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Naming's Necessity

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ESSAYS

On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship

Thirty years ago, Rhonda Rivera published “Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,” the first comprehensive law review article of its kind. Since then, the sexual orientation and gender identity legal literature has exploded, with hundreds of articles considering all imaginable aspects of the law’s relationship to gender identity and sexual orientation. At the same time, political demands of lesbians, gay men, bisexuals, and transgender have both multiplied and moved to the center of cultural debates, and the body of case law addressing these issues has likewise grown exponentially. What, then, are the next steps for legal scholarship?

These Essays serve to highlight new issues, new theories, possibilities for linking theory and practice, and visions of the field for the decade(s) to come.

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HAVE WE ARRIVED YET? LGBT RIGHTS AND THE
LIMITS OF FORMAL EQUALITY

Katie R. Eyer*

A decade ago when I joined the LGBT civil rights movement, the promise of formal equality¹ seemed remote. *Bowers v. Hardwick*² remained the law of the land, no state had recognized same-sex marriage, and legislative protections for the LGBT community were few and far between. Today, the legal and political landscape has been radically reconfigured, and we are tantalizingly close to achieving many of the goals of formal legal equality: marriage protections are proliferating through legislation and litigation, a gay and transgender-inclusive federal nondiscrimination statute seems within reach, and the antigay rhetoric of *Bowers* has been replaced by *Lawrence v. Texas*.³

So have we arrived yet? My reluctant answer to this question is “No.” To be sure, we are close to achieving many of the legal doctrines that will secure formal legal equality for the LGBT community. But achieving these doctrinal goals is just the first step on the road to equality. As scholars of race and gender equality (among others) have long recognized, achieving true equality within a formal equality regime poses many serious challenges.⁴ It is this next set of challenges to which we as LGBT scholars will increasingly need to direct our attention if we are to ensure that our hard-fought struggles for legal equality will have real meaning.

How can we best address this next set of challenges? As the existing efforts of LGBT scholars demonstrate, there are a multiplicity of possible areas to explore.⁵ LGBT legal scholars, however, have mostly been curiously silent on what is perhaps the most serious practical issue that the movement will face as it moves towards formal equality: the shift to a regime in which covert or structural discrimination will take the

* © 2010 Katie R. Eyer. Research Scholar, Alice Paul Center for Research on Women, Gender and Sexuality, University of Pennsylvania. Many thanks to Serena Mayeri and Jane Baron for their helpful feedback.

1. I use the term “formal equality” to refer to a legal system in which it is unlawful to intentionally discriminate against members of a protected group.

2. 478 U.S. 186 (1986).

3. 539 U.S. 558 (2003).

4. See *infra* note 6 and accompanying text.

5. See, e.g., NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

place of overtly expressed bias. Below, I provide a brief delineation of the problem, together with some initial thoughts on potential solutions.

A. *The Problem*

The problem, as it has been identified by prior civil rights theorists, is this⁶: while some discrimination disappears when discrimination becomes formally unlawful, much of what previously would have been expressed as overt bias simply becomes covert. Moreover, even those people who believe themselves to be nondiscriminatory may act out of unconscious biases and/or make decisions that systematically disadvantage the protected class. The standards for proving discrimination that have been crafted by conservative federal judges are poorly situated to detect and address covert, unconscious, and structural biases. And, even if the legal standards were more adequate, the legal decision makers themselves—from the predominantly conservative judges to the jurors—are weary of identity politics and skeptical of the existence of discrimination.

These concerns are not merely theoretical, as statistics from the employment discrimination context illustrate.⁷ Of federal employment discrimination plaintiffs who face defense motions for summary judgment (which include virtually all employment cases that do not settle), 63.6% lose those motions and see their cases dismissed before trial.⁸ Of those who make it through the summary judgment process and go to trial, only a small fraction (28.47%) ultimately will obtain a favorable verdict.⁹ These few plaintiff trial victories then face a 41.10% chance of being reversed on appeal.¹⁰ (In contrast, only 8.72% of defense employment verdicts are reversed on appeal.¹¹).

Real-life experiences confirm that these statistics are reflective of what is (from the perspective of a civil rights litigant) an almost shocking

6. This is obviously a rough sketch of what is a rich and varied literature. For a number of significant contributions, see, for example, Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Charles R. Lawrence III, *The Id the Ego and Equal Protection*, 39 STAN. L. REV. 317 (1987); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1156-69 (2008); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

7. All statistics are taken from Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009).

8. *Id.* at 128 n.68.

9. *Id.* at 129.

10. *Id.* at 109.

11. *Id.*

level of inability or unwillingness to see covert or structural discrimination. In my own practice, I recently tried an age discrimination case to a deadlocked jury. When I spoke with the jury afterwards, I discovered that *even those jurors who were the holdouts in refusing to find discrimination* believed: (1) that one of my clients had been told that the layoffs would target older workers; (2) that the layoff did in fact target only workers in the fifty-five-or-older category; (3) that three of the people involved in making the layoff decisions had previously engaged in age discrimination; and (4) that the defendant had repeatedly changed its reasons for targeting the older workers. Absent an actual admission of discriminatory animus, it is difficult to envision what more one could do to persuade such jurors. While this is, of course, a single case, it is hardly an isolated example; numerous studies have found a pervasive unwillingness by judges and jurors to recognize covert and structural discrimination.¹²

Moreover, there is little reason to believe that gay and transgender litigants will somehow be immune from this phenomenon. Already, as social attitudes toward the LGBT community have begun to evolve, prior overt forms of bias have been transformed to softer, more socially acceptable expressions of antigay animus. For example, Professor William Eskridge, Jr., has tracked the evolution of antigay discourse from an overtly antigay natural law or medical model to the less direct (but no less antigay) “no promo homo” approach (which stresses that adopting equal rights for gays will improperly “promote” homosexuality).¹³ As the strength of legal equality guarantees for the LGBT community have continued to increase, this “no promo homo” approach has itself begun shifting towards the regime of covert, structural and unconscious discrimination that already predominates in the context of other formally protected groups.¹⁴

B. The Solutions?

It would be impossible to canvass here the multiplicity of solutions that have been developed by civil rights theorists in response to this long-standing concern. However, one observation is worth making: both experience and theory suggest that doctrinal reform is not likely to be an effective cure. Over the last several decades, scholars have come forward

12. See, e.g., Hart, *supra* note 6, at 790 n.261; Robinson, *supra* note 6, at 1127-30, 1160.

13. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328-30 (2000).

14. See, e.g., *Mitchell v. Axcen Scandipharm*, No. Civ.A.05-243, 2006 WL 456173 (W.D. Pa. 2006); *Zavatsky v. Anderson*, No. Civ.3:00CV844(AVC), 2004 WL 936170 (D. Conn. 2004).

with a panoply of thoughtful well-researched proposals to reform nondiscrimination law to better address problems of structural and covert biases.¹⁵ Virtually none of these proposals have been adopted. The work of social psychology scholars provides insight into why this may be so: as such scholars have found, both cognitive and motivational factors predispose most of us towards perceiving only the most overtly discriminatory acts as discrimination.¹⁶ Unsurprisingly, then, efforts to entrench in the law a more radical vision of what “counts” as discrimination have often met with resistance, if not outright rebellion among juridical actors.¹⁷

So if we cannot fix nondiscrimination law, what is the alternative? One alternative—increasingly popular with civil rights scholars—would be to encourage employers and other societal actors to adopt internal reforms aimed at preventing or remedying discrimination.¹⁸ Although this approach has some facial appeal, I am not overly optimistic about its likelihood of success. Social science research shows that internal antibias programs (such as diversity training) often have little effect.¹⁹ And, as the very examples used by nondiscrimination scholars illustrate, undertaking truly effective antibias reforms typically requires substantial investments of time and money, investments most employers and governmental actors seem unlikely to undertake.

Another more radical alternative would be to consider moving away from an identity politics model (a model focused specifically on group-based nondiscrimination claims) toward a more broad-based approach.²⁰ This alternative may evoke strong (negative) reactions from those of us who have built our professional identities around civil rights advocacy and scholarship, as it seems at first glance to advocate the abandonment

15. See *supra* note 6 and accompanying text.

16. See, e.g., Laurie T. O'Brien et al., *Understanding White Americans' Perceptions of Racism in Hurricane Katrina-Related Events*, 12 GROUP PROCESSES & INTERGROUP REL. 431 (2009); Karen Ruggiero & Donald Taylor, *Coping with Discrimination: How Disadvantaged Group Members Perceive the Discrimination That Confronts Them*, 68 J. OF PERSONALITY & SOC. PSYCH. 826 (1995). The influence of cognitive and motivational factors in the perception of discrimination is the subject of a longer work-in-progress by the author.

