in Sweden is both international and domestic.⁴⁶

The Swedish Parliament voted on the 5th of June 2002 to change the law and allow same-sex couples that register their

43. According to International Child Rights, "the best interest of the child" shall be taken into consideration in government decisions regarding the national budget. See France, IRCO, CRC/C/15/Add. 20, para. 19 (Fr.); Paraguay, IRCO, CRC/C/15/Add.27, para. 9, 16 (Para.) as cited in UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD (1998) [hereinafter HANDBOOK]. The "best interest of the child" shall also be taken into consideration in legislation regarding discrimination. See Mexico IRCO, CRC/C/15/Add.13, para. 7 (Mex.), as cited in HANDBOOK at 41. The principle shall also be part of domestic law and possible to invoke before a court. See Indonesia IRCO, CRC/C/15/Add. 7, para. 18, Denmark IRCO, CRC/C/15/Add. 33, para. 24 (Den.); Canada IRCO, CRC/C/15/Add. 37, para. 11 (Can.); Sri Lanka IRCO, CRC/C/15/Add. 40, para. 25 (Sri Lanka); Germany IRCO, CRC/C/15/Add. 43, para. 16 (F.R.G.), as cited in HANDBOOK, *supra*, at 43.

44. The United Nations Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess. 61st plen. Mtg., Annex, U.N. Doc. A/44/25 (1989) [hereinafter CRC] art. 3. The CRC is the most widely ratified human rights treaty in the world. The only countries that are not parties to the convention are the United States and Somalia; every other country has ratified the convention. See Maria Grahn-Farley, *A Theory of Child Rights* 57 U. MIAMI L. REV. (forthcoming) (2003); Maria Grahn-Farley, *International Child Rights at Home & Abroad: A Symposium on the UN Convention on the Rights of the Child, Foreword: Crossing Borders*, 30 CAP. U. L. REV. 658 (2001); Maria Grahn-Farley, *A Child Perspective on the Juvenile Justice System*, 6 J. GENDER RACE & JUST. 297, 299 (2002).

45. See generally Maria Grahn-Farley, *Not for Sale! Race & Gender Identity in Post-Colonial Europe*, 17 N.Y.L. SCH. J. HUM. RTS. 271 (2000).

46. The Netherlands decided to deal with the international aspect of adoption by excluding international adoption as a possibility for same-sex couples. See Patterson, *supra* note 14, at 301.

partnership to adopt children.⁴⁷ The change could not enter into force before February 1, 2003,⁴⁸ because Sweden was a party to the European Convention on the Adoption of Children and that Convention does not allow same-sex couples to adopt children.⁴⁹ On July 3, 2002, Sweden withdrew from the sections of the convention regulating adoption, making it possible for the new law to enter into force.⁵⁰ The debate that took place in the Swedish Parliament on the 5th of June was the most intense debate of that spring.⁵¹ All major children's rights organizations in the country advised against allowing same-sex couples that had registered their partnership to adopt.⁵² They argued that the debate had taken place from only the adults' perspective and had excluded the best interests of the children. The organizations also argued that there is no adult's right to have children; there is only a child's right to have parents.⁵³

What is in the best interests of the child is a valid and legitimate concern; however, this Article argues that the center of

47. Partnerskap och adoption [Partnership and Adoption], *Snabbprotokoll* 2001/02: 120, 10 June 5, 2001, Lagutskottetsbetänkande 2001/02: LU 27; Partnerskap och adoption m.m. (prop. 2001/02: 123); Motion 2000/01: Ju724. [hereinafter Partnership and Adoption Debate].

48. *Ny homoadoptionslag kan gälla från 2003*, [New Homosexual Adoption Law Can Enter Into Force by 2003], DAGENS NYHETER, June 5, 2002, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?d=147&a=33338> [hereinafter *New Homosexual Adoption Law*].

49. European Convention on the Adoption of Children, Apr. 26, 1967, art. 6, 634 U.N.T.S. 256.

50. *New Homosexual Adoption Law*, *supra* note 48.

51. This according to *Dagens Nyheter*, Sweden's largest daily newspaper. *Hård debatt om homoadoption* [Tough Debate over Same-sex Adoptions], DAGENS NYHETER, June 5, 2002 at 18:39 available at <http://www.dn.se/DNet/jsp/polopoly.jsp?d=145&a=24737>.

52. Christel Anderberg (*Moderaterna* [Conservative Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 22. Anderberg argued that all the following child rights organizations and institutions were against changing the law to allow same-sex couples to adopt children: The Child Rights Ombudsman, The National Committee for International Adoptions (*Statens nämnd för internationella adoptionsfrågor*), The Swedish Medical Association (*Svenska Läkarsällskapet*), The Swedish Psychology Association (*Sveriges Psykologförbund*), The Forum for Adopted (*Forum för Adopterade*), Adoption center (*Adoptioncenter*), The National Association for Children's Rights in Society (BRIS), and Save the Children, Sweden, (*Rädda Barnen*). *Id.*

53. Christel Anderberg (*Moderaterna* [Conservative Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 22.

the heated debate was not concern for children, despite all claims to the contrary.⁵⁴ On the surface, both sides used the same child-centered foundation for their argument: children have a right to parents, but adults have no right to children.⁵⁵ But on a deeper level, the debate was not about the best interest of children. First of all, children were never asked about what would have been best for them.⁵⁶ This in itself violates the UN Convention on the Rights of the Child,⁵⁷ which states that the child should be heard in matters concerning the child.⁵⁸ Secondly, though many children lived in families with same-sex parents, the opposition to same-sex couples' legal ability to adopt children only recognized children that were living in families with different-sex parents. In one way, the argument against granting same-sex parents the ability to be legally recognized as parents was contrary to their own argument that a child has a right to parents. The argument itself denied the children living in same-sex families the legal and social recogni-

54. Marianne Carlström (*Socialdemokratiskapartiet* [Social Democratic Party]), argued for a change of the present law prohibiting same-sex couples from adopting. She pointed out that there is no way to know how children in same-sex families will fare in the long term because there is not enough research in the area. Marianne Carlström (*Socialdemokratiskapartiet* [Social Democratic Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 39. She also pointed out that in the United Kingdom the question of same-sex couples was welcomed as alleviating the shortage of parents for orphans. *Id.*

55. Tanja Lineborg, (*Vänsterpartiet* [Leftist Party]), as well as Alf Svensson (*Kristdemokraterna* [Christian Democrats]), used the same argument and arrived at opposite conclusions. They both stated that a children's perspective only gives children rights to parents but does not give adults rights to children. *See* Partnership and Adoption Debate, *supra* note 47, at Anf. 21, 27. For Lineborg this meant that same-sex couples should be able to adopt children. For Svensson, however, the same argument meant that same-sex couples should not be able to adopt children. *Id.*

56. Kia Andersson (*Miljöpartiet* [Environmental Party]), who argued for a change of the law, positioned the debate as one not about the best interests of children, but about which lifestyles and life choices society wanted to value. She asked: "What has the free love and the free sexual act between two adult people to do with a person's qualities, emotions and organized conditions to be able to care for a child?" Kia Andersson (*Miljöpartiet* [Environmental Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 53.

57. CRC, *supra* note 44.

58. CRC, *supra* note 44, at art. 12.

tion of their caretakers as their parents.⁵⁹ If there was total agreement on the appropriateness of applying a child's perspective, then from where did the fundamental disagreement stem?

The argument in this article is that this debate was never about the children. The debate was about the fear of contamination and the need for containment, both of which arise from extreme adherence to the Ideology of Genus.

