

1

Introduction

The Metaethics of Gay Liberation

The ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling material force of society, is at the same time its ruling intellectual force. . . . The ruling ideas are nothing more than the ideal expression of the dominant material relationships, the dominant material relationships grasped as ideas: hence of the relationships which make the one class the ruling one, therefore, the ideas of its dominance.

Marx and Engels, *The German Ideology*

The important idea for me is that before the conflict (rebellion, struggle) there are no categories of opposition but only of difference. And it is not until the struggle breaks out that the violent reality of the oppositions and the political nature of the differences become manifest. For as long as oppositions (differences) appear as given, already there, before all thought, “natural” – as long as there is no conflict and no struggle – there is no dialectic, there is no change, no movement. The dominant thought refuses to turn inward on itself to apprehend that which questions it.

Monique Wittig, *The Straight Mind and Other Essays*

When you live in a world that’s governed by laws you don’t understand and can’t understand, you can be destroyed mentally by that world.

Andrea Dworkin, *Life and Death*

THE PROJECT OF THIS BOOK

This book takes up the inquiry I began in my first book, *Sexual Politics: The Gay Person in America Today* (2006), and journeys beyond it.¹ It deals with

¹ *Sexual Politics* was both angry and hopeful. So, too, is *The End of Straight Supremacy*. The reader of both books will, however, find that the perspective of the latter has been greatly Radicalized. This Radicalism comes with my shift in focus from “gay rights” to Gay liberation.

some big questions, the Big Questions of power, sexuality, and gender, which are themselves the themes around which the following discussion/excavation is organized. Inquiry, with the experience of Gay life as its method, arrives at this quintessential question: Who can one be after a lifetime of being made into no one, no thing – nothing? The discovery this question invites is made all the more difficult because the Heteroarchy² has always posed the questions, defined their limits, and usually hidden the answers. The reality of Gay life under heteroarchal law lays bare the relationship between epistemology as a method of knowing and law as a method of power to enforce dominant thought: In the condition that is straight dominance, what is epistemological is taken as ontological.

Any Gay person who manages to stay alive is engaged in a struggle for the freedom of Self. In the process of this struggle, Gays face a beguiling *everyday* – a Scylla and Charybdis that looks like placid water until it is suddenly the swirling vortex consuming you. The “gay rights movement” has plunged into this vortex, rushed headlong into it, seemingly without a thought of the danger. This vortex is the vortex of the Heteroarchy’s cleverly constructed everyday, in which they succeed in defining even the Gay struggle for identity on straight terms: the monogamous family ideal, reproduction, marriage, et cetera. Anything not defined by – not moving in and through this context – is made to seem illusory at best, deviant at worst. Sustained attacks on the political system of straight supremacy are thus rendered unlikely, if not unthinkable. After all, if the goal has become assimilating into the straight model, then who would think of destroying this model? Or if revolution is too much to hope for, who would think even of engaging it analytically, when it cannot be seen for the simple reason that it is omnipresent?

Embracing straight values requires Gay people to forget what the Heteroarchy and its everyday has meant for them – their conceptual and, all too often, physical liquidation. *The End of Straight Supremacy* asks that Gays stop Self-censoring and start making the obvious connections between the Heteroarchy’s power, the institutions used to perpetuate it, and Gays’ own possibilities for freedom. So in addition to Big Questions, this book asks for Big

² The Heteroarchy is the system of straight over Gay domination. It is an administrative system that exerts control over sex and controls through sex. It is thoroughly sexual. It is based on the religious myth of straight male supremacy; patriarchy is its religion. Its politics is the politics of gender. Its script is the script of male–female relation in the patriarchal model. It creates pseudo-norms of sexuality, which it says are natural, and enacts them into law. Its laws regulate Gay sexuality, identity, creativity, and imagination. Its laws do not regulate the systematic terrorization, capture, and mass murder of Gays. Its aim is the planned, systematic destruction of Gays: *gaynocide*.

