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Gay Rights and Lefts:

Rights Critique and Distributive Analysis for Real Law Reform

Libby Adler[†]

I. Introduction

A common rebuke against critical legal work is that it has a tendency to undermine without substituting.¹ It might seem outrageous then, for a critic to persist, obdurately, in his or her failure by taking an explicit stand against reconstruction – a deliberately irresponsible and even nihilistic² position, unworthy of any claim to leftism. This particular version of anti-critical condemnation is built on a colossal oversight. It conflates *reconstruction*—the act of elaborating a new totalizing theory that justifies one’s law reform agenda³—with the agenda itself.

In recent articles, I have critiqued the formal equality ideology that animates the contemporary gay rights movement in the United States.⁴ In its stead, I have not offered a newly reconstructed theory that purports to explain why lesbian, gay, bisexual, transgender and gender non-conforming (LGBT-GNC) people are entitled to a set of equalizing (or dignifying or liberating) law reforms, nor do I intend to do so. I have, however, begun an arduous course of reimagining a concrete law reform agenda that I hope holds some potential for improving the legal conditions faced by those living furthest out on the margins of sexuality and gender.⁵

[†] Professor of Law, Northeastern University School of Law. My genuine thanks go to the editors of the Harvard Civil Rights-Civil Liberties Law Review for deciding that this topic was worth making the subject of a colloquium, and especially to Victoria Baranetsky for championing the idea. As always, I took wise counsel and indispensable feedback from Janet Halley. Rashmi Dyal-Chand provided comments on an earlier draft as well as her customary intellectual and general camaraderie. Frank Cooper recommended important readings. Duncan Kennedy did, as well, and pushed me forward on the distributive analysis.

¹ See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 85, 86 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas eds., 1995) (“In short, what values and concerns will guide us in this reconstructive moment? The failure to address these important questions constitutes the most significant shortcoming of the CLS [Critical Legal Studies] project”); Jose A. Bracamonte, *Foreward, Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 298 (1987) (“The CLS movement has failed to propound a rhetorical or ideological discourse to replace the rhetoric of rights.”).

² DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 359-63 (1997) (hereinafter: A CRITIQUE OF ADJUDICATION) (discussing opposition to reconstruction and the charge of nihilism).

³ See *id.* at 295-96.

⁴ See Libby Adler, *The Gay Agenda*, 16 MICH. J. OF GENDER & L. 147 (2009) (hereinafter: *The Gay Agenda*); Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595 (2010) (hereinafter: *T*).

⁵ See *The Gay Agenda*, *supra* note 4 at 197-216; *T*, *supra* note 4 at 612-15.

This paper explains how the critique and the concrete ideas combine to exemplify a critical approach to law reform agenda setting. The methodology rests on a distinction between *reconstruction* and *decisionism*. *Decisionism*, according to my usage, consists of making difficult choices about which law reform initiatives to undertake based on broadly informed distributional hypotheses and cost-benefit calculations and then acting on the best information one can get with the best judgment one can muster, always prepared to bear the costs of one's choices.⁶ Each law reform achievement, should it materialize, rather than being a step along a path in the direction of a lodestar such as formal equality, will—one hopes—effectuate a positive distributive impact for marginalized persons while imposing bearable costs. As a theoretic matter, the achievement is likely to be generalizable only to a limited extent, if at all. In other words, it will not necessarily further any overarching theoretic objective.⁷

The critique of rights has a history that does not have much to do with the rights of LGBT-GNC people.⁸ Beginning in the 1980s and creeping into the 1990s, an informal association of legal scholars interested in critical legal studies (CLS)⁹ (a.k.a. the *crits*) offered several strands of critique. That critique was ambivalently received by devotees of critical race theory¹⁰ (a.k.a. the *race crits*) and a subgroup of feminist legal theorists¹¹ (a.k.a. the *fem crits*). No *gay crit* or *queer crit* contingent appeared in those early conversations.¹²

⁶ Carl Schmitt is famously associated with the term due to his valorization of a decision's having been made by the proper authority over the nature of or basis for the decision; this is often linked to his support for National Socialism. See, e.g., Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 221 n. 86 (2009), citing CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 66 (George Schwab trans., Univ. of Chi. Press 2005). I am not eager to ratify a total absence of basis for a decision, or any suggestion that the mere fact of a legal authority making a decision renders the decision legitimate. To the contrary, my use of the term is meant to urge law reformers to take responsibility for their choices after considering the widest possible array of factors—utilitarian as well as normative—and notwithstanding the likelihood that any singular justificatory theory they invoke might not hold up to critique. It is that last piece that recalls Schmitt, but my usage is otherwise distinct..

⁷ My writing has focused on critique of rights-oriented theories associated with the sexuality and gender margins, and has not critiqued every conceivable theory that could support law reform in that arena. I have not, for example, critiqued an economic analysis of sexuality such as that proposed by Richard Posner. See RICHARD A. POSNER, *SEX AND REASON* (1992). Perhaps some theory out there is or will be the right one. My posture toward theoretic reconstruction is skeptical, however, and part of my idea in this paper is to urge reformers to place less faith in reconstructive theory as the best or only route to reform.

⁸ This is not a resentful remonstrance, merely an observation.

⁹ Some representative works include: Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); A CRITIQUE OF ADJUDICATION, *supra* note 2. Kennedy wrote several pertinent articles in the 1980s, but I rely instead on this retrospective work which recounts and consolidates many of the crucial critique of rights arguments that he and others have made.