VIII. FEAR

The debate about revising the prohibition against the adoption of children by same-sex couples awoke unusually strong emotions in Swedish people. There was something about this issue that brought to the surface the most heated passions of the people. The whole array of established institutions — from child rights organizations and administrative branches to the National Parliament — experienced the furiously breaking waves of emotions. Considering the Parliament's reputation for being dispassionate and almost dull, it was startling that it became so animated over the issue of adoption for same-sex couples.⁶⁰ The fact that the debate took place in the Parliament, the most public of all spaces in the Kingdom of Sweden, might have had a determining influence on the outcome of the adoption debate.⁶¹ The Parliament finally voted to rescind the law and allow same-sex couples to adopt.⁶²

59. Ulf Nilsson (*Folkpartiet* [Liberal Party]), argued that it would be unfair and contrary to the principles of a liberal party, which is supposed to be open-minded to difference, to limit the opportunities for children without parents to be adopted by new parents, and that an exclusion of same-sex couples from the adoption market would be unfair to those children who need new parents. Ulf Nilsson (*Folkpartiet* [Liberal Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 46.

60. The author herself attended many meetings in the Swedish Parliament as a member of the National Board of *Rädda Barnen* (Save the Children, Sweden). *Rädda Barnen* is the largest non-governmental child rights organization in the world. *Rädda Barnen* has 100,000 members in Sweden, a country of 9 million people. The author can agree, in part, that the Parliament deserves its reputation for being rather dull.

61. Derrida reminds us that Nazism did not come from some external empty space outside of the responsibilities of a society:

Nazism was not born in the desert. We all know this, but it has to be constantly recalled. And even if, far from any desert, it had grown like a mushroom in the silence of a European forest, it would have

The risk of contamination increases with intimacy. This is a fundamental concern of the nationalist right wing. Most often

done so in the shadow of big trees, in the shelter of their silence or their indifference but in the same soil.

DERRIDA, OF SPIRIT, *supra* note 2, at 109. Bauman emphasizes the constant negotiation and re-negotiation that must take place in the public between the public and the private, between power and politics and law. He argues that democracy today is under a two-fold threat because it is not open to the negotiation of the translation between the public and the private. He states, "There is no such thing in sight as a global democracy." BAUMAN, *supra* note 25, at 203. The public space of the agora where the private and the public meet to negotiate has lost its importance. *Id.* at 204–05. "The *agora* has been deserted." *Id.* at 205. Instead of negotiating the private and the public, the private is brought into the public, not as a negotiation or re-negotiation, but only for a public display of the private. This is when the private is only paraded in the public without any discussion about the way the public also plays a role in the private that has been displayed. *Id.*

One example of the private being displayed in the public without a re-negotiation or negotiation between the private and the public are the talk shows that display young mothers' claims that some man is the father of their child. This is a frequent theme in the day-time talk shows. The private conflict between the mother and the man whom she claims to be the father of her child, a child for whom he does not show the proper amount of care in forms of child support and play-time, is displayed in the public without a discussion of universal healthcare or poverty. Such a discussion would introduce to the public and inform the audience as to why the private argument is so focused on the right to child support. The public space of public negotiation and re-negotiation is exactly what Heidegger feared the most:

Distantiality, averageness, and leveling down, as ways of Being for the "they", constitute what we know as publicness [*die Öffentlichkeit*]. "Publicness" proximally controls every way in which the world and *Dasein* get interpreted, and it is always right...By publicness everything gets obscured, and what has thus been covered up gets passed off as something familiar and accessible to everyone.

HEIDEGGER, BEING & TIME, *supra* note 1, at 165 (H. 127). This 'publicness' has consequences for *Dasein*:

In utilizing the public means of transport and in making use of information services such as the newspaper, every Other is like the next. This Being-with-one-another dissolves one's own *Dasein* completely into the kind of Being of the Others...

Id. at 164 (H. 126).

62. 198 members of Parliament voted to change the law so that registered same-sex couples would be eligible to be adoptive parents, thirty eight voted against a law change, and seventy one abstained. *Riksdagen sade ja till homoadoption* [The Parliament Said Yes to Same-sex Adoption], DAGENS NYHETER, June 5, 2002, available at <http://www.dn.se/DNet/road/Classic/article/0/jsp/print.jsp?&a=24805>.

it is expressed as a fear of losing the cultural heritage, the national spirit, the true national *Geschlecht*. This fear of contamination is not limited to racism; it can be seen in the discourse against women entering male-dominated work places. The closet is central to homophobia. Heidegger expresses the risks of contamination as a general concern whenever the Human is interacting with the non-human spirits.⁶³ The contamination of the Self risks that the Self might become the Other. The Other is itself determined by its place of being in the social hierarchy.⁶⁴ The believers of the Ghost know deep down in their

63. Heidegger was afraid that closeness to others would lead to contamination and the loss of one's authenticity. For example, "This Being-with-one-another dissolves one's own *Dasein* completely into the kind of being of 'the Others', in such a way, indeed, that the Others, as distinguishable and explicit, vanish more and more." HEIDEGGER, BEING & TIME, *supra* note 1, at 164 (H. 126). Luce Irigaray, in her "philosophy of the caress," notes that this way of thinking is a general trend among male thinkers when expressing their desire for the Other. LUCE IRIGARAY, TO BE TWO 20–24 (Monique M. Rhodes & Marco F. Cocito-Monoc trans., 2001) [hereinafter IRIGARAY, TO BE TWO]. Irigaray writes, "In their desire for the other, male philosophers generally evoke sight and touch. Thus, like their hand, their gaze grasps, denudes and captures." *Id.* at 20. According to Irigaray, Sartre escapes his desire for the Other by throwing himself forward towards an impossible future, a future where he ends up in nothingness. *Id.* at 30.

Derrida notes that Heidegger fails in his effort to save, or to escape from having to be saved from, this extreme form of desire. Heidegger's desire is a force that can only be traced to a non-Christian space of time. This non-Christian force is, for Heidegger, a purity worth saving even when one knows of its evil. See DERRIDA, OF SPIRIT, *supra* note 2, at 10.

64. One of the markers of the Ideology of Genus is the belief that one is what one does, and that what one does is determined by one's environment, and that one's environment, in turn, is determined by who one is. One example of this thinking is as follows: a person that has to beg for money to survive is, in essence, a beggar. And if he is a beggar, his environment will always make him a beggar because he is a beggar. Another form of this argument is that a person who is held as a slave is also essentially a slave and therefore will always remain a slave and no social order or society or non-slave is responsible for the enslavement of an already enslaved slave. Heidegger describes this process:

The *ontologically* relevant result of our analysis of Being-with is the insight that the 'subject character' of one's own *Dasein* and that of Others is to be defined existentially — that is, in terms of certain ways in which one may be. In that which we concern ourselves environmentally the Others are encountered as what they are; they *are* what they do [*sie sind das, was sie betreiben*].

HEIDEGGER, BEING & TIME, *supra* note 1, at 163 (H. 126).

fearful frozen hearts that the danger of being co-opted, invaded, even seduced, by the spirit of the mob⁶⁵ cannot be avoided through a merely optical difference.⁶⁶ The optical difference is only the symptom of difference; the real difference is to be found in what the mob is doing. “The [mob] is what it does.”⁶⁷ The risk of losing the Self by being swallowed by, submerged into, or lost in the mob, or even succumbing to the practice of the mob that surrounds the Self, is unavoidable.⁶⁸ The mob shows itself⁶⁹ as Human, but it is fundamentally different; there is no way for the Self to see the difference by only observing its physical features. One has to observe its behavior to be able to know. For the Ideologist of Genus, the closet is essential for life. The homophobe in the Ideology of Genus has nothing against same-sex couples as long as the closet contains the relationship. The risk of contamination comes with walking out of the closet.⁷⁰ The

65. Derrida refers to Heidegger’s use of the term *das Böse* when talking about the risk of contamination. DERRIDA, OF SPIRIT, *supra* note 2, at 10. A colloquial meaning of *das Böse* in the Swedish dialect from Gothenburg is “mob.” This connects to the non-Christian, to the beginning before the original, when *das Böse* is at the same time evil but also the *spirituality* of the Germanic (Swedish) *Geschlecht*. DERRIDA, OF SPIRIT, *supra* note 2, at 10. Derrida interprets Heidegger’s use of the word “Evil” as meaning essentially spiritual. *Id.* at 29.

