I. Introduction

This Article is designed to illuminate options that I believe have been difficult for advocates of gay rights to imagine due to an incessant culture war and the hard work of anti-gay forces that have kept pro-gay advocates under persistent fire. The culture war, this paper argues, while a fundraising boon and a media draw, compels a particular type of participation and a particular reform agenda, eclipsing reform possibilities that might be preferable in the long run.

From its side of the culture war, the anti-gay camp often speaks in the language of protecting traditional family values. This elicits at least two species of rejoinders from gay rights advocates.

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First, gay rights advocates depict the gay family as morally indistinct from an idealized version of the heterosexual family, i.e., wholesome, monogamous, bourgeois and much more about love than sex. This is a drive toward a species of normalization. It is especially evident in the same-sex marriage campaign, but shows up on other frontiers, as well, and it has had under-recognized (though not entirely un-theorized) costs.

Second, gay rights advocates fight to impose on the battle their preferred frame of civil rights and equality. The history of civil rights and equality in the United States makes these terms powerful rhetorical tools, but their hazards—while subject to extensive academic discussion—too often seem to elude the architects of major reform movements.

This Article will recount the dangers of both normalization and rights discourses, but not without recognizing how powerful the pull toward them can be under conditions of a culture war. Still, my call will be to resist that pull. Fighting the oppressive forces of sexual moralism can be done in other—and very possibly more productive—ways that do not replicate the problems of normalization or rights discourse.

This Article will propose other ways, mindful of the insights of a handful of critical theoretic traditions, including American Legal Realism, Critical Legal Theory, and Queer Theory, which I believe have something real and valuable to offer the gay rights movement if what its participants want is to combat sexual moralism and to ameliorate the full range of hardships faced by persons associated with marginal gender or sexual identities or practices. Collectively, these traditions give us some tools for appreciating the drawbacks of the gay rights agenda as it is currently formulated, open a way of thinking about how legal and economic conditions—conditions that are potentially alterable through law reform—contribute to the formation of our gendered and sexual identities, add to our options for organizing our erotic and domestic lives, and could lead to a new way of conceiving a law reform agenda.

The agenda imagined in this Article is less consumed with achieving formal equality between gay and straight people, and more interested in using law to create the best possible conditions under which a broad array of people can make choices.

Part II discusses what I deem to be the difficulties with the current gay rights model, and in particular the way in which the reform agenda has been overly determined by the culture war. Next, Part III begins the process of re-imagining a law reform agenda along new lines, proposing concrete examples of how the insights of the critical theoretic traditions might be put to reformist purposes. My hope is to avoid acquiescing to the toxic demands of the culture war, to learn from these traditions, and to make a turn to an articulate and useful blend of what they offer.

II. Fighting a Culture War

The rhetoric of the contemporary American culture war is familiar—stale, really. It addresses issues ranging from gun control to abortion, from sex education to physician assisted suicide, from prayer in schools to stem cell research, spanning legal as well as popular venues. This part will recall the terms of just one of the culture war’s several frontiers: the battle over progress in the treatment of gay, lesbian, bisexual and transgender (GLBT) people and the status of same-sex erotic and domestic relations.

A. Anti-Gay Mainstays

In his State of the Union Address in 2005, President George W. Bush said:

Our second great responsibility to our children and grandchildren is to honor and to pass along the values that sustain a free society. So many of my generation, after a long journey, have come home to family and faith, and are determined to bring up responsible, moral children. Government is not the source of these values, but government should never undermine them.

Because marriage is a sacred institution and the foundation of society, it should not be re-defined by activist judges. For the

1. I am cognizant of the difficulties of the “GLBT” litany to describe a range of people among whom there are numerous differences, for example, the danger that transgender issues will be collapsed into or eclipsed by gay issues. Forgive my use of “GLBT” here, and the even more obscuring term “gay,” to cover a diverse array of people and concerns. My use of the term “gay” in particular refers more often to the archetypal subject of gay rights litigation than to an actual kind of human being. In fact, one purpose of the article will be to demonstrate how identity-based law reform is restricted in its capacity to ameliorate many of the adverse legal conditions faced by persons on the sexual and gender margins. I also make these vocabulary choices for reasons of economy, particularly in the first half of the article. In the second half, in which I make an effort to articulate a new approach to agenda setting, the differences among and contingencies within these identities will be given more careful attention.
good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.\footnote{2}

Whether or not you listened to this address, it probably sounds familiar. The terms "values," "moral," "faith," "sacred," and "family" are mainstays of the anti-gay right.

Observe as well the customary condemnation of judicial activism. The Americans to whom the above-excerpted lines probably are meant to appeal do not seem prone to inquire why judges are ill-suited to addressing a "values" question such as how marriage ought to be defined. Any law school graduate ought to understand the logic, but it is not clear that the rest of the electorate would. My instinct is that few Americans, if asked, actually could explain the reasoning, but that the link has been rhetorically drummed into them.\footnote{3}

1. Judicial Decisions Invoking Institutional Competence

Of course, in legal discourse, the whole idea of judicial competence and its limits is routine. I recount it nonetheless for a few reasons. First, I want to demonstrate some discursive continuity across the legal/popular divide while also highlighting a distinction between the commonly elaborated rationale for judicial deference and the poorly grasped rhetorical refrain. Second, while the rationale is in widespread use throughout constitutional law, it can be critiqued; I will provide a brief reminder of how that might go. Finally, a bit of anti-gay rights rhetoric contextualizes the pro-gay rejoinders that follow and it is the pro-gay arguments with which I am ultimately concerned.

A few key cases will suffice to recall the jurisprudential incarnation. In Lawrence v. Texas,\footnote{4} the 2003 decision of the United States Supreme Court striking down a Texas sodomy prohibition under the due process clause, Justice Thomas (along with Chief Justice Rehnquist) joined in a lengthy dissent authored by the reliable culture warrior, Justice Scalia.\footnote{5}

Despite Justice Scalia’s customary incisiveness and thoroughness, however, Justice Thomas submitted an additional dissent—a mere two paragraphs—signed only by him. Justice Thomas reasoned:

I write separately to note that the law before the Court today "is . . . uncommonly silly." If I were a member of the Texas Legislature, I would vote to repeal it. . . .

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases agreeably to the Constitution and laws of the United States."\footnote{6}

Presumably, Justice Thomas could not persuade Justice Scalia to incorporate this sentiment into his opinion or the case would include only a single dissent. His two paragraphs establish Justice Thomas as perhaps a bit less rabid than his conservative colleagues on the Lawrence Court and this might be what he hoped to convey. The same paragraphs, however, establish Justice Thomas as a culture warrior—not simply because he voted with the conservative wing of the Court on a divisive social issue, but because by articulating as he did the distinction between what he would do as a legislator and what he must do as a judge, he fortified the cable connecting the popular and legal discourses of the right in this substantive domain. In particular, this kinder, gentler culture warrior fused his vote for traditional, family-values style moralism to a conclusory pronouncement of the limit of judicial competence.

Justice Scalia, of course, performs this rhetorical task much more intently and elaborately, in his Lawrence dissent and also in his dissent

6. Lawrence, 539 U.S. at 605 (Thomas, J., dissenting).
7. Lawrence, 539 U.S. at 605-06 (Thomas, J., dissenting) (citations omitted).
8. Lawrence, 539 U.S. at 602-05 (Scalia, J., dissenting). After charging the majority with taking sides in the culture war and observing with apparent empathy that for reasons of morality "[m]any 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," id. at 602-03, Justice Scalia assumes a more neutral posture.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. . . . But persuading one's fellow citizens is one thing, and imposing one's views in the absence of democratic majority will is something else. . . .

What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient with democratic change.

Id. at 603.
in *Romer v. Evans,* the decision striking down an equal protection grounds an anti-gay amendment to Colorado's constitution. Justice White and Chief Justice Burger, however, preceded Justice Scalia in their majority and concurring opinions (respectively) in *Bowers v. Hardwick,* upholding a Georgia sodomy statute, shortly before Justice Scalia's elevation to the Supreme Court. Justice White, writing for the majority, was clear that the case 'did not require a judgment on whether laws against sodomy .... are wise or desirable. *" The issue presented," he famously explained, was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," adding that the case did entail the need for him to exercise "some judgment about the limits of the Court's role in carrying out its constitutional mandate." Justice White proceeded to reject the finding made in the Court of Appeals that the Supreme "Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy." In fact, Justice White admonished, nothing in the privacy line of cases "bears any resemblance to the claimed constitutional right" asserted by Hardwick. References to the *Lachner* Era and FDR's court-packing plan come a few pages later just to make sure that we got the point: this is not a matter for the Court.

Chief Justice Burger joined the main opinion, but wrote separately to form a kind of reverse parallel structure to the Scalia and Thomas pair

9. *Romer v. Evans,* 517 U.S. 620 (1996). "The Court has mistaken a Kulturkampf for a fit of spine," Justice Scalia begins, id. at 636 (Scalia, J., dissenting), presumably suggesting that the battle over the legal status of gays is a quintessential political and cultural brawl between two large-scale players such as Bismarck and the Roman Catholic Church, not a matter of a bigoted majority and a minority in need of equal protection. He goes even further by describing the anti-gay state constitutional amendment as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores ...." Id. Justice Scalia soon turns to the institutional side of the discourse, arguing that "[t]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'immorality' toward homosexuality .... is evil." Id. In addition to his skillful interweaving of the moral and the institutional, notice how Justice Scalia summons class resentment against the "politically powerful" gay minority and the "elite class" to which the justices belong. The message is that the Court is siding not with a weak minority that needs counter-majoritarian protection, but rather with a disproportionately powerful minority that has effectively captured the aristocracy.

21. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 Iss. L. J. 9 (1971) (criticizing the right to privacy as found in *Griswold v. Connecticut,* 381 U.S. 479 (1965)), and arguing that "[w]hen the Constitution has not spoken, the Court will be forced to find no scale, other than its own value preferences, upon which to weigh" a minority's freedom claim against the majority's regulatory power; Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform,* 96 Harv. L. Rev. 1497 (1983) (critiquing the public/private distinction).
constitution, the dissenting justices represented themselves as firmly disposed to the Thomas tonality. To those of us located in the Massachusetts legal culture, it would be difficult to imagine a contemporary justice of that court denigrating homosexual sex with Blackstonian epithet. Instead, the three dissenters (on a court of seven members), each of whom authored a dissent as well as signed the dissents of the others, stressed the institutional competence side of the discourse, even occasionally nodding to the possibility that the marriage statute might be worth legislative reconsideration. Despite the absence of Scalia/Burger-style vitriol on the Massachusetts court, however, a close reading reveals the same rhetorical entwinement.

Justice Spina, for example, began his dissent:

What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts. . . . Today, the court has transformed its role as protector of individual rights into the role of creator of rights.

Why is this not a question of rights, one might ask the justice. His answer is that the court, “using the rubric of due process . . . has redefined marriage.” The definition of marriage and the scope of its fundamental nature are to be drawn from the “nation’s history,” resulting in a similar analysis to the one that led the Bowers majority and Lawrence dissenters to determine that sodomy was not entitled to constitutional protection.

23. See, e.g., Goodridge, 798 N.E.2d at 983 (Cordy, J., dissenting).
24. Goodridge, 798 N.E.2d at 974 (Spina, J., dissenting).
25. Goodridge, 798 N.E.2d at 975 (Spina, J., dissenting).
26. Goodridge, 798 N.E.2d at 976 (Spina, J., dissenting). In the more recent decision by the Supreme Court of California requiring that state to grant marriage licenses to same-sex couples, In re Marriage Cases, 183 P.3d 384 (Cal. 2008), a dissenting justice made a similar cluster of arguments. Justice Baxter wrote “[i]n reaching this decision, I believe, the majority violates the separation of powers, and thereby commits a profound error,” id. at 456 (Baxter, J., concurring and dissenting), going on to charge that “a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves. . . . [T]he majority creates a new constitutional right.” Id. at 457 (Baxter, J., concurring and dissenting).

Justice Baxter makes explicit reference to a separation of powers case, id. at 458 (Baxter, J., concurring and dissenting), and to the conventional terms of fundamental rights analysis as “crucial restraints upon the overreach exercise of judicial authority in violation of the separation of powers.” Id. at 459 (Baxter, J., concurring and dissenting). Consistent with this, Justice Baxter also urges that

27. Goodridge, 798 N.E.2d at 979 (Sosman, J., dissenting).
28. Goodridge, 798 N.E.2d at 979 (Sosman, J., dissenting). A few pages later, Justice Sosman invites the reader to consider whether the court would find irrationality in a less emotional but analogous context:

"[I]f the issue were government subsidies and tax benefits promoting use of an established technology for energy efficient heating, the court would find no equal protection or due process violation in the Legislature’s decision not to grant the same benefits to an inventor or manufacturer of some new, alternative technology who did not yet have sufficient data to prove that the new technology was just as good as the established technology.

Id. at 981 (Sosman, J., dissenting).
In the absence of scientific certainty, Justice Sosman reasoned, the legislature cannot be said to be irrational for waiting until the data are in. 29 This dissent is at pains to avoid anfron ft; one can almost feel Justice Sosman pleading with her gay friends to understand that she thinks they are fine parents—it is just that the studies are not in yet, so she cannot—despite her personal open-mindedness—find that the legislature has been irrational. 30 Her decision is based strictly on institutional concerns.

Embedded in Justice Sosman's reasoning is her apparent confidence that heterosexual marriage has been an irrefutable triumph. Indeed, she urges in her opening paragraph that “the Legislature need only have some rational basis for concluding that . . . alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries.” 31 None of the justices question this assumption, or even contemplate that the legislature’s requiring same-sex marriage to prove itself while not requiring heterosexual marriage to do the same might raise a constitutional issue. This, I believe, is the spot to dig if one seeks to unearth evidence of Justice Sosman’s acquiescence to the rhetorical entwinement of anti-gay morality and morally neutral assessments of judicial competence: heterosexual relationships benefit from the assumption of success while homosexual relationships begin as suspect.

