Introduction

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Priorities

In 2004, Hastings College of Law, part of California's public university system, rejected the application of the Christian Legal Society to become a "recognized student organization." That status would have entitled the Christian Legal Society to receive law school funding, use the law school's logo, and take advantage of its publicity venues to promote its events. Hastings's policy requires recognized student organizations to be open to any enrolled student, but the Christian Legal Society explicitly excludes from membership people who engage in "unrepentant homosexual activities." The Christian Legal Society requested an exemption from the school's policy but was turned down, giving rise to a lawsuit that traveled all the way up to the U.S. Supreme Court.

Hastings was joined in the defense of its policy by the National Center for Lesbian Rights (NCLR), a major lesbian, gay, bisexual, and transgender (LGBT) law reform organization with offices in the Bay Area, and Jenner and Block, a large national law firm with an office in Washington, DC, that maintains a specialty in Supreme Court litigation. The powerful alliance proved successful. In 2010, in *Christian Legal Society v. Martinez*, Justice Ruth Bader Ginsburg found on behalf of five justices that Hastings's nondiscrimination requirement was "viewpoint-neutral" under the First Amendment and that the Christian Legal Society was not entitled to an exemption under the Constitution.[1]

Meanwhile, also in 2010, at the very same time that Hastings awaited the Supreme Court's ruling, another controversy was brewing just outside its campus gates. San Francisco was debating a proposed ordinance known as "sitlie." The substance of the ordinance, which was ultimately passed by referendum, is a prohibition against sitting or lying down on a city sidewalk between 7 AM and 11 PM on penalty of arrest and possible fines, community service, or jail time, depending on whether it is a first or subsequent offense.[2] The law was proposed by Mayor Gavin Newsom, who gained national attention in 2004 for

defiantly ordering the issuance of marriage licenses to same-sex couples prior to the cascade of state and federal lawsuits sorting out the legality of same-sex marriage in California. Newsom's ordinance was intended to deter loitering and panhandling by the city's homeless population.

An estimated four thousand youth are among the homeless in San Francisco, and surveys suggest that up to 40 percent of them identify as lesbian, gay, bisexual, or transgender.[3] They are disproportionately black and Latino/a.[4] In spite of the well-known overrepresentation of LGBT youth among the homeless—in San Francisco and in many of our nation's major cities—I was unable to find any trace of an organized LGBT presence in the fight to stop sit-lie. The homelessness organizations campaigned against the ordinance alone and to no avail.

Thousands of gay and trans young people face arrest under sit-lie, but no throng of gay law students ever sought admittance to the Christian Legal Society. So why did all of those LGBT law reform resources go into the battle over the latter rather than the former? Why did these major players in the movement for LGBT advancement dedicate themselves to defending a student organization policy that affects nearly (or perhaps precisely) no one and is effectively a matter of principle rather than to a fight happening simultaneously, on the same city block, that affects so many of the most vulnerable in the LGBT community?

Gay Priori begins with the premise that this juxtaposition—of the full-throttle Christian Legal Society litigation against the absence of an organized LGBT presence in the fight over sit-lie—reflects distorted priorities on the part of the leading LGBT advocacy organizations. Access to marriage, as any observer knows, was at the forefront of the battle for LGBT advancement for more than a decade, along with antidiscrimination protection, hate crimes legislation, and the repeal of Don't Ask, Don't Tell. Even now that same-sex marriage is a constitutional right in the United States, whether religious exemptions will come to swallow up that right has become the most embattled terrain. These priorities have garnered the most resources and attention, and they have brought significant benefits to the LGBT community.

They also neglect pressing needs in the most marginalized sectors of that community. LGBT people are overrepresented among foster children, the homeless, the poor, and the food-insecure. They are disproportionately vulnerable to police abuse, incarceration, HIV, insufficient access to health care, and unwanted pregnancy (yes, pregnancy). While antidiscrimination reform and marriage may make some small incursion into these conditions, they are hardly the way to effectuate real redistribution for the benefit of the most vulnerable members of the LGBT community. Why, when the mainstream LGBT move-

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ment is experiencing a pinnacle of its success and influence, do its law reform priorities continue to neglect those most in need?