66. The Ideology of Genus is based on a belief that there is a connection between biology as manifested in physical features upon peoples’ bodies and who they are. *See generally* Grahn-Farley, *The Law Room*, *supra* note 20, at 29; Anthony Paul Farley, *Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997). For example, because most prostitutes are believed to be women, within the Ideology of Genus it is concluded that women are prostitutes. *See* Grahn-Farley, *The Law Room*, *supra* note 20, at 31, 32.

67. The essence of the mob is summarized by Heidegger as, “*sie sind das, was sie betreiben* [they are what they do].” HEIDEGGER, BEING & TIME, *supra* note 1, at 163 (H. 126).

68. The unavoidability that comes with the price of existing as a genus is described by Judith Butler. She writes about how internalized subordination creates a passionate attachment to its subordination, in a move of turning on itself. JUDITH BUTLER, THE PSYCHIC LIFE OF POWER 9 (1997) [hereinafter BUTLER, THE PSYCHIC LIFE OF POWER].

69. Time is both what reveals the being of an entity (*see* Frede, *supra* note 2, at 64) and what veils the masquerade of masking itself. “A Being of entity can be so ‘covered up’ that it becomes forgotten and no question arises about it or about its meaning.” HEIDEGGER, BEING & TIME, *supra* note 1, at 59 (H. 36).

70. For the Ideology of Genus, “closeting” is not an effect of homophobia; it is a necessity for the maintenance of homophobia.

mob masquerades as the Self — the Self as I, the I am, the I am Human. The mob lies about who it is. It masquerades as Human.⁷¹ The difference comes from inside, and the difference is not optical.⁷² The result of this contamination is a dictatorship

Of course, the “they” is as little present-at-hand as *Dasein* itself. The more openly the “they” behaves, the harder it is to grasp, and the slier it is, but the less is it nothing at all. If we ‘see’ it ontico-ontologically with unprejudiced eyes, it reveals itself as the ‘Real subject’ of everydayness. And even if it is not accessible like a stone that is present-at-hand, this is not in the least decisive as to its kind of Being. One may neither decree prematurely that this “they” is ‘really’ nothing, nor profess the opinion that one can interpret this phenomenon ontologically by somehow ‘explaining’ it as what results from taking the Being-present-at-hand-together of several subjects and then fitting them together. On the contrary, in working out concepts of Being one must direct one’s course by these phenomena, which cannot be pushed aside.

HEIDEGGER, BEING & TIME, *supra* note 1, at 166 (H. 128).

71. The act of “coming out” becomes in this sense a fundamental threat to the Ideology of Genus because although “coming out” appears to be an unmasking, it is in the very act of “coming out” that the masking begins.

[T]he expression ‘appearance’ itself can have a double signification: first, *appearing*, in the sense of announcing-itself; as not-showing-itself: and next, that which does the announcing [*das Meldende selbst*] — that which in its showing-itself indicates something which does not show itself.

HEIDEGGER, BEING & TIME, *supra* note 1, at 53 (H. 30).

72. Without closeting, the risk of crossing is itself masked.

It itself *is* not; its Being has been taken away by the Others. *Dasein*’s everyday possibilities of Being are for the Others to dispose of as they please. These Others, moreover, are not *definite* Others. On the contrary, any Other can represent them. What is decisive is just that inconspicuous domination by Others which has already been taken over unawares from *Dasein* as Being-with. One belongs to the Others oneself and enhances their power.

HEIDEGGER, BEING & TIME, *supra* note 1, at 164 (H. 126).

Judith Butler raises a similar concern but from the perspective of the *one at question*:

If the subject is produced through foreclosure, then the subject is produced by the condition from which it is, by definition, separated and differentiated. Desire will aim at unraveling the subject, but be thwarted by precisely the subject in whose name it operates. A vexation of desire, one that proves crucial to subjection, implies that for the subject to persist, the subject must be threatened with dissolu-

under the rule of the mob.⁷³ For Heidegger, the mob is evil because of its ability to contaminate and because it is contaminated.

The fear of contamination is made into an ideology.⁷⁴ An extreme expression of this ideology is the Holocaust; another expression of this ideology is today's xenophobia. Yet another expression emerged in the form of the heated Swedish debate about same-sex couples and adoption. The adoption debate led people to the end of the road of the ideological contamination. People were forced to follow the road to its end, in hopes of finding a way out. Instead of finding a way out, they ended up running into a wall, and when they turned around their own ideology was staring back at them. What they saw was the Ghost of fascism coming back from the past.⁷⁵ A Ghost that they thought had died with the war. They had forgotten that Ghosts do not die. As it turned out, they had not seen the Ghost for some years, but this was only because they always had kept a few steps ahead.⁷⁶

tion. A subject turned against itself (its desire) appears, on this model, to be a condition of the persistence of the subject.

BUTLER, *THE PSYCHIC LIFE OF POWER*, *supra* note 68, at 9. Luce Irigaray has a different interpretation of desire and sexuality than what Heidegger and Butler describe. Irigaray emphasizes that the function of sexuality is a "relationship-to." She advocates the use of "perception as a means of acceding to the Other as other." LUCE IRIGARAY, *TO BE TWO*, *supra* note 63, at 22. And this makes it possible to both be a subject that is respected and is respecting the Other as a subject. *Id.*

73. Time itself is a major factor in the risk of contamination. The "outing" is only momentary. The "being out" appears through time to be the same as never having been closeted. *See, e.g.*, HEIDEGGER, *BEING & TIME*, *supra* note 1, at 164 (H. 126) ("In this inconspicuousness and unascertainability, the real dictatorship of the "they" is unfolded."). *See also* the use of "mob" in relationship to *das Böse*, *supra* note 65.

74. One form of this ideology is Nazism, a sub-set of fascism.

75. For a general reading about European fascism, see Grahn-Farley, *A Ghost*, *supra* note 23, at 170.

76. The Swedish Parliament does not have any extremist right-wing party, but this might change with the next election. *See* *In the Name of Sweden*, *supra* note 27.

IX. FALLEN TIME⁷⁷

The argument is that the people and Parliament did not become this passionate because of their deep-rooted concern for the children of the world. The argument is not that people did not care deeply about the children of the world; it is that the issue of adoption touched a point of Swedish consciousness that was not concerned with the care of children. It was the fear of contamination that forced to the surface a whole array of passions. The passions were forced to the surface, triggered by an ideology that has not been allowed to range freely since World War II. This outburst of passion was not rooted in a desire to take care of children, but in the fear and horror experienced when the Self's ideology is staring back at the Self, and when what the Self sees is the Ghost returning from the past. Confronted with such horror, the Self falls into time.

The UN named Sweden the most sex-equal country in the world in 1995.⁷⁸ This does not mean, however, that there is no sexism within Sweden, just as the fact that Sweden has liberal immigration policies does not mean that Sweden does not have racism. The fact that Sweden has one of the most progressive statutes acknowledging same-sex relationships does not mean that Sweden does not have homophobia. Racism, sexism, and homophobia are all dependent on the non-occurrence of time.⁷⁹ "Being equal" constitutes in this sense a temporally-based threat to the Ideology of Genus of "being out."⁸⁰ "Becoming

77. Derrida writes about Heidegger's *Fallen* as indeed a fall, a fall from one time to the other. He explains: "I dare not say from time to time or now and then [*de temps en temps ou de temps à autre*]. The falls it causes are not from spirit [*de l'esprit*] into time. But from time into time, one time into another." DERRIDA, OF SPIRIT, *supra* note 2, at 28. It is the fall of one spirit into another. *Id.* at 30.

78. Eva-Maria Svensson, *Sex Equality: Changes in Politics, Jurisprudence and Feminist Legal Studies*, in RESPONSIBLE SELVES, *supra* note 21, at 71.