17. See, e.g., Linda Hamilton Krieger, *Sociolegal Backlash*, in BACKLASH AGAINST THE ADA: REINTERPRETATING DISABILITY RIGHTS 340 (Linda Hamilton Krieger ed., 2006).

18. See, e.g., Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

19. See, e.g., Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 593 (2006).

20. For example, the Family and Medical Leave Act attacks problems of structural and covert bias against women and people with disabilities, without relying on discrimination rubric or limiting who may utilize its remedies.

of decades of hard work in the identity politics vein. I do not believe, however, that this alternative needs to be viewed in such a dichotomous fashion. It seems self-evident that an identity politics model is necessary in order for a legally disfavored group to make the transition to formal legal equality, and that such a transition is a necessary precursor to any deeper equality work. Moreover, even following the transition to formal legal equality, some forms of bias (including overt bias) will continue to be best addressed through an identity politics approach.

It seems equally obvious, however, that a more inclusive model may be best situated to addressing problems of covert and structural discrimination within a formal equality regime. Social psychology tells us that there are substantial motivational and cognitive factors that cause many of us to resist making attributions to discrimination in all but the most overt circumstances.²¹ These factors simply do not apply, however, where the question is not framed as one of "discrimination" (as, for example, in the context of a "just cause" termination statute, where the question is simply whether the person was terminated for "just cause").²² Moreover, the political backlash that typically accompanies identity-politics-based attempts to address covert and structural biases could potentially be significantly blunted by focusing on strategies that incorporate broad-based and inclusive remedies.²³

Of course, there will not be a basis in every circumstance for a non-identity-politics-based approach. But it is not hard to envision developing such an approach in many of the areas in which we seek to do equality work. To provide just a few examples: (1) "just cause" legislation (which requires "just cause" for the termination of *any* employee) in the employment context; (2) reform of the "best interest of the child" standard (to make the standard applied less arbitrary and subjective for *all* parents) in the family law context; and (3) universal health care coverage of medically necessary care (for everyone, including unmarried couples and members of the transgender community). Even if such approaches merely supplement (and do not supplant) more traditional nondiscrimination arguments, they are sure to increase the buy-in of a public that, at best, does not understand claims of covert or structural discrimination and at worst views such claims as "special rights."

21. See, e.g., O'Brien, *supra* note 16 and accompanying text.

22. *Id.*

23. Cf. THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 421-45 (Margaret Wier et al. eds., 1988).

C. Conclusion

We, as scholars of the LGBT civil rights movement, have the advantage of knowing what obstacles we are likely to face once we achieve the objective of formal legal equality. What we do with this information is up to us. Will we face the disappointments of formal legal equality as other prior groups have? No doubt yes, to some extent. But perhaps, by taking seriously the challenges of those who have succeeded in their struggles for formal equality before us, we can find ways to ensure that LGBT litigants (and all others who could benefit from the reforms we seek) face a more hopeful future.

NAMING'S NECESSITY

Elizabeth M. Glazer*

Writing about the law's relationship to sexual orientation and gender identity presents authors with a number of choices. Topics range widely.¹ Different areas of law intersect with different aspects of sexual orientation and gender identity.² With her publication of *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*,³ Rhonda Rivera created not just avenues but an entire infrastructure of possible routes on which legal scholars writing about issues relating to sexual orientation and gender identity can travel.

Rivera wrote the article to "provide a comprehensive picture of the legal position of homosexual persons in the United States [in 1979]."⁴ At the time Rivera wrote, "this area of the law [wa]s so young and so fragmented it [w]as not . . . possible to find broad rules which cut across all the areas involved."⁵ A lot has changed since Rivera published her article. While there is a continuing need for legal commentary on issues related to sexual orientation and gender identity, simply choosing to write about these issues is no longer novel. Bill Rubenstein's memory of an evening spent in the library at Harvard Law School when, as he went "[u]p and down the cavernous corridors and through the labyrinth of stacks," he could find "no casebooks, no hornbooks, no treatises, no

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1. Nothing more than a cursory browsing of compiled syllabi for the Law & Sexuality course is necessary to conclude that a wide range of topics fit within the intersection. See, e.g., WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *TEACHER'S MANUAL TO CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* app. A (2d ed., 1998). Some have even brought issues related to sexual orientation and gender identity into classrooms devoted to the study of another area of law. See Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3 (2009).

2. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008) (arguing that the First Amendment's obscenity doctrine has generated discriminatory collateral effects against gays and lesbians); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003).

3. Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

4. *Id.* at 799.

5. *Id.* at 947.

black letter guides, no practice pointers . . . about [his] life,” is a memory that will not be relived by the four to five percent of law students who today identify as he did.⁷

Predictably, now that ground has been laid, writers wishing to contribute to the literature must discover side streets or bumps in the road on which to focus their scholarship. Of course, by that I do not mean to minimize the importance of either early or more recent scholarship. Similar to the way in which a patented device represents a “substantial discovery” but derives additional value from its ability to “add[] to our knowledge and marks a step in advance of the useful arts,” early legal commentary on sexual orientation and gender identity issues made possible the subsequent explosion of scholarly interest in the topic.⁸ And authors of more recent scholarship must—in order to contribute meaningfully to the conversation—understand how to add value to the substantial discoveries of their predecessors.

This requires later authors to understand the value of earlier authors’ work, which also requires a later author to explain the ways in which his work differs from that of his predecessors. For example, an understanding of the law as it relates to homosexuals is required before one can appreciate Mary Anne Case’s insight that the law as it relates to gays and lesbians should take as its analytical unit not the gay or lesbian individual, but instead the gay or lesbian couple, for it is coupling that is “the behavior that defines the class’ of homosexuals.”⁹ And an understanding of same-sex coupling is required before one can appreciate Holning Lau’s insight that the constitutionality of public accommodations laws, in particular, should be analyzed by reference to the couple rather than the gay or lesbian individual.¹⁰

Of course, this is not a unique phenomenon. Any new author writing about any area of law must distinguish himself from those who have come before him. However, a difference between earlier and later pieces of scholarship about the law as it relates to sexual orientation and

6. WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (3d ed. 2008).

7. Kelly Strader et al., *An Assessment of the Law School Climate for GLBT Students*, 58 J. LEGAL EDUC. 214, 217, 226 (2008) (reporting, based on data from the Law School Admission Council, that between four and five percent of law students identify as gay, lesbian, bisexual, or transgender).

8. *Atl. Works v. Brady*, 107 U.S. 192, 200 (1883).

9. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Gay and Lesbian Rights*, 79 VA. L. REV. 1643, 1643 (1993) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)).

10. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2006).

gender identity issues is an evolving concept not only of what the law should protect, but of *whom* the law should protect.

Alongside the evolving concept of whom the law governing sexual orientation and gender identity should protect, there has existed an unspoken negotiation about what to call the protected individuals. Rhonda Rivera has written about “homosexuals.” William N. Eskridge has written about “gays.”¹¹ Mary Anne Case has written about “gays and lesbians.”¹² Chai Feldblum has written about “LGBT” people.¹³ Holning Lau has written about the “sexual minority,”¹⁴ and later about “SOGI minorities.”¹⁵ Sometimes when legal scholars refer to members of the group they do so in order to limit the scope of their prescriptions. Kenji Yoshino’s discussion of the bisexual,¹⁶ Zachary A. Kramer’s discussion of the heterosexual,¹⁷ Julie A. Greenberg’s discussion of the intersexed,¹⁸ and Taylor Flynn’s discussion of the transgender person come to mind.¹⁹ But not always. And when contrasted with the explicit treatment that legal scholars writing in this area have offered to distinguish themselves from their predecessors, it seems worth noting that these name changes have gone undocumented.

Rhonda Rivera broke ground by writing a piece which she probably would have called by a different name had she written it today. Today, the word “homosexual” is one that is most often heard spoken by people who hate him, who think he is ill,²⁰ or that he has an “agenda.”²¹ And

11. WILLIAM N. ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2001).

12. See Case, *supra* note 9, at 1693.

13. See Chai Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *BROOK. L. REV.* 61, 63 (2006) (“I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual, and transgender (LGBT) people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws.”).