One possible explanation for the priorities of the mainstream LGBT advocacy organizations is that the donors, executive directors, general counsels, and board members of those organizations are drawn predominantly from an adequately housed and well-nourished class. Their experience of being gay may well involve discrimination, but for most of them it probably does not involve homelessness. The resulting class bias is certainly plausible as a partial explanation, but this relative privilege of gay elites does not explain the movement's priorities adequately. On the contrary, several of the major LGBT organizations have devoted resources to studying LGBT youth. They are acutely aware that the streets of our cities are populated by LGBT kids selling sex, shoplifting, and panhandling to survive. They know very well that LGBT kids run away and are kicked out by their parents at a higher rate than the general population of youth.

Professionals in the LGBT human services sector have responded to the phenomenon, contending with the usual obstacle of insufficient resources to serve everyone as well as they would surely like, and some LGBT legal advocates have represented these kids in juvenile or child welfare proceedings. LGBT law reformers, however, who have spent years splashing the front page with news of their latest triumph, have been of little help to homeless LGBT kids. Proposals to devote more resources to serving vulnerable LGBT youth abound, but law reform targeting the basic conditions of their daily lives is scant. Why, despite keen awareness in the organized, professional LGBT world, does the LGBT law reform agenda appear not to be designed with these kids' lives in mind? Why does sit-lie not appear on the LGBT law reform radar while so many resources go into fighting a matter of principle?

LGBT Equal Rights Discourse

Gay Priori proposes that a crucial factor in explaining the priorities of the mainstream LGBT law reform movement is the power of LGBT equal rights discourse. As I use the term, *LGBT equal rights discourse* refers to a host of narrative practices evident in contemporary U.S. LGBT equal rights advocacy, including legal advocacy, lay advocacy, and public relations, as well as academic and empirical work that supports advocacy efforts. The discourse comprises a cluster of constituent strands that depict, characterize, and represent LGBT people—recognizable tropes that tell us about our virtues, our vulnerabilities, and our relationships. It also encompasses strands that appease the requirements of American constitutional and antidiscrimination law, the American

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civil rights progress narrative, and the neoliberal emphasis on personal responsibility. The term refers neither to equality nor to rights in general, both of which cover a vast conceptual territory, much of which is totally unaddressed by the argument in this book. Instead, *LGBT equal rights discourse* is meant to summon to mind a collection of practices that fuse into a current and recognizable pattern—one in which LGBT law reform is deeply immersed.

The well-intentioned leaders of the LGBT law reform movement are participants in a culture war, the terms of which are familiar to all. The struggle is feverish, and its exigencies play a powerful role in driving the political agenda and sidelining nonconforming alternatives. Gay rights advocates have hotly pursued the dream of formal equality, prioritizing antidiscrimination reforms and imagining the zenith of gay emancipation to be access to marriage. The discourse of LGBT equal rights that advances these objectives, however, produces myopia, so that access to marriage, antidiscrimination protection, hate crime legislation, and international human rights reforms that mimic American conceptions of equal protection come easily into view, while a broader array of law reform possibilities is eclipsed. Understandably, the discriminatory logic of cultural conservatism provokes habitual insistence on formal equality by LGBT advocates, but that constant call and response unnecessarily entrenches conceptual boundaries around what it means to make progress on behalf of LGBT people. As we fight, we stifle our own imaginations. Consequently, the largely symbolic *Christian Legal Society* case is readily intelligible as an LGBT legal issue while sit-lie and scores of other legal issues that have far more impact on the daily lives of our most marginalized community members go unnoticed—even by those who care deeply and want to help.

In 2012, Chad Griffin, the new president of the Human Rights Campaign (HRC), visited a shelter for homeless youth in Utah. HRC is the national gay lobby and the largest LGBT civil rights organization in the country, claiming more than 1.5 million members and supporters. In conjunction with his trip, Griffin issued this statement: "We can and must continue to push for federal advances like workplace protections and marriage equality, but we must simultaneously work to better the lives of LGBT youth. That means many things—it means making schools safer; it means calling out and eradicating homophobia and transphobia in popular culture; it means settling for nothing less than full equality."[5] Griffin gave a few subsequent media interviews, including one to the *Washington Blade* (an LGBT newspaper), in which he named homelessness among LGBT youth as an issue that garners too little attention. He cited the need for more public funds to provide direct services to LGBT youth and lamented the rejection (by parents, teachers, and churches) that results in their

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disproportionate homelessness, noting that LGBT kids represent as much as 40 percent of the homeless youth in Salt Lake City.[6]

