A New Vision for LGBT Rights Critique and Reform

Author : Douglas NeJaime

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Libby Adler, Gay Priori: A Queer Critical Legal Studies Approach to Law Reform (2018).

Libby Adler's remarkable 2018 book, Gay Priori, joins a long list of academic critiques of the LGBT rights movement. But Adler sets herself apart in three critical ways: First, Adler does not blame LGBT advocates but instead locates advocates in a broader framework of "LGBT equal rights discourse" that comprehends only some harms and envisions only some solutions. Second, Adler is not satisfied with merely critiquing the prevailing approach to LGBT rights. Rather, she translates her theoretical arguments into an affirmative vision for reform—a vision that keeps faith with law. Third, Adler's prescriptive claims do not sound in radical transformations that most LGBT advocates would dismiss as impractical. Instead, she offers realistic, grounded, and detailed forms of intervention that LGBT advocates would support and can implement. **Gay Priori** is a powerful call to action that manages to be both theoretically sophisticated and practically oriented. It is perhaps the most careful, grounded, and constructive critique of mainstream LGBT rights work one can read.

First, consider Adler's treatment of what she terms "LGBT equal rights discourse." A familiar set of practices, narratives, priorities, and frames shapes law reform on behalf of subjects who are understood to have a minority identity based on sexuality and/or gender identity. With the emphasis on judicial neutrality and formal equality in constitutional and antidiscrimination law, marriage access and nondiscrimination mandates appear as logical priorities. LGBT equal rights discourse, Adler observes, also resonates with neoliberal impulses toward privatization and personal responsibility, again making understandable the focus on marriage and employment nondiscrimination.

When problems are framed in terms of LGBT identity and reforms are imagined in the registers of equality and nondiscrimination, the range of issues and responses is relatively narrow. Wide-ranging problems that affect vulnerable LGBT individuals, but that are not limited to LGBT populations and are not captured by explicit anti-LGBT sentiment, can be obscured. Or, if they are noted, the response may take the form of LGBT-specific solutions that fail to meaningfully address the problem. For example, the focus on nondiscrimination may occlude the high rates of homelessness among LGBTQ youth. If the homelessness problem is identified, it may be difficult to manage a workable solution without moving outside of conventional LGBT frames.

Even if I am not entirely persuaded by Adler's relatively comprehensive characterization of LGBT rights work as wedded to "formal equality,"[1] her diagnosis and critique are powerful. Adler's treatment of those doing the LGBT rights work she criticizes is especially noteworthy. Avoiding a common mistake in academic critiques of the LGBT rights movement, Adler makes clear that the problems she identifies are not advocates' *fault*.[2] She expressly disclaims any "charge of nefarious intent to harm or exclude" by "[t]he well-intentioned leaders of the LGBT law reform movement." (P. 4, 7.) Instead, "even our most savvy and sophisticated leaders…are 'subjects', too; they are…shaped by the same knowledge that shapes the rest of us." (P. 140.) The state of affairs that Adler describes "can be critiqued and interrupted," but it requires "conscious deliberation." (P. 7.)

One should not underestimate the significance of this move. Adler's analysis allows us to appreciate the constraints under which advocates operate and to intervene constructively—recognizing the good faith in which both the advocate and critic are operating. This is crucial, because Adler does not limit her intervention to critique. Rather—and this is the second important distinguishing feature of the book—she offers an affirmative vision for law reform going forward.

Adler's vision of reform grows out of and takes cues from her powerful critique. She urges "a reconceptualization of

the relevant constituency," shifting the priority away from "LGBT people as an undifferentiated, rights-bearing identity group seeking equality," and toward "vulnerable LGBTQ subpopulations seeking the best possible bargains for themselves in a world in which their prospects and decisions are heavily conditioned by law." (P. 178.) This shift, Adler shows, requires moving away from a recognition model of LGBT advocacy (á la Nancy Fraser's work)[3] and toward a distributional model (á la Judith Butler's work).[4] Adler's distributional approach draws on legal realism and critical legal studies. Resisting the view that law intervenes against some natural baseline, Adler seeks to uncover the background legal conditions that shape our interactions and structure the alternatives available to us.