14. Lau, *supra* note 10, at 1273 n.9.

15. Holning Lau, *Sexual Orientation and Gender Identity: American Law in Light of East Asian Developments*, 31 *HARV. J.L. & GENDER* 67 (2008).

16. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *STAN. L. REV.* 353 (2000).

17. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 *NW. U.L. REV.* 205 (2009).

18. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265 (1999).

19. Taylor Flynn, *Transforming the Debate: Why We Need To Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *COLUM. J. GENDER & L.* 392 (2001).

20. See *Gay Adjectives vs. Lesbian Nouns* (Sept. 16, 2008), <http://thenewgay.net/2008/09/gay-adjectives-vs-lesbian-nouns.html>.

21. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some

even the abbreviation that includes lesbian, gay, bisexual, and transgender people—"LGBT"—has been criticized for not being inclusive enough.²² It is not my position that legal scholarship about issues that relate to these groups, whatever an author chooses to call them, needs to refer to them by only one name. It is also not my position that one particular name is better than another. But names are important.²³ Philosophers of language debate about the level of importance that should attach to names—whether names are synonymous with or separate from the objects that they describe—but all would agree that naming is essential so that those engaged in language with others can productively communicate about and refer to objects (or individuals) in the world. And names are particularly important at the intersection of law and sexual orientation and gender identity because so much of the progress made by scholarship in this area relates to whom the law should apply.

So before charting the future of legal scholarship about sexual orientation and gender identity, we who write about these issues should pause to discuss an admittedly basic premise in our writing. We should pause to have the conversation that we have been having silently already: the conversation about what it means when we use one name or another to refer to each other. Because we can only communicate with each other about the future of sexual orientation and gender identity law when we know exactly what we mean when we refer to our constituent group.

homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct").

22. See Lau, *supra* note 15.

23. See SAUL KRIPKE, *NAMING AND NECESSITY* (Blackwell Publishing 1981) (1972); SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (Blackwell 2d ed. 2000).

BRIDGING MARRIAGE SKEPTICISM AND MARRIAGE EQUALITY

Suzanne A. Kim*

Conventional wisdom divides the debate on the left concerning same-sex marriage into those who argue for “marriage equality,” viewing the right of access to marriage as a civil right,¹ and those on the right who treat the effort to obtain marriage as regressive, limited, and troublingly assimilationist.² But a third position has gone unexamined. A few have encouraged us to consider ways to articulate a position in support of same-sex marriage while criticizing marriage.³ I offer the term “skeptical marriage equality” to identify this middle position, skeptical of marriage as a legal category and its privileged place in law and society but favoring same-sex marriage because of the motivations for or consequences of barring it.

How can we harmonize the powerful and compelling critique of marriage advanced by feminist and queer scholars while simultaneously supporting same-sex marriage? This Essay attempts to do so by arguing that same-sex marriage may not only make marriage internally less hierarchical as others have argued, but it may, more importantly, unsettle the hierarchical relationship between marriage and other forms of intimacy under the law.

The pursuit of same-sex marriage facilitates the pluralistic goals of the marriage critique, and the destabilization of marital primacy, by

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1. See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (2004); Thomas B. Stoddard, *Why Gay People Should Seek the Right To Marry*, in *WE ARE EVERYWHERE* (Mark Blasius & Shane Phelan eds., 1997).

2. See, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

3. See Katherine Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008).

drawing attention to the gender-hierarchical and sexuality-norm-enforcing construction of traditional marriage. The pursuit of same-sex marriage and the resistance to it on the right shed light on the extent to which marriage has tended to bear its privileged status because of its exclusionary, heterosexual, and heteronormative construction, rather than just in spite of it. The debate over same-sex marriage, accordingly, forces reconsideration of the privileged status of marriage, on gender- and sexuality-related hierarchy and exclusion. By shaking the foundations of marriage's traditional predominance, the pursuit of same-sex marriage bears the potential to open the way for more pluralistic and inclusive understandings of family.

According to the feminist critique, marriage both reflects and reinforces gender differences and hierarchy through its operation⁴ and consequences of exit.⁵ As Nancy Cott has observed, “[M]arriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized. So far as it is a public institution, it is the vehicle through which the apparatus of the state can shape the gender order.”⁶

While many feminist and lesbian and gay rights scholars have criticized traditional marriage's gendered and heteronormative framework, contemporary arguments from the right against same-sex marriage also demonstrate how marriage has been constructed—and embraced—as a gender-enforcement mechanism in law and society.

For example, the “definitional” argument against same-sex marriage—that marriage is “between a man and a woman”—provides an opportunity to consider whether marriage's perceived social value rests to a large degree on this gender function. To use Susan Appleton's phrase, the definitional argument reveals quite tellingly how much marriage is about “gender talk.”⁷

While for feminists, the gender function of marriage is a reason to criticize marriage, for those who oppose same-sex marriage, the gender function of marriage may be understood not only as an important side-

4. See Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003) (exploring the gendered nature of marital duties).

5. See Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 170 (2004) (arguing that modern divorce law has “systematically devalued the contributions of women, particularly home labor”).

6. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2002); see also Susan Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 98, 110-11 (2005).

7. See Appleton, *supra* note 6, at 98.

effect of marriage but also an intrinsic part of its appeal. The argument against same-sex marriage has focused to a significant degree on the role that marriage, as traditionally constituted, has played in promoting conventional gender roles.⁸ The gender function of traditional marriage is best summed up by the following “fact” about “counterfeit marriage” offered by the Family Research Council: “Homosexual marriage is an empty pretense that lacks the fundamental sexual complementariness of male and female.”⁹

For many, the value of marriage also lies significantly in its exclusionary nature, limited to those who fit within its gendered and hetero-normative paradigm. According to Susan Appleton, “Those who seek federal and state constitutional amendments to restrict marriage to ‘one man and one woman’ often describe their goal as ‘preserving’ or ‘protecting’ marriage. For example, in calling for a constitutional amendment, President Bush cited the need ‘to protect marriage in America.’”¹⁰

The language of protectionism and preservation that pervades the opposition to same-sex marriage presupposes a limited pool of marital privilege.¹¹ For example, former U.S. Senator Rick Santorum has argued that it is important to consider the impact on the “entire moral ecology of our country” from allowing same-sex marriage.¹² Santorum likens support of same-sex marriage to “people argu[ing] that we can build the equivalent of a strip mall without even thinking about what those consequences are.”¹³

Those “consequences” are the putative devaluation of marriage. In the eyes of same-sex marriage opponents, opening up marriage to same-sex couples means “taking away” marriage from heterosexuals. In Santorum’s view, the heterosexual, gendered, and exclusive nature of marriage comprises its value.¹⁴ To allow same-sex marriage is to “deconstruct[] marriage” and “devalue what you want to value.”¹⁵

8. See Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

9. Timothy J. Dailey, Family Research Council, In Focus: Ten Facts About Counterfeit Marriage, <http://www.frc.org/content/ten-facts-about-same-sex-marriage> (last visited Aug. 4, 2009).

10. Appleton, *supra* note 6, at 126-27.

11. *Id.* at 126.

12. An Argument Against Same-Sex Marriage: An Interview by David Masci with Rick Santorum, Senior Fellow, Ethics & Pub. Policy Ctr. (Apr. 24, 2008), <http://pewforum.org/events/?EventID=180>.

13. *Id.*

13. *Id.*

14. See *id.*

15. *Id.*

In other words, marriage traditionally has been meaningful to same-sex marriage opponents because it has been constructed as an “elite private club,”¹⁶ insofar as “the value of membership depreciates if just anyone—particularly outsiders like gays and lesbians—can join.”¹⁷ Marriage’s coveted status for many of its truest believers lies in the distinguishing function it performs in dividing those worthy of its privileges and benefits from those who are not. This division has powerful and painful effects. It bears serious consequences for those, gay and straight, who live outside of marriage.¹⁸ For same-sex marriage opponents, this discipline is part of marriage’s importance.

For same-sex marriage opponents, the best way to save marriage is not to encourage it widely, but to continue to conserve it for the benefit of those who fit its traditional gender and sexuality paradigms. On this view, overuse threatens the institutional species of marriage.¹⁹ The point of marriage for these opponents is its exclusionary and limited nature.