Justice Cordy concluded the longest of the three dissents with equivalent courtesy. “While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative or judicial action.” 32 This opinion echoes that of Justice Sosman on the point that until there is certainty that the same-sex-headed household is equal to the unquestionably successful heterosexual household, the court ought to defer to the legislature, 33 but goes perhaps a bit further in suggesting that marriage is designed to organize the procreative capacity of heterosexual intercourse and so can be rationally confined to that context. 34 His argument veers back and forth between the pragmatics of reproduction and the morality-laden language of history and tradition. 35

2. Popular Discourse of Institutional Competence

It is useful to bear in mind the jurisprudential justifications for judicial deference on gay issues when turning to popular discourse on the same topic. Take, for example, the lay advocates of amending the United States Constitution to preclude same-sex marriage, who speak in terms virtually identical to those of the conservative justices (if sometimes in a slightly more antagonistic tone). The national organization Focus on the Family, which has advocated a federal amendment, confronts on its website in “frequently asked questions” format, why homosexuals should not be entitled to the same treatment as heterosexuals. The answer reads in part:

Here’s what is intolerant. Same-sex “marriage” is being forced upon us by a small, but elite, group of individuals dressed in black robes—judges—who say that thousands of years of human history have simply been wrong. That is a very arrogant notion that will bring great harm to our culture. 36

Similar efforts have been made to amend the Massachusetts Declaration of Rights. A layperson’s guide produced by the Massachusetts Family Institute pointedly entitled Take Back Democracy, 37 coaches would-be activists with the following talking points:

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29. Goodridge, 798 N.E.2d at 981 (Sosman, J., dissenting).
30. Goodridge, 798 N.E.2d at 982 (Sosman, J., dissenting).
31. Id. See also the separate dissenting opinion of California Justice Corrigan, who wrote, “In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view.” In re Marriage Cases, 183 P.3d at 468 (Corrigan, J., concurring and dissenting).
32. Goodridge, 798 N.E.2d at 979 (Sosman, J., dissenting).
33. See Goodridge, 798 N.E.2d at 1003 (Cordy, J., dissenting).
34. See Goodridge, 798 N.E.2d at 995 (Cordy, J., dissenting).
35. See, e.g., Goodridge, 798 N.E.2d at 985–87 (Cordy, J., dissenting).
that has had an impact on Americans' understanding of civil rights more generally. First, he identifies
a reaction against the fast-growing visibility of gays and lesbians and the forms of knowledge and political presentation of
the self under which the demand for civil rights has been made. This has created a responsive set of political strategies
that use lesbian and gay identities and political claims as an "alter" against which majorities have realized their opposing
interests.40

But Goldberg-Hiller does not think this is the entire story. He discerns a
second component:

The rhetorical tactics used to retain the privilege of marriage
for nongays have combined formerly diverse, contradictory,
and sometimes dormant American discourses into mutual co-
herence, amplifying their effects. This hybrid political
language has sampled from liberal and nonliberal political ide-
ologies, neoliberal economic notions, nationalist ideas of
political space, religious morality, themes of civilization, and
even—indeed, especially—from the discourse of civil rights.
Cobbled together, these discourses aid the constitution of new
identities capable of building majorities and driving them to
the polls in opposition to courts and rights-based move-
ments.41

Goldberg-Hiller illustrates in vivid and sophisticated fashion how courts
and law have become rhetorically entangled with gay identity and how
together they have been posited as threats to a host of prized values such as
family and order.

3. Critique of the Institutional Competence Arguments

These rhetorical ties between substance and institutional competence—while routinely deployed and virtually instinctive to persons
with legal training and apparently unquestioned by laypersons who
might not even understand the structural rationale undergirding their

38. Id. at 5.
39. JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND
THE POLITICS OF CIVIL RIGHTS (2007). See also Haw. Const. art. I, § 23 (restricting
marriage to heterosexual unions); Reciprocal Beneficiaries Act, Haw. REV. STAT.
§ 572C (2006) (creating a non-marital partner status with benefits similar to those
available under state marriage law); Bahr v. Lewin, 852 P.2d 44 (Haw. 1993) (hold-
ing that the state needed a compelling interest to justify depriving same-sex couples
of marriage rights).

40. GOLDBERG-HILLER, supra note 39, at 7.
41. Id. at 7–8.
own position—are nonetheless eminently vulnerable to critique. In
abridged form, the critique might go something like this:

- All sides agree that it is the province of the court to inter-
  pret the constitutional text—in the case of Goodridge, for
  example, the equality and due process guarantees of the
  Massachusetts Declaration of Rights.

- Still, if one reads those provisions to mean that a gay per-
  son cannot be denied the right to enter into a marriage
  with his or her chosen mate just as a heterosexual person
  may, then one would also believe that the Massachusetts
  court acted within its proper institutional bounds, merely
  enforcing the constitutional terms.

- If, however, one reads the same provisions to mean that
  while no gay person can be denied the right to enter into
  a heterosexual union on the same terms as a heterosexual
  person, the provisions do entail the additional right to
  choose the sex of one’s mate, then one would also believe

42. Article I of the Massachusetts Declaration of Rights, as amended by the Equal Rights
Amendment, provides as follows:
All people are born free and equal and have certain natural, essential and
unalienable rights; among which may be reckoned the right of enjoying
and defending their lives and liberties; that of acquiring, possessing and
protecting property, in fine, that of seeking and obtaining their safety and
happiness. Equality under the law shall not be denied or abridged because
of sex, race, color, creed or national origin.

MASS. CONST. art. I, as amended by MASS. CONST. art. CVI.

43. Article X provides in relevant part as follows: “Each individual of the society has a
right to be protected by it in the enjoyment of his life, liberty and property, according
to standing laws.” MASS. CONST. art. X. While the term “due process” does not ap-
pear in this Article (which otherwise closely tracks the language of the Fifth
Amendment to the United States Constitution), the due process requirement has
been implied. See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 973 (Mass.
2003) (Spina, J., dissenting).

44. This is Justice Cordy’s view. “The classification is not drawn between men and
women or between heterosexuals and homosexuals, any of whom can obtain a license
to marry a member of the opposite sex; rather it is drawn between same-sex couples
and opposite sex couples.” Goodridge, 798 N.E.2d at 994 (Cordy, J., dissenting). A
dissenting justice in the California marriage case agreed. See In re Marriage Cases,
183 P.3d 384, 462-63 (Cal. 2008) (Baxter, J., concurring and dissenting) (arguing
that a new right was being invented by the majority and that the case bore no relation
to California’s state court case striking down an anti-miscegenation statute (citing
Perez v. Sharp, 198 P.2d 17 (1948))). The California majority, however, saw the
choice of marital partner as encompassed in the right to marry. See Marriage Cases,
183 P.3d at 399. See also infra Part II for a discussion of analogy to federal miscege-

45. See James Varnis & Tracy Jan, In Storm Over Gay Books, a Principal Holds Ground,
families, including a single-parent family, a bi-racial family, a family with divorced parents and a family with same-sex parents. When the boy's father, David Parker, learned that same-sex parenting was being presented to his son as a legitimate familial arrangement, he set off for the elementary school and refused to leave school grounds until administrators agreed to excuse his son from any further instruction on that point. Instead of conceding to Parker, the principal called the police and Parker was arrested for trespassing. He refused bail and so spent the night in jail, consequently becoming a cause célèbre for the anti-gay right. Fred Phelps's organization, the Westboro Baptist Church (an independent church, the slogan of which is "God hates fags"), came to Lexington to demonstrate; then-Governor Mitt Romney made a public statement in support of parental rights; and MassResistance, the Commonwealth's premier anti-gay marriage organization, came to Parker's aid and supported the unsuccessful federal lawsuit he and his wife filed against the town of Lexington.

Parker raised constitutional claims, including claims arising under the substantive due process right to parent and the free exercise clause.

47. See Vannis & Jan, supra note 45.
48. See id.
50. Cf. Vannis & Jan, supra note 45 (reporting that out-of-state groups came to Lexington to demonstrate).
51. See Maria Crumer & Ralph Ranalli, Arrested Father Had Point to Make, Boston Globe, Apr. 29, 2005, at B1.
52. See Sacchetti, supra note 49. See also Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass. 2007), affd, 514 F.3d 87 (1st Cir. 2008). The Parkers were joined in their lawsuit by another family that was disgruntled with the Lexington school district's provision of positive gay imagery; the Wirzhins' second-grader listened to a reading of a fairy-tale entitled King & King about two princes who fall in love. Parker, 474 F. Supp. 2d at 266. See also Linda De Haan & Sterin Nuland, KING & KING (2002).
53. Parker, 474 F. Supp. 2d at 263. The federal district court dismissed the constitutional claims based largely on a First Circuit case, which "held that the constitutional right of parents to raise their children does not include the right to restrict what a public school may teach their children and that teachings which contradict a parent's religious beliefs do not violate their First Amendment right to exercise their religion." Id. (quoting Brown v. Hot, Sexy, and Safer Prods., 68 F.3d 525, 534, 539 (1st Cir. 1995)). The court of appeals affirmed the dismissal, relying on slightly different reasoning:

The heart of the plaintiffs' free exercise claim is a claim of "indocitration": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views. . . . Plaintiffs' pleadings do not establish a viable case of indocitration.

and also alleged that the school district violated a state statute, which provides (in relevant part) as follows:

Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexuality issues shall adopt a policy ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal. No child so exempted shall be penalized by reason of such exemption.

Parker's argument was that the statute entitled him to notice in advance of the lesson to his son's kindergarten class as well as to the right to have his son excused from the class. The school district's position, joined by the American Civil Liberties Union, a couple of gay rights organizations and others, was that the statute did not apply. As the amicus memorandum in support of the school district's motion to dismiss argued,

None of the books objected to by the plaintiffs here are part of a curriculum "primarily[ ]" about "sexual education" or "human sexuality issues" for purposes of the statute, and thus fall outside of its scope. The books about which the plaintiffs complain are simply stories that contain gay characters—a far cry from the type of content implicated by the statute. The argument that depictions of gay characters constitute sex education or "sexual" content would mean that depictions of families with a husband and wife as parents are also about sexuality education, a plainly absurd notion. The promotion of tolerance, acknowledgement of diversity, and discussion of

54. See Parker, 474 F. Supp. 2d at 263. State claims were dismissed without prejudice to allow the plaintiffs to bring them in state court. See id. at 278. I found nothing to indicate that the plaintiffs have done so.
56. Parker, 474 F. Supp. 2d at 267.
57. See Parker, 474 F. Supp. 2d at 262 (listing amici).
58. See Parker, 474 F. Supp. 2d at 264, 266, 278. The school district and amici also argued that the statute creates no private right of action. See id. at 264.
equal treatment and rights of gay people in society is not "sex education."  

As the Boston Globe reported, school officials stated "that the material was about families, not sexuality."  

This argument holds a certain understandable appeal. One can draw a relatively coherent line between the children's books at issue and, for example, a lesson about how to use a condom. It is a line that the Massachusetts Department of Education arguably drew in its regulation interpreting the statute, and one can understand why the school district and its allies would articulate the division in this case. The pro-gay side is trying to de-stigmatize same-sex relationships and make them seem not importantly different from heterosexual relationships—not more sexual or threatening than the traditional mother/father/child formation and therefore not warranting the excess of deference to parental preferences that is required under the state's sex education law.

Still, the argument, with its insistence on a sharp dichotomy between "families with . . . parents" and "human sexuality" ought to come under some critical scrutiny in my view. The argument suggests and promotes a sex-family distinction, so that a book can manage to teach about how some kids have two mothers or two fathers, but still not be


60. Vaznis & Jan, supra note 45.

61. In title 603, section 5.02 of the Code of Massachusetts Regulations, the Department interprets the statutory terms to refer to "courses (typically, sex education or discrete units of a health education or biology course), school assemblies or other instructional activities and programs for which the instruction and materials focus principally on human sexual education, the biological processes of human reproduction and sexual development, or human sexuality issues." 603 Mass. CODE REGS. 5.02 (1987).

about sexuality. The gays who have children, it starts to seem, are somehow not quite the same gays as those who have sexuality. The split recalls the virgin-whore dichotomy to which feminists have so long objected. The gays in the children's books are virgins, not whores, or alternatively, good gays, not bad gays.

But what is most noticeable to me about this formulation, this downplaying of the "sex" in sexual orientation while working overtime to depict the gay family as a legitimate and morally upstanding fragment in the multicultural mosaic, is its endemism to the culture war. The sex-family dichotomy was not forged in Lexington; it is a trope, and the trope can be heard coming from culture warriors of all stripes.

Most obviously, the right wing has promoted the division to advance its anti-gay agenda. The very fact that the plaintiffs portray the children's books in question as regarding sexuality, while presumably not understanding Goldilocks and the Three Bears (which you will recall involves a mama, a papa, and a baby bear) as regarding sexuality to the same extent, says plenty. Apparently, heterosexual sex within the confines of marriage is hardly sex at all. (Those bears were married, right?) The very rhetoric of "family values," as invoked against an array of matters concerning sex, including but not limited to homosexuality, promotes the dichotomization.

But the trope is not the sole province of the anti-gay camp. Pro-gay advocates promote the same distinction, and when they do, they are already playing on the field of sexual moralism—exactly where the right-wing wants them.

62. For relatively contemporary references in law review articles, see, e.g., Mary Becker, Women, Morality, and Sexual Orientation, 8 UCLA WOMEN'S L.J. 165, 189 (1998), and Elizabeth M. Iglesias, Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality, 49 VAND. L. REV. 869, 929-43 (1996). For more foundational examples from feminist classics, sometimes using Mary and Eve as the archetypal figures, see, e.g., Mary Daly, GYN/ECOLOGY 231 (1990), and Simone de Beauvoir, The Second Sex 144 (H.M. Parshley trans., 1989) (1952).

63. Another articulation comes from Michael Warner, who wrote that "the image of the Good Gay is never invoked without its shadow in mind—the Bad Queer, the kind who has sex, who talks about it, and who builds with other queers a way of life that ordinary folk do not understand or control." MICHAEL WARNER, THE TROUBLE WITH NORMAL 114 (1999).