Unlike many prominent critiques of the LGBT movement, Adler does not give up on law. She rightly points out that what are often framed as critiques of "law" are in fact critiques of "litigation," or even a certain type of litigation—the impact cases like the ones used to pursue marriage equality. Law reform, in Adler's vision, should be approached not as a top-down enterprise but instead as a bottom-up endeavor, with advocates learning from and responding to actors on the ground. Accordingly, Adler directs the law reformer's attention toward "the immediate legal conditions in a local population's experience." (P. 170.) Rather than see a single broad-scale intervention as an answer to the problems facing LGBT people, Adler looks across various domains, finding "obstacles to work, safety, nutrition, housing, health care, and so on," and seeking "low-profile" interventions. (P. 170.)

At times, Adler may underestimate the extent to which LGBT movement leaders are already acting in ways she envisions. For example, in the family law space, advocates are pressing parentage reform that does not merely facilitate queer family formation but attends to background conditions that constrain the efforts of LGBT individuals with fewer resources. Lack of access to healthcare may lead some same-sex couples to engage in donor insemination without the oversight of medical professionals. In response, LGBT advocates have worked to remove physician assistance requirements from laws regulating donor insemination. Reforms of this kind benefit not only LGBT individuals, but also others who rely on donor gametes to have children.

Like these family law efforts, the interventions Adler advocates are small-scale and practical. Here is the third critical feature of Adler's contribution. When some critics of marriage equality work have moved into more prescriptive registers, they have argued that the LGBT movement should have pursued wide-ranging reforms—for instance, universal healthcare rather than marriage as a route to employer-provided health insurance.[5] Universal healthcare would be a good thing (and today is more politically plausible), but advocates made decisions in light of constraints and limitations in the legal and political context they occupied. Adler, it seems, appreciates this. Instead of leveraging her critique in ways that lead to proposals that are impractical in the current moment, she supplies detailed elaborations of grounded and practical interventions.

Adler offers the case of LGBTQ youth to demonstrate the type of reform efforts she imagines. Vulnerable youth find their choices constructed—and constrained—by legal conditions that exist across a range of substantive areas that are generally not understood as "LGBT law." The law's privileging of parental authority, the regulation of the foster care system, the legal constraints placed on minors seeking to engage in work and commercial transactions, the policies of homeless shelters, policing practices, and the criminalization of sex work together influence the path of LGBTQ youth. Making relatively small changes in these various domains could dramatically affect the alternatives available to LGBTQ youth navigating difficult circumstances.

Consider a concrete illustration. Many assume that parents naturally exercise authority over their children. On this view, the state's unwillingness to interfere with parental control over LGBTQ children simply represents the state's recognition of and deference to a pre-political state of affairs. But, as Adler shows, this view is wrong. Law is in fact intervening when it makes the decision to vest parents with authority over their children that allows them to engage in homophobic and transphobic parenting. One could imagine regulating parents in ways that conceptualize certain forms of homophobic and transphobic parenting as the type of abuse and neglect prohibited by the state. Adler makes similar observations with respect to foster parenting. As Jordan Woods argues, the state could affirmatively protect LGBTQ children entering foster placements by requiring LGBTQ-affirming parenting.[6] But instead, in the vast majority of states, the law does little to prevent children from being placed in hostile households. These background legal conditions

shape and limit the range of alternatives available to LGBTQ youth when parents are unwilling to accept their children's sexual orientation or gender identity. Constraining parental authority and requiring foster parents to be LGBTQ-affirming would alter the conditions under which LGBTQ youth make decisions and could significantly improve the material circumstances of some LGBTQ youth.

Other background legal conditions, such as those regulating minor's access to housing and credit, shape the path of vulnerable LGBTQ youth. As Adler explains, "the laws conditioning parenting practices combined with the laws conditioning youth self-support structure survival alternatives for youth. The real consequence of these restrictions on youth is to push them into the informal, or underground, economy." (P. 200.) Sex work is a critical part of that economy. As one study suggests, "between a quarter and a half of homeless youth engage in sex work during their period of homelessness." (P. 201.)

Sex work provides a useful way to see how Adler's prescriptive claims are importantly distinct from other critiques of LGBT rights work. Scholars have criticized the marriage equality campaign for repudiating the sex-positive impulses that formed the basis for queer organizing. As Michael Warner famously argued, even though "[g]ay political groups owe their very being to the fact that sex draws people together…, often the first act of gay political groups is to repudiate sex."[7] The marriage equality movement, on Warner's view, benefitted "[t]hose whose sex is least threatening," while "[t]he others, the queers who have sex in public toilets, who don't 'come out' as happily gay, [and] the sex workers…are told…that their great moment of liberation and acceptance will come later."[8] In this light, sex work—decriminalization? labor regulation?—appears as a priority for a sex-positive queer agenda.