A rich and still-developing literature informs us about the promise same-sex marriage holds for transforming gender relations within marriage.²⁰ But how can same-sex marriage transform the status of marriage within law and society more broadly?²¹ As Martha Fineman has discussed, marriage is privileged as the primary way of addressing dependency.²² The intense focus on marriage as a means of privatizing care, however, leaves out vast reaches of the population and marginalizes those who are not married.

The pursuit of same-sex marriage promises to unsettle the primacy of traditional marriage within the social and legal landscape concerning family. The counterarguments to same-sex marriage, as based on gender and exclusion, highlight the extent to which the predominance of traditional marriage may not just be incidental to the gender-enforcement and exclusionary aspects of marriage as traditionally constituted, but

16. Appleton, *supra* note 6, at 127.

17. *Id.*

18. See, e.g., MARTHA FINEMAN, *THE AUTONOMY MYTH* (2004); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); Laura Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007); Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004).

19. Lynn Wardle has analogized the prospect of same-sex marriage to the “tragedy of the commons.” Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “the Tragedy of the Commons,”* 22 BYU J. PUB. L. 441, 470-72 (2008).

20. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 TUL. J.L. & SEXUALITY 9 (1991); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356 (1992).

21. Appleton, *supra* note 6, at 124 (“And how might same-sex marriage help transform marriage (or its place in law and society) for heterosexuals?”).

22. See FINEMAN, *supra* note 18.

might actually be the *sine quo non* of marriage in its traditional form.²³ Accordingly, the debate over same-sex marriage draws out the extent to which marriage's primacy has significantly derived from its discriminatory workings.

Same-sex marriage holds the potential not only to transform marriage internally but also to alter marriage's "place in law and society."²⁴ Marriage skepticism has principally focused on the ways in which marriage has functioned socially and legally to create and enforce hierarchy—both within the institution of marriage and across the spectrum of intimate and caregiving relationships.

Rooted in this marriage skepticism is a concern about socially and legally supporting a diverse array of caretaking and intimate relationships, beyond the conjugal relationships that have been traditionally idealized as between men and women. Marriage skepticism, accordingly, may be viewed as a project in pluralism.

The pursuit of same-sex marriage facilitates pluralism by shining a light on the nature and origins of traditional marriage's privileged status. By doing so, it opens the path toward challenging its primacy and considering, instead, additional means of supporting family, intimacy, and caretaking beyond just marriage. In other words, we may make marriage matter less ultimately as the principal and privileged means of supporting caregiving by making it matter more now as a civil rights goal.

23. I am not, for example, persuaded that traditional marriage's staying power all these years has been just about more benign aspirations like love and commitment. The voluminous research on the significance of marriage to women's social, economic, and political power demonstrates that love and commitment have not principally driven women to marry. See, e.g., COTT, *supra* note 6; STEPHANIE COONTZ, *MARRIAGE, A HISTORY* (2005). Moreover, the increase in rates of divorce and delays in women's age at the time of marriage coincide with increased workforce participation by women and greater opportunities in higher education. See NAT'L COMM'N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 21-23 (1991). These demographic trends suggest that marriage is not just about love and commitment.

24. Appleton, *supra* note 6, at 124 ("And how might same-sex marriage help transform marriage (or its place in law and society) for heterosexuals?").

VIEWING LAW AS CULTURAL POLITICS IN THE
PROMOTION OF GAY EQUALITY

Steven J. Macias*

Rather than a new jurisprudential theory about gay rights, what we need is a new realization that the possibility of LGBT equality lays squarely within the domain of cultural politics. We need to understand that equal and respectful treatment of gay men and lesbians will only come about because sociocultural practices will have changed for the better, not because a new “due process” or “equal protection” argument has been invented. This is not to suggest that there is no room for lawyers and legal scholars at the gay strategy table, for surely there is. Instead, conceiving of the quest for gay inclusiveness as primarily a sociopolitical goal, and not as a doctrinal or jurisprudential goal, means recognizing that the judicial process occurs within a larger sphere of cultural politics. Eric Posner and Adrian Vermeule curiously miss this point in a recent review article.¹

According to Posner and Vermeule, progressive legal scholars lack the coherent theoretical program of conservative activists.² They further contend that it is the want of a liberal programmatic theory that explains conservative dominance, not only at the highest levels of the judiciary, but also in the public mind.³ The coherence of originalism, they believe, has contributed to its sociolegal ubiquity.⁴ Their review criticizes a collection of “progressive” essays as follows: “Common to nearly all the authors are two commitments—a commitment to using law to promote a progressive political agenda, and a commitment to public candor about the first commitment; but these are incompatible, at least in pragmatic terms.”⁵ Although I can appreciate their instinct that the public mind as well as the professional legal mind will not accept a law-as-politics formulation, I believe that there is a third option. Between formal legal

* © 2010 Steven J. Macias. Teaching Fellow, California Western School of Law. Visiting Assistant Professor, University of Oregon School of Law 2010-11. I welcome comments at macias@stanfordalumni.org or smacias@cwsu.edu.

1. Eric A. Posner & Adrian Vermeule, *Outcomes, Outcomes*, NEW REPUBLIC, Aug. 12, 2009, 43 (reviewing *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009)), available at <http://www.tnr.com/article/books/outcomes-outcomes?page=0,0>. Although I do not share their conclusion that “political programs must draw their strength from theoretical innovation, and not the other way around,” Posner and Vermeule make a good case that the essays under review lack a certain political savvy. *Id.* at 47.

2. *See id.*

3. *Id.*

4. *Id.* at 43-44.

5. *Id.* 47.

theory-laden doctrine and unadorned legal instrumentalism lies the real pragmatic view: law as cultural politics.⁶

Viewing law as cultural politics means several things. First, it means that those who strive for cultural change, including gay rights activists, must communicate with the bench and bar on emotional—sympathetic and empathetic—levels.⁷ Decision makers must understand and identify with the human pain and suffering caused by unequal laws. Without such identification, a judge's cultural view is necessarily limited, thus leading to narrow, conservative decisions, regardless of the judge's jurisprudential stripes.

The second pragmatic insight follows from this last observation: gay rights activists need not worry about the theoretical preferences of the judges, and thus need not argue with them in theoretical terms. If a judge has empathy for gay citizens, whether she is a law-and-order judge, an originalist, a strict constructionist, or merely just trying to avoid being reversed on appeal, she will rule in favor of gay equality. The judge whose cultural milieu is large enough to understand that sexuality-based distinctions serve no useful public purpose, but instead work real harm, will find her preferred theory of interpretation malleable enough to include gays and lesbians as equal citizens.

The third and final insight, and the one that the rest of this Essay is designed to illuminate, is that arguing the case for gay equality in either theoretical or doctrinal terms, without full empathy from the bench, will more often than not lead to confusion and loss. As Stanley Fish has explained, "the liberal tendency to turn substantive convictions into formal abstractions" distracts from accomplishing one's political goal by making the goal seem larger than it actually is.⁸ This is what happened in

6. I mean to use the phrase "cultural politics" as Richard Rorty did. "The term 'cultural politics' covers, among other things, arguments about what words to use. . . . It includes projects for getting rid of whole topics of discourse." RICHARD RORTY, *Cultural Politics and the Question of the Existence of God*, in 4 PHILOSOPHICAL PAPERS: PHILOSOPHY AS CULTURAL POLITICS 3, 3 (2007). For my purposes, "law as cultural politics" means teaching the legal establishment that its current conceptions of "gay," "homosexual," and "sexual orientation" do not match up well with how actual gay persons conceive of themselves as individuals.