64. Opposition to pornography, for example, is sometimes cited as a "family value." See, e.g., Timothy Egan, Technology Sent Wall Street into Market for Pornography, N.Y. TIMES, Oct. 23, 2000, at A1 (discussing the prosecution of a porn dealer in Utah, including both his large consumer base and the public support for his prosecution given the "family values" orientation of that state).
The gay marriage campaign is the clearest—albeit not the only—example. The public relations strategy of the campaign is fairly evident. While the Goodridge case was pending in Massachusetts, Newsweek ran a sympathetic, 3300-word article entitled The War Over Gay Marriage, opening and closing with domestic scenes that featured the named plaintiff couple. 65 It was a homey scene,” the article began. “Standing in their warm kitchen on a winter’s day in 2001, Julie and Hillary Goodridge, a couple for 16 years, played the old Beatles song ‘All You Need Is Love’ for their young daughter, Annie.” 66 Let you suspect that the opening conceit represents solely the intentions of the columnists, the article reported on the explicit PR strategy of one of the nation’s leading gay rights organizations:

Lambda is trying to soften up public opinion with town-hall meetings designed to show that gay families are good for the community. “The town halls we’re doing tell people, ‘Hey, we’re just like anyone else—a middle-class, hometown suburban couple that’s been called boring,’” says Cindy Meneghin, 45, who with her partner, Maureen Kilian, also 45, and their two children, Joshua, 10, and Sarah, 8, are suing to be recognized as a legal family in New Jersey. “You can’t look at our beautiful, charming kids and not notice that we’re a family, and the myths start tumbling down. What we’ve found is that people get to know us as people with families and kids, that I coach soccer and take pictures, and Maureen is the best dessert maker in town, and, oh yes, Maureen and Cindy are a gay couple.” 67

Let me be clear that I have no problem with suburban parenting, soccer, or dessert, but something more is going on here. In their eagerness to be seen as “boring,” their pointing to children as evidence that their relationship is legitimate, their hope to contravene myths, and “oh yes, [they] are a gay couple,” lies something more insidious. My reading of the subtext of this paragraph is as follows:

Pay no attention to our lesbian sex. Our sex is a small matter compared with the ways in which we are an ordinary, bourgeois family. We’re nothing like what you imagine (i.e., practitioners of anonymous sex in public restrooms). Because sex is only a minor matter and normal family life is the big picture, we should not be marginalized.

If my reading is a plausible one, then the problem that follows is that Lambda’s spokeswomen are conceding that their sex is a negative, something that must be downplayed in order to bolster their credibility as a family and make the case for fair legal treatment. Moreover, their plea contains the implicit concession that those who are leading other lifestyles are morally inferior and less deserving of such fairness.

Lambda’s strategy is a species of normalization. As Janet Halley explains:

Normalisation [in the Foucauldian sense] is not the generation and imposition of some consolidated idea of good behavior or good values, the coercive herding of more and more people into normalcy defined by that behavior or those values; it is the ever-shifting, provisional ordering of a social, conceptual, and ethical field around a distinction—say, married/unmarried; or a range of distinctions—say, wife/mistress/girlfriend; or a standard—say “room temperature” or “illness” or “reasonableness.” . . . [E]thical value may or may not emerge as an effect of the ordering of the field.”

The Lambda PR strategy is normalizing in precisely this sense. It conceptually organizes the social world around the sex-family distinction. Moreover, in this case, it seems to me that a predominant ethical valuation does emerge—family is ethically privileged over sex—although one could take the same basic discursive structure in the obverse and wind up with the contrary ethical conclusion. Examples can occasionally be heard coming from pro-sex radicals such as Pat Califia, who—in an essay about the inadequacy of extending constitutional protection to sodomy while failing to protect gender deviance and more outlying sexual practices such as S/M—contemptuously spits out the label “lesbian

66. Id.
67. Id.
68. Id.
soccer moms” or addresses with un concealed hostility “you, bubba, with your domestic partner and Jack Russell terrier.” My critique is not meant to render righteous anything belligerent to mainstream values. Denigrating family with the suggestion that it is anti-sex fortiﬁes the dichotomy no less than downplaying sex with the implication that it is adverse to family. One can reinforce the basic dichotomy regardless of which side one privileges.

The Lambda normalization strategy might be effective in winning over some people who can ﬁnd empathy only for those who represent themselves as modest and unthreatening participants in run-of-the-mill family forms, but the cost is vilification of homosexual sex (or the valorization of sex among pro-sex radicals, but then family starts to look bad). While the strategy might very well lead to some formal legal victories, it leaves entirely intact the sexual moralism of the anti-gay right.

Courts that have awarded gay rights advocates with litigation victories sometimes fortiﬁes their opinions using the same strategy. In Goodridge, the main opinion by Chief Justice Marshall, while (in my view) admirable for its sober focus on marriage as an administrative and distributive tool, includes a gratuitous list of occupations among the plaintiffs ("business executives, lawyers, an investment banker, educators, therapists, and a computer engineer"), noting also that "[m]any are active in church, community, and school groups." I suppose this could be read merely as a general introduction to the parties, but one has to surmise that go-go dancers and Straford impersonators were not considered as potential plaintiffs—and that if they had been, this paragraph would have an entirely different feel. The paragraph as written advances a sense of normalcy in the bourgeois sense. Admittedly, it might be beneﬁcial for the compassion-challenged to be reminded that they have something in common with people whose rights they might otherwise feel comfortable abrogating, but it is worth asking what less desirable images these images of bourgeois normalcy are meant to counteract. If the answer is homosexual sex—and I think it is—then the normalizing imagery comes at a cost.

Even in Lawrence, the normalizing imagery shows up to mute the sex and bolster the pro-gay reasoning. Justice Kennedy reproached the Bowers Court for its articulation of the question presented when he urged that such a framing "demeaned" Michael Hardwick’s claim, “just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse,” and went on to make clear that Lawrence, a case about sodomy, was not only, or maybe even mainly, about sodomy: "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” The men prosecuted for sodomy in Lawrence did not claim to be forming such a personal bond, but that they could have diluted the distaste some readers might experience for what they were doing. There is just no denying that this case is about criminalized sex acts, but the Court nonetheless relies on a variation on the trope: here, gay sex is tolerable because it can be part of a legitimate relationship—the kind that heads a family.

Whether the anti-gay right is sensationalizing gay sexuality in order to delegitimize gay family life, pro-gay advocates or gay-sympathetic

71. Id. at 67. This did not offend me personally, as I have a Labrador retriever.
72. See for a lapse here and there about "connection that expresses our common humanity," Goodridge v. Dept. of Pub. Health, N.E.2d 941, 955 (Mass. 2003), the Chief Justice does not let discourses of love or sanctity cloud her judgment, e.g., “[i]n short, for all the joy and solemnity that normally attend to marriage, G.L. c. 207, governing entrance to marriage, is a licensing law." Id. at 952. The California Court was a bit less sober, extolling "the opportunity to publicly and ofﬁcially express one's love for and long-term commitment to another person by establishing a family together with that person [which] also is an important element of self-expression that can give special meaning to one's life." In re Marriage Cases, 183 P.3d 384, 425 (Cal. 2008).
73. Goodridge, 798 N.E.2d at 949. See also the concluding paragraph of Justice Greaney’s concurrence, which again lists the plaintiffs’ occupations and mentions their participation in religious and other “ordinary daily” parts of life. Id. at 973 (Greaney, J., concurring). The California case includes a similar paragraph. See Marriage Cases, 183 P.3d at 403.
74. Gender deviance might also be among the “myths” that the normalizing imagery is meant to counteract. Moreover, the imagery might easily leave one with a monolithic impression as to class.
75. A few people in a workshop setting reacted to this argument by reminding me that it is helpful for litigators working for social change to humanize their clients and portray them in a manner that enables judges, who might come from more privileged groups, to identify with them. I do not dispute this. Normalization is not, in my view, the same thing as humanization or depicting clients sympathetically. The problem with equating normalization and humanization is that it comes at the expense of dehumanizing those who may be depri vileged by the norm that is being (re)produced by the strategy. It might take a bit more thought, but it does not seem to me impossible to depict one’s clients as human—real people who need, desire and suffer—without at the same time implicitly and judgmentally prescribing what they should need, desire or suffer from in order to be worthy of decent legal treatment.
76. See infra Part II A.
78. Lawrence, 539 U.S. at 567.
79. I have complained about this before and in greater detail. See Libby Adler, The Dignity of Sex, 17 UCLA WOMEN'S L.J. 1, 18–19 (2008); Libby Adler, The Future of Sodomy, 32 FORDHAM URB. L.J. 197, 215–18 (2005).
multiculturalists are normalizing (read: de-sexing) homosexuality in order to legitimize gay family life, or sex radicals are exhibiting disdain for gay domesticity in order to valorize transgressive sex, the suggestion is that family and sex are somehow antithetical enterprises. Of course they are not. If some people experience them that way, however, it might be because that is the reality that the trope is producing.

Normalization rhetoric, therefore, and specifically the sex-family distinction, is political, but not in the sense that it belongs solely to one side of the culture war. On the contrary, the power of the sex-family trope lies precisely in its not being the sole property of any one political camp, but rather in its being a creature of the war itself, so common and shared as to be difficult to see. This frontier of the culture war is looking more and more as if it were premised on family’s segregation from its dark sexual side.

It is hard to resist normalizing rhetoric under conditions of a culture war, with the anti-gay right’s compassionless denigration of same-sex intimacies and gay parenthood, but the hazards of fighting in these terms have gone under-recognized. It is not clear to me whether the culture war is winnable, but if it is, and further cementing of the sex-family distinction is required to do it, the victory will be Pyrrhic. A victory on those terms cannot possibly be a genuine victory over the oppressive forces of sexual moralism. At best, it can result in the acquisition of a few formal rights while reproducing the general framework that maligns sex and justifies the oppression of persons identified with marginal sexual practices.

Moreover, the cost of an impossibly entrenched, virtually invisible dichotomy between family (or parenting) and sex could be staggering. This is not because people would in the ultimate sense have to choose between one and the other so that no one could ever have both children and sex, but because of the possibilities for shame and projection when people cannot quite manage all of their desires and self-states, and the political consequences that can flow from that failure.

When looking to the right, pro-gay advocates have no trouble seeing this danger. Reaction to the bathroom scapegoat of Senator Larry Craig (R-Idaho) (to choose from a mountain of available examples) is a case in point. A columnist for the San Francisco Bay Times, a newspaper aimed at gay readers, wrote, “Larry Craig is a confused and closeted gay man unable to connect the dots between his sexuality and his belief in marriage and family.” Setting aside for the moment the pile of assumptions built into this sentence (e.g., the assumption that Craig is gay, as opposed to bisexual or just a guy who enjoys anonymous bathroom sex and rarely encounters women in public men’s rooms), observe the author’s awareness that one’s political beliefs can be driven unconsciously by what one fears or loathes in oneself.

While perhaps a bit vulgar and overly certain, the columnist’s statement more or less amounts to the basic psychoanalytic insight that what one cannot consciously manage about one’s own desires will find its way into some neurosis that might easily be acted out to the detriment of others. When we contemplate the tragic falls of right-wing, excessively judgmental figures such as Craig, it is easy to imagine that those who wield the weapon of sexual moralism most menacingly are ill at ease with their own proclivities. This is not to suggest that every homophobe is a closeted homosexual, but that behind sexual moralism is a generalized hatred of that painfully vulnerable human experience of desire. Gay rights proponents know this very well.

What seems harder to remember is that gay-identified people are perfectly capable of the same unconscious fear and self-loathing, and that this can take a political toll no less damaging than the one imposed by Craig. There is no doubt, for example, that normalization strategies such as the one deployed by the Lambda spokeswomen undermine queer alliances. The entire volume from which Califia’s essay is drawn

80. We must cease once and for all to describe the effects of power in negative terms it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.


82. See, e.g., SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 64 (James Strachey trans., 1961) (1930) ("Psycho-Analytic work has shown us that it is precisely these frustrations of sexual life which people come to know as neurotics cannot tolerate. The neurotic creates substitute satisfactions for himself in his symptoms, and these either cause him suffering in themselves or become sources of suffering for him in raising difficulties in his relations ... "); MARTHA C. NUSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 219 (2004) (arguing that branding a group as sexually deviant is a way of casting out one’s sexual shame).

83. See infra note 84 and accompanying text. This is not the only source out there that is critical or resentful of gay mainstreaming. See, e.g., WARNER, supra note 63, at 97 (characterizing the arguments of a pro-same-sex marriage advocate as "[w]hoever gets state support first wins. You are free to pursue 'other avenues,' but, of course, don’t blame us if you find yourself stigmatized, aborted, or criminalized."); id. at 111 (responding to a same-sex marriage proponent that "[w]hen leading gay legal theorists dismiss gay sexuality as mere liberty, uncivilized and uncommitted, it is no
is a protest by sundry sexual outsiders (e.g., transgender persons, sex workers, vocal practitioners of S/M) against the mainstreaming impulse of the gay rights movement and an expression of resentment at being left out in the cold, as well as a call for a queer politics that is not so devoted to the dream of social acceptance. In the introduction, the editor (whose attack is a bit more focused on consumerism in the gay rights movement, but who assails gay assimilation in all its aspects) is clear about the book's unifying theme:

assimilation robs queer identity of anything meaningful, relevant, or challenging—and calls this progress. ... The gay mainstream presents a sanitized, straight-friendly version of gay identity, which makes it safe for David Geffen, Rosie O'Donnell, or Richard Chamberlain to come out and still rake in the bucks. By the twisted priorities of this gay mainstream, it's okay to oppose a queer youth shelter because it might interfere with "community" property values, or to enact neighborhood "beautification" programs that require the wholesale arrest of homeless people, transgenders people, sex workers, youth, people of color. ... As an assimilationist gay mainstream wields increasing power, the focus of gay struggle has become limited to the holy trinity of marriage, military service, and adoption.84

Just as the Senator Craigs of the world have fomented homophobia by their self-abnegation and strident "pro-family" moralism, so the gay rights movement attains its own normalcy by apologizing for its sex at the cost of drawing a line between good gays and bad, virgins and whores. As a result, the whores suffer—just ask them. Tune in a bit more deeply, though, and see that the "boring" gays lose, too, if one believes (as I do) that there is a subtle and longer term loss to be discerned in discursive complicity with the denigration of homosexual sex.

2. Rights, Especially Equality

In answer to the dissenters' charge of judicial overstepping, Chief Justice Marshall wrote in *Goodridge*:

\[\text{wonder that so many gay men and lesbians feel either indifferent to or assaulted by this campaign allegedly waged on their behalf.}\]


The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of the courts to determine whether these criteria are met and whether these limits are exceeded. ... To label the court's role as usurping that of the Legislature ... is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.85

Of course, the Chief Justice begs the question no less than her detractors. To determine whether a substantive issue is a constitutional one and therefore a properly judicial one, a person must first form an opinion on the substantive issue itself. Someone who does not view the denial of marriage licenses to the plaintiffs as rising to the level of an equality or due process concern will not, as a consequence, consider the issue a judicial one, and *vice versa*. Chief Justice Marshall is no dope, and it is difficult to imagine that this epistemological difficulty eludes her. If that intuition is correct, then my complaint is about her bad faith rather than her sophistication.