Commitments, because making these necessary connections will require that one see not only one's own life, but also its interconnectedness with the lives of Gay people in other places, in other circumstances, existing in other stages and degrees of straight-induced torture. Equality rights, after all, are group-based rights. Making these commitments requires a process of consciousness-raising that takes "Gay" from object to subject. Only when we are able to read the context from this vantage point are we truly able to see the entire pattern of heteroarchal deception for what it is. Only then can we truly be Radical. "Radical" has become a dirty word, but it is derived from the Latin *radix* and means simply "going to the root or source." It is time that Gay people throw off the mind-numbing accoutrements of the Heteroarchy's everyday and get to the root of the heteroarchal domination that is killing us. How many more lives will it take?

Equality, the primary subject of this book, is a Radical idea. Although it is a constant topic in polite liberal discourse, many marginalized people – specifically in the context of this work, Gay people – live whole lives without it. Consequently, I am in pursuit of a legal theory in pursuit of equality, specifically a legal theory that operates in and through the lives of Gay people. In some works, theory has been a clever way of eliding reality. Judicial and academic theorizing about equality has resulted in the perpetuation of the second-class (or even third-class) citizenship of Gay Americans. Theory created in the image of straight dominance, quite frankly, has not fit the reality of Gay lives. Recognition of this and encounters of the past several years with various colleagues, students, and clients persuaded me that a new kind of theory was needed. The resultant work, a theory rooted in Gay lives, is a theory engaged with reality, contending with reality, challenging it, and sometimes calling for its large-scale revision. Its method is not merely the application of the reality of Gay lives to existing legal possibilities. The method of this book is the engagement of law with life, a method often touted, but seldom practiced in typical academic analysis (with some notable feminist exceptions). Its aim is a new order in which homosexuality is something other than the absence of heterosexuality and where Gay people are more than a counterfactual to straight supremacy. Its aim is to envision a world in which Gay people are finally accepted as irreducibly human. In so doing, the book departs significantly from the status quo of asking only for the minima. In sum, the purpose is to root a *metaethics* of Gay liberation in Gay lives and experiences.

I wanted to subtitle this book "The Metaethics of Gay Liberation," but my editor, for various reasons, persuaded me against it. Nevertheless, I preserved it as the title of this introductory chapter, because it aptly describes the metaethical endeavor of my work here. As commonly understood, "metaethics"

is the “study of the meaning and nature of ethical terms, judgments, and arguments.”³ My book is very much that. In the process of making new arguments it analyzes the terms, judgments, and arguments that already exist. But by choosing this subtitle I meant to indicate more than that. There are several definitions of “ethics.” One of them, according to *Webster’s*, is “a set of principles of right conduct.” The prefix “meta” means “higher,” “beyond,” “more comprehensive”; so I chose it to reflect that some of the arguments I make, about marriage and pornography, for example, aren’t strictly legal arguments. With pornography, I don’t pose a legal solution to the pornography problem; instead, I argue that the pervasiveness of Gay pornography actually prevents Gays from exercising their First Amendment rights (or any other rights for that matter). So it is more comprehensive than the usual legal/ethical arguments. And, yes, by choosing “meta” I meant to say that an ethics rooted in Gay experiences would be *higher, beyond, superior to* any understanding that heterosexuality has produced, because it would be infused with an understanding and empathy gleaned from being on the receiving end of oppression – from being buried alive in it. “Meta” also indicates change or transformation, and what I hope to accomplish here is a discursive change that is substantive in theory and reality.

In the effort toward this metaethics, I critique the prevailing understandings of equality and free speech, as well as the three sacred cows of the contemporary “gay rights” movement: pornography, (same-sex) marriage, and transsexuality. As to these three, I show that, while they are usually theorized as central to liberation, they are actually engines of oppression, both external and internal. I also show that, while they are usually theorized/engaged separately, they are closely related in theory and practice. Part I of the book, “Equality and Making Meaning,” accepts that “gay” is a social construction and an implement of the legal caste system. As such, Gay people have had almost no input or power in shaping the parameters of this legal and political identity, including the conceptualization of equality that has brought us meager gains.⁴ I offer a legal analysis for a world in which Gay people would/

³ The term “metaethics” and my use of it are informed by Mary Daly’s book, *Gyn/Ecology: The Metaethics of Radical Feminism* (1978).