Adler's approach to sex work, in contrast, is part of a distributional intervention. LGBTQ youth exchange sex for money, shelter, and food, and their bargaining posture is shaped by legal rules and enforcement decisions. Appreciating how vulnerable LGBTQ youth are situated in the bargaining environment could lead lawmakers to ask whether particular interventions help or hurt that population. Do prostitution-free zones make sex work more dangerous? Is the same true for the criminalization of buying sex? What about enforcement actions against online platforms for the sale of sex? Through Adler's lens, the criminal prohibition on the sale of sex is problematic, not merely because it trades on the stigma of sexual activity that defies conventional norms, but because it makes vulnerable LGBTQ youth less safe and limits their income. Further, enforcement with respect to low-level crimes associated with sex work delivers LGBTQ youth to the criminal system. As Alexandra Natapoff's arresting new book, Punishment Without Crime, reveals, entry into the misdemeanor system can dramatically affect one's ability to survive—to work, find housing, and pay for necessities—for the rest of one's life.[9] Natapoff's central concerns with race and class meet Adler's focus on sexuality and gender, demonstrating what intersectionality means in practice for a movement committed to the wellbeing of *all* LGBTQ populations.

Ultimately, Adler offers perhaps the most compelling bridge between theory and practice in the LGBT space. Resisting the stark distinction between scholarly critique and movement lawyering that often pervades debates of this kind, Adler shows why "[t]he continuous practice of critique is vital to law reform." (P. 215.) This is not to suggest that there are not barriers to the type of reform efforts Adler endorses. Given that LGBT legal organizations rely on funding from donors who are mostly wealthy and white, those donors must be made to see the work that Adler envisions—work that generates fewer headlines and has less concrete benefit for the donor base—as worthy of pursuit. Efforts of this kind are not impossible. Adler relies extensively on LGBT poverty research produced by the Williams Institute (P. 176), an organization for which I served as Faculty Director from 2015 to 2017. The Williams Institute's donors grew to understand the importance of poverty work as an LGBT priority and have financially supported that work. Surely donors at other LGBT organizations (some of whom are also Williams Institute donors) are moving toward greater support for poverty work and other efforts aimed at the most vulnerable members of the LGBT population. With this in mind, **Gay Priori** should be required reading not only for scholars of law and sexuality and lawyers leading LGBT organizations, but also for those who identify with, support, and fund LGBT causes.

Douglas NeJaime is the Anne Urowsky Professor of Law at Yale Law School.

1. *See* Douglas NeJaime, *Differentiating Assimilation*, 75 *Studies in Law, Politics, and Society* 1, 4 (2018) (in the LGBT context, showing how, "[t]hrough claims premised on sameness and inclusion, features that mark the excluded group as different can be subtly integrated into law" and "institutions can be reconstituted in ways that reflect the distinctive aspects of those long subject to inclusion").
2. *See, e.g.,* Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 65 (2011) (asserting that "[t]he gay rights agenda…has come to reflect the needs and experiences of…[t]he mostly white, educationally privileged paid leaders" of nonprofit legal organizations and that "the lesbian and gay rights agenda has shifted toward preserving and promoting the class and race privilege of a small number of elite gay and lesbian professionals while marginalizing or overtly excluding the needs and experiences of people of color, immigrants, people with disabilities, indigenous people, trans people, and poor people").
3. *See* Nancy Fraser, From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist Age*,"* in **Adding Insult to Injury: Nancy Fraser Debates Her Critics** 9, 20-22 (Kevin Olsen ed. 2008).
4. *See* Judith Butler, *Merely Cultural*, in **Adding Insult to Injury: Nancy Fraser Debates Her Critics** 42, 50-52 (Kevin Olsen ed. 2008).
5. *See, e.g.,* Spade, *supra* note 2, at 61.
6. *See* Jordan Blair Woods, *Youth, Equality, and the State* (draft on file with author).
7. Michael Warner, The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life 47-48 (1999).
8. *Id*. at 66.
9. Alexandra Natapoff, Punishment Without Crime (2018).

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