But my complaint is also about the position in which the gay rights advocates have put her, where acquiescing to the same kind of obfuscation promoted by the anti-gay right regarding the limits of judicial competence seems like the best that she can do. In both legal and PR venues, gay rights advocates—perhaps especially advocates of same-sex marriage—routinely levy arguments that collaborate in the reproduction of the framework that the anti-gay right is promoting when it condemns "judicial activism." Even if the pro-gay cause is the nobler one, the assertion that the constitutional terms render same-sex marriage a properly

85. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003). Similarly, the California majority opinion states:

\[\text{[W]e disagree with the Attorney General and the Governor to the extent that they suggest that the traditional or longstanding nature of the current statutory definition of marriage exempt the statutory provisions embodying that definition from the constraints imposed by the California Constitution, or that the separation-of-powers doctrine precludes a court from determining that constitutional question. On the contrary, under "the constitutional theory of "checks and balances" that the separation of powers doctrine is intended to serve" a court has an obligation to enforce the limitations that the California Constitution imposes upon legislative measures, and a court} \]

\[\text{would shrink the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.}\]

In re Marriage Cases, 183 P.3d 384, 448 (Cal. 2008) (citations omitted).
judicial question of rights, as opposed to a legislative question of values, is just as lacking in foundation as the contrary claim. The critique set forth in Part II.A supra is equally applicable, and I suppose too dangerous to deploy against anti-gay advocates for precisely that reason.66

It might be that it is simply very, very hard not to speak in terms of rights when talking about as emotional an issue as same-sex marriage under conditions of a culture war. When an issue appears to be a basic and obvious question of fairness, when one has felt personally demeaned by the treatment one has received under the law, as well as by the public’s conversation about the life one leads, including the intimacies that one feels gives her or his life meaning, the turn to rights is intuitive, nearly impossible to forgo. I have experienced this and have complete empathy for that pull.

Moreover, there is the hard, cold fact of the constitutional regime.67 To prevail on a constitutional claim one obviously is bound to deal in rights and justify counter-majoritarian action. My argument in this section is not that gay rights advocates should make suicidal attempts to bring constitutional claims without reference to rights or the reach of judicial power. Instead, I am laying ground for a pitch (that will come in the next part) to do something else—that is, to re-conceptualize the law reform agenda to de-privilege questions of rights.

In addition to the collaborative elision of the epistemological problem, constructing an agenda around rights has disadvantages that have gone under-recognized just as normalization does. Left-wing, critically-minded legal thinkers have been trying to illuminate those disadvantages for years,68 but somehow they seem easily forgotten in the context of identity-based legal reform. This section recalls some of the difficulties as they manifest themselves in the relevant context.

a. Rights Claims Can Conflict and Even Invite Competing Rights Claims

Romer v. Evans concerned the constitutionality (under the Equal Protection Clause of the United States Constitution) of an amendment, passed by statewide referendum, to the constitution of Colorado that would have invalidated state and local laws providing antidiscrimination protection to gay people. 69 One of Colorado’s arguments in defense of the impugned “Amendment 2” was “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”70 Colorado’s brief urged that the amendment enhances individual freedom by eliminating governmental interference in the choices people make in religious, familial, personal, and associational matters. . . . Under the ordinances preempted by Amendment 2, individual landlords or employers who have sincere and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions . . . . 71

Justice Kennedy and the rest of the six-member majority did not buy it, but three dissenting justices (who expressed empathy for those who wish to exclude gay people from teaching positions, tenancies, etc.) 72 and plenty of Coloradans (who voted in the referendum to adopt the amendment) 73 did. Jonathan Goldberg-Hiller describes this as “permitting dominant majority political interests to be viewed through a minoritarian lens,” 74 meaning, as I read him, that the gay people subject to discrimination were the true minority while the anti-gay, religious landlords were properly understood as belonging to a majority. It is not clear, however, how one arrives at this certainty without first consulting one’s political preference. Religious landlords might constitute a small minority of people, their religious and associational rights are at least arguably implicated, so in what sense is this—in Goldberg-Hiller’s

66. Cf. Suzanne B. Goldberg, Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication, 106 Colum. L. Rev. 1955, 2008–14 (2006). In a section entitled “The Costs and Benefits of Candor,” Goldberg perceives a tension judges face between preserving institutional legitimacy and being explicit about their choices among competing norms when they are being asked to advance a social progress agenda: “To the extent courts are concerned with legitimacy and capacity constraints, a regime requiring discussion of norm choices might also lead to a decrease in decisions embracing societal change.” Id. at 2012. “Simply put, norm declaration closes doors more definitively than norm avoidance.” Id. at 2013.
67. The Massachusetts tripartite system functions much like the federal system, in that the judges are appointed and have (not life tenure but) tenure until the age of seventy. Mass. Const. pt. 2, ch. II, § 1, art. IX and pt. 2, ch. III, art. I. One would expect in this system, at least as much and probably more so than in a state in which judges are elected, a good deal of attention paid to the balance between the judicial and other branches of government in which the existence of rights justifies the exertions of the counter-majoritarian branch.
70. Romer, 517 U.S. at 635.
72. See supra note 9.
74. Id. at 63.
two conflicting rights might not be analytic correctness, but political preference. Rights, therefore, should be understood as unreliable. They are not fundamental first principles that, properly considered, constrain decision-makers to arrive at predictable and logically determined decisions in every case. Decision-makers with different politics can (at least sometimes) do different things with them. Some decision-makers might do things that pro-gay advocates detest, but that cannot—rationally speaking—be shown to be wrong.

Justice Scalia shows further the malleability of the discourse of majorities and minorities in his Romer dissent, not precisely on the point of rights, but still in the general domain of attributing power and victim-status. He describes Amendment 2, adopted by statewide referendum, as an effort "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." He cites expert opinion to the effect that "those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . [and] have high disposable income . . . ." He chastises the majority for characterizing homosexuals as "politically unpopular" (and therefore in need of counter-majoritarian protection) by observing that the "group enjoys enormous influence in American media and politics, and which . . . though composing no more than 4% of the population had the support of 46% of voters on Amendment 2."

Justice Scalia describes the statewide referendum as "this most democratic of procedures" used in this case "to counter both the geographic concentration and the disproportionate political power of homosexuals." Leaving aside for the moment the specious factual assertions about gay demographics, observe how the alleged minority achieves through geographic concentration and wealth a position that removes it from the counter-majoritarian purview. It turns out that power and powerlessness can be shifted around a bit more than the formulation:

98. See Kennedy, supra note 88, at 316–17.
100. Romer, 517 U.S. at 645 (Scalia, J., dissenting).
101. Romer, 517 U.S. at 652 (Scalia, J., dissenting).
102. Romer, 517 U.S. at 647 (Scalia, J., dissenting).
103. Romer, 517 U.S. at 647 (Scalia, J., dissenting). This comes up in the California marriage case, as well. One of the dissents disputes the finding of a suspect class and the application of strict scrutiny in part because "the gay and lesbian community does not lack political power." In re Marriage Cases, 183 P.3d 384, 466 (Cal. 2008) (Baxter, J., concurring and dissenting). The majority does not appear to disagree about the group's political power, but was satisfied that the class "exhibit[s] a certain characteristic [that] historically has been subjected to invidious and prejudicial treatment." Id. at 443. See also Kerrigan v. Conn., 957 A.2d 407, 487–88 (Conn. 2008) (Borden, J., dissenting) (on political powerlessness).
gay = victim of majoritarian discrimination, anti-gay = majoritarian would allow.

If these were the only hazards in rights discourse, one might conclude that the best plan is to proceed with the gay rights agenda and hope for decision-makers who share pro-gay politics. Sometimes this works—as it did in Romer. Sometimes it does not, as in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston104 and Boy Scouts of America v. Dale105—both cases in which a statutorily granted right against discrimination had to give way to an expressive or associational right under the First Amendment. This, however, is not the full extent of the danger.

It might actually be the case that a discourse of gay rights invites conflicting rights claims. In Massachusetts, for example, after the Goodridge decision, advocates of a state constitutional amendment that would ban same-sex marriage were thwarted by a legislature that repeatedly tabled their proposed amendment, eventually voting it down, so that it never made it to the ballot for a statewide referendum.106 They and then-Governor Mitt Romney urged that “the people” had a “right to vote” on the amendment.107 Aghast at the flippant of the rights rhetoric, pro-gay advocates protested that it was basic American civics that “rights” arguments were the province of the minority seeking equality.108

b. Rights Imply Rights-Bearers

In an equal protection case or a claim that involves the rights of some group, the judgment is only one of perhaps many consequences. As a separate matter, the very assertion of the group’s existence, and the terms used to define or depict that group, can have potent effects. Litigators “represent” their clients in more than just the usual sense of the lawyerly duty to zealously advocate on their behalf.109 So, for example, when a gay rights litigator “represents” gays and lesbians in some civil rights action, the claim implies a more or less coherent and identifiable group on whose behalf the claim is made. It would be a mistake, however, to imagine that the litigator simply observes that pre-existing group, can discern its rough boundaries and can ascertain its interests. Instead, this subsection argues, the litigator—consciously or not—is participating in the ongoing production of that group.

This does not make everything that the litigator does on behalf of the group inherently wrong, but it does suggest that the litigator ought
to feel obligated to deliberate on the consequences of that facet of representation. "[R]epresentation is very different from reflection: 'It implies the active work of selecting and presenting, of structuring and shaping: not merely the transmitting of already-existing meaning, but the more active labour of making things mean."

So, when a lawyer articulates a client-constituency and asserts claims on its behalf, that articulation is not merely a passive description of the group as it is found in the natural world; instead the lawyer is an active participant in making that constituency real and giving it meaning and therefore should, in my view, take responsibility for that act.

At least two relevant potential consequences to gay rights litigation should be considered. First, as one of the more oft-cited thinkers in this area, political scientist Wendy Brown, has cogently argued, it is worth contemplating

whether legal “protection” for a certain injury-forming identity discursively entrenches the injury-identity connection it denounces. Might such protection codify within the law the very powerlessness it aims to redress? Might it discursively collude with the conversion of attribute into identity, of a historical effect of power into a presumed cause of victimization?

In other words, when a lawyer brings the unfairly treated class of gays and lesbians to court to seek redress, or petitions a legislative body to enact protective legislation, it is not merely the acquisition of a judgment or piece of legislation to which the lawyer ought to attend. A judgment or law that seems favorable might have the long term cost of re-inscribing injury on the class. There is a cost-benefit analysis to be performed between the value of the judicial relief or protective legislation sought and the protraction of the group’s subordinate status as a political reality. It is as an injured subordinate that one approaches the law seeking protection or vindication. Where Brown mentions turning a “historical effect of power into a presumed cause of victimization,”

113 I take her to mean that an identity group associated with injury and subordination such as gays and lesbians is not a natural grouping that would exist under any historical conditions. Various forces converged to produce an identity group around a particular (if variable) set of behaviors, traits, or tendencies. It is worth considering whether a better strategy in the long term, if what one wants is to ameliorate the injury, is to highlight the historical contingency of the grouping, to call into question the coherence of the grouping or the moral relevance of the traits said to render the group coherent, rather than to re-enforce the apparent naturalness of the group by bringing it before the law for remedies, which seems like a good recipe for prolonging the existence of the injured class. This may be an under-recognized cost associated with rights argumentation: when the advocate articulates the claimant group and the injury it suffers as a class, the advocate simultaneously discursively reproduces the group as a subordinate.

The second consideration has less to do with injury but nonetheless regards the production of identity and the establishment of governing norms. In a Foreword to the Supreme Court Review of the Journal of Criminal Law and Criminology published the year after Lawrence, Bernard Harcourt wrote surprisingly that it is "far too simplistic today to think about a decision such as Lawrence in dichotomous terms—as either 'good' or 'bad' for 'homosexuals.'" The sentence is surprising because it takes a consciously critical effort to imagine that there might be constituencies, vaguely pro-homosexual if we divide the world in two, for whom that case might be a defeat. Taking as his starting point Justice Scalia’s dissent which asserts that the Lawrence majority sided with homosexuals, "Harcourt sets out to undermine this dichotomous view of the culture war, in which there is a pro-gay side and an anti-gay side."

Harcourt depicts instead a disorderly array of small groups with wildly divergent sexual projects (e.g., ‘promiscuity, monogamy, child custody, sadomasochism, commitment, ‘fisting,’ public sex, female-to-male sex change operations and (male-to-female), ‘barebacking’ and ‘bug chasing,’ importuning, ‘role-playing,’ ‘piercing’ and ‘cutting,’ ‘packing,’ ‘fancying,’ marrying, childbearing, adopting, pornography, and sexual assault—to name just a few’) and identities (e.g., heterosexual,

114 See John D’Emilio, Capitalism and Gay Identity, in Making Trouble: Essays on Gay History, Politics, and the University 3 (1992) (on the progress of American capitalism from the colonial period through industrialization and how that progress contributed to the emergence of gay identity).

115 Bernard E. Harcourt, Foreword to “You are Entering a Gay and Lesbian Free Zone”: On the Radical Dissensus of Justice Scalia and Other (Post-)Queers, [raising Questions About Lawrence, Sex Wars, and the Criminal Law], 94 J. CRIM. L. & CRIMINOLOGY 503, 511 (2004).