7. Martha Nussbaum captures this sentiment well in the Preface to her new work on sexuality and law. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW*, at xvii (2010). There, she explains that the "politics of disgust" has been the prevailing lens through which the majority views issues of sexual orientation. *Id.* By contrast, Nussbaum argues for a "politics of humanity." *Id.* Disgust can prevail "only if one has never made a serious good-faith attempt to see the world through that person's eyes or to experience that person's feelings." *Id.* In order to turn from a politics of disgust to one of humanity, we need an "exercise of imagination." *Id.*

8. STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 149 (1999).

the Proposition 8 (Prop. 8) case in the California Supreme Court.⁹ Opponents of Prop. 8, including the state attorney general, argued that the outcome of the case depended on the intricacies of separation of powers, the complexities of constitutional amendment-revision distinctions, and the scope of prepolitical natural law, rather than simply fair treatment of people.¹⁰ But because six of the seven justices really did not consider gays and lesbians to be worthy of equality, they took up the opponents' challenge and discussed the case as though principles, and not people, were all that mattered.¹¹

Proposition 8, now part of the California Constitution, contains a mere fourteen words: "Only marriage between a man and a woman is valid or recognized in California."¹² This sentence takes its place in the constitution immediately after the section containing the equal protection clause, thus implying a limitation on the concept of equality. In its famed 2008 opinion, the California Supreme Court interpreted the equal protection clause as prohibiting sexual orientation discrimination in the state's marriage scheme.¹³ Attorney General Jerry Brown, in arguing for the invalidation of Prop. 8, put forth the argument that the framers of California's constitution, never intended "to subject the rights of individuals or groups . . . to abrogation by popular vote—raising the specter of Mills's [sic] 'tyranny of the majority.'"¹⁴ Within the same section of his brief, Brown outlines a theory of prepolitical fundamental rights and discusses a social contract theory of government,¹⁵ neither of

9. Strauss v. Horton, 207 P3d 48 (Cal. 2009).

10. See Answer Brief in Response to Petition for Extraordinary Relief, Tyler v. California, No. S168066 (Cal. 2009) [hereinafter Brief in Response], available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168066-answer-brief-petition.pdf>.

11. See *In re Marriage Cases*, 183 P3d 384 (Cal. 2008). Certainly the four members of the court who legalized gay marriage prior to Proposition 8 had a certain amount of *sympathy* for gay people. But it turned out that three of those four justices had no *empathy* for gays and lesbians. Like a houseguest who sees a stray dog on a rainy day, the court initially brought the dog inside, dried him off and warmed him up—because they felt sorry for him. But when the owner objected to a strange dog inside his house, the court sent the dog back outside to face the elements alone. Indeed, it appears that the three judges who switched sides post-Prop. 8 had merely condescended to gays and lesbians in their first opinion, and perhaps that is all they could do given their limited cultural vocabulary. Cf. Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231, 232, 249 (1991). In explaining that marginalized groups need to give up on the vocabulary used to marginalize them, Rorty suggests that "we have to think of gays, blacks, and women inventing themselves rather than discovering themselves, and thus of the larger society as coming to terms with something new." *Id.* Hence, he praises feminist legal scholar Catherine MacKinnon, who "sees moral and legal principles, particularly those phrased in terms of equal rights, as impotent to change [intuitive] reactions." *Id.*

12. CAL. CONST. art. I, § 7.5.

13. *In re Marriages Cases*, 183 P3d at 452-53.

14. Brief in Response, *supra* note 10, at 85.

15. *Id.* at 85-87.

which theorist John Stuart Mill would have approved. The point, however, is that none of this, whether intellectually consistent or not, was enlightening to the court, or anyone else, as to why Prop. 8 should have been invalidated. It *should* have been invalidated, and Mill *could have* helped, but his political theory was the wrong place to turn.

Political theory, except in its most simplistic form, is not the stuff of American legal briefs or opinions. Judges are not trained in political theory and most, quite frankly, do not have the intellectual background to evaluate the history of political thought when it is presented to them.¹⁶ Rather than framing the Prop. 8 case as one concerning prepolitical, inalienable rights,¹⁷ the Attorney General should have used Mill's *On Liberty*¹⁸ to explain why such a discriminatory law does not advance "the good of the whole."¹⁹ Instead, the brief simply stated that to be the case, and did so in the same breath as discussing ticket scalping, merchant coupons, and insane asylums.²⁰ But as pragmatist philosopher, Richard Rorty, once said, "I would not consider myself to be seriously discussing politics with my fellow-citizens if I *simply* quoted passages from Mill at them, as opposed to using those passages to help me articulate my views. . . . What should be discouraged is *mere* appeal to authority."²¹ Rorty's statement is especially relevant when making an argument to a state supreme court that essentially engages in policy analysis and for whom authority has much less force.

Attorney General Brown used Mill as a rule of law from which the court was supposed to deduce the logical outcome.²² Mill's harm principle and public/private distinction were simply the accepted major premises upon which the judicial opinion was supposed to depend.²³ Yet, what successful Prop. 8 opponents needed to show, was not that the new

16. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 227 n.28 (2003). In explaining how abstract political concepts can only confuse matters in legal opinions, Posner observes, "Empty, sometimes naive or even fatuous, judicial remarks about democracy abound."

17. See Brief in Response, *supra* note 10, at 79–80 (discussing "inalienable" rights, which "'antedate' the constitution as inherent in human nature").

18. JOHN STUART MILL, *ON LIBERTY* (1859).

19. Brief in Response, *supra* note 10, at 80.

20. See *id.*

21. Richard Rorty, *Religion in the Public Square: A Reconsideration*, 31 J. RELIGIOUS ETHICS 141, 147 (2003). On Rorty's contribution to law, see Steven J. Macias, *Rorty, Pragmatism, and Gaylaw: A Eulogy, a Celebration, and a Triumph*, 77 UMKC L. REV. 85 (2008); Ian Ward, *Bricolage and Low Cunning: Rorty on Pragmatism, Politics and Poetic Justice*, 28 LEGAL STUD. 281 (2008).

22. See Brief in Response, *supra* note 10, at 85.

23. Richard Rorty, *Pragmatism as Romantic Polytheism*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 21 (Morris Dickstein ed., 1998).

constitutional provision was *intellectually* irresponsible by ignoring natural rights, but *morally* irresponsible by “circumvent[ing] the process of achieving democratic consensus about how to maximize happiness.”²⁴ Continuing with Rorty’s argument, Prop. 8 proponents “sin not by ignoring Mill’s inductive methods, but by ignoring his reflection on liberty.”²⁵ Likewise, a pragmatic and morally responsible California Supreme Court would have demanded more from anti-marriage proponents than the simple fact of their 52.3% showing at the ballot box.²⁶ Both sides must engage in reasoned debate, at least in the courtroom.²⁷

Attorney General Brown’s brief only hints at what a pragmatic analysis of Prop. 8 might look like by suggesting that the court subject it to a “compelling need” test.²⁸ A better inquiry might be whether limiting marriage to cross-sex couples is a project of social cooperation or a project of individual self-development.²⁹ In other words, does Prop. 8 make a difference primarily in our social interactions or primarily in our personal self-conceptions?

Judge Posner asks us to consider a version of this question by examining whether gay marriage will “degrade or depreciate the concept of marriage,” thus lowering the marriage rate “with adverse social consequences.”³⁰ According to Posner, “the danger seems small” because “the people who worry about the effect of gay marriage on the institution of marriage are those most committed to the institution, and they are unlikely to desert it.”³¹ Even if they did, Posner reasons that the privatization of marriage would not have major social consequences

24. *Id.* at 29.

25. *Id.*

26. Supplement to the Statement of Vote Statewide Summary by County for State Ballot Measures (Nov. 4, 2008), *available at* <http://www.sos.ca.gov/elections/ssov/10-ballot-measures-statewide-summary-by-county.pdf>.

27. In upholding Prop. 8, the court defended the prerogative of the people as though their vote reflected the outcome of a deliberative debate. *See* *Strauss v. Horton*, 207 P.3d 48, 108 (Cal. 2009) (“[T]he people may amend the Constitution through the initiative process when they conclude that a judicial interpretation or application of a preexisting constitutional provision should be changed.”). However, in a concurring opinion, Justice Kennard explained that decisions of the voters need not be supported by a “compelling interest,” nor as far as I can tell, any publicly intelligible reason whatsoever. *Id.* at 124 (Kennard, J., concurring).

28. Brief in Response, *supra* note 10, at 90 (“[T]he proponents of Proposition 8 advanced no compelling need in furtherance of public health, safety, or welfare for abrogating the fundamental rights of same-sex couples.”).

29. Rorty, *supra* note 23, at 28.

30. Posting of Richard Posner to the Becker-Posner Blog, *The Economics of Gay Marriage*, The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/08/the_economics_o_8.html (Aug. 10, 2008).