¹⁰ Some representative works include: Cook, *supra* note 1; Bracamonte, *supra* note 1; Kimberlé Williams Crenshaw, *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 103 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas eds., 1995); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-CL. L. REV. 301 (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

Even now that there is a burgeoning literature on LGBT-GNC legal issues, my research turned up no fully elaborated discussions of the critique of rights in that context;¹³ my own work is in part an effort to fill that gap. William Eskridge, the well-known proponent of same-sex marriage, has addressed some of the arguments against same-sex marriage emanating from the left,¹⁴ but—as far as I could find—has not discussed the critique of rights discourse specifically. In at least one spot he positions himself against rights-critics, but without a substantive rebuttal.¹⁵ The closest I was able to locate came in his lengthy article on “identity-based social movements” in which he explains “limited judicial activism” constrained by politics (discussing gay rights and other rights), but he does not squarely confront any critique that would cast doubt on the very assumptions of activism or constraint.¹⁶ Suzanne Goldberg has engaged the critique of identity, but in the context of rights-oriented litigation that was otherwise assumed.¹⁷ Paisley Currah has responded to rights-criticism from communitarian quarters, in which the animating

¹¹ Some representative works include: Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987). Olsen, *supra* note 9, should also be placed among the fem crits, as she is a self-identified feminist, but I included her in the earlier note listing crits because I read her to be staunchly aligned with the critique of rights side of the debate rather than with the side that is worried about the demise of rights for feminist purposes.

¹² This, of course, is not to say that none of the individual participants in the debate were gay-identified, just that I discerned no collection of writers with a self-identified gay perspective or with the cohesiveness of the race crits or fem crits.

¹³ A partial exception can be found in Peter M. Cicchino et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 617-26 (1991). I would not place this article quite in league with those of the race crits or the fem crits, in the sense that it was not entirely dedicated to discussing the critique of rights, did not generate or participate in a discrete genre, and while borrowing and applying it, did not advance or critique the critique. Still, a significant portion of the article engages with the critique of rights emanating from CLS and notes its utility for understanding the Massachusetts gay civil rights law, using the example of the conflict of rights between gay tenants and anti-gay landlords who do not wish to rent to them. Among the article's conclusions is that reformers who succeeded in getting the law enacted fell prey to the perils identified by the crits because they were too easily satisfied with immunity (a.k.a. negative) rights and did not do enough to make the case that homosexuality was good.

¹⁴ See, e.g., William N. Eskridge, Jr., *The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)*, in LEGAL RECOGNITION OF SAME-SEX PARTNESHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 113 (Robert Wintemute & Mads Andenæs eds., 2001); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1486-93 (1993).

¹⁵ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 100 (1999) (“Contrary to its critics, rights discourse with all its fuzzy edges tangibly worked to the benefit of the most despised minority in America, at least by empowering gays in their interactions with antigay police, censors, and state employers. Indeed, rights created for the benefit of blacks and the poor may have benefited white middle-class gay people more than they actually helped blacks and poor people.”) Strangely, Eskridge does not seem to take this latter observation as a good reason to critique rights.

¹⁶ William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2370-72 (2002).

¹⁷ Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002).

concern is for the “common good” (against which identity-based rights claims tend to chafe), but not to the critique of rights emanating from the crits.¹⁸

That conversation about rights-critique has occurred mainly with regard to the rights of racial minorities and women.¹⁹ Still, an analogous, sharp disconnection exists between those engaged in the ongoing architecture of the gay rights agenda and those writing in queer and other critical traditions. I take this to be evidence that antecedent discussants from the other two civil rights contexts have cast long shadows and that persons concerned with the sexuality and gender margins have assumed corresponding positions. What has happened since the initial discussions among the various critical strands, both in the domain of law reform on behalf of LGBT-GNC people and in the evolution of queer theory, warrants revisiting the critique of rights with a fresh eye and a focus on issues of sexuality and gender. I do that here.

Our current historical moment provides a more general reason to revisit the debate over the critique of rights, beyond those reasons presented by developments specific to the sexuality and gender margins. The Rehnquist Court delivered a bit of a beating to the left using the club of rights, and the Roberts Court—still in its early years—seems unlikely to provide a respite. Cases such as *Bush v. Gore*,²⁰ *McDonald v. City of Chicago*,²¹ and *Citizens United v. FEC*²²—all right-wing victories premised on rights—are more than just politically demoralizing to the left. Decisions such as these could undermine what faith there is in rights as a path toward progressive change. It seems that every generation of leftists will have to learn the hard way the lessons of *Lochner*²³ unless and until the left takes seriously the hazards of rights first observed by the legal realists, elaborated by the crits, and further elaborated in certain respects by queer theory. Embrace of the critique of rights does not lead inexorably to nihilism if we can let go of reconstruction as our only conception of how to make a positive contribution and teach ourselves instead to be rigorous distributive thinkers in the service of concrete change.

II. Revisiting the Debate over Critique of Rights

¹⁸ Paisley Currah, *Politics, Practices, Publics: Identity and Queer Rights*, in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES* 231, 233 (Shane Phelan ed., 1997). Two other contributors to this colloquium, Shannon Minter and Aziza Ahmed, were kind enough to recommend Paisley Currah, *Transgender Rights Imaginary*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 245 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009). In this essay, Currah embraces and analogizes to arguments made by some of the race crits, and notes that those arguments came in response to critiques made by the crits, but does not engage the crits’ work directly.

¹⁹ This is not to say that no one engaged in the debate ever mentioned gay rights. See, e.g., Gabel, *supra* note 9, at 1578.

²⁰ 531 U.S. 98 (2000).

²¹ 130 S.Ct. 3020 (2010).

²² 130 S.Ct. 876 (2010).

²³ *Lochner v. New York*, 198 U.S. 45 (1905).

I begin by briefly reviewing some of what I found in the writings of my progenitors, borrowing what seems most applicable from their indispensable work.²⁴ I consider how pertinent arguments play out in the LGBT-GNC rights context and discuss how insights drawn from queer theory could enrich critical analysis in that same context. It is my contention that one can assemble from these critical traditions an eminently responsible legal leftism for the benefit of persons living on the margins of sexuality and gender. Through diligent, even painstaking attention to a broad array of legal conditions, the critical approach to agenda-setting developed here can be used to generate concrete law reform proposals that, while imperfect, neither replicate the deep problems of rights nor make themselves vulnerable to charges of nihilism.