116 Lawrence v. Texas, 539 U.S. 558, 602–03 (Scalia, J., dissenting).

117 Harcourt, supra note 115, at 506–07.

118 Id. at 507.
homosexual, bi-, trans-, poly-, metro-, pomo-sexual, lesbian, queer—again, to name just a few[119]). He urges that before we can know "[w]ho wins and who loses," as a result of a case such as *Lawrence*, we would have to engage in "a much closer parsing of sexual projects" than Justice Scalia's dichotomous portrayal of the culture war permits.[120] Harcourt's key examples of those who might experience *Lawrence* as a defeat are constituencies who thrive on transgression, for whom constitutional protection for their sex acts might be anathema.[121]

One could take the position that these variables and (in many cases) outlying constituencies do not much matter. This should be recognized as a political choice, though, for which a person designing a law reform agenda ought to take responsibility. Mere assertion of the "pro-gay position" or of the interests of the gay community, without the "parsing" that Harcourt calls for, steamrolls over the concerns of real people. Moreover, the practice of asserting the singular pro-gay position is a powerful discursive act. That is, the articulation of the group and its interests is group-making, not merely group-describing. Of course, one must speak, describe, and make—the argument is not that one can avoid that, but is (in part) a defense of explicit deliberation. To consciously deliberate on the varied projects, identities and interests, and to state forthrightly what factors are deemed most weighty and which must give way to them, even if in the end the judgment call is to seek constitutional protection for sodomy (which I favor), is a more honest act than to articulate competing interests out of view.[122]

Rights imply a rights-bearing constituency with an identity bounded by traits and/or norms. Production of this constituency by

119. Id. at 507.
120. Id. at 511. I also have portrayed the culture war as dichotomous in this Article, but I hope it will not be read in the same way. Part of my argument is that many costs and benefits have been excluded from strategic calculation precisely because of the course of the culture war, one facet of which is its polarity. Like Harcourt, I am advocating a deliberate step outside of that discourse in order to see what the discourse obscures.
121. Id. at 525–37.
122. This takes us back to the discussion in Part II.B.1 supra regarding normalization—in particular, the idea that the sex-family distinction is a trans-political trope that produces the experience of sex and family as incompatible. See supra note 80 and accompanying text (citing Foucault for the concept of production). Here, the idea is that the legal representation of the rights-seeking gay constituency, let's say as a constituency for whom access to marriage amounts to fair legal treatment, could produce that constituency in multiple ways. For example, it could organize the constituency around a good gay/bad gay polarity and entrench the perception gay identity is naturally occurring rather than historically contingent, which, as other writers have argued, see, e.g., D'Emilio, supra note 114, is both historically flawed and associated with certain perils.
frontrunners, Senator Barack Obama (D-IL), Senator Hillary Clinton (D-NY), and former Senator John Edwards (D-NC), in *seriatim*, indicated their support for identical legal benefits for same-sex couples, even at the federal level, but under the separate name "civil union" rather than "marriage." The panelists, including the president of the Human Rights Campaign (HRC) (the leading gay rights lobbying organization that convened the forum), expressed dissatisfaction with the position of each. The issue of same-sex marriage exceeds its dimension of concrete legal benefits. Gay rights advocates will not feel satisfied that they have been victorious until all discernable signs of formal inequality are expunged. Once the war is on, one must win it.

This might be a good reason not to wage war, but if not, there are others. First, the war continues to require the commitment of tremendous resources that might have gone elsewhere (the next part will offer alternative sites). Second, the need for equality at the level of *symbolism*, not merely at the level of concrete benefits, accords more power to the state to provide one's sense of self-worth than perhaps is healthy. Finally—my main point here—it would be good to have the mental room to deliberate on whether this is the best place to devote so much law reform effort, but psychological room to critically evaluate law reform priorities is pretty difficult to come by when marriage is so tied up in the discourse of equality. Operating within the discourse, one almost cannot help but to ask: Am I truly being treated as equal if my intimate partnership is managed under the separate legal category of "civil union"? It is much harder to generate such questions as: Is the denial of access to marriage the cause of so much suffering in the domain of sexuality compared with other causes that it should ascend to the top of the reform agenda? Is some of the suffering that it does cause a result of my having yielded to the state too much power to bestow legitimacy and value on my life, so that I could mitigate against that suffering by thinking in a new way? What other possibilities for change fall outside of my line of vision while I chase this prize? And finally, Might the battle for marriage rights for same-sex couples impose any costs on GLBT or other marginalized people?

In the forum on gay issues for Democratic presidential candidates, lesbian pop musician Melissa Etheridge (inexplicably one of the panelists) began the questioning of John Edwards. After observing that both she and Edwards's wife had suffered from cancer, Etheridge recalled the high cost of her treatment and inquired, "[D]o you understand the special needs of people in gay and lesbian couples who cannot depend on their partner's insurance for protection because they are not a legal spouse or have to pay extra on the benefit? What would you do about this?" Edwards used the opportunity to tout his health care plan, then, in an apparent *non sequitur*, said:

> And I might add just a few weeks ago I was the [sic] LA Gay and Lesbian Center, which is an extraordinary place, which I'm sure some people here are familiar with here in the Los Angeles community, where they are doing amazing, amazing work.

But there's a message from my visit there that I think is really important for America to hear, which is I met a whole group of young people who were there because they were homeless, and they were homeless because they came out of the closet and told their parents the truth, and their parents kicked them out of the home.

And there they were—the only place—they were living on the street, had nowhere to go. Thank God for the LA Gay and Lesbian Center being there for them, and an extraordinary woman who runs the center. But without that place, where would those young people go?

And it just can't be that in America people think that's OK. They can't believe that's OK. And they need to hear and see exactly what I saw when I was there, because it was moving. It was touching, and I actually believe that that kind of experience would have a huge impact on the American people if they could just see."

The panelists were not so moved. Etheridge responded by asking Edwards whether he was "uncomfortable around gay people" and eventually the panelist from HRC brought the brief discussion back to Edwards's inadequate position on marriage. Apparently, it did not occur to any of them to ask some sort of follow-up question, such as, What would you do as president to help those kids that you met at the LA

128. See id.
129. See id.
130. See id.
131. See id.
132. Id.
133. Id.
134. Id.
Gay and Lesbian Center? Would the panelists contend that access to marriage was a more pressing injustice or are they just unable to see anything outside of marriage's glare?

Same-sex marriage seems to have captured the imagination of numerous people concerned with sexuality. In addition to this popular display by HRC's panel, the canon of books and articles is virtually endless; a number of well-known scholars have written extensively on the topic. It is not merely volume, however, that conveys the point about dominating the imagination. If one were to compare readings advocating same-sex marriage to, say, readings advocating that gay people be permitted to adopt children, the arguments convey a different feeling about their purpose. Readings in the former, unlike the latter, often contain an implicit—sometimes explicit—suggestion that to prevail on same-sex marriage is to prevail finally.

Take, for example, the work of leading academic proponent of same-sex marriage, William Eskridge. Eskridge has argued that "legal recognition of same-sex unions—or, ultimately, marriages—comes through a step-by-step process. Such a process is sequential and incremental: it proceeds by little steps that are taken in a particular order." According to Eskridge, the countries that have partner recognition laws that come close to marriage first decriminalize consensual sodomy and equalized the age of consent for homosexual and heterosexual intercourse, then adopted laws prohibiting employment and other kinds of discrimination against gay people, and finally provided other kinds of more limited state recognition for same-sex relationships, such as the giving of legal benefits to or the enforcing of legal obligations on cohabiting same-sex couples.

Eskridge borrows at least some of his observations from Kees Waaldijk of the University of Leiden, a Dutch legal scholar and same-sex marriage proponent, internationally known in the debate. In Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, Waaldijk lays out the three phases (cited by Eskridge) based on his observations of the legal treatment of homosexuality and the steps antecedent to formal partner recognition in Europe, then proceeds to

135. Perhaps a pop star cannot be expected to follow-up appropriately, but the other two panelists were a journalist and the chief of a major gay rights organization. Also, it is worth noting that neither did it seem to occur to Ethridge that even people who are not in same-sex relationships sometimes face difficulty paying for expensive medical treatments. Same-sex marriage would hardly fix the problem of access to affordable medical care. I am not the first person to observe this, see, e.g., Beyondmarriage.org, http://www.beyondmarriage.org/full_statement.html, the web page for a group of left, GLBT and queer activists, academics, artists and others who convened initially in 2006 to think about change "beyond" same-sex marriage, but I mention it nonetheless because it bolsters the point about the power of the equality discourse to curb imagination.

136. This glare seems to blind proponent to other pressing issues as well as to the downsides of marriage itself. For example, one often sees the well-known advantages of marriage in the immigration context cited in support of the need for equal access for same-sex couples. See, e.g., Evan Wolfson, Why We Should Fight for the Freedom to Marry, in Same-Sex Marriage: Pro and Con 128, 129 (Andrew Sullivan ed., 1997). Somewhat, though, those proponents have not noticed that reformers in the domain of domestic violence have had to struggle with the bind in which the marital immigration advantage leaves battered women immigrants who face a disincentive to leave their citizen husbands. See generally Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise, 24 N. Ill. U. L. Rev. 153 (2004). Shouldn't the pros and cons of marriage in the immigration context at least be fully evaluated before putting gay immigrant victims of domestic violence in this same position?


describe in detail the history that concluded in the legalization of same-sex marriage in the Netherlands, which was the first jurisdiction in the world to take the leap. His claims are not modest:

If you look at the legislative history of the recognition of homosexuality in European countries, it seems that this process is governed by certain trends, that can tentatively be formulated as if they were “laws of nature”. At the very least, there is a clear pattern of steady progress according to standard sequences.

Waaldijk goes on to specify sub-steps—the components of each of the three major phases—and to deem the overall process demonstrative of his “law of small change,” a theory which appears to have won over Eskridge.

It may be that Waaldijk and Eskridge have the history right, and one might even give Waaldijk the benefit of the doubt in his assertion that the history amounts to something of a pattern—that it, might be true that same-sex marriage is so shocking, as compared with, say, decriminalizing sodomy, that it can come into being only after the general population of a society is gradually introduced to pro-gay law reforms and a certain sense of fairness toward gay people is cultivated. Taking the teleological approach, however, obscures law reform possibilities deemed non-essential in the march toward the telos—for example, finding ways to house kids who have been kicked out of the house by their parents after expressing something about their emerging identities or desires.

Eskridge urges repeatedly in his work that same-sex marriage is demanded by the principle of formal equality, even charging that “neither progressives nor conservatives [opposed to same-sex marriage] have yet produced a convincing response to my argument that the principle of formal equality requires the state to recognize same-sex unions on the same terms as which it recognizes different-sex unions.” It seems to me that there is a basic epistemological difficulty that more or less equally plagues pro- and anti-same-sex marriage arguments (i.e., only political preference tells us whether formal equality requires the law to do more than permit all persons of any sex or sexual orientation to enter into a heterosexual marriage). I will explain how his challenge can be met here, then proceed to what I see as the real issue.

In his 1996 book, Eskridge devotes a chapter to arguing that prohibitions against same-sex marriage should be found unconstitutional based on Loving v. Virginia, the case in which the United States Supreme Court struck down a state law prohibiting interracial marriage. As Eskridge explains, the usual argument against extending Loving to strike down prohibitions against same-sex marriage is that in Loving, the statutory classification was race, and the ideology animating the statute (Chief Justice Warren found) was white supremacy, effectively creating a “caste system” that disadvantaged non-white people. In the case of same-sex marriage, however, the statutory classification is sex, while the ideology is homosocialism (rather than sexism) and the disadvantaged class is homosexuals (rather than women). The argument against the applicability of Loving is based on this discontinuity between the classification and its animating ideology and resulting hierarchy. Eskridge sets out to undermine that distinction in two alternative ways.

First, he cites Sylvia Law and Andrew Koppelman for the argument that homosocialism is, at its core, a manifestation of sexism and that women, confined historically to a disadvantageous marital role, are in fact a disadvantaged class as a result of the heterosexual-only definition of marriage. There is, therefore, greater continuity than appears at first blush and the Loving analogy holds.

But then Eskridge laments that this argument has something of a “transvestite quality, “dressing[ing] a gay rights issue up in gender rights garb,” and moves on to his second version of the Loving analogy in which sexual orientation is the classification, an argument he views as

144. Id. at 439.
145. Id. at 440.
146. See Eskridge, Comparative Law, supra note 137, at 647–48.
148. See Eskridge, Comparative Law, supra note 137, at 641–42.
149. See supra Part II.A.
151. Eskridge, Case for Same-Sex Marriage, supra note 137, at 153–82.
152. Id. at 165.
153. Id.
154. Id. at 165–67.
156. Eskridge, Case for Same-Sex Marriage, supra note 137, at 171.
"more direct." In the second argument, Eskridge taps Washington v. Davis and Yick Wo v. Hopkins for the idea that a facially neutral statute's heavily "lopsided effect[s]" are constitutionally relevant, and that this is particularly pertinent in the same-sex marriage context where the prohibition "is animated in large part by the state's insistence on compulsory heterosexuality." This argument justifies his using sexual orientation as the classification, despite a marriage statute's typical facial neutrality as to that category. Then, if we are all in agreement that heterosexism is behind the law and homosexuals are the disadvantaged class, we have continuity and (assuming we apply a heightened form of scrutiny, an argument he also makes but which I will not recount here) the Loving analogy holds.

One has to admire Eskridge's nimbleness with the categories of sex and sexual orientation, sexism and heterosexism, women and homosexuals. The complex and highly debatable connections among those categories give him a lot with which to work. He is less nimble with the components of Loving, however, and this is why his formal equality arguments are not as determinate as he thinks. Chief Justice Warren made choices regarding classification, ideology, and disadvantaged group that Eskridge did not appear to notice were choices.

The State defended itself in Loving by denying any racial hierarchy in the impugned statute, and in fact an earlier Supreme Court accepted that reasoning in Pace v. Alabama, as Eskridge notes. The State was forthright about its eugenic ideology, but did not go so far as to admit to an ideology of white supremacy. Of course, Chief Justice Warren was having none of it. In the Chief Justice's view, the eugenic purpose of the statute "boiled down to 'White supremacy,'" just as in the Law/Koppelman view, heterosexism "boils down to" sexism. The former might seem obvious, but it was not obvious to the Pace Court,

157. Id. at 172.
160. ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, supra note 137, at 172–73.
161. Id. at 176–81.
162. Id. at 181.
163. Loving v. Virginia, 388 U.S. 1, 8 (1967).
165. ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, supra note 137, at 156.
166. Loving, 388 U.S. at 8.
167. ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, supra note 137, at 160. See also Loving, 388 U.S. at 7; 11.

which made a different political choice. Likewise, not everyone adheres to the Law/Koppelman view.

Eskridge may be correct to read Chief Justice Warren's opinion as finding a "cast system" in which non-white people were the disadvantaged class, but if this reading is correct the finding was not necessary. Mildred and Richard Loving were equally subject to penalty under the Virginia law, so it was not just black people who suffered. As Eskridge acknowledges, another articulation of the disadvantaged group might have been "people who fall in love with a person of another race." We could call these people something—let's say "different-race-o-sexuals"—but we don't. We refrain from labeling them as such, even though we might observe in the world around us that some people have a fairly consistent tendency toward cross-racial desire, perhaps as consistent as the correlation between same-sex desire and gay identity. Again, there are unseen decisions being made. Had Chief Justice Warren, relying on Yick Wo (Washington v. Davis had not yet been decided), found that a group called "different-race-o-sexuals" was unfairly disadvantaged by the statute, and that they constituted a real group, perhaps immutably so, for equal protection purposes, then the argument usually offered against the Loving analogy would collapse, saving Eskridge nearly thirty pages.