79. Time both reveals and masks Genus. See HEIDEGGER, BEING & TIME, *supra* note 1, at 60–64 (H. 36), 163–64 (H. 126). See also Frede, *supra* note 2, at 64 (commenting on Heidegger's relationship to time).

80. In the Ideology of Genus, history functions as the masquerade of time. History makes time a one-way street. Through history, time can only go one way.

"Historicality" stands for the state of Being that is constitutive for *Dasein's* 'historizing' as such; only on the basis of such 'historizing' is anything like 'world-history' possible or can anything belong histori-

equal” is just momentary and will be forgotten. When the moment of becoming equal has been forgotten, “being equal” will then appear as the same as never having been un-equal.⁸¹ Never having been un-equal will appear to be the same as never having been “closeted.”

X. GENUS

The ideology that was staring back at the Swedish people was the Ideology of Genus.⁸² It is built on the presumption that everything and everyone can be assigned a place and a category within a world system⁸³ and that the meaning of an entity depends on its relationship to others.⁸⁴ This means that the category that normally would be thought of as “people” can be subdivided into sub-categories of which the highest level is the Human, or *Dasein*.⁸⁵ An Ideology of Genus has four main elements, but only one purpose. The four elements are:

cally to world-history. In its factual Being, any *Dasein* is as it already was, and it is ‘what’ it already was.

HEIDEGGER, BEING & TIME, *supra* note 1, at 41 (H. 20).

81. History is what brings the temporality of the momentary “coming out” or “becoming equal” out of *tempus* into a space out of time’s reach.

In one’s concern with what one has taken hold of, whether with, for, or against, the Others, there is constant care as to the way one differs from them, whether that difference is merely one that is to be evened out, whether one’s own *Dasein* has lagged behind the Others and wants to catch up in relationship to them, or whether one’s *Dasein* already has some priority over them and sets out to keep them suppressed.

HEIDEGGER, BEING & TIME, *supra* note 1, at 163–64 (H. 126).

82. Genus in the English language has connotations of natural categories of different lives. Genus in Swedish has been used as a definition of a theory of male supremacy. See Svensson, *supra* note 78, at 77, citing Yvonne Hirdman, *Demokrati och makt i Sverige. Maktutredningens huvudrapport* [Democracy and Power in Sweden in 1990] (SOU 1990:44, ch. 3). This Article uses the concept of genus in a broader sense than the Swedish gender-specific meaning. This Article uses the concept of genus to refer to the belief that people can be subdivided into social categories that can be justified by biology or nature. The belief that people can be sub-divided by nature into given groups is a distinct view of the world. This is why it is an Ideology of Genus.

83. HEIDEGGER, IDENTITY AND DIFFERENCE, *supra* note 38, at 29.

84. Frede, *supra* note 2, at 50.

85. Frede, *supra* note 2, at 56. It is the context of a person that also determines his or her “being.” *Id.*

- The belief that groups that seem natural to society are biologically natural groups.⁸⁶
- The belief that people can be subdivided according to natural categories, and that this belief shapes our understanding of the world.⁸⁷
- The belief that the world is an inherently dangerous place, where the survival of the Self is based on the submission of the Others. (This also makes it an ideology of hierarchy).⁸⁸

86. The Ideology of Genus, or the compulsion to categorize, has an inherent contradiction or tension that finds its expression in the concept of reproduction. It is in the “naturalness” of reproduction that the system of genus begins its own masquerade.

[T]he sexed division of humanity is regarded as leading to and constituting two heterogeneous groups. The fantasy implies that men make men and women make women. In the case of the sexes, emphasis is more and more placed on intra-group homogeneity: men with men, women with women, in their quasi-speciation.

COLETTE GUILLAUMIN, *Race and Nature: The System of Marks, in RACISM, SEXISM, POWER AND IDEOLOGY* 133, 137 (1995) [hereinafter GUILLAUMIN]. Heidegger's re-reading of Greek philosophy lead him to the conclusion that those categories, or entities, are natural. Sheehan, *supra* note 2, at 81.

The social idea of natural group rests on the ideological postulation that there is a closed unit, endo-determined [determined from within], hereditary and dissimilar to other social units. This unit, always empirically social, is supposed to reproduce itself and within itself. All this rests on the clever finding that whites bear whites and blacks bear blacks, that the former are the masters and the latter the slaves, that the masters bear masters and the slaves slaves, etc., and that nothing can happen, and that nothing does happen, to trouble this impeccable logic.

GUILLAUMIN, *supra* note 86, at 136.

David Cruz gives a constitutional argument for a disestablishing of sex and gender. See David B. Cruz, *Disestablishing sex and Gender*, 90 CAL. L. REV. 997 (2002).

For an examination of the psychological and physiological violence directed toward people that white supremacy categorizes as non-white, see Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

87. GUILLAUMIN, *supra* note 86, at 136.

88. For Heidegger's fear of being ruled by the Others, see HEIDEGGER, *BEING & TIME*, *supra* note 1, at 164 (H. 126).

- The fear of not qualifying for humanity.⁸⁹

The purpose of an Ideology of Genus is to confirm that the Self is human⁹⁰ and to prevent non-humans from contaminating the Self with non-humanity.⁹¹ One element that makes a human qualify in the world as a human is to know how and where to place each object that the Self encounters in the world.⁹² Humanity is based on knowing which genus to assign to each object encountered in the world. It is this very ability that qualifies one for humanity in an Ideology of Genus. Humans have the ability to both belong to a genus within the world system and at the same time to assign *identities* to everything and everyone.⁹³ According to the Ideology of Genus, it is this capac-

89. Derrida notes Heidegger's relationship between the speech and the handwritten. The hand is important because it becomes the symbol of the opposition between the Human and the animal. DERRIDA, OF SPIRIT, *supra* note 2, at 11. The question of the relationship between the thing, the animal and the Human begins and ends with the question of *Dasein*. *Dasein* is Human because it is able to claim its assigned position as the master of the assigning.

The hand is the symbolic difference (the mark of difference), but it is the ability that *is* the difference, an ability that comes with the non-Christian force (*geistige Kraft*). *Id.* at 39. A force that is measured in ability to have, a force that is measured in wealth. The thing does not have anything.

The stone is poor; it is because it is poor it is a stone. An animal has but does not have much; an animal is getting by but is not rich. It is because the animal has some part of something that it is higher than a stone and a thing. The Human is wealthy; the Human is human because it is rich."

Id. at 11–12, 52–55. "[T]he stone is without world (*weltlos*), the animal is poor in the world (*weltarm*), man is world-forming (*weltbildend*)." *Id.* at 11–12, 21. For a further exploration of the relationship between wealth and category, see DERRIDA, OF SPIRIT, *supra* note 2, at 52 (about the stone), at 55 (about the animal). Regarding the importance of containing the animal, see DERRIDA, OF SPIRIT, *supra* note 2, at 54.

90. It is out of this combination of the awareness of the self and of the world in which the self exists that the meaning of *Dasein*, the specific being of human beings grows. See Frede, *supra* note 2, at 55; SPIEGELBERG, *supra* note 3, at 348–49.

91. HEIDEGGER, BEING & TIME, *supra* note 1, at 51–53 (H. 129). This is also why every genus has to be approached with a "method of suspicion." See Frede, *supra* note 2, at 54.

92. This is also called "Object-givenness." See Frede, *supra* note 2, at 48–49.

93. "*Dasein* also possesses – as constitutive for its understanding of existence – an understanding of the Being of all entities...providing the ontico-

ity to both be assigned and to have the ability to assign that qualifies the Self for humanity.⁹⁴ To fail to assign and be assigned genus is the same as failing to achieve humanity.