A. Indeterminacy vs. Utility

The indeterminacy of law is perhaps the most familiar crit thesis.²⁵ Rights, according to some CLS writers, are “unstable,” so that a right that brings a favorable result for a minority in one case might easily fail to do so in the next.²⁶ This is because a right is an abstraction, not a tight description of what a litigant actually seeks.²⁷ We might easily, therefore, have different ideas about the meaning of a right, such as equality, which, for example, supports a program of affirmative action according to one definition and precludes it according to another.²⁸

Moreover, rights often conflict with one another, so that a judge must choose between them in a given case, rather than identify the sole right that is at stake and deduce his or her way to a case outcome.²⁹ In the LGBT-GNC context, this phenomenon is easy to spot. Gay and transgender rights to equality and against discrimination have vied against opponents’ right of expressive association,³⁰ right to vote,³¹ right against harassment,³² and right of privacy.³³ As I have argued elsewhere,³⁴ on the LGBT-GNC frontier of the culture war, assertion of an equality

²⁴ This is not meant as a comprehensive survey; for that an interested reader ought to turn to the original sources. My account is purposive and skips over fine distinctions among the thinkers as well as over arguments that I deemed irrelevant to my purposes.

²⁵ See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 258-62 (1987). The critique of rights spans well beyond constitutionalism, anti-discrimination and equality rights, but I focus this section on that cluster.

²⁶ Tushnet, *supra* note 9, at 1364-71.

²⁷ *Id.* at 1382-84. Tushnet says more, especially about alienation, but I have not covered the whole argument.

²⁸ See Crenshaw, *supra* note 10 at 105 (discussing “the expansive view and the restrictive view” of equality).

²⁹ See Olsen, *supra* note 9, at 387.

³⁰ See *Boy Scouts of American v. Dale*, 530 U.S. 640 (2000) (holding that the Boy Scouts may exclude gay scout master as an exercise of First Amendment right).

³¹ See *Largess v. Supreme Judicial Court of Mass.*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004) (unsuccessfully challenging state same-sex marriage decision as a violation of the federal Guarantee Clause).

³² See *Cruzan v. Special Sch. Dist. #1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (a teacher unsuccessfully alleged hostile work environment against her employer school district based on a trans woman’s use of the women’s restroom).

³³ See Aaron Belkin & Melissa S. Ember-Herbert, *A Modest Proposal: Privacy as a Rationale for Excluding Gays and Lesbians from the U.S. Military*, 27 INT’L SECURITY 2 (2002).

³⁴ See *The Gay Agenda*, *supra* note 4 at 175-79 and *T*, *supra* note 4 at 600-06.

right sometimes even seems to *provoke* the generation of a countervailing right, and this provocation can do quite a bit of damage.

Importantly, the devotees of critical race theory and feminist critical legal theory did not directly refute these arguments on their merits. In fact, some seemed rather convinced by them, occasionally even insinuating that they did not require such an elaborate case to know that the legal regime that oppressed them was rife with indeterminacy and room for abuse. As Richard Delgado wrote, “[w]e know, from frequent and sad experience, that the mere announcement of a legal right means little.”³⁵ He nonetheless lamented what he perceived as disregard for the strategic utility of rights, observing that “[f]or minorities . . . rights serve as a rallying point and bring us closer together.”³⁶ Elizabeth Schneider agreed: “[r]ights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity.”³⁷

Others noticed, however, that rights could just as easily prompt a “loss of collectivity.”³⁸ After the achievement of formal equality, which is likely to leave the most disadvantaged segments of a community behind, it might be *more* difficult to unify everyone in a group behind a common political objective.³⁹

Critics of rights and critics of the critics were arguing on slightly different planes. Contrast two archetypal disputes: between a critic and a defender of liberal legalism, the argument might sound like this: “Rights are indeterminate. Let me show you in an example.” The liberal defender answers: “But the system of adjudication can work fairly and neutrally. Let me show you how Hercules⁴⁰ would make a decision.” Between critics and devotees of critical race theory or feminist critical legal theory who are worried about the demise of rights for strategic reasons, however, the argument might sound more like this: “Rights are indeterminate. Let me show you in an example.” The reply comes back: “Yes, I knew that already, but we need them anyway for strategic purposes. Don’t ruin them or we’ll have nothing.” The commonality, it seems to me,

³⁵ Delgado, *supra* note 10, at 304.

³⁶ *Id.* at 305.

³⁷ Schneider, *supra* note 11, at 590-91, 611-12 (Schneider continued, “[r]ights discourse can also have a dimension that emphasizes the interdependence of autonomy and community. It can play an important role in giving individuals a sense of self-definition, in connecting the individual to a larger group and community, and in defining the goals of a political struggle, particularly during the early development of a social movement”). See also Minow, *supra* note 11, at 1873 (using the secondary school disciplinary process as an example of rights “reconfirm[ing] community.”).

³⁸ See Crenshaw, *supra* note 10, at 117-118.

³⁹ See *id.* See also Gabel, *supra* note 9, at 1566-81 (arguing that rights contribute to alienation rather than “authentic connection”).

⁴⁰ See RONALD DWORKIN, LAW’S EMPIRE 238-241 (1986).

among the writers in the critical traditions, is acceptance of the indeterminacy thesis.⁴¹ A point of disagreement is whether a demonstration of indeterminacy in some doctrinal location leaves reformers with nothing to do.

B. Analysis of Identity and Oppression: The Contribution of Queer Theory

Another “critique of the critique”⁴² of rights is that racism has been at least as significant a factor in the perpetuation of inequality as the indeterminacy of law, so that the absence of an accompanying robust analysis of race and racism renders the critical analytic tool kit incomplete. As Kimberlé Crenshaw argued, “[i]f racism is just as important as . . . liberal legal ideology in explaining the persistence of white supremacy, then the CLS scholars’ single-minded effort to deconstruct liberal legal ideology will be futile.”⁴³ Presumably, it would be analogous to urge the necessity of an analysis of sexuality and gender, and homophobia and transphobia, alongside any critique of LGBT-GNC rights.⁴⁴ Queer theory has much to offer such an enterprise.

Queer theory comes to us from the humanities⁴⁵ but it has yielded a number of concepts and critiques that could be valuable to legal thinkers. Writers such as Michel Foucault,⁴⁶ Judith Butler,⁴⁷ John D’Emilio,⁴⁸ and Jonathan Ned Katz⁴⁹ have formulated rich and sophisticated

⁴¹ I have papered over a bit here to sharpen a point. Tushnet, for example, addresses the utility argument head-on, arguing that not only are rights indeterminate, they are also not useful and in fact harmful. See Tushnet, *supra* note 9, at 1384-94.