Loving hinged on a judicial willingness to move analytically from a race-based classification to a particular ideology and a racial hierarchy. Chief Justice Warren made good choices in Loving, but that does not mean that they were required as a matter of formal logic. When we go to the grocery store and see apples in one bin and oranges in another, we do not suspect the grocer of having an apple-supremacist ideology. Yet white supremacy seems like a pretty reasonable suspicion when we read Virginia's statute. Formal logic does not tell us the difference; experience does.

This is the answer to Eskridge's challenge. Same-sex marriage is not logically required by the principle of formal equality any more than Loving was. To get to his decision in Loving, Chief Justice Warren made the political choice to reject the distinction between a eugenic ideology and white supremacy and to see the creation of a racial hierarchy rather

169. Loving, 388 U.S. at 3.
170. ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, supra note 137, at 166.
171. See Oliver Wendell Holmes, Early Forms of Liability, in THE COMMON LAW 1, 1 (1881), reprinted in AMERICAN LEGAL REALISM 9, 9 (William W. Fisher III et al. eds., 1993) ("The life of the law has not been logic; it has been experience.")
than harm to a discrete class of people who exhibit cross-racial desire. To get to same-sex marriage using a constitutional equality provision, one must make similar choices, but one could refuse. One could begin with sex as the classification, but then find that heterosexism does not “boil down to” sexism, or, alternatively, one could begin with sexual orientation as the classification, then find that heterosexism is at base sexism but that women are not disadvantaged. Of course, one also could find as Eskridge wishes; it’s just that one need not.

My larger argument, however, is that Eskridge’s framing of the challenge is problematic. Formal equality has its merits, but it is not uncontrollable that formal equality is the highest value that law reformers could be pursuing at all times. For one thing, the very term formal equality exists in opposition to substantive equality, and—as any student of affirmative action or workplace accommodations for working mothers will attest—these goals can conflict. A formal equality agenda can eclipse or even undermine other potentially worthy goals. For example, the achievement of formal equality has been held responsible by some for obscuring subtle forms of racism that would be better addressed using a more remedial approach, or that fly beneath the radar of anti-discrimination discourse thereby debilitating anti-racist political action. In the case of workplace accommodations for working mothers, feminists with divergent interests (i.e., those mothers seeking accommodation for their family lives and those non-mothers who could find themselves either discriminated against because they are seen as potential mothers or bearing the brunt of the work from which the accommodated mothers obtained relief) have found that they do not

form a singular constituency for whom formal or substantive equality is a clear and uncontroversial goal.

In the case of gay people, the benefits of formal equality stand counterpoised to the costs associated with the pursuit of formal equality. While the attainment of formal equality has undeniable fairness appeal, the pursuit takes place in the context of a culture war which is waged in normalization and rights discourses, some costs of which are described in this part.

Eskridge anticipates one difficulty with the culture war in his discussion of fundamentalist religion. He acknowledges that

the trajectory of religious enthusiasm. . . . might be influenced by gay people’s efforts to secure equal rights. As gay rights and openly gay people have become part of the public culture, fundamentalist religions in the United States have not only been energized in their efforts to confront that development, but have reordered their religious beliefs to make homophobia doctrinally central. Thus, it is quite possible that recognition of same-sex marriages in one or a few jurisdictions could massively reenergize religious fundamentalism and trigger a national or transnational backlash against gay rights.

Eskridge understands that advocacy of same-sex marriage is an engagement in the culture war and that this is an invitation to opponents to fight back and sometimes win. He underestimates the costs of engagement, however, because he is fixated only on the telos of marriage/formal equality: you win some, you lose some. The argument here, however, is that the costs are being inflicted now, in the pursuit. Sex is being segregated from family, vulnerable people are being left behind and alienated, alliances are being undermined, and the imagination necessary to fully develop law reform possibilities unrelated to the march toward marriage/formal equality is being curbed. The same-sex marriage campaign is the easiest target for this critique. Marriage, however, is not the only item on the gay law reform

men may lose little and employee–mothers win some . . . All women may be at increased risk for employment discrimination . . . Permanently childless women like me will be in a lose/lose situation—so long as we are potentially mothers, we are at risk for discrimination; so long as we are not actually mothers, we get no offsetting compensation from the increased childcare benefits.”

Eskridge, Comparative Law, supra note 137, at 657.

See Warner, supra note 63, at 84 (“Since the 1993 March on Washington, marriage has come to dominate the political imagination of the national gay movement in the United States.”).
agenda the desire for which might be the product of a discourse that is difficult to see and the pursuit of which might in turn reproduce the discursive conditions that curb imagination. A former student in my course on Sexuality, Gender and the Law raised the possibility that the debate over adding sexual orientation as a category of offense to hate crime statutes contributes to anti-gay violence. Real causation would be tough to demonstrate as an empirical matter and he made no pretense of doing so; instead, he argued that as the debate about hate crimes wears on, pro- and anti-gay advocates participate in a discourse that not only entrenches an injured gay identity, but inflicts and re-inflicts the question of homosexuality's moral worth. His point was not that hate crime protection was itself harmful, but that there are unnoticed costs being inflicted along the way to that law reform goal.

I add to his argument only the possibility that a confluence of interrelated discourses of equality, injury and minority status produce the gay desire for that specific law reform. This is not to deny the travesty of anti-gay violence for both bodies and minds, but rather to call into question how one comes to desire the particular solution of hate crimes legislation. All of the legitimate and worthy minorities seem to be covered by hate crimes legislation; to be recognized as a worthy minority, it therefore seems to follow, one must have it. Possibilities for addressing the problem of physical safety besides a public law prohibition that targets animosity toward gay identity might occur to reformers under different discursive conditions, but right now such possibilities are difficult to imagine. Imagining them requires a deliberate effort to step outside of the culture war discourses of equality and minority status.

In another example, pro-gay lobbyists have been urging Congress for years to pass the Employment Non-Discrimination Act (ENDA). ENDA would provide anti-discrimination coverage in the employment context much like Title VII does for other groups. Early versions of the bill protected against discrimination on the basis of sexual orienta-

178. The former student is Carl Roller, Northeastern University School of Law, class of 2005.

179. See, e.g., 18 U.S.C. § 245(b)(2) (2006) (regarding violence motivated by animus based on race, color, religion, or national origin). This is not to assume that hate crime laws, once enacted, work out well for the intended beneficiaries. See generally Lisa A. Crooms, "Everywhere There’s a War: A Racial Realist’s Reconsideration of Hate Crime Statutes," 1 GEO. J. GENDER & L. 41 (1999) (arguing that hate crime laws as applied, construed, upheld, and struck down, can entrench the problems of racial subordination that they are ostensibly aimed to combat).

180. See infra Part III.B. (regarding NYC zoning law).


tion, but did not address gender identity. As the voices of trans people became louder and trans activists logged in some significant victories at every (local, state, and federal) level (despite some defeats under Title VII), there were calls to add anti-discrimination coverage based on gender identity to the bill. In October, 2007, Representative Barney Frank (D-MA) issued a missive, urging that after years of fighting for the passage of ENDA he thought he could get the votes in the House if gender identity coverage were excluded from the bill. He must have been stunned by the resistance he encountered. Over three hundred GLBT organizations came together to form an ad hoc coalition called "UnitedENDA" to push for the more inclusive version. Members' inboxes swelled with emails from the UnitedENDA organizations urging constituents to contact members of Congress and insist that transgender people not be left out.

In calling for a consensus to drop the gender identity protections, Frank had urged patience for the gradualism of law reform. Patience for gradualism is not an inherently terrible idea, but in this case scaling back the bill was the wrong move, and the organizations were right to oppose it—even at the risk of seeing ENDA fail—because of the toll it


185. See, e.g., Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1086-87 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (holding that discrimination on the basis of being transsexual is not actionable under Title VII).


189. Id. This announcement was issued as an email as well as a posting on GLAD's website.

190. See Statement of Barney Frank on ENDA, supra note 187 ("If we were to push for a vote now, knowing that the transgender provision would be defeated by a majority, we would be making it harder ultimately to win that support.")
Seemed likely to take in divisiveness had they agreed to split the “GLB” from the “T.”

Stepping back a few feet from that question, however, observe how the fight for ENDA, and over who will be covered by its provisions, is about where to draw the line between legitimate, worthy minorities and the acceptably marginalized. It is mired in a discourse about equality and negates its own role in producing norms (e.g., legitimate and illegitimate minority) and identities (e.g., persons in the injured identity categories that would be entitled to remedies under the legislation). The bill’s passage and contents hinge on just how far out Congressional Democrats are willing to seem in the midst of a culture war in which their Republican challengers could hold validation of homosexuality and/or transsexuality against them at the next election cycle. As a result, it is tough to see how such problems could be avoided. Under these conditions, it is worth considering whether pushing for ENDA is the right move at all. This is not to say that employment discrimination is just fine; rather it is a call to redirect law reformist attention toward an assessment of whether statutory protection against it is of such extraordinary value as to make the effort to get ENDA passed worth whatever it costs in divisiveness, normalization, and so on.

I am not sure what the right answer is, but I think that the question deserves consideration and that the calculus should be fully informed as to both costs and benefits. The premise that discrimination is bad does not inexorably lead to the conclusion that trying to get ENDA passed is good. There ought to be an intervening cost/benefit analysis, but it is hard to squeeze anything in between premise and conclusion under culture war conditions. Equality discourse seems to demand its formally correct outcome not only in the marriage domain, but in antidiscrimination law, as well. Standing inside equality discourse, it is difficult to see much else. Before making the judgment call, however, it would be good if law reformers could step outside and try.

Before moving to the next part, I want to reiterate that pro-gay reliance on the discursive strategies critiqued above is not random. The strategies are, in my view, virtually impelled by a culture war in which sexual moralists criminalize and mock same-sex intimacies, grounding lessly assail gay parents who cannot fathom their characterization as presumptively substandard when they devote such fierce love and labor to their children, propose that it is legitimate to deny qualified and dedicated people access to their chosen vocations or avocations (e.g., teacher or scoutmaster) because of their desires or identities, and so on. My fondest hope is that this Article will not be read to demonstrate lack of appreciation or compassion for the hardships of derision, discrimination, or inhumanity.

The problem on which I am attempting to shed light is what happens when the culture war drives the agenda. The culture war provokes pro-gay discourses of normalization and equal rights; those discourses all but require prioritization of particular law reform efforts—eclipsing others—and such efforts, while they have resulted in some extraordinary successes, also have some serious pitfalls that have been accorded too little attention. There are other things we could do.

III. Re-Imagining a Law Reform Agenda

A. Prime Example: Homeless Adolescents

To begin with, we could accept John Edwards’s invitation to consider the circumstances of the young people he met at the Los Angeles Gay and Lesbian Center. Homelessness is a huge problem among GLBT youth, and while some organizations have taken up their cause, the

195. In case it is not clear, I want to stress that this is a paper about law reform. The GLBT organizations engage in all sorts of other activities (organizing, education, social services referral and delivery, etc.), and this paper is not intended as a comment on any of those. It is strictly an analysis of what appears to be the architecture of the GLBT law reform agenda, particularly its rights orientation and the discourse of normalization that supports it.
197. See Ray, supra note 196, at 91–152 (documenting the efforts of GLBT youth homeless shelters, especially the Ruth Ellis Center in Detroit, Green Chimneys: Triangle Tribe in New York City, Ozone House in Ann Arbor, Michigan, Urban Peak in Denver, and Waltham House in Boston).
laws that condition their lives have not drawn nearly the attention that
the marriage laws have. I investigated these conditions once before in an
effort to understand at least some of the sex work undertaken by mi-
 nors, and GLBT minors in particular.198

The lives of these young people begin under a legal regime that
grants tremendous deference to their parents to raise and control them in
accord with parental values, including values that might be ungenerous
toward homosexuality or gender deviance.199 This deferential posture has
constitutional roots200 but makes its real effects felt in child welfare prac-
tice, where no consensus exists as to whether seeking treatment intended
to discourage a child’s homosexuality or transsexuality constitutes abuse,201
and where neither homophobic nor transphobic attitudes typically serve
as a per se bar to adults wishing to become foster or adoptive parents.202
Perhaps as a result, a disproportionate number of runaway adolescents
identify as GLBT.203

198. See Libby Adler, An Essay on the Production of Youth Prostitution, 55 Ms. L. Rev. 191,
201–04 (2003). I say “some” because I learned that while some kids appear to sell sex
to survive, some do so despite the fact that they are not in material need, apparently
to buy luxury items or for pleasure or adventure. Id. at 204–06. Much of the dis-
cussion in this section of the legal conditions faced by homeless youth is based on the
more elaborate analysis provided in that article.

Reform 835, 837 (1985) (noting that it is not considered “intervention” for the state
to enforce parental authority over children).

(1923).

201. See Elvis R. Arriola, The Penalties for Puppy Love: Institutionalized Violence Against
Lesbian, Gay, Bisexual and Transgendered Youth, 1 J. GENDER RACE & JUST. 429,
458–68 (1998); Sonia Renee Martin, Note, A Child’s Rights To Be Gay: Addressing the

application for reasons of the applicant’s religion). Discrimination on the basis of sexual
orientation is also prohibited, but when the general anti-discrimination policy is read
next to the eligibility criteria to become a foster or adoptive parent, see 110 Mass.
Code Regs. 7.104(e) (2005) (“the ability . . . to respect the integrity of a child’s ra-
cial, ethnic, linguistic, cultural and religious background,” but not the ability
to respect the child’s gender identity or sexual orientation), the regulations do not ap-
pear to preclude homophobic—and certainly not transphobic—persons from
becoming foster or adoptive parents.

203. See Ray, supra note 196, at 1 (“Our analysis of the available research suggests that
between 20 percent and 40 percent of all homeless youth identify as lesbian, gay, bi-
sexual or transgender (LGBT). Given that between 3 percent and 5 percent of the
U.S. population identifies as lesbian, gay or bisexual, it is clear that LGBT youth ex-
perience homelessness at a disproportionate rate.”).