XI. SIMILAR IS DIFFERENT

It is easy to presume that an Ideology of Genus would be occupied mostly with difference. The Ideology of Genus is not concerned with what *is* different; things that really are different are not a concern for the Ideology of Genus. The concern for the Ideology of Genus is the same, meaning identical with itself.⁹⁵ The concern of the Ideology of Genus is with what cannot be *permitted* to remain the same.⁹⁶ Instead of treating it as the same, the Ideology of Genus treats it as similar to. A similarity is what seems to be the same, but is not the same:⁹⁷ while appearing the same, it is not.⁹⁸ It is the similar masquerading as the same. Within an Ideology of Genus, similarity constitutes the biggest threat to the Self because of the risk of contamination, because it *can* mix. One does not need laws that segregate and prohibit mixing when there is difference. When there is difference, mixing cannot happen. Laws that segregate and prohibit mixing are only needed when mixing is possible. Mix-

ontological condition for the possibility of any ontologies.” HEIDEGGER, BEING & TIME, *supra* note 1, at 34 (H. 14).

94. HEIDEGGER, IDENTITY AND DIFFERENCE, *supra* note 38, at 31.

95. The Ideology of Genus is not against the stone or the animal as long as they do not “come out” or “become equal.”

Indeed it is even possible for an entity to show itself as something which in itself it is *not*. When it shows itself in this way, it ‘looks like something or other’...This kind of showing-itself is what we call “*seeming*”...[Phenomenon] signifies that which looks like something, that which is ‘semblant’, ‘semblance’ ... means something good which looks like, but ‘in actuality’ is not, what it gives itself out to be.

HEIDEGGER, BEING & TIME, *supra* note 1, at 51 (H. 29).

96. For a general discussion on the process of making the same into a “natural” difference, see GUILLAUMIN, *supra* note 86, at 141–42.

97. See HEIDEGGER, BEING & TIME, *supra* note 1, at 51 (H. 29).

98. This method of differentiating between similarities begins with the Self as the only referential point. Frede, *supra* note 2, at 63. It is a project that makes every Other into one’s own personal project. *Id.* This in combination with the fear of contamination becomes an Ideology of Genus. HEIDEGGER, BEING & TIME, *supra* note 1, at 164 (H. 126).

ing is only possible when it is the same, when there is no difference.

Biology plays a central role in the Ideology of Genus. It is through biology that genus is believed to be transmitted through time.⁹⁹ It is through biology that notions of race and sex are explained as “natural” concepts. Questioning ends at the beginning of nature.

The Ideology of Genus is clearest in its claimed “biological” categorization of race and sex, as if it is biology that makes women wear skirts and men trousers. The social construction of a relationship between cause and effect is central to the Ideology of Genus. An example of the construction of a relationship between cause and effect can be seen in the biological connection and, later, disconnection in the argument made in the Swedish Parliament against granting same-sex couples the ability to legally adopt children. A fair summary of Alf Svensson’s comment in the Parliament is that every child in the world is conceived by a biological woman and a biological man and it is this biological origin that has to be protected. Because it is not biologically possible for two biological men or two biological women to conceive a child, they could not be allowed to adopt.¹⁰⁰

To use biology in the discourse of adoption is to disconnect cause and effect.¹⁰¹ Adoption itself is a manifestation of the non-biological nature of childrearing.

Questions about who and what is Human are also questions about who and what is non-Human. This is why biology is so important in the Ideology of Genus. It is through biology and history that race and gender are explained; it is through biology and history that genus is traced. To claim that biology defines genus is to believe that men give birth to men, women give birth to women, people of color give birth to people of color, and

99. This is why it is important to observe Time when observing Being. See HEIDEGGER, BEING & TIME, *supra* note 1, at 62–63 (H. 38). “A Genus carries its time with him. It is like the snail who carries its home.” GUILLAUMIN, *supra* note 86, at 136.

100. Alf Svensson (*Kristdemokraterna* [Christian Democrats]), Partnership and Adoption Debate, *supra* note 47, at Anf. 27.

101. Peter Goodrich highlights the construction of a relationship between cause and effect in his Article *Erotic Melancholia*. Peter Goodrich, *Erotic Melancholia*, 14 LAW & LITERATURE 103, 104 (2002). See also PETER GOODRICH, LAW IN THE COURTS OF LOVE (1996).

that people without color give birth to people without color.¹⁰² According to the Ideology of Genus, the biological definition of race and sex which assigns each a genus must also assign same-sex couples either a genus of their own or the genus of their sex. Either way, it is when biology is used to justify why same-sex couples cannot adopt children that the Ideology of Genus runs into its own dead end. This is because, according to the Ideology of Genus, the “natural” conclusion seems to be that same-sex couples, *absolutely should be able to adopt children*.

Either genus can reproduce within its own category or it cannot. If it can reproduce within its own category, then men would give birth to men, women to women, persons without color to persons without color and persons with color to person with color. However, if genus cannot reproduce inside of its own category, then biology cannot be used as a reason for separate treatment, and the Ideology of Genus cannot use biology as a justification for the containment of same-sex couples. The Ideologist of Genus might claim that different genera must be separated and kept apart because they are biologically different. However, in that case same-sex couples should be *encouraged* to reproduce within their own genus through adoption. If one believed in the biological explanation of the natural that the Ideology of Genus provides, one would not be able to explain why the two “different” genus categories of “man” and “woman” are both needed to produce a child. Indeed, if the Ideology of Genus is believed, one could not even explain why it is possible for the two “different” genus categories of “person of color” and “person without color” to conceive a child.¹⁰³

102. GUILLAUMIN, *supra* note 86, at 136.

103. Indeed, the Ideology of Genus can be seen in all of its absurdity in American laws that forbid interracial sex, marriage, and families. The Ideologists of Genus argued that black and white people should not “mix” and also that they could not mix, as a matter of biology. *See* Brief for Appellee at 42, *Loving v. Virginia*, 388 U.S. 1 (1967) (“On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock (W.A. Dixon, M.D., *Journal of the American Medical Association*, Vol. 20, p. 1 (1893))”). The fact that different “races” can and do “mix” and that a “white” for example can give birth to a “black” or that a “black,” as is seen in passing, can give birth to a “white,” was addressed by the Ideologists of Genus by displacing the dire results of such mixing onto the future.

If same-sex couples are truly of a different genera — such that their biological difference justifies different treatment from different-sex couples — then their reproduction through legal adoption of children should be encouraged and not discouraged. The alternative would be to believe in the explanation of the “natural” provided by the Ideology of Genus. That explanation, that mixing across genus is unnatural, fails to account for *any* reproduction. The explanation cannot account for the fact that the genus “man” is unable to reproduce within its own genus and the genus “woman” is also unable to reproduce within its own genus. The genus “man” and the genus “woman” must *unnaturally* mix across genus to reproduce. The fact is that there is no difference of genus. Because there is no real difference of genus there is a fear, a fear of the same, a fear of contamination, a fear that the Ideology of Genus attempts to contain through the lie of difference.

The question of same-sex couples’ legal eligibility to adopt children is manifested in the moment that the Ideology of Genus stares back at itself. It is at this moment that the Ideologist of Genus must decide to either stop believing or to continue running forever.

The fear of contamination is the underlying argument in this biological discourse. The fear was that non-same-sex children, (children of humans, children of a biological woman and a biological man) would be contaminated by same-sex parents and become same-sexes. This fear was expressed in the deep concern shown over the extra-vulnerable identities of adopted children.¹⁰⁴

XII. ABILITY

What does it mean when one group is able to assign identities to Others and the Self according to a social hierarchy?¹⁰⁵ Who

104. See Alf Svensson (*Kristdemokraterna* [Christian Democrats]), Partnership and Adoption Debate, *supra* note 47, at Anf. 27.