31. *Id.*

“given the ease with which under modern law marriages can be dissolved by either party.”³²

Posner has also recently said, in praising “judicial modesty,” that it would be a mistake if the United States Supreme Court “created a federal constitutional right of homosexual marriage.”³³ His primary reason, however, was because

the question of whether to nationalize an issue in the name of the Constitution calls for an exercise of judgment; and when the nation is deeply divided over an issue to which the Constitution does not speak with any clarity, and a uniform national policy would override differences in local conditions, nationalization may be premature.³⁴

In the case of Prop. 8, we were dealing not with a national, but rather a state, issue. As Kenneth W. Starr’s brief explained, “California’s generous statutory protection for the civil rights of gays and lesbians amply attest to their concern for minorities.”³⁵ Therefore, the California Supreme Court’s “exercise of judgment” should have proceeded precisely along the lines of Posner’s consequentialist analysis, explaining to otherwise tolerant Californians why the invalidation of Prop. 8 was morally, and therefore legally, correct. That would have been a true exercise in law as cultural politics.³⁶

32. *Id.*

33. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32, 34.

34. *Id.* Even someone as sympathetic to equal marriage rights as Martha Nussbaum recognizes that “Same-sex marriage is a good issue for federalism to handle, at least for a while.” NUSSBAUM, *supra* note 7, at 161.

35. Interveners’ Response to Pages 75–90 of the Attorney General’s Answer Brief at 19, *Strauss v. Horton*, (Cal. 2009) (No. S168047), *available at* <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s1680xx-response-ag-brief.pdf>.

36. Another name for “law as cultural politics” might be “postmodern justice,” which “requires . . . that in the process of deciding, the judge attend to the uniqueness of the other and in doing so suspend and reinvent the law.” Peter Goodrich, *Postmodern Justice*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 188, 204 (Austin Sarat et al. eds., 2010). In explaining what postmodern justice looks like in action, Goodrich calls it “an instance of law’s entry into the multiplicity of language games.” *Id.* at 208. Following these lines of thought, the Prop. 8 Court might have disrupted the language game of democracy—a heterosexist game—in favor of a language game that expanded the circle of those entitled to the law’s protection. Because the choice between these two language games is far from settled, the gay-rights lawyers have to convince the judges to pick theirs. Perhaps that alternate language—the one in which gays are fully formed human beings—is not yet complete (and I think it is not) and thus there are not many courts willing to play games with such a limited vocabulary. If that is the case, then the agenda for LGBT legal academics is clear: strengthen the conception of the gay subject as a rights-bearing human subject without outside (anti-gay) interference, then take the resultant language game and play it up as often as possible. The hope is that eventually the judges (and everyone else) will then play along.

NEW ENTRANTS BRING NEW QUESTIONS

Douglas NeJaime*

A. Introduction

In a relatively short period of time, the lesbian, gay, bisexual, and transgender (LGBT) movement has moved from the margins to the center. The movement's push for equality has attracted the attention—both sympathetic and oppositional—of important groups and individuals outside of the movement. Christian Right advocates, on the one hand, and government lawyers and private nonmovement lawyers, on the other, now invest heavily in litigation implicating LGBT rights. This mainstreaming of the LGBT movement yields significant issues for sexual orientation and gender identity scholars. In this Essay, I will first show how the LGBT rights context provides rich new material with which to explore decades-old debates and pressing new questions in sociolegal scholarship. Then, I will explain how the addition of new voices and the increasing acceptance of LGBT equality norms present significant substantive issues relating to religious liberty and antidiscrimination law.¹

B. Sociolegal Scholarship—Cause Lawyering, Law and Social Movements, and Legal Mobilization

The rise of the Christian Right legal movement and its increasing attention to LGBT rights issues suggest critical questions that often have been neglected in sociolegal scholarship. As an initial matter, the literature on conservative cause lawyering is a domain from which sexual orientation and gender identity scholars are largely absent.² Yet analysis of conservative public interest lawyering is a worthwhile task. Christian Right advocates frame LGBT issues in provocative and influential ways. LGBT rights lawyers respond, unable to frame issues entirely on their own terms. For instance, in California's Proposition 8 battle, Christian

* © 2010 Douglas NeJaime. Associate Professor, Loyola Law School Los Angeles. I am grateful for the thoughtful comments I received at the Section on Sexual Orientation and Gender Identity panel at the 2010 AALS Conference. Many thanks go to Suzanne Goldberg for organizing this important discussion, and to Dean Spade, for his insightful comments on this Essay.

1. This short Essay attempts to highlight and pose some key questions for future legal scholarship on sexual orientation and gender identity. These highlights, of course, are colored by my own research interests, and I want to acknowledge that a number of important and provocative issues populate the field.

2. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT* (2008), for a thorough exploration of conservative cause lawyering.

Right advocates connected marriage equality to gay-inclusive public school curriculum, forcing Proposition 8 opponents to address both issues.³ LGBT advocates spent significant time and money responding to the fears of parents with school-age children and, instead of embracing gay-inclusive curriculum, largely dismissed the prospect of such curriculum as far-fetched and irrelevant.⁴ How, then, do countermovement frames affect movement messaging, priorities, and resource allocation?

On a broader level, the relationship between the Christian Right and LGBT rights movements provides a productive lens through which to explore movement and countermovement phenomena. While most scholarship on law and social movements conceptualizes movements battling against the state,⁵ the intense relationship between the Christian Right and LGBT rights movements illustrates the need to consider and understand opposing movement relationships. How does the increasing success of the LGBT movement facilitate Christian Right advocates' appeal to minority rights claims? How does analysis of the Christian Right/LGBT rights movement/countermovement relationship complicate established theories of movement mobilization and organization?

The LGBT movement's very recent history has witnessed a trend toward more sympathetic state actors, further underscoring how a simple model in which a social movement opposes the state does not map neatly onto LGBT rights. In fact, in the past year, top government lawyers from California and Massachusetts have staked out significant pro-gay positions. In the federal challenge to Proposition 8, the California Attorney General argued that the state constitutional amendment is unconstitutional under both federal due process and equal protection guarantees.⁶ At the same time, the Massachusetts Attorney General challenged part of the federal Defense of Marriage Act (DOMA).⁷ Working with an earlier suit brought by Gay & Lesbian Advocates &

3. See California General Election Official Voter Information Guide, *Arguments: Prop 8* (2008), <http://www.voterguide.sos.ca.gov/past/2008/argu-rebut/argu-rebutt8.htm>.

4. See *id.*

5. See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1629 (1996) ("Because most empirical and theoretical work on social movements focuses on movement challenges to the state, the phenomenon of ongoing interactions between opposing movements demands a revision and extension of our theories of social movements and social change.").

6. See Answer of Attorney General Edmund G. Brown Jr., *Perry v. Schwarzenegger* 2009 WL 1748382 (N.D. Cal. May 22, 2009) (No. 3:09-cv-02292-VRW).

7. See Complaint, *Commonwealth of Mass. v. United States Dep't of Health and Human Services*, No. 1:2009-cv-11156 (D. Mass. July 8, 2009), <http://www.boston.com/news/politics/politicalintelligence/DOMA%20Complaint%20FINAL.pdf>.

Defenders (GLAD),⁸ the Massachusetts Attorney General argued that DOMA unconstitutionally requires Massachusetts to treat similarly situated couples differently.⁹ We can no longer consider the state to be *the* opposition to LGBT rights claims; rather, LGBT and Christian Right advocates each attempt to seize on openings offered by state actors sympathetic to their respective movements. By reconceptualizing movement dynamics in this way, I do not mean to cast the state as either a centralized or benign actor. Rather, power operates in multiple, diffuse ways across multiple institutional domains. How do the dynamics of power across state institutions affect the political opportunity structure available to the LGBT rights and Christian Right movements? How do the changing relationships of state actors to each movement influence how the respective movements use elite support to bring about social change?

The new role that government lawyers have taken in pro-gay litigation also complicates traditional cause lawyering analysis. While the increasing presence of government lawyers in LGBT rights litigation speaks to the progress of the movement, that same presence suggests a potential shift away from a carefully orchestrated trajectory. In challenging Proposition 8 in state court, the California Attorney General put forth a novel theory, arguing that a simple majority of voters cannot take away a fundamental right from a suspect class without a compelling governmental interest.¹⁰ He expressly rejected the amendment/revision theory advanced by LGBT rights lawyers.¹¹ While the Attorney General's opposition to the newly adopted constitutional amendment created a significant moment in LGBT history, his legal position produced some internal tension that those opposing Proposition 8 had to manage and resolve. How do government lawyers who side with a social movement negotiate their roles as public lawyers and cause lawyers? And how do movement lawyers respond to sympathetic but independent government lawyers?