This was Griffin's first trip as HRC president, and he made it to a youth shelter. He cannot be faulted for failing to care about homelessness among LGBT youth. But once he got there, he did not know what to do other than call for equality and condemn homo- and transphobia. It did not seem to occur to Griffin, on the occasion of visiting a homeless shelter, to urge that the LGBT organizations join the fight against homelessness. The mind-set that hid that reformist course from him is precisely the same mind-set that endows Newsom with a reputation for allegiance to the gay community. Newsom's brash and premature order that marriage licenses be issued to same-sex couples in San Francisco notwithstanding, he is also the man responsible for subjecting homeless youth, not unlike those Griffin visited in Utah, to arrest for sitting down.

That mind-set is a consequence of LGBT equal rights discourse, and it has played an important role in occluding reform alternatives that are oriented toward redistribution rather than formal equality, though to be sure these two goals often overlap. A purpose of the book is nonetheless to illustrate how the discourse has steered LGBT law reform objectives toward formal equality, neglecting and even impeding law reform that would foreground redistributive goals. *Gay Priori* proposes an alternative that would reverse these priorities.

The vocabulary in this book draws a sharp distinction between formal equality, equal rights, and antidiscrimination, on the one hand, and redistribution, on the other. This is not a total giving up on equality (or an embrace of discrimination); nor is it an insistence that a redistribution of resources cannot be properly conceived as an equality project. It is fully compatible with the message of the book to read it as a reimagining of the equality objective. The discourse of LGBT equal rights has been so powerful, though, that using a different vocabulary represents an effort to disengage it and to make a shift to a different set of priorities and objectives.

To focus on the discursive aspect of LGBT equal rights means that if we make a deliberate effort at critical examination, we can discern tropes and patterns in the arguments, factual assertions, and narrative tales that compose the overall endeavor. From the critical position I propose, we are not assessing arguments for their force, claims for their truth, or facts for their accuracy; rather, we are looking for evidence of these tropes and patterns and then assessing them for their productive power. LGBT equal rights discourse, including professional legal argument as well as less technical versions offered by and for non-lawyers, plays a powerful role in producing LGBT identities, as well as what looks to be innate desire for specific law reforms.

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What is tricky about a discourse is that we both deploy it and subject ourselves to it. We are its instruments as well as its subjects,[7] so that even as we participate in it, it exerts power to orient our perceptions. A discourse can make some ideas seem natural and others inconceivable, depending on whether the ideas make sense according to the terms of the discourse—whether they sound in its key. A discourse should be understood not as the sole determinative factor controlling one's every thought but, rather, as a network of deep cultural understandings, shared and also perpetually under construction, that establishes conceptual boundaries.

This book, like many others that have gone before, assumes a critical posture toward LGBT identities. It does not, however, propose jettisoning these identities altogether as a path to liberation; nor does it propose abandoning the whole project of a movement to advance the interests of LGBT people in favor of a strict antipoverty movement. Whether those things would be desirable is beside the point because they are implausible. While we who take seriously the insights of critical theory regard LGBT and other identity categories as historically contingent, an aspect of the knowledge that we produce rather than a part of nature, we ought also to appreciate that liberating ourselves entirely from the discourses that are constantly producing our social and conceptual world is not realistic. For this reason, complete repudiation of LGBT identity or LGBT equal rights would be an artificial gesture. That does not mean we cannot push in the direction of resignification, but we cannot escape entirely the knowledge we inhabit.[8]

It is important to acknowledge that LGBT equal rights have brought many benefits to the LGBT community. Those benefits have been widely heralded in books, speeches, news articles, and judicial decisions. LGBT equal rights as a discursive practice, however, comes with costs that have been less thoroughly discussed. *Gay Priori* is an effort to shine a light on some of those costs and to offer an alternative way to think about law that could widen the expanse of reformist possibilities that are imaginable to us. The argument in *Gay Priori* extends its consideration beyond the winning of cases and the acquisition of formal rights, to the production of LGBT people and the distribution of resources. This is not to claim that a redistributive alternative is divorced from the discursive conditions in which it is generated. Its virtues instead lie in being the product of critical methods that shine a new light on LGBT reformist agenda setting and in being based on an explicit normative preference for redistributing access to safety, health, housing, nutrition, jobs, and income. *Gay Priori* employs a suite of critical methods drawn from queer and critical legal theory

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to illustrate some of the costs of LGBT equal rights discourse and to make the case that there are other ways to advance the interests of LGBT people.