105. Within the Ideology of Genus, hierarchy is not only a fact but also an obligation. It is through hierarchy that the Human takes and occupies its rightful place as the assigner and the designer of all the Others. This is an obligation towards all other Humans. DERRIDA, OF SPIRIT, *supra* note 2, at 19–20.

can assign identities to Others and the Self?¹⁰⁶ The Human is open to Being and the Being is open to the Human. A Human is someone that is assigned a genus, that of *Dasein*,¹⁰⁷ and at the same time assigns genus to the Self. The meaning of being Human is the ability to assign genus to Others.¹⁰⁸ This relationship between being assigned and also being the one who assigns makes hierarchy itself essential for the possibility of Human existence.¹⁰⁹ With hierarchy as an essential part of the Human,

106. In its original language, Heidegger uses the term *Das Man*; John Macquarrie & Edward Robinson have translated this as “the They.” The use of “the They” disrupts the flow of the text too much and does not communicate the German meaning of *Das Man* and the risk of contamination through kinship.

The German word *Man* can be used to mean I, You (individually), You (collectively), We, They, and People. The word *Man*, originates with I and the ability for the I to know its surroundings, and generalize the I into also meaning everyone and all. The use of the word *Man* connotes more than a *Pro Nome*, it also indicates the power of a specific position. I decided to use the word *mob*, to indicate the distance that Heidegger communicates with his use of *Das* preceding *Man*. *Das Man* can be interpreted as a relationship in the sense of kinship. But one wants it to be known that one only acknowledge their presence because of the kinship; in every other aspect one distances oneself from what they represent.

107. Jean-Paul Sartre identifies a person who never changes, who only is what the person has always been, as a person controlled by fear, and most of all, by passion. “Only a strong emotional bias can give a lightning like certainty; it alone can hold reason in leash; it alone can remain impervious to experience and last for a whole lifetime.” JEAN-PAUL SARTRE, ANTI-SEMITES AND JEW 19 (George J. Becker, trans., Schocken Books 1948) (1946) [hereinafter SARTRE, ANTI-SEMITES AND JEW]. In contrast, Martin Heidegger believed that, “In its factual Being, any *Dasein* is as it already was, and it is ‘what’ it already was. It *is* its past, whether explicit or not.” HEIDEGGER, BEING & TIME, *supra* note 1, at 41 (H. 20).

108. “*Dasein* has grown up both into and in a traditional way of interpreting itself: in terms of this it understands itself proximally and, within a certain range, constantly.” HEIDEGGER, BEING & TIME, *supra* note 1, at 41 (H. 20).

109. What is Heidegger’s biggest fear is Sartre’s biggest hope. “[T]he principle underlying anti-Semitism is that the concrete possession of a particular object gives as if by magic the meaning of that object.” SARTRE, ANTI-SEMITES AND JEW, *supra* note 107, at 24. Sartre continues:

[T]he anti-Semite flees responsibility as he flees his own consciousness, and choosing for his personality the permanence of rock, he chooses for his morality a scale of petrified values. Whatever he does, he knows that he will remain at the top of the ladder; whatever the Jew does, he will never get any higher than the first rung.

access to power becomes a determining factor when Humanity is assigned, or not assigned, or seen.¹¹⁰ Only what the Human has recognized can be assigned, therefore existence itself is based on having been “touched” by the Human.¹¹¹

XIII. LAID DOWN IN LAW

There is a relationship between biology and law. It is the law that constructs the causality between the biological and the social.¹¹² Same-sex couples are raising children whether the law

Id. at 27. Jean-Paul Sartre’s view of possession and property is quite different than that of Martin Heidegger.

In each case *Dasein* is its possibility, and it ‘has’ this possibility, but not just as a property [*eigenschaftlich*], as something present-at-hand would. And because *Dasein* is in each case essentially its own possibility, it *can*, in its very Being, ‘choose’ itself and win itself.

HEIDEGGER, *BEING & TIME*, *supra* note 1, at 68 (H. 43).

110. Charles Taylor points out the role of the body and its culture in the Heideggerian shaping of the world. What he means is that the way one is in-the-world also is dependent on the body, its culture and form of life. Charles Taylor, *Engaged Agency and Background in Heidegger*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER*, *supra* note 2, at 317, 318–19.

Judith Butler has expressed similar observations without attributing them to a Heideggerian view. “In other words, within subjection the price of existence is subordination.” BUTLER, *THE PSYCHIC LIFE OF POWER*, *supra* note 68, at 20.

111. In contrast, Jean-Paul Sartre argued that it is this very ability and willingness to be contaminated that is ethical. “But there are people who are attracted by the durability of a stone.” SARTRE, *ANTI-SEMITE AND JEW*, *supra* note 107, at 18. The symbolic meaning of the hand is not only to write but also to touch. The touch of a hand is the touch of a soul, while touch itself can only constitute spirit as not being a stone.

If the chair could touch the wall, this would presuppose that the wall is the sort of thing ‘for’ which a chair would be *encounterable*. An entity present-at-hand within the world can be touched by another entity only if by its very nature the latter entity has Being-in as its own kind of being—only if, with its Being-there [Da-sein], something like the world is already revealed to it, so that from out of that world another entity can manifest itself in touching, and thus become accessible in its Being-present-at-hand. When two entities are present-at-hand within the world, and furthermore are *worldless* in themselves, they can never ‘touch’ each other, nor can either of them ‘be’ ‘alongside’ the other.

HEIDEGGER, *BEING & TIME*, *supra* note 1, at 81 (H. 51).

112. GUILLAUMIN, *supra* note 86, at 147–149. See also Grahn-Farley, *The Law Room*, *supra* note 20.

recognizes their relationships as relationships between children and parents or not. It is only the law that can uphold the biological claim that same-sex couples cannot be parents.¹¹³

If it were not for the law, the biological argument would not have validity. Without a law that makes it impossible for same-sex couples to be parents, same-sex couples would be parents. Same-sex couples are *de facto* parents; it is only *de jure* that they are not.¹¹⁴ This is how the law functions as an intermediary between biological and social cause and effect. This, according to an Ideology of Genus, can be explained by the fact that the law is the agent that makes the belief in categorization correspond to the lived experiences of those who are categorized.¹¹⁵ Within the Ideology of Genus it is not biologically possible for same-sex couples to be parents, even if it is socially possible. It is here that the agent of the law makes the biological assumption a social reality.¹¹⁶ This is also where the power of inhumanity is executed through law. Law is the tool through which same-sex couples are un-seen as parents, and with that also un-made as parents. It is by being “touched” by law that the relationship between same-sex couples and the children in their care can become elevated into a human relationship.¹¹⁷ It is by being designated “untouchable” by law that the relationships between same-sex couples and their children are un-done.¹¹⁸

The way we shape a legal right or a legal prohibition is also the way that we have decided to lay our values down within a

113. Registered Partnership Law, *supra* note 34, at Kap. 3:4.

114. Tanja Linderborg, (*Vänsterpartiet* [Leftist Party]) Partnership and Adoption Debate, *supra* note 47. Linderborg made the point to the Swedish Parliament that there are already children being raised by same-sex couples and to not allow for same-sex couples to adopt children is to deny these children their rights to parents. *Id.*

115. Taylor, *supra* note 110, at 317, 318–19. Taylor describes the construction of a relationship between cause and effect as follows: “Here is a ‘world shaped’ by embodiment in the sense that the way of experiencing or ‘living’ the world is essentially that of an agent with this kind of body.” *Id.* at 318.

116. The way that the category, or the genus that has been assigned, also determines the lived experience of everyday life is illustrated by Taylor: “We point out how the nature of this which this experience is described as thus given their sense only in relation to this form of embodiment.” *Id.* at 319.

117. HEIDEGGER, BEING & TIME, *supra* note 1, at 81–82 (H. 55).

118. *Id.*

public discourse.¹¹⁹ It is an invitation to a discussion, a discourse that ultimately is about defining and specifying the relationships between children and their caretakers, or between two adults in their role as caretakers of children.¹²⁰

The way that we ask the question will also determine the answer. The way a question is asked has two meanings: (1) What was the question asked about? and (2) How was the question asked? When the question is, "Can same-sex couples be parents?" it is not a question of whether same-sex couples *can* be parents. There is no doubt that same-sex couples *can* be parents; they *are* parents. Then what is the question about? It is a question about genus. It is a question about who and what is Human. Within the Ideology of Genus there are certain experiences of life that go specifically with being human.¹²¹ Can the genus of same-sex couples be parents when being parents means being Human? To ask such a question is to ask if same-sex couples are Humans, or qualify as caretakers of Humans.¹²²

119. The spiritualization of 'values' through law is illustrated by Pierre Schlag:

Values are like little divinities. Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence, and self-abnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and Human existence.

PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 50 (1996). See also HEIDEGGER, BEING & TIME, *supra* note 1, at 56 (H. 32–33).

120. The discourse about rights and reason serves as masking the power relationship between the oppressed and its oppressor. "It masquerades the question 'Was heisst Dasein?'"

The anti-Semites have a *right* to play with discourse for, by giving ridiculous reasons, they discredit the seriousness of their interlocutors. They delight in acting in bad faith, since they seek not to persuade by sound arguments but to intimidate and disconcert.

SARTRE, ANTI-SEMITE AND JEW, *supra* note 106, at 20.

121. Taylor, *supra* note 110, at 317, 319. Taylor argues that it is only a Human that can truly know what it feels like to be Human. *Id.* at 319. He argues that it might be possible for Others "to work out some descriptions that were roughly extensionally equivalent." *Id.*

122. For a clarifying discussion of parenthood within same-sex relationships and the presumption of parenthood, see Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299 (2001).

To ask such a question is to ask a question that is unethical. The question itself begins in the space of the unethical.

The way the question is asked also matters. It is significant that the question of whether same-sex couples could be parents was asked through the law. To question someone's humanity through the law is to take the inside of someone's body and drag it into the open in the name of the law.¹²³ It is to have what is perceived to be the soul made into an argument, just to become the object of a discourse.¹²⁴

Judgments about the humanity of a person are not about truth but about preferred attachments to arguments laid down for discourse. When the question about one's humanity is made

123. The French sociologist Colette Guillaumin connects the relationship between might and power in her observation: "The law is the expression of the ideological/practical techniques of the system of domination." See GUILLAUMIN, *supra* note 86, at 140.

The Scandinavian Realist Alf Ross makes the connection between cause and effect through the agency of the law. His argument builds on the premise that a law is only a law when it is applied according to the nature of the *genus* to which it is applicable. The proof that the presumed genus is manifested in the law is that the law works. This way of arguing moves the legal discourse out from the room of power discourse into the room of a belief in biological categorization:

[A]ccording to the definition a directive is a norm only if it corresponds to certain social facts ... [T]o say that a norm 'exists' means, then, that these facts exist; and to this extent the adequacy of the definition is secured with regard to that use of 'norm' which requires that norms exist, and that statements to this effect form part of the description of society.

ALF ROSS, DIRECTIVES AND NORMS § 21 (Ted Honderich & Bernard Williams eds., Routledge & Kegan Paul Ltd. 1968). The Scandinavian Realist school of thought is still haunted by its Nazi past. Taylor in his comment on Heidegger makes the observation that each genus can only know itself and exist according to its class. This position also determines the experiences of the World in which one lives. See Taylor, *supra* note 110, at 317, 319.

124. See Peter Goodrich, *Officium Poetae*, 23 LIVERPOOL LAW REVIEW 139, 147 (2001). Peter Goodrich writes about "[t]he attraction of the poem, of language that pleases and potentially persuades by going beyond what can be consciously formulated, lies in an aspiration to move authentically outside the self."

The argument in this Article is that the law is about the inauthentic and when the law is about asking whom and what is Human, the person at whom the question is aimed is not the Self, but the Other. See also W. E. B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES (1903).

through the law it also means that one's inside, one's soul, has been assigned non-humanity.

XIV. CONTAINMENT

The law-room¹²⁵ that prohibits same-sex couples from adopting children is a law-room designed to contain. It is designed to prevent contamination.¹²⁶ The thing that is contentious is not the different but the similar. The law-room that contains same-sex couples by preventing them from adopting children is a law-room protecting the genus Human from becoming non-Human through contamination.¹²⁷ The law-room serves the purpose of protecting the Human from being un-done through contamination.¹²⁸ The Ideology of Genus breaks down in the very moment that it is justified and constituted by biology. The question of same-sex couples and adoption is the point where the two parallels actually meet. The first line of argument is the importance of mixing genera for the sake of reproduction. The second line of argument is the importance of separating genera from each other in order to prevent contamination. According to the Ideology of Genus, it is not possible to biologically justify the eligibility of same-sex couples to be adoptive parents. This is because biologically there is a risk of the contamination of the child that is not biologically "same-sex" through a close relationship with same-sex parents. At the same time, the child itself is a result of a genus-mixing between a man and a woman. This cross-genus mixing produces through a logical leap the pure genus, the human child. The pure human child must be protected from becoming contaminated with the impurity of the humanly impossible, same-sex parents.¹²⁹

125. The direct translation of a legal paragraph in Swedish is "law-room." See Grahn-Farley, *The Law Room*, *supra* note 20, at 34.

126. For a discussion on the fear of embodiment of diseases connected to genus, see generally Anthony Paul Farley, *Thirteen Stories*, 15 *TOURO L. REV.* 543 (1999).

127. HEIDEGGER, *BEING & TIME*, *supra* note 1, at 51–53 (H. 29).

128. *Id.*

129. Christel Anderberg (*Moderaterna* [Conservative Party]), *Partnership and Adoption Debate*, *supra* note 47, at Anf. 51. Anderberg argued that research had shown that children that had blood relationships to one of the parents and were adopted by the other parent in a same-sex relationship suffered from "certain" problems. There is no available research on same-sex couples and international adoption, but Anderberg guessed that, considering

A law-room that prohibits same-sex couples from adopting is a law-room that in an Ideology of Genus is internally contradictory to its own ideology.

XV. END STATION

Homophobia is the logical end station of racism and sexism within the Ideology of Genus. Homophobia is the wall at the end of the road. Homophobia is what forces one to turn around and either confront what one sees or continue to run.

The debate over the question of registered same-sex couples' right to adopt was the wall that forced the Swedish people to make a choice, to confront their Ideology of Genus, or keep running. Different members of the Swedish Parliament made different choices, as was demonstrated in the debate in the Parliament.¹³⁰

The Ideology of Genus in the homophobic state is cornered by his or her own use of biology. For a person who believes in the Ideology of Genus, race and sex can at least be optically detected.¹³¹ The person living in a same-sex relationship, however, is invisible to the eye. It is only by seeing the internal, the essential of genus, that the correct genus can be assigned to the person living within a same-sex relationship. Law here cannot contain before a meeting is possible. Law, in this instance, is limited to containing *behavior* and not *physical features*. When it comes to the genus of the same-sex, it is only knowledge that can help to assign since there are no physical features to imagine-into-existence.¹³² Further, such knowledge can only be obtained by intimacy. And such intimacy also increases the risk of contamination; the homophobe is here cornered by the homophobe's own homophobia. Humanity is at risk: either by contamination or by misclassification. Failure in assigning the cor-

the complete lack of blood relationship to either parent, the children's identity problems would be even more severe. *Id.*

130. See Partnership and Adoption Debate, *supra* note 47.

131. For a general reading on the relationship between the optical and the assigning of racial genus, see Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000).

132. GUILLAUMIN, *supra* note 86, at 138-40.

rect genus is also a sign that the Self is not being Human, because the Human knows the genus of every Other.¹³³ The risk of misclassification and contamination set aside, a third threat, internal to the Ideology of Genus, occurs when reading same-sex couples as meaning the *same* within the meaning of the Ideology of Genus.¹³⁴ Such reading de-sexualizes the hierarchy of genus itself. If desire between the two as the same is possible,¹³⁵ meaning two people as relating “to” each other without feeling the need of dominating or being dominated,¹³⁶ hierarchy itself loses its primary purpose, which is to control the outcome of desire.¹³⁷ This desire can lead to an uncontrolled mixing between genera. Further, same-sex couples’ interpersonal love and desire towards each other (as the same) not only threatens the purpose of hierarchy but also the purpose of sexuality: a sexuality that can no longer be challenged through hierarchy can no longer be controlled. The existence of same-sex couples with the ability to legally adopt not only questions the status of sexualized hierarchy as necessary between subjects, it also questions sexuality as such. It challenges sexuality to actually be a meeting of minds. Desire cannot hide behind the biological purpose of reproduction; it has to take responsibility for what it is, a meeting of minds.