The recent federal marriage equality lawsuit, brought by prominent private lawyers against the advice of movement advocates, casts in even

8. See Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill v. Office of Personnel Management* (D. Mass. Mar. 3, 2009), <http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf>.

9. Complaint, No. 1:2009-cv-11156, *supra* note 7, at 3-4.

10. See Answer Brief in Response to Petition for Extraordinary Relief, *Tyler v. State of California*, No. 5168066 (Cal. S. Ct. Dec. 19, 2008), <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168066-answer-brief-petition.pdf>.

11. See *id.* at 22-53.

starker relief the threat to social movement control.¹² David Boies and Ted Olson, supported by the newly formed American Foundation for Equal Rights, took decisive action ahead of the organized movement's timeline.¹³ Their federal suit challenging Proposition 8 provides further evidence of the mainstream-ing of LGBT equality norms. The unlikely marriage of two ideological rivals presents the question of marriage equality as a nonpartisan matter of basic fairness. And it attests to the success of the LGBT rights movement. But for work on cause lawyering and legal mobilization,¹⁴ the suit presents provocative questions regarding movement control. How do movement lawyers maintain control of strategy? How might elite support—a key indirect effect in the legal mobilization framework—actually threaten a movement's cause? How do advocates react to loss of control at the hands of supportive elites? And how does the move by Boies and Olson tell us about the risks and benefits of court-centered strategies in LGBT rights work? Might reliance on litigation without adequate popular support jeopardize the movement's progress?

While the LGBT rights domain provides experiences that pose pressing new questions on cause lawyering and law and social movements, it also presents new material to explore classic debates in sociolegal theory. In fact, many scholars are looking to the LGBT rights movement for rich new data with which to assess the effectiveness of litigation and the role of lawyers in social movements.¹⁵ Recent experiences with marriage equality litigation provide empirical evidence that speaks to the place of litigation in social change campaigns and to the strategic moves of activist lawyers.¹⁶ Furthermore, exploring the movement and countermovement relationships between LGBT rights advocates and Christian Right advocates might have significant implications for theorizing social movement lawyers' roles and determining the effectiveness of litigation strategies. Within the legal mobilization framework, what have been the indirect effects of marriage equality litigation? How have both LGBT and Christian Right advocates

12. See *Perry v. Schwarzenegger*, 592 F.3d 971 (9th Cir. 2009).

13. See Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, 2009 WL 1490740 (N.D. Cal. May 22, 2009) (No. CV-092292VRW).

14. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

15. See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. (forthcoming 2010).

16. Compare GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008), with Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151 (2009).

conceptualized litigation, and how much have they affirmatively turned to courts for social change?

C. Antidiscrimination and Religious Liberty

Some of the same new entrants who present significant questions for sociolegal scholarship also affect the substantive doctrinal issues facing sexual orientation and gender identity scholars. Christian Right advocates have successfully pushed antigay initiatives across the country. Sexual orientation scholars must address how such laws, which strike at the heart of lesbian and gay families, contravene foundational constitutional protections. How does Arkansas's Act 1, which prohibits unmarried cohabiting couples from fostering or adopting children,¹⁷ deny equal protection of the law, invade privacy and freedom of intimate association, and strike at parental rights of LGBT individuals? And how does it do the same to other individuals who fail to meet entrenched notions of the married, heterosexual, nuclear family? Moreover, how does Act 1—and a host of other ballot initiatives across the country—distort the political process and complicate our conceptualization of direct democracy?

At the same time, Christian Right advocates have been forced to become more defensive. With government actors increasingly adopting LGBT equality norms (and displacing discrimination norms), Christian Right advocates must react. As LGBT rights are achieved, the contours of those rights must be determined. Such determinates will often turn on the operation of religious objections. How will religious exemptions carve out exceptions to LGBT rights? How will religious free exercise and expressive association influence the meaning of sexual orientation and gender identity nondiscrimination?

The push for religious accommodation by Christian Right lawyers illuminates the importance of substantive issues underexplored and under-theorized by sexual orientation and gender identity scholars. While some religious liberty advocates might exaggerate the extent to which LGBT rights threaten religious freedom, the conflict is real. Indeed, as marriage equality has moved from an impossibility to a reality, some state lawmakers have taken up the task of balancing the rights of same-sex couples to marry against the rights of religious groups and

17. See Lynda Altman, Editorial, *Arkansas' Act 1 Limits Foster Care, Adoption to Married Couples Only* (Oct. 23, 2008), http://www.associatedcontent.com/article/1137116/Arkansas_act_1_limits_foster_care_adoption.html?cat=17.

individuals not to recognize such marriages.¹⁸ Most of the scholars weighing in on these questions come from the law and religion field. While some sexual orientation scholars, most notably Chai Feldblum and Andrew Koppelman, do an admirable job of articulating normative positions in favor of LGBT equality while providing careful (but divergent) analyses of religious objections, more voices are needed.¹⁹ This conflict and its resolution will surely pervade the field for years to come, and it would be wise for sexual orientation and gender identity scholars to turn their attention to it. Our careful analysis, with its due respect for the rights of LGBT individuals, will add an important perspective to the scholarly debate and offer an essential contribution to future legislative efforts. Of course, even as we maintain a normative commitment to LGBT rights, we must acknowledge the importance of religious liberty; in fact, we must take to the question of religious accommodation the very solicitude for minority rights that informs sexual orientation and gender identity scholarship. How are religion- and LGBT-based identities similar? How do they manifest themselves in modes of public expression? How can courts and legislatures clearly articulate LGBT equality norms and yet also respect and accommodate sincere religious objections?

D. Conclusion

We have reached a pivotal moment in sexual orientation and gender identity work. We are not simply speaking to each other. Others are paying attention. Christian Right advocates have devoted significant attention to our issues. Government lawyers are now taking up our cause. And private lawyers on both sides of the aisle are defending our rights. But with these new players come new empirical, theoretical, and doctrinal questions. We should address such questions head-on: How have Christian Right lawyers changed our understanding of cause lawyering? How does the relationship between the Christian Right and LGBT rights movements inform work on law and social movements? How do sympathetic government lawyers and private nonmovement lawyers complicate our definition of cause lawyers and threaten movement lawyer control? How do the recent experiences of LGBT

18. See, e.g., Kevin Landrigan, *Religion Clause Added to Gay Marriage Proposal*, NASHUA TELEGRAPH (N.H.), May 30, 2009, at A1.

19. See, e.g., Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

rights litigation shed light on debates regarding the effectiveness of court-centered strategies? How do efforts by the Christian Right test our notions of equality and liberty? How do they challenge our ideals about the political process and the judiciary's role in protecting minority groups? And how do they pose difficult questions of religious freedom, antidiscrimination, and minority rights?

PLACE, SPACE, AND TERRITORY AS FRONTIERS
FOR LGBTQ SCHOLARSHIP

Marc R. Poirier*

I weary of scholarly arguments about the interests of LGBTQ folk that are framed primarily in terms of equality, fundamental rights, privacy, First Amendment speech, dignity, equal citizenship, and the like. To be sure, this is the broad speech of constitutional doctrine, and therefore it is powerful when adopted by an authorized decision maker, whether judicial or legislative. Constitutional doctrine serves litigators, who must frame their arguments in its terms to persuade judges, or to provide judges with a legitimating vocabulary in which to articulate decisions reached for other reasons. Scholars can help muster and sort doctrinal constitutional arguments. But we should not limit ourselves to them.