Among the costs of LGBT equal rights discourse is the obscuring of the discourse's tendency to entrench identities, as well as distributions of power and resources, within the LGBT community, favoring the community's most privileged members on axes of race, class, age, and region. Those distributions, we will find, circle back and contribute again to our ideas about LGBT people and what we want from law, forming a highly productive discursive cycle that disadvantages marginalized constituencies and nonconforming policy proposals. Nothing here is a charge of nefarious intent to harm or exclude; it is, rather, a description of a circuit that, through conscious deliberation, can be critiqued and interrupted.

As many before me have complained, the advances made by the mainstream movement for LGBT people have disproportionately benefited the most privileged members of the LGBT community. We should not be leaving poverty issues such as homelessness to the poverty organizations and legal aid lawyers. The priorities of the LGBT movement, however, have been set within the terms of a powerful discourse, the bounds of which make it difficult to imagine another set of primary objectives that would benefit a different subset of LGBT people. To shift the focus to those most in need, LGBT advocates would have to apply a specific kind of intersectionality that not only takes into account race, class, age, region, and other factors, but also attunes itself to highly localized legal and economic conditions facing LGBT subconstituencies.

Gay Priori is about our law reform priorities. It is an argument about a discourse that plays an under-recognized role in shaping our priorities and in shaping us. LGBT people and our longing for equality do not preexist the discourse of LGBT equal rights. This is not a historical claim. It is a claim, rather, about the operation of a dynamic. LGBT people and our desire to be treated equally with straight people do not exist prior to LGBT equal rights discourse in a linear, temporal progression.[9] By our participation in the discourse, we are constantly producing ourselves and the breadth of changes we are capable of imagining. LGBT equal rights discourse has a hand in forming our ideas about ourselves and influencing what we want from the law.

In this respect, the analysis offered in *Gay Priori* is queer. Queer theory developed methods drawn from antecedent traditions in critical social thought, honing those methods with particular attention to gender and sexuality. Over the past three decades, queer theory has become quite rich and varied and means different things to different people. I have approached queer theory as lawyers

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notoriously do history, economics, psychology, and other fields: to pillage. The question animating my visit to queer theory has been: *What here could be of utility to those interested in social, economic, and racial justice on behalf of people marginalized by virtue of their gender or sexuality*? The argument therefore takes up only a fraction of what queer theory has to offer. The primary current of queer theory that runs through *Gay Priori* concerns the power of discourse to produce identity and desire.

Throughout *Gay Priori*, I consider LGBT equal rights arguments and claims not on their own terms and merits but from one step removed. How do those arguments and claims, and the empirical facts and narrative depictions marshaled in their support, reflect and mold what it means to be LGBT, giving LGBT identity a race, a class, a lifestyle, and a demeanor? How does that meaning engender in us desire for specific law reforms? And how do those law reforms, and the distributions that they effectuate, feed back into LGBT identity? In other words, how does our participation in LGBT equal rights discourse shape us and our law reform agenda? Critical methods can give us insight into these questions and prepare us to modify how we conceive of LGBT law reform so that alternatives in pursuit of redistributive objectives become more visible. Dwelling uncritically in LGBT equal rights discourse is not our only option. Rigorous law reform alternatives become visible once we tear our gaze away from its captivating and deceptively simple promise.

Left Politics

The dominant narrative of the past several years has been one of LGBT triumphalism. Commentators endlessly tout the victorious march of LGBT equal rights, pointing especially to achievements such as same-sex marriage and military inclusion. Many on the left, however, have felt riven over the priorities of LGBT law reform, vaguely distressed by its "mainstreaming" or "cooptation." Dissident voices have long been audible from the margins of sexuality and gender to those who have been willing to listen. Self-identified radicals and queers have criticized the mainstream LGBT advocacy organizations for neglecting the most marginalized constituencies, including the poor, people of color, trans people, sex workers, undocumented immigrants, prison inmates, HIV-positive people, the polyamorous, and practitioners of BDSM. Many of the existing critiques bemoan the corporatism of the major organizations, collusion with the bourgeois family ideal, and incompatibility of state regulation with genuine freedom. What happened, some leftist critics have queried, to the more radical

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politics of days gone by? The sexual liberation? The lesbian feminism? The race and class consciousness? The refusal to yield to all of capitalism's demands, including commercialism, militarism, and environmental degradation? How did our politics come to be all about the marital exemption from the estate tax and booking the highest-ranking White House official for the HRC gala?