⁴² Crenshaw, *supra* note 10, at 110.

⁴³ *Id.* See also Delgado, *supra* note 10 at 314 (“To date, Critics have not articulated a psychological or political theory of the origin of racism or of how it could be eradicated.”). Cf. *id.* at 316-320 (discussing theories of race and racism and urging these analyses on CLS). There is a related, but not identical, argument in the race-crit literature that the differing capacities to appreciate the importance of rights are rooted in the differential experiences of legal thinkers of different races, which position people differently with regard to awareness of unconscious racism. See, e.g., Patricia J. Williams, *The Pain of Word Bondage*, in *THE ALCHEMY OF RACE AND RIGHTS* 146, 152 (1991). I have not taken up this argument. Cf. Schneider, *supra* note 11 at 648 (“The legal formulation of [women’s] rights grew out of and reflected feminist experience and vision....”).

⁴⁴ This is not to neglect the pertinence of race to sexuality and gender. As Kimberlé Crenshaw is perhaps best known for explaining, intersecting analyses are often useful. See *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991). See also PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2005). The post-colonial literature, too, is rich with intersecting analyses, broadly understood to mean analyses that account for both race (or ethnicity or nationality) and gender, but might take a postmodern/anti-coherentist approach to either or both. See, e.g., Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Larry Grossberg, eds., University of Illinois Press 1988).

⁴⁵ See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 107-279 (2006), for a genealogy.

⁴⁶ See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., 1978) [hereinafter: FOUCAULT, VOL. I]; MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

⁴⁷ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

⁴⁸ See John D’Emilio, *Capitalism and Gay Identity*, in *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* 3 (1992).

⁴⁹ See JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995).

conceptions of the production of identity, so that categories such as men and women, gay and straight, start to seem historically contingent rather than naturally occurring, yet discursively powerful, forming us as subjects and shaping our understanding of ourselves and our world. Wendy Brown⁵⁰ has developed specifically the negative effects of discursive entrenchment of injured subjectivity on political efficacy. Leo Bersani⁵¹ and Lee Edelman⁵² have written of the value of ecstatic states and disorganization (as opposed to consolidated identity and rationality) in confronting problems of oppression. Eve Kosofsky Sedgwick⁵³ demonstrated how thoroughly the hetero-homosexual dichotomy structures Western thought, and Michael Warner⁵⁴ and Gayle Rubin⁵⁵ have explored the hazards of normalization and criticized the moral devaluation of marginalized sexualities.⁵⁶

It is probably anathema to queer theorists to sum up their work as a set. Rather than attempt to do so, I suggest merely that there is plenty with which to work if one seeks to enhance the critique of LGBT-GNC rights with a sophisticated analysis of sexuality, gender, homophobia and transphobia. Queer theory is thick with reflection on the material and discursive conditions that have produced identities and subjectivities, and have given meaning to sexual acts and gender performances. In many cases it provides, as well, ideas for disrupting this knowledge.

A few legal writers have attempted to import some of the ideas associated with queer theory into legal analysis,⁵⁷ and I have tried to do so myself,⁵⁸ but regrettably the process of migration has been slow-going and the wealth of insight available to legal thinkers has gone terribly underutilized. A real benefit of queer theory for the legal left, as I see it, is in more fully assessing the costs of legal strategies. We ought to be able to think through the ways in which the legal discourses in which we participate might affect the ongoing production of gendered and sexualized identity categories, or will contribute to normalizing or anti-sex moralism. Bringing these analytic tools to bear is not heading off on an intellectual holiday. To the contrary, it is no longer responsible to behave as if we did not have access to them as we develop law reform

⁵⁰ See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

⁵¹ See Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* 197 (Douglas Crimp ed., 1987).

⁵² See LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* (2004).

⁵³ See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

⁵⁴ See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* (1999).

⁵⁵ See Gayle Rubin, *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carole S. Vance ed., 1984).

⁵⁶ This is nothing near an exhaustive list, but merely a sample of writers and concepts that have been useful to me. Queer theory has become voluminous, and much of it, while fascinating, I have not—as a lawyer—quite figured how (or whether) to use yet. See, e.g., JUDITH HALBERSTAM, *IN A QUEER TIME & PLACE* (2005).

⁵⁷ See, e.g., Bernard E. Harcourt, *Forward: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers, [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503 (2004); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008); Katherine M. Franke, *Putting Sex to Work*, in *LEFT LEGALISM/LEFT CRITIQUE* 290 (Wendy Brown & Janet Halley eds. 2002); Ian Halley, *Queer Theory By Men*, 11 DUKE J. GENDER L. & POL'Y 7 (2004).

⁵⁸ See, e.g., *The Gay Agenda*, *supra* note 4 at 161-72, 179-97.

goals and approaches, or to pretend that our choices have nothing to do with the adverse consequences that occur in these registers.

C. The Problem of Legitimation and Beyond

Everyone writing in a critical tradition whose work I encountered seemed to agree that arguing in the language of rights serves a dangerous legitimating function.⁵⁹ It is a mammoth concession to the logic of the legal regime and it carries the risk that after one's formal rights have been vindicated, remaining inequities will seem fair, as if they are the result of natural inequalities rather than legally created ones.

Surely persons concerned with LGBT-GNC constituencies must recognize this danger. Imagine a future in which sexual orientation and gender identity have been added to every anti-discrimination law in the land, and same-sex marriage has been constitutionally required of every jurisdiction. Will all of our legal problems be solved? Will whatever trouble remains be due to our own inherent oddity or moral inferiority? What will we say when we have formal equality, but our youth are still disproportionately homeless, in foster care, abusing substances and suicidal? What will we say when we have formal equality, but HIV or some as yet unknown sexually transmitted successor ravages some segment of our community? What will we say when we have formal equality, but—unable to afford crucial gender-affirming health care—the impoverished among us are still taking street quality hormones, injecting silicone, and subjecting themselves to arrest—including police and prison violence—after engaging in sex work and other criminal activity to survive and to pay for health-related needs? What will we say when we have formal equality, but somehow, subtly, and always with some accompanying rationale, we find ourselves more vulnerable than others to allegations of obscenity, sexual impropriety, or predation?