Constitutional-level analysis standing alone often does little to explain how experiences of equality, inequality, dignity, insult, etc. arise; nor does it encourage us to investigate the pervasive and often subtle mechanisms of identity, including asking how we might use identity processes to alter structures of dominance and subordination. Constitutional analysis can lack adequate attention to the dynamics of individual identity as it is experienced, produced, and reproduced in everyday life through our microinteractions with one another.¹ Microinteractions also reproduce power relations—normal and

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1. Sociologist Erving Goffman's work bristles with insights about microinteractions and identity. In particular, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Erving Goffman, *The Interaction Order*, 48 AM. SOC. REV. 1 (1983).

stigmatized status, to use sociologist Erving Goffman's terms,² or dominance and subordination, to use terms common to critical race theory and feminist theory. To be sure, as feminist theorists and others—including Goffman—have pointed out, identity performances can deviate and transgress, potentially (although not always) shifting the shared interpretive frame within which identities are (re)produced and understood.³

Investigating microinteractions is not new to legal scholarship. Early critical race theorists articulated the insult that comes from “microaggressions”⁴ and the need to understand the injury of race discrimination in terms of how small interactions are interpreted and internalized.⁵ Feminists developed cogent critiques of everyday interactions, speech, and “private” institutions, as processes of subordination. Mechanisms of cognitive bias have been explored by legal scholars relying on psychologists and sociologists, leading to an increasing focus on relational approaches to remedying discrimination.⁶ Recently I put this literature to use, arguing that the injury in the “civil union/marriage” distinction can be understood as the state's legitimation of a widespread differentiating linguistic practice, which tends to perpetuate preexisting cognitive stereotypes and biases.⁷

Increased contact among groups can play a vital part in prejudice reduction. But it does so in a far more complex way than the naïve “contact hypothesis” articulated fifty years ago by Gordon W. Allport.⁸

2. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772-73 (2002) (restating Goffman's arguments about conversion, passing, and covering in a contemporary legal and sociological context that includes LGBTQ folk and their microinteractions).

3. See, e.g., Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. C.R. & SOC. JUST. 3, 21-23 (2008) (discussing how individual microperformances can shift the shared frame within which identity performances are interpreted, with specific reference to Goffman).

4. See, e.g., Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 15-17 (2002) (discussing Dr. Charles Pierce's psychological theories of race and microaggression).

5. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

6. Classic analyses include Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Lawrence, *supra* note 5. See Jerry Kang & Mahzarin R. Banaji, *Four Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006), for a recent assessment. See Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008), for practical applications.

7. Marc R. Poirier, *Name Calling: Identifying Stigma and the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009).

8. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

Interpersonal contact shifts social practice under specific conditions. These can be studied, understood, and then carefully fostered through appropriate policies and institutional design. I am not sure that LGBTQ scholars have fully realized the import of this literature.⁹

And yet attempts to shift identity status frames crop up all the time. I recently learned that the United Kingdom has an antibullying program for elementary schools, with an educational component that includes newly penned jump rope rhymes, along the lines of “My gay uncle is green, your gay uncle is blue.”¹⁰ This strikes me as brilliant, an approach that familiarizes children with gay identity in a nonthreatening, desexualized way. The rhymes are, to use Jerry Kang’s term, LGBTQ “Trojan Horses.”¹¹

Traditionalists would surely object to these nursery rhymes as left-wing propaganda, and would claim that they interfere with parents’ right to choose the proper (moral) education for their children. Many a battle over school curriculum, school or public library holdings, internet indecency, and sex education shapes up along just these lines. For identity is ineluctably shared. It is not individual, make no mistake, just as visibility is shared, indeed as any meaning-making resource is shared. Identity implicates social meaning. And because meaning is in common, its (re)production is subject to battles for control.¹²

This brings us to visibility. Indisputably, visibility has been key to the rapid shift in Western culture around the status of homosexuality. And LGBTQ strategists seem to return to visibility tactics when all else fails. The reversal represented by the success of California’s Proposition 8 and the looming “lavender ceiling” for relationship recognition have triggered a “conversation strategy.”¹³ LGBTQ folk are being encouraged

9. I wonder whether the recently developed, plausible claim that disgust, not fear, drives antihomosexual emotions means that mechanisms of prejudice reduction that are effective in other contexts will be ineffective here. Some folks may always experience instinctive disgust at sex and bodies; contact may not be able to fix that. See generally MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL RIGHTS (2010).

10. Interview with Federico Podeschi, Managing Dir., LGBT Excellence Ctr. Wales & LGBT Cymru (Mar. 2009).

11. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497 (2005).

12. Thus, I have argued that the traditionalist position on same-sex marriage could be conceived of as a cultural property claim to an intangible cultural resource. Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343 (2008).

13. See ACLU, *Make Change, Not Lawsuits* (2009), http://www.aclu.org/pdfs/lgbt/make_change_20090527.pdf. For an analysis of this strategy in terms of the transformative potential of microperformances of identity, see Poirier, *supra* note 3, at 59-68.

to talk to friends and relatives about marriage, but *not* to sue for rights.¹⁴ The leading advocacy groups thus seek to produce a widespread educational effort diffusely, through interactions at the micro level.

LGBTQ visibility can be tricky, however. My first close-up view of LGBTQ politics was the 1979 March on Washington.¹⁵ March organizers sought a particular kind of visibility in order to lay claim to normal status. They appropriated the tradition of Martin Luther King's 1963 March on Washington by planning a national civil rights march in the same location. The March comprised a transgressive performance of visibility; yet its organizers sought to control whatever else might be visibly associated with the March.¹⁶ They worried about transvestites, motorcycle dykes, topless women, and leather S/M fetishists. Should these folks be allowed to march? If not, how to stop them?

So it is not enough to focus on identity and visibility. We scholars must also address control of places and spaces because microinteractions are physical.¹⁷ They occur in specific places and/or via specific discursive spaces. In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, for example, the United States Supreme Court used First Amendment doctrine to assign a property-like right to exclude to the parade organizers, allocating control over a real place (Boston streets) and a specific discursive space (the date, time, and location of the traditional St. Patrick's Day Parade).¹⁸

My title mentions "territory" as well as "place" and "space." "Territory" involves continuing control of place/space by a culturally cohesive group. I have not discussed "territory" previously in my work; but the concept is implicit in my analysis of the failure of traditional

14. There is also a parallel effort to encourage LGBTQ folk to go beyond coming out and to be more articulate to friends and family about what it is like to be LGBTQ. See, e.g., Tell3 Homepage, <http://www.tell-three.org> (last visited Mar. 10, 2010).

15. See The Rainbow History Project, The March on Washington, <http://www.rainbowhistory.org/mow79.htm> (last visited Mar. 10, 2010). I was not an organizer. I lived in Washington, volunteered to help, and wound up being one of three Grand Security Marshalls on the day of the March.

16. See *id.*

17. Whenever stigmatized identity is at issue, we should "ask the place/space question." Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FLA. INT'L U. L. REV. 307, 334 (2008). This inquiry will get us out of the constitutional vocabulary and focus us on processes that assign control of the material substrata that support contested microperformances of identity.

18. See Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996) (analyzing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995)).

accounts of federalism to explain *Kulturkampf*.¹⁹ I suggested a new term, "beachhead federalism," for situations where combatants in a *Kulturkampf* are not engaged in regulatory experiments, but rather seek to "win" by controlling all of the territory that they can in order to facilitate their moral claim to correctness.²⁰ A property owner's claim of a religion-based right to exclude same-sex couples from access to a beachfront pavilion for the purpose of conducting same-sex civil union ceremonies is one contemporary example of a small territorial claim.²¹

LGBTQ scholars must revisit First Amendment principles, informed now by considerations of place, space, and territory. We must engage property theory which, properly understood, studies the dynamics of allocating the control and use of shared resources. Clinging to the literal words of the First Amendment simply does not get us there. We need to enrich these words by developing a fuller account of "expressive identity."²² Timothy Zick's attention to recurring "spatial tactics" and "microgeographic principles" in First Amendment law is a promising start; but Zick focuses on political events and protests, not identity performances.²³ The next phase of LGBTQ scholarship should include sociological and reconceptualized doctrinal accounts of battles over place, space, and territory, as they bear on control of identity performances. For example, in one classic case, Judge Pettine opined that a same-sex couple's presence at a high school prom was different from and more suited to First Amendment protection than more traditional First Amendment activities such as leafleting or speechmaking.²⁴ We need to be able to explain why.

19. See Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 *TEMPLE POL. & C.R. L. REV.* 387 (2008).

20. *Id.* at 393-95 (describing "beachhead federalism").

21. I have written about this ongoing controversy in Ocean Grove, New Jersey, most recently in Poirier, *supra* note 3, at 51-59.

22. See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 *HARV. C.R.-C.L. L. REV.* 1 (2000).

23. Timothy Zick, *Place, Space, and Speech: The Expressive Topography*, 74 *GEO. WASH. L. REV.* 439, 455-85 (2006).

24. *Fricke v. Lynch*, 491 F. Supp. 381, 385 n.4 (D.R.I. 1980).