While *Gay Priori* is not a polemic against anything that tends toward the mainstream, I nonetheless hope it will clarify and vindicate at least some of this hazy unease and disappointment on the left. For LGBT and LGBT-friendly readers who have felt internally split over whether to support same-sex marriage or the Don't Ask, Don't Tell repeal, not wanting to side with the homophobic right but unable to shake the nagging disquiet that there is something retrograde about the mainstream LGBT agenda, *Gay Priori* will speak into that dissonance with an explanation. I want us to see how we argued ourselves into this corner.

Left and queer critiques of the mainstream gay agenda abound, many of which have been profoundly influential in my thinking. *Gay Priori* nonetheless distinguishes itself from those that have gone before in at least two respects. First, it brings together assets from queer and left legal theory, extracting insights from each in what I hope will read as an unusually clear, concrete, and integrated explanation of the costs of LGBT equal rights discourse from a queer/left perspective. Second, *Gay Priori* expresses no antipathy toward the state or toward law. It engages law, making a granular-level inquiry into the possibilities for regulatory change. Law has real effects—not all of which are equally visible—on the daily life of every individual. We can use critical legal analysis to identify some of the levers that allocate resources and locate opportunities for change.

These opportunities, it will become clear, emerge on a small scale rather than in the form of wholesale emancipation. While the absence of a revolutionary vision may be dispiriting to some, the purpose is optimistic; it is to leave readers emboldened that alternatives to the current LGBT agenda are possible so that we can demand it of our leaders when they come to us seeking contributions and other forms of solidarity.

The goal of the book is to make conceivable a cognitive shift. For academic readers, whether oriented to the social sciences, the humanities, or law, I hope to instill some optimism that the field of law contains possibilities for critique and that strands of queer and critical legal theory can be put to practical reformist use. For legal advocates and activists willing to consider alternative strategies, I hope that *Gay Priori* helps to unlock the reformist imagination, showing how an adjustment in perspective opens up new possibilities for real change.

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I hope, finally, to convey deep respect for decision and action, along with acceptance that none of us can know for sure what will be all of the consequences of our choices. The best we can do is to cast an ever broader net of thoughtfulness and responsibility.

What Follows

Part I describes and analyzes LGBT equal rights discourse. It is divided into three chapters, each of which isolates distinct strands of the discourse and draws attention to the underappreciated costs they impose.

Chapter 1 discusses some of the unique requirements of American judicial reasoning and the discursive elements that these requirements elicit from LGBT advocates. The chapter introduces the ideal of judicial neutrality and explores the charge of *judicial activism*, or politically motivated deviation from constitutional fidelity and deductive reasoning—a charge that has been a culture war mainstay. Deductive reasoning in the judicial context cannot, as leftist legal critics have argued for decades, live up to its pretense to political neutrality, and yet the maintenance of the pretense remains a preoccupation of American law. The result is a distinct set of discursive requirements designed to affirm judicial neutrality. In the context of courtroom battles, LGBT advocates have had no choice but to embroil themselves in this entwined discourse. Operating within the American constitutional structure, advocates must argue in terms that legitimate the system. The need for judicial legitimation is heightened by a stubborn indeterminacy of meaning that plagues concepts such as "equality." Chapter 1 argues that the problem of indeterminacy, the anxiety over judicial legitimacy that it inflames, and the resulting discourse of apolitical deductive reasoning, impose an under-recognized cost. As advocates strive to legitimate the logic of the legal regime in which they work, they simultaneously create the impression that inequalities that are left unaddressed are fair, or the result of natural, rather than legally constructed, hierarchies, rendering some inequities especially intransigent.

Chapter 2 is about the tremendous power of LGBT equal rights discourse to generate identities. The discourse produces its own archetypes—LGBT equal rights-bearing subjects. *Knowledge* about gay and trans people is a constant by-product of LGBT advocacy. The chapter illustrates the process by which we become healthy and ill, ordinary and flamboyant, patriotic and traitorous, and domestic and perverse, as we march toward equality.