In the context of race, Crenshaw made the compound observation that while rights argumentation sometimes legitimates an oppressive status quo, it simultaneously gains an imperative for just causes by being a discourse that is recognized as legitimate.⁶⁰ “Demands for change that do not reflect the institutional logic . . . and . . . reinforce the dominant ideology—will probably be ineffective.”⁶¹ Schneider, discussing women's rights, made a related observation: “[b]y claiming rights, women asserted their intention to be taken seriously [their] interests, previously relegated to the private sphere, and therefore outside the public protection of law, now received the protection of the Constitution.”⁶² “For blacks,” Crenshaw added, “the task at hand is to devise ways to wage ideological and political struggle while

⁵⁹ See, e.g., A CRITIQUE OF ADJUDICATION, *supra* note 2 at 236-63, and Crenshaw, *supra* note 10 at 112.

⁶⁰ See Crenshaw, *supra* note 10 at 111 (“People can demand change only in ways that reflect the logic of the institutions they are challenging.”).

⁶¹ *Id.*

⁶² Schneider, *supra* note 11 at 625-26.

minimizing the costs of engaging in an inherently legitimating discourse.”⁶³ That formula seems designed to maximize the benefits that can be extracted from rights while minimizing the costs of rights, which seems sensible enough—if one accepts that rights are the only or best way to obtain the benefits. I do not.

Moreover, I do not think that the term “legitimation” captures the problem adequately; it sounds too much as if fully formed subjects were delivering an effect on a system external to themselves. Participation in rights discourse does more than legitimate the existing legal order. It also eclipses from reformers’ view possibilities that lie outside the regime of rights. The choice to engage in a rights-based legal strategy is not a simple question of good faith or bad faith, but of shaping one’s faith. In the LGBT-GNC context, particularly the struggle for formal equality, including same-sex marriage, the persistent drum beat of equal rights has made it difficult to conceive of law reform goals not in sync with that beat. This is the powerful effect of discourse, as Foucault instructed; it produces knowledge and shapes our desires.⁶⁴ To take seriously its power, we should recognize its effect on those who participate in it to achieve strategic ends. We should not imagine that calculating lawyers can deploy rights discourse in a purely instrumentalist manner to achieve litigation victories, persuading courts while they and their constituencies remain utterly unaffected. It gets harder and harder for LGBT-GNC people and their lawyers to tear their gaze away from the shining star of formal equality as we call for it again and again in courts, at rallies, and through news media. It is not impossible, but it takes a deliberate effort.

III. Reconstruction vs. Decisionism

My recent work has been such an effort. It endeavors to identify and also to generate law reform possibilities that do not simply materialize as self-evident within the terms of equality discourse. My goal has been to shine a light on and articulate concrete tasks that lawyers can evaluate and realistically undertake if they deem them good bets for improving the lives of marginalized people at acceptable cost levels. This section will further develop that methodology, which I conceptualize as a *critical approach to agenda-setting*. The methodology begins with critique, understood not as a strictly negative enterprise as its many detractors have characterized it,⁶⁵ but as a crucial step in evaluating reformist options, in which indeterminacy and provocation of competing rights are recognized as costs.⁶⁶ I will assume that step to be

⁶³ Crenshaw, *supra* note 10 at 119.

⁶⁴ See FOUCAULT, VOL. I, *supra* note 46 at 92-102.

⁶⁵ See, e.g., Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 422-23 (1984) (“The [CLS] movement is utopian and theoretical. Its expositors decline to offer or consider particular programs. They are ‘jurisprudes’ in search of the ultimate insight that will explain the harsh world.... CLS writers have not yet found that insight, but they believe devoutly that their exposure of the ‘incoherence’ and ‘contradictions’ of liberal philosophy will cause a new correct thinking to cohere and grow.”).

⁶⁶ While I have not stressed the point in this paper, I have noted in the past and note again here, that a rights-based strategy might sometimes look like the best course of action. Critique is still crucial to anticipating its

familiar.⁶⁷ The methodology picks up not with reconstruction, in the sense of elaborating a new meta-theory of LGBT-GNC emancipation, but with more of what I hope will be a slightly improved (but no doubt improvable) distributive analysis, and will conclude in a decisionist posture, driving toward commitment to tangible law reform tasks—not because they promise total equality or emancipation in some other mode—but because we are willing to accept their costs as the price of the benefits that we hope they will bring, eyes wide open to the fact that we cannot be sure.

Some critics of the critique of rights have complained that “CLS scholars are often hazy about what would provide minorities comparable protection if rights no longer existed,”⁶⁸ describing the CLS program as “Utopia.”⁶⁹ Some have insisted that a reconstructive effort is necessary to rehabilitate critique and render it something more worthwhile than a self-indulgent exercise in trashing.⁷⁰ While some work associated with CLS over the years has stressed critique over decision, I had no trouble at all locating alternatives to rights argumentation in critical work. Whether from the crits’ early days or in more contemporary writing, one can discern a strong thread of distributive analysis designed to inform reformist decision-making.⁷¹

This is not the same, however, as reconstruction, which is perhaps the crux of the problem—a problem that I would characterize as one of recognition. That is, when a work evaluates a modest legal option and attempts to trace its (positive and negative) implications

hazards, but I do not foreclose the possibility that a rights argument might sometimes be worth the anticipated costs. What should be crystal clear, however, is that rights are not the *only* option for advancing the interests of persons on the sexuality or gender margins. Inability to think of anything other than equal rights as a strategy should not be the reason for pursuing an equal rights strategy. See *The Gay Agenda*, *supra* note 4 at 216.

⁶⁷ If not, see *The Gay Agenda* and *T*, *supra* note 4, for examples in the domain of sexuality and gender or see *supra* note 9 for a more general selection.

⁶⁸ Delgado, *supra* note 10 at 305. See also Crenshaw, *supra* note 10 at 111 (lamenting that no strategy for supplanting rights has yet been articulated).