XVI. HUMAN

The Human has to be the presumed. Humanity has to be the unproved. Humanity is that which is to be believed without proof. The human has to be the non-defined; the human has to be the unspecified. Every project that is about defining the

133. HEIDEGGER, BEING & TIME, *supra* note 1, at 34–35 (H. 14).

134. For the position that the same-sex couple has liberated itself from the dependency on “equal” or “similar” in its interaction between twos, see HEIDEGGER, IDENTITY AND DIFFERENCE, *supra* note 38, at 25–27. Heidegger argues that the same only needs one, the self with itself. *Id.*

135. *See id.*

136. Irigaray calls it a “horizontal transcendence.” IRIGARAY, TO BE TWO, *supra* note 63, at 18. Desire comes from this irreducible alterity. *Id.*

137. This is similar to what Freud discusses as “the zero of sexual tensions” according to Irigaray. IRIGARAY, TO BE TWO, *supra* note 63, at 41.

human is an inhuman project, and every inhuman project is fundamentally unethical.¹³⁸

Every definition of the Human is also a definition of the non-human.¹³⁹ The question in the debate over same-sex couples' eligibility to adopt children was whether same-sex couples could be parents. The meaning of that question is that same-sex couples are not constituted by two Humans. Non-humanity was presumed and humanity was what had to be proven. That is what it means when the question is whether same-sex couples can be allowed to be intimate with the Human, intimate in the sense of being caretakers of a Human child. The law-room itself was the proof of the presumed non-humanity. The need for a law-room that contains is the proof that non-humanity was what was presumed.

In this debate, Human was defined as the ability to biologically conceive a Human child as a couple, or at least to be able to appear as the conceivers of a Human child. At the same time that the Human was defined through biology in the Swedish Parliament, the non-Human was also defined.

The definition of the Human is a project that is without ethics. This is also why the debate in the Swedish Parliament in the Spring of 2002 was an unethical debate. It was unethical because it was about qualifying for humanity. In this debate both sides argued about the Human, and one side argued that same-sex couples did not qualify for the definition of Human, in the sense that they could not qualify as the genus "parents." They were held to not qualify as members of the genus that could be mixed with the offspring of Humans. To not qualify for the definition of Human is to be non-Human, and to enter any such debate is to participate in an inhuman project.

This is also why a debate like the one that took place in the Swedish Parliament sends chills down the spine, because it is a debate in the Spirit of the Ghost of the Second World War. So many thought the Ghost was gone only because it had not been

138. See Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV. (forthcoming 2003).

139. "Thus *Dasein* has turned out to be, more than any other entity, the one which must first be interrogated ontologically." HEIDEGGER, BEING & TIME, *supra* note 1, at 34 (H. 14).

seen for some time, not because it had no believers. Its reappearance proved such believers still exist.

XVII. CURE

The only cure for the fear of contamination is to not believe in Ghosts. It is to prefer the belief in the Human to the fear of the Ghost. The only way the homophobe can find a cure for the fear of contamination is to abandon the project of classification and the Ideology of Genus. It is about conquering the fear instead of conquering each other. It is about, as Irigaray says, a “philosophy of caress”¹⁴⁰ and about “loving to you” instead of loving you.¹⁴¹ It is about creating the space for a meeting between minds in the “to” where both are the Other to each other.

XVIII. CONCLUSION

The debate in the Parliament on the topic of same-sex couples and adoption was based on an Ideology of Genus. The Ideology of Genus was the unspoken undercurrent of the whole adoption debate. This is also why the question of adoption became so sensitive; it targeted the question of reproduction within the Ideology of Genus. The Swedish debate was haunted by the spiritualization of categorization. The Ghost of Heidegger resurfaced with the question of who, among people, belonged to the category of the Human. The people in question were same-sex couples.¹⁴² Control over reproduction is one of the cornerstones of male hegemony.¹⁴³ The Ideology of Genus begins and ends with a categorization of people according to a hierarchy.¹⁴⁴

140. IRIGARAY, TO BE TWO, *supra* note 63, at 24.

141. *Id.* at 19.

142. Tasso Stafilidis (*Vänsterpartiet* [Leftist Party]) pointed out that the question was about allowing children of same-sex parents the same protection as children with different-sex parents. Tasso Stafilidis (*Vänsterpartiet* [Leftist Party]), Partnership and Adoption Debate, *supra* note 47, at Anf. 68.

143. Pamela D. Bridgewater connects the control of reproduction not only to male privilege but also to Whiteness. Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom*, 3 J. GENDER RACE & JUST. 401 (2000); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC L.J. 11 (2001).

144. See HEIDEGGER, BEING & TIME, *supra* note 1, at 164 (H. 126) (commenting on the danger of falling under the rule of the Other).

This hierarchy is believed to be natural and needed for the Human to be a possibility.¹⁴⁵

The question of same-sex couples' eligibility to adopt children became the wall against which the Ideologist of Genus was confronted with his own internal contradictions.

There was an implosion. It was deemed necessary, on the one hand, to treat same-sex couples as a genus separate from the genus of different-sex couples. And, on the other hand, it was also deemed necessary to treat same-sex couples as the result of a combination of two of the same genera (a combination of same-sex), in contrast to different-sex couples, which were treated as the result of a combination of two different genera (a combination of different sex). These incompatible necessities imploded when placed within the context of reproduction. What could not be resolved within the Ideology of Genus was whether reproduction happens through a combination of genera or within each individual genus.

The question of adoption as a form of reproduction therefore became crucial in deciding which route within the Ideology of Genus to follow. The genus *child* becomes itself a complicated genus connected to the question of reproduction of genus. The reproduction of genus became in this debate a question of containment and separation of different genera, namely same-sex couples from different-sex couples, and their offspring, children.

The underlying current of the whole debate was that different-sex couples' offspring, namely children, had to be shielded from the environment of same-sex couples so that they would not be contaminated by and seduced into becoming same-sex as well.

One key question was whether an entity constructed out of two could be an entity without an internal hierarchy of genus, such as man-over-woman. This leads to the question of the *sexualization* of hierarchy itself.

The whole debate over same-sex couples' ability to legally adopt children became a threat to the notion that hierarchy is necessary between two different genera to prevent contamination of the primary genus, the man, as the symbol of humanity.

In the end, it became a questioning of and a threat to the status of male hegemony as a necessary part of the natural or-

145. *Id.*

der. In that sense, the Ideology of Genus has taken it upon itself to uphold male hegemony in the defense of the Human.

The author has not argued that male hegemony is a specific Germanic phenomenon. The author has argued that the way that male hegemony was defended in the Swedish Parliament followed an Ideology of Genus with roots in a Germanic cultural heritage of and belief in *Wesen*.

The author has argued that when the internal logic of the Ideology of Genus is followed, homophobia is the end station of racism and sexism. The motivating force towards the end station of homophobia is supplied by the question of reproduction within the Ideology of Genus. The connection between racism, sexism and homophobia has been shown to follow three parallel tracks, all of which, in the end, are reflections of the same underlying ideology, the Ideology of Genus. The three tracks have been, the story of the spirits of the National Socialist Party, embodied in Martin Heidegger, the presence of the Ghost of Heidegger in the same-sex couples' adoption debate and, finally, that the fable of the spirits, the *Wesen* of the Germanic culture that haunt Heidegger, is central to his work. The spiritualization of the categorization of humans into different genera, and the use of the legal system to prevent those entities from mixing, is the Ideology of Genus.