As Michel Foucault used the term and as it is now commonly used in queer theory,[10] *knowledge* is different from, say, *information*. Information is readily

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available for our reference or examination. In the case of knowledge, however, one must assume a deliberately critical posture to do more than merely *inhabit* it, rendering it an artifact available for study.[11] For example, much of the time we might uncritically inhabit the knowledge that the human population is divided into male and female when we carelessly ask, "Is it a boy or a girl?" With a little deliberate effort, however, we know that the duality of gender can be critiqued. We can contemplate (perhaps live in) transitivities, liminal gender identities, and intersexed bodies. The dichotomized gender system is a discourse; it organizes our perceptions, producing the knowledge that there are two. We may never rid ourselves entirely of the discourse of gender duality, but we can position ourselves to critically assess it and the knowledge that it produces.

Among the most prolific contemporary producers of knowledge about LGBT people is the Williams Institute, a gay rights think tank housed at the University of California, Los Angeles, and the major legal academic center for the support of LGBT advocacy. The Williams Institute fulfills its role by churning out a stream of facts about gay and trans people, same-sex couples, the effects of same-sex marriage on children, the benefits of same-sex marriage for state economies, and so on. An email missive from the Williams Institute to its supporters in 2013 read, "Children Reared by Female Couples Score Higher on Good Citizenship than Children Reared by Heterosexual Parents."[12] This conclusion was based on a study of Dutch children age eleven to thirteen raised in lesbian households, who apparently, on average, manage conflict and difference more productively than others in their peer group. So many studies now suggest spectacular outcomes for children raised in lesbian households that lesbian parents could be forgiven for expecting their kids to sprout capes and start fighting crime.

The Williams Institute and supportive social scientists have generated sufficient data on the equivalency or superiority of outcomes for children raised by same-sex parents that it has become irrational for a court to decide against gay parenting or same-sex marriage based on child welfare concerns. This has been an obvious rejoinder to cultural conservatives' assertions that children do not fare as well when raised by gay parents—an assertion that became increasingly difficult to maintain as such studies accumulated.

All of this fact generation contributes to the creation of archetypes, such as the civic-minded lesbian soccer mom, that are becoming increasingly recognizable to the popular eye. And empiricism is not the only vehicle for producing these archetypes. Gay rights advocates carefully select plaintiffs for high-profile courtroom battles, while outside the courtroom they make deft use of public relations (PR) campaigns and closely monitor depictions of gay characters on

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television and throughout popular culture, all in pursuit of strategically crafted ideal figures.

As advocates display LGBT virtues in the production of ideal archetypes, what must we do with our embarrassing relatives? If we are domestic, what of our sex workers? If we are bourgeois, what of our homeless? If we are the girl next door, what of our six-foot girls with extra-long lashes?

The archetypes, moreover, can be dizzyingly contradictory. In the battle against bullying, for example, advocates turn to data that illustrate the terrible consequences of stigma and rejection endured by LGBT youth. Rather than the cheerful, impossibly wholesome, civically engaged parent, LGBT advocates display her younger self by perhaps twenty years: the depressed, substance-abusing adolescent contemplating suicide. The contradiction represented by these two discursive types is unruly. What if our injured, suicidal selves show up while we are trying to establish our stolid well-being? What if our healthy capacity for social engagement materializes while we attempt to demonstrate how injured we are by stigma? Like the mad scientist who releases his greatest creation into the world, LGBT advocates cannot prevent the havoc that might be wrought when hostile forces deploy our archetypes against us. Drawing on the work of Foucault and Eve Kosofsky Sedgwick, chapter 2 illustrates the perils of uncritically generating volatile LGBT identities and their potential to generate unintended meanings, as well as an arsenal of weapons for those who seek to halt LGBT advancement.

Chapter 3 argues that LGBT equal rights discourse produces an unnecessarily constricted range of law reform objectives—notably, access to marriage, antidiscrimination protection, heightened constitutional scrutiny, hate crimes legislation, and international human rights protections that mimic American conceptions of equal protection. The discourse curbs the imagination we need to generate alternatives to the mainstream equal rights agenda. It does this in part by proliferating a teleological narrative about equality that contemplates a singular reformist path that concludes with access to marriage.