Once they run away (a status offense punishable in the juvenile jus-
tice system204), their options for survival are few. Youth shelters that
receive federal funds must report the whereabouts of runaways to their
custodians within seventy-two hours.205 Sleeping in parks is illegal in
most places,206 and renting an apartment will not be an easy task. First,
there is a limitation on a minor’s capacity to contract (called the power
of disaffirmance), which vests minors with the unilateral right to void
contracts without cause; this presumably will reduce the number of
landlords willing to offer them a lease.207 Second, how will a minor pay
rent? The hours that people under the age of sixteen are permitted to
work are limited by federal and state law,208 as are other aspects of youth
employment,209 and minors cannot serve as payees for their own child
support.210

Undoubtedly, the GLBT organizations are aware of the barriers to
youth self-support and of the apparent consequence that many of these
youth turn to sex work and other criminal enterprises,211 but the major
gay law reform efforts do not appear to be designed in contemplation of
any of these background legal conditions.212 My principal contention is
that this can be explained by the fact that these legal issues (as opposed
to, for example, issues of discrimination) do not sound in the culture
war, making it difficult both for the movement lawyers to notice them

198. See Libby Adler, An Essay on the Production of Youth Prostitution, 55 Ms. L. Rev. 191,
201–04 (2003). I say “some” because I learned that while some kids appear to sell sex
to survive, some do so despite the fact that they are not in material need, apparently
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perience homelessness at a disproportionate rate.”).

tent runaways under certain circumstances).

205. See 45 C.F.R. § 1351.18(e) (2007).

206. See, e.g., 350 Mass. Code Regs. 2.01(2)(b) (2001) (“No person is allowed on [Met-
ropolitan District Commission]. Reservations except during the hours from dawn to
dusk unless specified otherwise at the site, or by permit.”).

1998); E. Allan Farnsworth, 1 Farnsworth on Contracts § 4.4 (2d ed.
1998). In some jurisdictions the full capacity to contract would be vested in a minor
if that minor were to be emancipated, but this would likely come with the loss of any
right to support. See Carol Sanger & Eleanor Willemsen, Minor Changes: Emancipat-

208. Andrea Gianpetro—Meyer & Timothy S. Brown, Protecting Society from Teenage
Greed: A Proposal for Revising the Ages, Hours and Nature of Child Labor in America,

209. See id.

210. See 45 C.F.R. § 302.38 (specifying to whom child support payments shall be made).

211. See, e.g., Ray, supra note 196, at 52.

212. See id. at 154–60. This section of Ray’s report makes a number of useful policy rec-
ommendations, a couple of which scratch the surface of the kind of legal thinking
that this Article advocates, such as changing the law to “[physical] minor youth, espe-
cially unaccompanied minors, to receive primary and specialty health care services
without the consent of a parent or guardian.” Id. at 154.
and for the major organizations to speak to their constituencies about them and raise money.

In 2007, a fundraising appeal from MassEquality, a pro-same-sex marriage organization in Massachusetts that worked to defeat the anti-same-sex marriage constitutional amendment, arrived in my mailbox. On the exterior of the nine-by-twelve envelope was a photograph of a vulnerable-looking, wide-eyed boy, maybe six years old, watching television. The text read:

Imagine it’s 2008.

A small boy in Massachusetts turns on the TV—and tunes into a $15 million campaign to single out his family and take away his parents’ equal rights.

He sees a message that says:

You do not have a real family. Real families have a mother and a father. You’re an experiment. Your life will be unhappy. Your family isn’t normal, and that’s why we have the right to judge it.

Those are actual, focus-group tested arguments our opponents are using right now.

The attack is coming. And only one thing can stop it . . .

The ellipsis, of course, beckons the reader to open the envelope and submit to the ask. Note the familiar rhetoric of equality and normalcy. This appeal practically wrote itself.

Now try to imagine drafting the appeal to raise funds for reforming the Department of Health and Human Services regulation against minors serving as payees for their own child support, or for addressing common law limits on a minor’s capacity to contract. It would be a lot harder to draft that appeal, because the drafter could not simply rely on the recipients’ involuntary assumption of their culture war positions. Maybe a more general account of GLBT youth homelessness would do some of the work, but even that probably would not benefit from the level of reactivity provoked by the MassEquality appeal.

No doubt each of the above-described doctrines and rules governing minors came into being for a reason, and I do not write to advocate the total eradication of any one in particular, but there are half a dozen legal conditions that might at least serve as starting points for a law reform initiative that could benefit GLBT kids. I suppose using the law to provide more options for youth survival would do little to advance Eskridge’s march toward formal equality, but it might be a step forward in establishing decent conditions for young people to develop their sexual habits and identities.

Of course, even if I am correct that strategies of normalization and rights do little to help homeless GLBT adolescents, could it be that some adolescents remain safely in their homes due in part to the success that such strategies have had in breeding tolerance in their parents? It is certainly possible that this is the case. My contention is not that these strategies bring no benefit whatsoever. That benefit, however, must be weighed against the costs. 213 The goal of Part II.B infra is to foreground those costs, which have gone under—recognized, so that law reformers have as much as possible in their calculus when they make strategy decisions. 214

213. I would add to what is written in Part II.B supra with regard to normalization, that the strategy does not necessarily provide even those kids who are safe at home with safety at no cost. Rather, the safety of some of those kids could quietly be coming at the cost of conforming (consciously or not) to the norm. That might be just fine with someone like Eskridge, whose book title, The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment, supra note 136, makes plain his idea of how gay people ought to behave. If the title is not sufficient, the text inside will be:

It should not have required the AIDS epidemic to alert us to the problems of sexual promiscuity and to the advantages of committed relationships . . . . To the extent that males in our culture have been more sexually venturesome (more in need of civilizing), same-sex marriage could be a particularly useful commitment device for gay and bisexual men.

Id. at 9. It is hard to read this as anything other than sexual moralism and, particularly by his use of the term “civilizing,” a deep wish for acceptance into an established norm. It should not be overlooked that it is a political choice whether to ally oneself with the center or the margins. One who chooses the former is likely to be comfortable with the costs of normalization, but one whose political identification is with the marginalized is more likely to be concerned about the costs of the norm. Recall, though, that even a person whose identification is with the center, such as Lambda’s “boring” spokeswomen, may be paying a subtle, long-term cost in the form of the denigration of their sex. See supra Part II.B.1.

214. Necessarily, there is a certain amount of speculation involved. Janet Halley et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 Harv. J.L. & Gender 335, 406 (2006) (Hila Shamir, subp., author) (describing the benefits of cost-benefit analysis and the complex interplay of empiricism and speculation). A number of legal thinkers wrote articles in the aftermath of Lawrence that included rich and, to my mind, highly valuable, predictive, if speculative, cost-benefit analysis. See, e.g., Angela P. Harris, From Stonewall to the Suburbs: Toward a Political Economy of Sexuality, 14 WM. & Mary Bill Rts. J. 1539 (2006); Berta E. Hernández-Truyol, Querying Lawrence, 65 Ohio St. L.J. 1151 (2004); Tenea Rushola, Gay Rights vs. Queer Theory: What’s Left of Sodomy After Lawrence v. Texas?, 23 Social Text 84–85 (2005). Some commentators have less patience for
Imagine if the gay law reform organizations dedicated as much brainpower, time, and money to finding ways to feed and house these kids as they do to same-sex marriage. Imagine more generally if the gay agenda were constructed in resistance to the culture war rather than in reaction to it. Imagine if instead of reflexively chasing symbolic equality, the organizations refocused their attention on the low-profile legal conditions against which people live and evolve into their gendered and sexual selves. Imagine if instead of sating their own and the anti-gay right’s appetite for titanic clashes over equality, normalcy, morality, and legitimacy, they engaged the legal system’s obscurer doctrines and rules and spoke about them clearly to their supporters, baffling the anti-gay right in its crusade for symbolic supremacy. As the next sub-part attempts to demonstrate using additional examples, American Legal Realism, Critical Legal Theory, and Queer Theory can help figure out how to make this move.

B. Other (Appropriated) Examples Collected andThematized

To the chagrin of some (at least me), there is an absence of genuine understanding between lawyers (presumably mostly legal academics) interested in theory and lawyers (academics as well as practitioners) on the front lines of pro-gay law reform. My intent here—and the Article is a failure if it does not do this—is to offer legal thinkers who participate in the ongoing construction of the gay agenda some concrete ideas for taking what I see as potentially useful theoretic interventions and putting them to work. The theory utilized here is “critical” and involves “critique.” I am aware of the bad rap that critique has outside of its small circle of devotees in law, but I beg for some patience. The bad rap, as I understand it, stems from the impression that critique offers nothing positive, is nihilist, and performs the easy task of explaining why everything that practitioners and judges do is wrong without offering anything reconstructive to do instead. That is not quite right.


215. I do not mean to imply that the anti–gay right is too dim–witted to notice a shift in tack, and would not think to steer course to undermine progress. Still, it cannot hurt to stay a few steps ahead, and moreover, to drain the fuel that comes from feeling oneself in an historic battle to preserve so–called “family values.”

216. See KENNEDY, supra note 88, at 359–63.

217. Careful genealogy of the different methodologies has been done by others. See generally id.; JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006). Here, I intend the term Critical Legal Theory to embrace not only the school of thought known as Critical Legal Studies, but also its antecedent American Legal Realism, and the importation of some aspects of Queer Theory.

218. See KENNEDY, supra note 88, at 359–63.

one 'owns' the ocean, that you have no legal obligation to help a starving
stranger, that workers can sell their labor and must refrain from taking
its product home," structured the employer-employee bargaining rela-
tionship even while not speaking directly to it.221 Moreover, the law of
property “influence[d] the possibility and desirability of abandoning
employment altogether,”222 for example, by making it illegal to eat what-
ever food one happens upon if one does not own it and cannot pay for
it.223 Law operating in the background, therefore, established the realistic
range of options available to parties to an employment relationship and
thus concretely influenced their material reality far more than, say, ab-
stract assurances of their right to bargain autonomously ever could. At
first glance, contract doctrine might not appear to have anything to do
with the legal lay of the land for GLBT people, but upon closer inspec-
tion, it might open up some avenues for change that do not directly
engage the big culture war issues. For my purposes here, that is the Real-
ist contribution.

The contribution drawn from Queer Theory regards the capacity of
law to produce the identity of its subjects, as discussed supra (on the
identity-producing capacity of rights argumentation).224 “[J]uridical sys-
tems of power produce the subjects they subsequently come to repres-
ent.”224 As law regulates or even protects a class, it also takes part
in the formation of the group’s identity.

This subpart provides a handful of additional examples drawn from
the recent work of several feminist, pro-gay, pro-sex and/or pro-trans
thinkers. These thinkers all have different reformist goals, but they share
a critical watchfulness that guards against the pitfalls of equal rights ar-
gentation discussed in Part II, and they have the potential to shine
new light on problems (some of which are old and tiresome) and steer
reformist thinking away from discursive dead-ends. The thinkers in this
subpart seem aware of law’s productive capacities and offer law reform
ideas designed to intervene in the difficulties faced by their constitu-
cencies while resisting the tendency to entrench them in culture war, gender
war, or other identities that might actually limit the potential for
improving their circumstances in the long run. The examples that follow
are intended as models for how to step outside of the mental confine-
ment of the culture war and other worn out polarities and generate new
possibilities, to wrench our eyes from equal rights and redirect attention
to those rules and doctrines that constitute the background legal condi-
tions of daily life, affecting such crucial matters as employment
opportunity and physical safety.225

To begin with, Katharine Silbaugh, a leading voice in the long-
running feminist discussion of work-family balance, wrote an article in
which she took up the possibility that some of the costs associated with
the excess burden of domestic labor on women might be alterable
through greater attention to space.226 Historically, the problem of work-
family balance has been seen to demand changes in employment or family
law that would correct for sex-based inequalities (e.g., workplace
accommodations for working mothers or adjustments to rules governing
property distribution, alimony, and child support upon divorce, respec-
tively).227 The usual reform proposals bring up wearisome conundrums
such as meeting the needs of “most” women (who are caretakers) versus
creating remedies for women that produce them as caretakers.228 Taking
sides about whether such proposals will do more to remedy or entrench
problems of sex-based inequality is like taking sides between reason and
passion—it will always leave you partly wrong. Could there be another
way of approaching the work-family balance problem? We do not want
to be paralyzed into inaction by old dilemmas, but neither should we
pretend not to see them.

Silbaugh has taken what could turn out to be an early step down a
new analytical path. She draws attention to areas of law that have not
traditionally been mentioned in connection with the work-family bal-
ance problem, such as single-use zoning, pointing out effects on work-
home commutes and errand-running:

225. This is to be distinguished from proposing a move toward “socio-economic rights,”
which, in my view, would be likely to replicate the problems associated with more
traditional rights, such as conflicting rights, the production of rights-bearers, and so
on.

226. Katharine B. Silbaugh, Women’s Place: Urban Planning, Housing Design, and Work-

227. See, e.g., Joan Williams, Unbending Gender: Why Family and Work Conflict
And What to Do About It 5 (2000).

228. See, e.g., Mary Becker, Caring for Children and Caretakers, 76 Chi-Kent L. Rev.
1495, 1528–29, 1535–36 (2001) (noting that most women are mothers, and re-
sponding to Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and
Desire, 101 Colum. L. Rev. 181, 183 (2001)) (arguing that some feminist law reform
efforts designed to advance the interests of women as caretakers “collapse women’s
identity into motherhood”).
Some travel researchers have argued that women are more likely to choose workplaces closer to home in order to manage dual responsibilities. If this is so, we have workforce participation patterns determined in a gendered fashion according to attributes of land use patterns. The landscape separating work from home places constraints on employment decisions of workers who take greater responsibility for family work. This constraint on job mobility should be expected to negatively influence women's wage equality. When a worker makes a residential decision for her family based on the location of her employer, or an employment decision based on family, a greater portion of family stability is tied to stability in a single job. This should give an employer a bargaining advantage once employment has begun, because her exit options are impaired . . . . If an entire area is more densely developed [than single-use zoning generally permits], it is possible that a larger array of employment options would be available . . . . This improves a worker's exit strategy, which in turn improves her bargaining position with her current employer.229

The article is filled with such insights, steering clear of old-school calls for anti-discrimination measures or a shift toward or away from legal accommodations in work or family domains. Instead, Silbaugh examines the nitty-gritty of zoning, housing design,230 the home mortgage deduction,231 and utility subsidies,232 and considers their possible impact on work-family balance.