⁶⁹ Delgado, *supra* note 10 at 305.

⁷⁰ See *supra* note 1. See also A CRITIQUE OF ADJUDICATION, *supra* note 2 at 360 and Crenshaw, *supra* note 10 at 111 on trashing.

⁷¹ See, e.g., from the early days, Olsen, *supra* note 9 at 406-12 (assessing the costs and benefits of several proposals to regulate statutory rape); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1989) (offering short and long-term proposals for the reform of labor law in pursuit of a more democratic work place); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990) (making a critical, post-modern argument in favor of radically expanding affirmative action specifically in law schools because they are political institutions that wield significant power); and more recently, Prabha Kotiswaran, *Born Unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579 (2008) (assessing the potential distributive effects on sex workers and others of various interventions in the criminal law and political economy in Sonagachi, a large red-light district in India); Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies In Liberal Welfare States*, 58 AM. J. COMP. L. 953 (2010) (assessing the potential distributive effects on care workers in the United States and Israel of various possible interventions in the political economies of those countries); 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 (2006) (evaluating several feminist reforms using distributive analyses).

throughout a complex distributive map, rather than offering a theoretically consistent push toward a shining telos on a hill, it might be hard to recognize that *as reformist*. It could require some self-conscious retraining to recognize law reform options that do not come in the form of fully reconstructed theories. Using examples from the latest generation of critical work, my goal here is to make the modest contribution of identifying the work as reformist in a distributive rather than reconstructive sense. The examples are an endeavor to make distributive analysis recognizable as a positive undertaking. Critique is a component of that analysis, one that is well-suited to revealing certain costs and perils of considered law reform alternatives.

Critique doesn't leave us with "nothing," in the sense of making it impossible to decide what to do. . . . Those of us who are not moral realists (believers in the objective truth of moral propositions) are used to committing ourselves to projects, and deciding on strategies, on the basis of a balancing of conflicting ethical and practical considerations. In the end, we make the leap into commitment or action [even if] we don't believe we can demonstrate the correctness of our choices⁷²

The last piece of this thought is crucial to the methodology I am advocating, because it distinguishes reconstruction from decisionism. Reformers might be accustomed to turning to legal academic writers for theoretic justification that will situate a specific law reform item in an accepted, overarching, philosophic objective such as equality. Legal thinkers are also making a contribution, however, if they help reformers speculate in an informed fashion about the costs and benefits of possible reform strategies before reformers must "make the leap into commitment or action."⁷³

For example, Hila Shamir has written a detailed analysis of the effects of regulation of the child care market in the United States on the allocation of domestic responsibilities between men and women within a household and on the distribution of wealth among families.⁷⁴ She traces the impact of federal child care subsidies, tax credits, and welfare rules, combined with other market regulating factors such as "high tolerance for employment law violation"⁷⁵ in the heavily migrant child care work force, on the likelihood of women in different classes participating in the paid economy and on the portion of the domestic burden they are likely to shoulder in relation to men.⁷⁶ Here is a fragment of her much larger analysis: tax credits for child care combined with lax enforcement of immigration and labor laws enable middle- and upper-income women to join the paid work-force and privatize significant portions of domestic

⁷² A CRITIQUE OF ADJUDICATION, *supra* note 2 at 361-62.

⁷³ *Id.*

⁷⁴ See Shamir, *supra* note 71.

⁷⁵ *Id.* at 969.

⁷⁶ *Id.* at 962-77.

labor at low costs on the “supply side.”⁷⁷ Low-income women, on the other hand, while benefiting from subsidized child care available under federal welfare rules, also face time limits on their eligibility; when considered together with the constraints of a tight employment market, the rules push such women into family-formations with men.⁷⁸ The allocation of domestic labor between men and women in low-income households depends on the local employment market: “due to the growing service economy, in some urban settings women are more employable than men,” and men may therefore end up with greater domestic responsibility.⁷⁹

Shamir compared her U.S. findings to the regulation of the market in private care for the elderly in Israel and conducted a similar analysis, looking for both allocation of household responsibility by sex and effects by class stratum and immigration status.⁸⁰ The result again, made especially vivid by virtue of the comparison, is a complex map of the apparent effects of laws regulating markets on the distribution of domestic burdens and wealth.

Shamir might have used a rights-based approach that focused on women, the poor or immigrants to address her normative concerns, which she states to be “increasing women’s equality and decreasing class stratification.”⁸¹ She bypassed the limits of that species of analysis, however, and provided something much more hard-nosed and full of reformist opportunity. With so many potential targets of reformist intervention so clearly and methodically evaluated, it would be folly to charge her with “utopian” thinking.

In another example, Prabha Kotiswaran has carefully analyzed the potential effects of various rules on bargaining endowments among differently situated sex workers, brothels, patrons, landlords, and police within the economy of a major red light district in India called Sonagachi.⁸² Kotiswaran begins by setting forth the two poles at or between which most feminist approaches to sex work appear:

[first, is] a subordination approach, which is typically against the commodification of sex; [those who embrace this approach] view sex work as nothing but coercion and violence and view sex workers as victims who lack agency and are slaves to institutionalized violence. Individualists or sex work advocates [on the other hand,] adopt an autonomy approach, are indifferent to the commodification of sex, and they understand sex work in terms

⁷⁷ *Id.* at 969-70.

⁷⁸ *See id.* at 967-68.

⁷⁹ *Id.* at 974.

⁸⁰ *See id.* at 977-984.

⁸¹ *Id.* at 984.

⁸² *See Kotiswaran, supra* note 71.

of choice and work and view sex workers as agents who can negotiate within institutions as individuals.⁸³

Urging that the latter view “is undertheorized . . . with the result that it falls back on the . . . discourse around choice, consent,” and other liberal concepts,⁸⁴ Kotiswaran undertakes a critical and legal realist project of depicting “sex work as a form of work [while] at the same time [remaining] attentive to questions of power.”⁸⁵ She does this by evaluating the impact of actual and proposed rules on bargaining among different stakeholders in the sex work industry in Sonagachi.