The chapter also addresses the related element of LGBT equal rights discourse that stresses love and interdependence. These tropes align far too easily with the neoliberal discourse of personal and family responsibility. The emphasis that the mainstream LGBT movement placed on same-sex marriage could not help but collaborate with the valorization of so-called family values to the disadvantage of those living on the wrong side of that norm. The prioritization of same-sex marriage for the past two decades (and perhaps the next two, as culture warriors battle over religious exemptions) has collaborated with the neoliberal trend that favors privatization of family obligation, the concomitant

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diminution of the welfare state, and the rise of criminalization and other anti-welfarist policies that broaden the divide between the haves and the have-nots. In effect, the major organizations have doggedly pursued law reforms that do not always help, and sometimes harm, some of the most marginalized among us. Our own discourse, even as it furthers the reformist goals that have predominated, impedes the advancement and even survival of our most vulnerable community members.

As the mainstream LGBT agenda bears fruit, it creates a new world—one in which antigay discrimination is increasingly forbidden on the terms set forth by LGBT equal rights discourse. This kind of progress rewards versions of gay identity that benefit from the improved system, resulting in further shaping of identity and reformist goals in the image of the rewarded constituencies. The successes of LGBT law reform should not be expected to "trickle down" to the most marginalized LGBT constituencies—to the contrary: They should be expected to entrench themselves as producers of what it means to be LGBT and what LGBT people want.

While marching along the well-laid path to equality, a nagging question surfaces and resurfaces: Am I equal? Certain longings stir: Is my group included in that antidiscrimination law? That hate crimes bill? Are people like me protected against discrimination in that other country? What questions do not come to mind? What reform options are not on the table? That brings us to part II.

Part II switches out the narrow LGBT equal rights discursive lens for one that enables a broader scope. The central purpose of this part is to reconceptualize sexuality and gender as axes of distribution rather than as fixed identity categories that suffer discrimination and require an equal rights solution.

Chapter 4 begins this undertaking by situating the argument of *Gay Priori* in a longer conversation about progressive strategies on behalf of marginalized constituencies. It reviews antecedent and contemporary debates about how to understand the injury to a marginalized group and what kinds of reformist interventions would address the core problems it faces. In the vocabulary of law, the question is whether to accord primacy to symbolic and formal equality or to substantive and economic justice. This dichotomy has shown tremendous resilience across movements and time. The question before the LGBT movement now echoes one that has persisted throughout the history of black civil rights in America. A vast literature explores the intersections of race and economic disparity, but LGBT equal rights discourse has had such a hold on the reformist imagination that an analysis of sexual and gender identities as involving distributive facets, particularly at racial and economic intersections, has not been as thoroughly developed.

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The chapter digs into a debate between Nancy Fraser and Judith Butler over the nature of the legal injury to sexuality and gender constituencies—that is, is it one of recognition or one of distribution?—and the appropriate framing of remedial efforts. It concludes by offering a revised understanding of the place of sexual and gender identities in political economy. Law is a dynamic presence, constantly reproducing itself in slight variations that adjust both resource distribution and knowledge. As a consequence, political economy is pliable in myriad small ways. The first task for progressive law reformers ought to be to discern how law conditions distributions of resources and knowledge and what variations are possible.

Chapter 5 introduces a methodological turn to what lawyers call *background rules*. The idea of a background rule is drawn from the American legal realists, a group of late nineteenth century–early twentieth century legal thinkers with intellectual connections to the pragmatism of William James and Charles Peirce.[13] The Columbia University economist Robert Hale was a central figure. Hale explained conceptual shortcomings plaguing the ideal of contractual freedom, observing that individual choices are—to a greater or lesser extent—constrained by the alternatives available to a decision maker.[14] In a contract negotiation, both parties experience some constraint, although one may have more and better alternatives to the terms offered by the other—and that party can be regarded as having superior bargaining power. A constitutive element of each party's range of alternatives is law. Legal conditions operate *in the background*, not directly governing the contract but shaping the alternatives to the contract that are available to the bargaining parties. This insight can be extended to social negotiations more generally. Shifting analytic focus to background legal conditions can enable reformers to intervene in a given inequity by improving the range of choices available to a relevant constituency.

The "crits," a leftist group of legal scholars that came together in the 1980s under the rubric of critical legal studies (CLS), drew crucial lessons from the realists, paying attention to background rules in an effort to open up questions of law's role in the distribution of resources.[15] Distributive analysis is informed by the details of a given population's legal, economic, and other conditions as it negotiates with other bargain seekers.