This approach has the potential to make reformist headway while avoiding some of the wheel-spinning of the conventional positions staked out in this longstanding debate. Silbaugh's is a Legal Realist argument in its attention to the conditions against which people choose a job and decide what pay, hours, and so on to accept. It is also at least consistent with (though perhaps not deliberately informed by) some of the insights gained from thinkers cited in Part II.B.2 on the difficulties of rights argumentation—thinkers who are associated with Critical Legal Theory (e.g., Kennedy) or Queer Theory (e.g., Bersani and Foucault)—in that she made a shift outside of old discursive confines and is thinking in ways other than how best to serve her constituency up for a group-based remedy. Silbaugh's article has the capacity to be a breakout moment—a strong heave that finally pushes the tires out of the muddy trench. It can start a fresh conversation, with different terms and new potential for change.

Moving back to the gay agenda, recall the discussions in Part II regarding the shortcomings of normalization and rights discourses. Recall the identity-entrenching, norm-producing, culture war-stoking hazards associated with the Lexington school case and the same-sex marriage campaign, or with hate crimes legislation or ENDA. Are there any other ways to address the status of same-sex走势图ism (of greater or lesser domestication) or to confront the problems of physical safety and employment for GLBT people? Are there approaches that do not replicate the hazards of normalization/equal rights/identity-based/anti-discrimination discourse?

As it turns out, zoning may be a fertile area of law for combating anti-gay and anti-sex politics, as well. The administration of Mayor Rudy Giuliani used zoning rules as a major tool in an anti-sex initiative that affected GLBT constituencies, adult businesses, and sex workers in New York City.233 In 1995, following a Giuliani administration study asserting "secondary impacts" (i.e., diminishing property values and increased crime) associated with the city's sex-oriented businesses,234 the City Council amended the city's zoning law to, among other things, restrict the number, size, and placement of sexually-oriented businesses, keeping such businesses away from houses of worship, schools, and daycares, and also preventing such businesses from clustering.235

As Lauren Berlant and Michael Warner argue,

The law aims to restrict any counterpublic sexual culture by regulating its economic conditions; its effects will reach far beyond the adult businesses it explicitly controls. The gay bars on Christopher Street draw customers from people who come there because of its sex trade. The street is cruiser because of

229. Silbaugh, supra note 226, at 1826.
230. Id. at 1829–35.
231. Id. at 1844–46.
232. Id. at 1847–48.
the sex shops. The boutiques that sell freedom rings and “Don’t Panic” T-shirts do more business for the same reasons. Not all of the thousands who migrate or make pilgrimages to Christopher Street use the porn shops, but all benefit from the fact that some do. The street becomes queer. It develops a dense, publicly accessible sexual culture. It therefore becomes a base for nonporn businesses, like the Oscar Wilde Bookshop. And it becomes a political base from which to pressure politicians with a gay voting bloc.\footnote{Berlant & Warner, supra note 233, at 562–63.}

Moreover, the legally forced geographic dispersion of sex businesses could put persons identified as sexual minorities at greater risk of violence as they search for businesses and each other in less concentrated areas.\footnote{See id. at 551, n.9.} Also, to the extent that the zoning laws actually cause the dissolution of existing businesses, many people will lose their jobs, perhaps including a disproportionate number of GLBT persons who staff the bars, t-shirt shops, and book stores.\footnote{See Pendleton & Goldschmidt, supra note 233, at 30.}

Some of the mainstream gay rights organizations did tune into the significance of the Giuliani crackdown.\footnote{See Berlant & Warner, supra note 233, at 551.} In fact, new alliances among GLBT populations, porn buyers and sellers, and sex workers arose in response, coalescing around shared interests (rather than shared identity) in what became a long-running political struggle in that city.\footnote{See Pendleton & Goldschmidt, supra note 233.} The struggle did nothing to divide good gays from bad, but in fact spanned across the interests of such archetypes. Nor was it an anti-discrimination campaign—formal equality would be difficult even to map on this issue. Some of the legal action did occur under a rights banner (i.e., free expression),\footnote{See Stringfellow’s of NY, Ltd. v. City of New York, 91 N.Y.2d 282, 394 (1998).} but engagement with this local zoning law nonetheless had it all: sex (gay and not) and the cultivation and protection of sexual culture, political community, physical safety, and business and employment. This is not formal equality; it is where the rubber hits the road, where bodies gather for intimacy, community, politics, safety, and work. This can be done.

A critical approach has begun to take hold in the legal analysis of sex work, as well. This issue, not unlike the issue of work-family balance, has long endured the grind of irresolvable conundrums that divide reform-minded thinkers. For example, while some people have the idea that sex work can be a legitimately chosen profession,\footnote{See, e.g., David A.J. Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195, 1272 (1979); Margo St. James, The Reclamation of Whores, in GOOD GIRLS/BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE 81, 84–87 (Laurie Bll ed., 1987).} at least one subset of feminists view sex work as a manifestation of women’s structural subordination to men and believe it is impossible for a woman to choose that line of work in a genuinely autonomous sense.\footnote{See, e.g., Kathleen Barry, The Prostitution of Sexuality 57–58 (1995); Catharine A. MacKinnon, Prostitution and Civil Rights, 1 Mich. J. Gender & L. 13, 20, 24–25 (1993). See also Sylvia A. Law, Commercial Sex: Beyond Decriminalization, 73 S. CAL. L. REV. 523, 530–52 (2000) (coursing through the most prominent arguments on the topic, feminist and not, focusing on the autonomy debate but also on public health and other concerns).} In a way, both positions are oriented toward rights and equality: the former involves the idea that women should not be denied (either legally or by virtue of the condescension of the structuralist position) the right to autonomous choice, while the latter involves the idea that women’s structural inequality undermines the authenticity of their autonomy. Both offer compelling arguments in support of their positions, but suffer from a lack of being able to know for sure.

Feminists and others concerned with the issue could carry on this debate indefinitely, and sometimes it feels as if they have. Many of the programmatic approaches that emerge from the debate in those terms have been ideologically driven. Some feminists have called for “partial decriminalization”—that is, “decriminaliz[ing] the activities of sex workers” while leaving the acts of Johns and third parties criminal.\footnote{Halley et al., supra note 214, at 338–39.} This program reflects the view that commercial sex is bad and should be outlawed, but that the sex worker is properly regarded as a victim rather than a culprit. Others have called for “complete decriminalization”—that is, “the repeal of any special criminal legislation dealing with sex work”—or “legalization,” which “involves decriminalization coupled with” any of a variety of regulatory schemes, such as “labor law, employment law, zoning of sex businesses, compulsory medical check-ups, licensing of sex workers, etc.”\footnote{Id. at 339. See also Law, supra note 243, at 552–72 (discussing numerous regulatory regimes).} While decriminalization proposals might sometimes represent a pragmatic concession to the inevitability of commercial sex, many proponents of decriminalization hold the perspective that the work is legitimate and chosen.\footnote{See Halley et al., supra note 214, at 347 (Chantal Thomas, subpt. author) (explaining two feminist perspectives on prostitution and trafficking as "structuralist" or radical...
approaches that endorse an abolitionist (i.e., partial decriminalization) approach[,]... and 'individualist' or liberal/libertarian approaches that contemplate the possibility that some prostitution is consensual... and consequently that are amenable to greater decriminalization or legalization.

247. Id. at 340 (offering hard-nosed ideas, guided by insights drawn from American Legal Realism, for shifting the analysis of various feminist legal concerns, including sex work, toward consequentialism and cost–benefit analysis).


249. Id.


chasing sex is criminal.

Kaiser claims that the results have been declining prices and a shrinking client population, with many of the remaining Johns being the most anti-social and dangerous.

Sex work is not just a women’s issue but a GLBT issue as well in that the GLBT population, including its youth, is over-represented in the industry.

The pertinence of some legal and economic conditions might vary by sub-population. For example, the availability and cost of hormones or sex reassignment surgeries would form a background condition for at least some transgender sex workers whose choices might be partially determined by powerfully felt needs for medical treatments for which they lack insurance coverage.

Access to decent and affordable child care, on the other hand, would probably be a more prominent concern for mothers in the trade who might leave their children sleeping

252. Id.; See also Halley et al., supra note 214, at 396 (Hila Shamir, subp. author) (discussing the Swedish model citing Lag om föbud mot köp av sexuella (Svensk förfaringssamling [SF], 1999-408 (Swed.), revoked and replaced in 2005 by Brotnsalken [BbB] (Criminal Code) 611 (Swed.).)

253. See also Halley et al., supra note 234, at 396 (Hila Shamir, subp. author) (observing that while structuralist feminisms view the Swedish legal reform as a triumph, critics argue that sex work merely "went deeper underground" which resulted in "worse working conditions, lower pay, greater dependence on pimps, and higher health risks to sex workers"; Law, supra note 243, at 568-69 ("[P]rostitute activists argue that laws punishing customers will cause men who are married, with respectable careers and a reputation to protect," to avoid the risk of exposure, while "men who are criminally inclined... will not be discouraged."). Kaiser also reports the fascinating consequence in Sweden of women posing as sex workers in order to rob Johns, who cannot report the robberies without risking arrest for having attempted to purchase sex. Kaiser, supra note 248.

254. This is not to deny that sex work and its regulation have significant implications for women. Mary Joe Frug’s argument that anti-prostitution rules have productive effects on women by "formally preserving the distinction between legal and illegal sexual activity," effectively presenting women with a choice between the role of wife/mother and that of whore, suggests that the regulation of sex work has significance for women generally, not merely for those who practice the trade. See Mary JOE FRUG, A POSTMODERN FEMINIST LEGAL MANIFESTO, IN POSTMODERN FEMINIST LEGAL FEMINISM 125, 134 (1992).


256. See ESTES & WIEGER, supra note 255, at 61 (explaining that access to such treatments has been an important area of law reform by the major GLBT law reform organizations). See, e.g., GLAD: Our Work: Cases; In re Rh Connon O’Donnnabain, http://www.glad.org/work/cases/in-re-rh-connon-odonnnabain/ (last visited Mar. 16, 2009) (describing GLAD’s work in an ongoing dispute in U.S. Tax Court over whether sex reassignment surgery is a deductible medical expense).
at home at night with the idea that the neighbor has one ear out for them, but who feel less comfortable leaving them alone during the daytime. Other conditions, such as the nature and extent of police enforcement and/or abuse, would be of universal concern, even if the conditions themselves differ by sub-population, venue (e.g., escort services vs. street prostitution), neighborhood, and so on.

In any case, the conditions on the ground are likely to be factors in each person's decision about whether to engage in sex work, as well as what kind or how much to engage in, how much risk to take in pursuit of a trick, whether to serve as police informants, and so on. If one's concern is with the safety and well-being of sex workers, these sorts of concrete legal conditions might be good places to intervene. Abstract and irresolvable debates about autonomy seem less promising. We could insist on ideological victory ("I chose this work!") or hold our breath for the arrival of true equality between men and women, gays and straights, or trans and non-trans people to see who was right, but if we tune our legal minds to a different channel, we might actually be able to change some legal conditions that have concrete effects on real people's lives.

In the transgender domain, reformers have succeeded in getting some state and local anti-discrimination laws enacted and have had mixed results in obtaining anti-discrimination coverage by other means. Some of these efforts surely have raised the profile of the issue and emboldened and organized the constituency. On the other hand, they come with the same hazards discussed above (identity production/entrenchment, provocation of competing rights, obscuring of law reform possibilities other than formal equality, etc.).

257. Sylvia Law reports that in France, a feminist legislator named Marthe Richard was a moving force behind legislation that closed the brothels in that country, but that after the legislation took effect and the apparent consequences were increased "venereal diseases, public solicitation, . . . police corruption . . . [and sex workers' dependency] upon pimps," she then attempted to reverse her previous reform. Law, supra note 243, at 555–56. Based on this telling, Marthe Richard is my feminist heroine, because she bravely permitted the consequences of the initial reform to dislodge her from a position rooted in ideology.

258. See supra Part II.B.2 (discussing ENDA).

259. An example of a competing right that might be provoked by pro-trans rights argumentation is the right of women not to encounter biological males in a public women’s restroom. Cf. Gómez v. W. Group, 635 N.W.2d 717, 721, 726 (2001) (dismissing discrimination claim made by a transgender-employee plaintiff). In Gómez, the defendant-employer understood the complaints of the other women employees against their transgender co-worker for using the women’s restroom to be “a hostile work environment concern.” Id. at 721.


262. Spade, supra note 261, at 745.

263. Id. at 762.

264. Id. at 771–72.
headlong down the path of normalization and rights, or they can try instead to engage the low-profile rules that are quietly producing gender identity and distributing jobs, safety, and services.

The law reform approaches described above do not share a focal equality objective. Read one after another, their goals might seem a bit dispersed, but that is exactly the point. What they share is attentiveness to legal conditions happening at the ground level rather than at the height of constitutional vindication. Their aims are varied but concrete, in the details of daily life.

None is intended (by me) as a specific law reform proposal. Rather, I collect, summarize, and thematize them to demonstrate that there are alternatives to the dominant gay rights agenda and that to critique that agenda and highlight its costs does not leave reformers with nothing to do. Full throttle engagement in the monumental confrontation between moralism and rights might be the most visible option, but it is not the only option. Strategic thinking should involve thorough evaluation of many viable possibilities. This section is meant to bring a handful of those possibilities into view and to promote a critical approach to agenda-setting.

IV. Conclusion

Rights such as equality are limited in their capacity to advance the full range of interests of multiple sexual and gender constituencies and every representation of these constituencies hazards exclusion and harm. This is not to say that conventional equality-seeking strategies have no benefits or should never be used. Rather, the point has been to confront their costs and to demonstrate that, despite how things may seem under

people in these groupings. Id. The statement does not oppose same-sex marriage, but rather urges that same-sex marriage not serve as the "only strategy" for increasing recognition of family forms and redistributing benefits. Id. While I sympathize with the overarching goal of getting "beyond same-sex marriage" and the good will of this group toward people living in all sorts of ways and needing access to societal benefits, the statement comes off as naïve, particularly in its concluding call for a "future where all people will be truly free." Id. The drafters seem to imagine that there is some way in which the government could recognize everything as legitimate, and not be guilty of any norm-setting. I would urge thinkers inclined to an ideal of getting the government out of our lives or, conversely, having the government legitimize every conceivable formation, to recalibrate their analysis to the very specific effects of each law or doctrine and its norm-setting and distributive capacities. Instead of hoping that a strong push in one direction or the other will remedy a mass of inequalities all at once, assess each detail for its costs and benefits and make difficult judgment calls, sometimes between costs for one constituency one cares about and benefits to another.
culture war conditions, they are not the only options for constructing a law reform agenda. The approaches presented as examples in this paper are not silver bullets and may well carry costs of their own, but I hope they will contribute something useful to a process of re-imagining the possibilities for reform. §