She speculates, for example, on the effects that partial decriminalization of sex work—*i.e.*, criminalizing the acts of patrons, brothel-keepers, traffickers, and others who might benefit from the exploitation of sex workers, but decriminalizing the acts of the sex workers themselves⁸⁶—might have on bargaining within the red light district.⁸⁷ Her analysis, like Shamir’s, is elaborate and intricate. I only sample from it here.

For purposes of speculation, Kotiswaran explicitly assumes that the police would enforce the (proposed) revised law, under which a landlord could be criminally prosecuted for knowingly allowing rented property to be used as a brothel.⁸⁸ If the landlord leased a room to an independent sex worker however, the sex worker’s practice would likely not, according to Indian law, fall under the definition of a brothel.⁸⁹ Another section of the law would criminalize the leasing of property for prostitution even without the element of a brothel, but the proposed definition of prostitution would require sexual exploitation or abuse,⁹⁰ presumably intended to target traffickers while leaving the mere exchange of sex for fee outside of the criminal law’s purview. As a result, Kotiswaran surmises, not only would the sex worker’s acts be exempt from criminal liability, but so might her landlord’s, who could argue that the tenant was not exploited, but working for herself.⁹¹

⁸³ *Id.* at 581.

⁸⁴ *Id.*

⁸⁵ *Id.* at 582.

⁸⁶ The Indian government was deliberating on a partial decriminalization bill at the time of her writing, but the analysis is also useful because partial decriminalization has been emerging as a consensus position among “many feminists who, despite their many differences, are almost unanimously against complete criminalization, but are at the same time ambivalent about both legalization and complete decriminalization, which some feminists perceive as legitimizing the inequalities of the sex industry.” *Id.* at 617.

⁸⁷ Kotiswaran conducted an elaborate ethnographic study in Sonagachi, located in West Bengal, from which she learned about the complex economy of the district and its differently situated economic actors. *See id.* at 580.

⁸⁸ *See id.* at 618-19.

⁸⁹ *See id.* at 619.

⁹⁰ *See id.*

⁹¹ *See id.*

The criminal law's impact on the landlord could in turn have effects on the positions of differently situated sex workers trying to rent apartments in Sonagachi. Landlords would be forced (or perhaps freed) to evict brothels and prostitutes in order to avoid criminal liability. Only independent sex workers would be protected against eviction.⁹² Other sex workers, however, who previously thought that they had relatively secure housing at a stable rent level—security for which they had paid a premium⁹³—would be subject to eviction and loss of their security payment.⁹⁴ Landlords would be in a position to rent to new tenants and collect new securities, likely a prohibitive deal for those who would have just been dispossessed of their last deposit.⁹⁵ Meanwhile, the improved reputation of the district could bring in more prospective tenants, causing rents and security rates to increase.⁹⁶ As Kotiswaran concludes, “[o]nly independent self-employed sex workers with secure tenancy rights would continue to live and do sex work in Sonagachi.”⁹⁷

Kotiswaran could have approached the regulation of sex work as so many others have,⁹⁸ as a question of what degree of agency to accord to sex workers, and assessed the partial decriminalization bill based solely on her ideology regarding sex worker autonomy, but her work is not so abstract. Her inquiry drives directly to such matters as the availability of rental housing and the loss or not of valuable security payments. She traces the effects of potential reformist interventions on crucial material matters in an effort to help reformers assess their reform proposals for much more than ideological satisfactoriness. The question is not merely “am I for or against prostitution?” or even “does this law appropriately characterize villains and victims?” but “how might a change in the criminal law affect rents and other material realities?”

For several years, I have been working with yet another example,⁹⁹ that of LGBT-GNC youth who are disproportionately likely to be homeless as a result of conflict with their parents.¹⁰⁰ Some equal rights might be of use to them, but the legal conditions that have the greatest impact on their daily reality do not sound in that key. Some of these legal conditions might not even directly concern their sexual orientations or gender identities. For example, homeless youth face

⁹² See *id.* at 620.

⁹³ This “right to rent,” called *selami*, is the most secure among three different kinds of tenancies in Sonagachi. *Id.* at 595. The article lays out species of tenancy in detail. See *id.* at 595-606.

⁹⁴ See *id.* at 620.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 57-58 (1995).

⁹⁹ For still more examples, especially concerning LGBT-GNC people, women, and sex workers, see *The Gay Agenda supra* note 4, at 202-16 and *T, supra* note 4 at 612-13.

¹⁰⁰ See NAT'L CTR. FOR LESBIAN RIGHTS, ET AL., NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH (2009), available at <http://www.nclrights.org/site/DocServer/national-recommended-best-practices-for-lgbt-homeless-yo.pdf?docID=5821>.

many obstacles to self-support and housing . . . including federal rules requiring runaway and homeless youth shelters to report the whereabouts of youth to their custodians within seventy-two hours, limits on youth capacity to contract (*e.g.*, for rental housing), rules against sleeping in parks, labor laws limiting the hours and conditions under which young people can work, and the ineligibility of minors to serve as payees for their own child support.¹⁰¹

These legal conditions are not unique to LGBT-GNC youth; they affect all homeless youth, whatever their sexuality or gender identity. Still, by intervening in these conditions, law reformers might be able to use law to affect the concrete reality lived by some of the most marginalized among the sexuality and gender constituencies—if they are willing to forego the gratifications of identity-based reform.

Of course, every one of the rules listed above has a purpose, and it would be foolhardy to run headlong into eradicating any one of them without a full—if speculative—evaluation of the possible effects of doing so. Take, for example, limits on youth capacity to contract. Minors are not entirely without contractual capacity, but they are limited by a doctrine called the *power of avoidance* or *disaffirmance*,¹⁰² which permits them to void their contracts unilaterally for any reason or no reason. Obviously, this provides a powerful disincentive to landlords to rent to them and to businesses to extend them credit.¹⁰³ That legal condition is a tough one for homeless youth, who must find a way to subsist independently, and (combined with other legal disabilities) probably contributes to the high rate of survival sex in this population.¹⁰⁴ The importance of having full contractual capacity, including the ability to bind oneself to an expectation of performance, is generally a right-wing position.¹⁰⁵ That position typically does not extend to minors,¹⁰⁶ but it might be that full capacity is good for youth in this circumstance because it would remove one of the barriers to obtaining housing.