Examples in chapter 5 illustrate how sexuality and gender, often intersecting with race, class, region, and age, create a complex scheme for allocating resources. Once reconceived in this way, a new dimension of potential legal reforms reveals itself to intervene in the distribution of health, safety, housing, nutrition, jobs, and income. The purpose is to generate fresh possibilities for

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law reform that, while illegible within the familiar terms of the culture war, might effect some positive redistribution at a tolerable cost level.

Nothing in the chapter has the majestic quality of an emancipatory destination—it makes scarce mention of equality, dignity, liberty, self-determination, or any other lofty goal. It is designed to tear the reader's gaze away from grand aspiration and principled vindication and redirect it downward, toward the gritty, low-profile rules, doctrines, and practices that condition daily life on the margins. The analysis uncovers potential targets for law reform, accepting that any change we make is likely to impose some cost even as it brings some relief. Child support regulations, contract doctrine, shelter rules, credit practices, mandatory arrest policies, labor laws, food stamp application forms, and a host of other low-profile legal conditions will take center stage, while titanic clashes between morality and equality, tradition and progress, red and blue will take a back seat. Chapter 5 does not offer a prescription for all social justice movements at all times. Indeed, a key point is that the work of setting a law reform agenda must be done on location, where one can observe closely the legal, economic, and ethnographic detail.

The conclusion brings the argument around to the role of lawyers in social movements. It confronts the complaint that law reformers often distort grassroots priorities, arguing that this is not a necessary feature of law or lawyers' participation. Lawyers should take their direction from a careful assessment of background legal conditions that affect the daily lives of their constituencies, particularly the most vulnerable. They have more tools at their disposal than has been widely recognized. A shift in perspective opens up a new world of reform possibilities.

I Have Met the Enemy and It Is "Us"

In 2012, during his bid for reelection, President Barack Obama publicly declared his support for same-sex marriage. This was a watershed moment for the same-sex marriage campaign. In previous election cycles it had been an untouchable position for a serious presidential contender. By 2012, however, it was to the president's advantage; it turned out to be a fundraising boon. According to one report, one in six of his large, individual donors was gay.[16] The week of the announcement, the president attended a Hollywood fundraiser at the home of George Clooney that brought in more than any single event in the history of U.S. presidential campaigns ($15 million), and some of that donor enthusiasm was thought to be due to the president's newfound willingness to embrace same-sex marriage openly.

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Commentary followed. Conservative opponents of the president charged him with pandering to a wealthy and powerful interest group. Admiring onlookers marveled at the astonishingly rapid progress of gay rights. Leftist cynics observed that gay rights advocates were enjoying an easier road than immigrant rights groups or environmentalists because their agenda posed no obvious threat to corporate power.

That commentary is reactive, but it is also productive. It produces an archetypal subject of gay rights who is wealthy, politically connected, in control of popular culture, typically white, and (notwithstanding the "T" in "LGBT") probably not transgender.

That archetypal gay rights subject, in turn, has consequences for who is "us" when we conceptualize law reform on "our" behalf. An amply fed, well-housed archetype is not likely to give rise to a reform agenda focused on hunger and homelessness. President Obama's endorsement and the comments that followed obscured not only the contest over whether marriage ought to be our chief concern but also the contestants.

Uncritical participation in a discourse that attempts to stabilize LGBT subjects comes with hazards, and those hazards are not imposed only by the homophobe and the transphobe. We impose those hazards on ourselves, often while making LGBT equal rights claims. The specific plea here is for cognizance of the power of LGBT equal rights discourse to produce "us" and "what we want."

Reconsidering Our Priorities

Gay Priori does not argue that equal rights strategies should never be used. It offers instead a call to awareness that the discourse in which LGBT equal rights has been pursued has impeded our thinking. While LGBT equal rights discourse has opened some doors to be sure, it has sealed off others from our sight, often to the detriment of people living far out on the margins. This book is a deliberate effort to gain some insight into our own limitations and—in some necessarily limited way—to try to exceed them.

I write for those who have been plagued by the sense that while some of us are getting the fair treatment we should never have been denied, others of us are being left behind. The unfolding of LGBT progress in this way is not happenstance, and we should not wait for the gains we have seen to flow to those least well positioned to benefit from them. We should take responsibility for the adverse as well as the beneficial impact of our actions. We should change how we think about law and we have the tools to do it.

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