On the other hand, the limit on youth capacity was designed to protect minors from their own immature judgment and from unscrupulous adult actors who might take advantage of them.¹⁰⁷ Usually, it is a left-wing position that it is better to protect weaker parties from the

¹⁰¹ T, *supra* note 4 at 612-13.

¹⁰² See 7-27 CORBIN ON CONTRACTS § 27.2 (LEXSTAT 2010).

¹⁰³ See *id.*

¹⁰⁴ See NAT'L CTR. FOR LESBIAN RIGHTS ET AL., *supra* note 100.

¹⁰⁵ See Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 42 Md. L. Rev. 563, 633 (1982).

¹⁰⁶ One who embraces the position that it is generally good for people to be able to bind themselves to a contract probably would want to ensure that contract is not deprived of its key rationale—voluntariness—by being exercised by incompetent persons. See *id.* at 569-70.

¹⁰⁷ See *id.* at 569.

dangers of bargaining autonomy¹⁰⁸ though a wider range of thinkers probably accept that position when it comes to minors. Moreover, LGBT-GNC youth are disproportionately represented in the foster care system¹⁰⁹ and a stunningly high percentage of youth in that system reach the age of majority with their credit history already damaged by adults (sometimes birth family members, sometimes foster family members) who steal their names and social security numbers to open utility accounts or credit cards.¹¹⁰ Theoretically, the youth are not liable for any debt that accrued during their minority, but as many people know first-hand, it is not easy to correct errors in one's credit history or repair the damage that results from identity-theft, and young people just emerging from the foster care system are probably less equipped to navigate that process than many middle-class adults who have had plenty of difficulty doing so.

Back on the first hand, however, if minors cannot get credit, then they have no opportunity to develop a *good* credit history, either. This could disadvantage them when they try to rent an apartment.¹¹¹

Neither contractual autonomy nor protection against it is an ideal solution for homeless youth, LGBT-GNC or otherwise.¹¹² Distributive analysis does not yield perfect solutions any more than rights do. It might be that through careful deliberation, intermediate or partial solutions would emerge, such as an exception to the power of disaffirmance for apartment leases, low-cap credit lines for minors, accelerated repair of credit history for eighteen year-olds, a slight lowering of the age of majority for contract purposes, or revisiting the prerequisites for or effects of emancipation under state law.¹¹³ Of course, it also might be that the contract rules ought to remain as they are and reformers should turn to child support rules, or elsewhere. In the course of rigorous distributive analysis, the law reform proposals must be considered in context, with as much information on the table as possible. No once-and-for-all answer to the question “should minors have contractual autonomy for the sake of their own welfare?” is likely to be right, but

¹⁰⁸ See *id.* at 620.

¹⁰⁹ See LAMDA LEGAL DEF. AND EDUC. FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE, 11 (2001), available at <http://data.lambdalegal.org/pdf/28.pdf>.

¹¹⁰ See Jesse Ellison, *Sabotaged by the System*, NEWSWEEK, Feb. 7, 2009, available at <http://www.newsweek.com/2009/02/06/sabotaged-by-the-system.html#>.

¹¹¹ See *id.*

¹¹² Cf. Klare, *supra* note 71, at 24-25 (Demonstrating in the labor law context that the abstract ethic of antipaternalism and contractual liberty, to the extent that it has “philosophical content,” or “is linked to . . . human fulfillment and self-determination, [raises] very complex and problematic empirical difficulties in showing that particular... rules actually serve such ideals.” Klare points to a need for “contextualized inquiry.”).

¹¹³ A similar analysis could be done regarding child labor laws. Obviously, compulsory schooling and limits on the hours during and conditions under which children can work were established for some pretty sound reasons. For homeless youth, however, those sensible policies do nothing to eradicate the need to earn money, so their effect is to push the youth toward sex work and other survival activity. One hardly wants to return to the days of child labor, of course, and a significant relaxation of child labor laws could increase school drop-out rates and cause wages to drop. Cautious weighing of possible costs and benefits of small-scale alternatives, however, could yield something helpful to LGBT-GNC youth, something that helps them subsist and makes not engaging in sex work a realistic choice.

some law reform possibility could emerge as the best bet to address a given problem, *i.e.*, it could, based on informed judgment, appear likely to produce the most benefit at a tolerable cost. Costs, it bears repeating, would include those discovered using the tools of critical and queer theory, such as the perils of indeterminacy and any anticipated effects on LGBT-GNC identity. Then, once the weighing is done... *jump*. The methodology leaves us with no new theory, but it does end with a decision.

IV. Conclusion

Critical theory (by which I mean to include all of the multifarious strands discussed above) is not merely a luxury of the academy that real law reformers cannot afford to indulge. To the contrary, if put to deliberate use in service of a redistributive agenda, critical theory can enhance one's capacity to participate in law reform responsibly by laying bare more and more (perhaps never all) of what law reformers ought to want to anticipate as they ponder their next steps, especially what costs might result from their well-intended initiatives. The methodology that I have described cannot do everything;¹¹⁴ it cannot bring the triumph of emancipation over oppression, equality over hierarchy, or dignity over discrimination. But through patient, at times painstaking, attention to the lives as experienced under law by the most marginalized among us, small victories might be found, one or a small handful at a time. Perhaps someone, some day, will come up with the meta-theory that saves us from the mixed government of laws and men that we have. Until that day, however, I urge reform-minded thinkers to generate numerous and dispersed possibilities, each the product of specific and local consideration for its concrete, distributive impact, readiness to bear the costs that may come, and acceptance of the difficult reality that we cannot know in advance how everything will turn out.

¹¹⁴ One writer is critical of what he perceives as a CLS tendency to reject piecemeal reform. See Delgado, *supra* note 10, at 307. Without speaking for anyone whom he might accurately be describing, I hope it is clear by this point in the paper that I have not taken any cues from any such work and my own deployment of some of these critical tools does not lead in any such direction.