⁴ These are limited statements. What I mean here is that Gays live in a legal reality over which we have had little control. I do not mean that there is no Gay Self or no Gay identity to claim – no Gay history. The postmodernist project of claiming negation, of trying zealously to prove that Gays have, in fact, been absent from history and that only our current visibility need be explained (reflected, for example, in the history urged on the Supreme Court in *Lawrence v. Texas*; see Chapter 3, this volume, for expansion) is repugnant to me. As Will Roscoe put it lucidly, “This denial of identity seems to me a uniquely Gay form of self-hatred. I can think of no other contemporary minority whose intellectuals are so deeply invested

could actually matter. Part II, “Equality, Sexuality, and Expression,” deals with the collision of two concepts, speech and equality, when sexual minorities are added to the mix. The center of gravity of free speech law has shifted so that the core of speech doctrine is designed to protect anti-identity, anti-equality speech at the expense of the equality rights of Gay and other marginalized people. The chapters in this section examine how the free speech norm is generally manipulated to keep Gay people powerless, as well as posit an alternative approach by which expression *and* equality might receive protection. Part III, “Millennial Equality: A Primer on Gay Liberation in the Twenty-first Century,” anticipates the issues looming and applies the theory elaborated in previous chapters to suggest solutions that do not compromise Gay identity for short-term gain.

Some major concepts/themes of the following chapters require prophylactic clarification.

Power/Sexuality/Gender

Sexuality, as it has been defined – indeed, one might say invented – by the heterocrats,⁵ is a political system that is all-encompassing. Gender is the regulatory script, if you will, of this system – *Robert’s Rules of Order* with a sadistic edge. The politicization of the sex act itself, by straight men, transforming it from an activity into an identity (after Foucault), creates sexuality. Gender, then, was developed as a way to order sexual identity, cutting across categories of sexuality (straight and Gay) to sketch the boundaries of emerging identities in a system the boundaries of which were/are distinctly sexual. In other words, gender determines who does what to whom, sexually speaking. Quite clearly, then, sexuality and gender are not one and the same, but they also cannot be adequately theorized separately. They work *in tandem*.

Sexuality tells us who is fucking: men fucking women or men fucking men or women fucking women. Gender tells us who’s fucking *whom*, or to put it a bit more vernacularly, who’s on the top and who’s on the bottom – again, across categories, for “top” and “bottom” are appellations to which even Gay men remain politically faithful.⁶ The importation of straight sexual mores into

in erasing their difference.” See Will Roscoe, *Afterword: Harry Hay and Gay Politics*, in *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER HARRY HAY* 347 (Will Roscoe, ed., 1996).

⁵ I use this term for the men and women who make up the Heteroarchy and carry out its edicts.

⁶ As used within the Gay community, a “top” is the insertive partner, while a “bottom” is the receptive partner (fuck-er/fuck-ee). This has nothing at all to do with the actual position of either partner *en flagrante delicto*.

Gay sexuality is testimony to the fact that sexuality, whatever component of it might be biologic, cannot exist unaffected by a system of social inequality. Hierarchy sexualized becomes sexuality. The idea here is that sexuality is social (in the way that feminists have said for some time that gender is social) – in the sense that sexuality – heterosexed – is hierarchical and dominance is sexual. Thus, a proper understanding of sexuality and gender sees sexuality as a product of heterosexual (mostly male) dominance, with the politicization of the sex act creating sexuality as we experience it. The discriminating force that exists within this methodical but deranged system manifests often as gender and discrimination on account of it.

In order to understand how the relationship between sexuality and gender is most commonly undertheorized in gay rights scholarship, consider Janet Halley's analysis of the usual trajectory of Gay antidiscrimination claims. Halley writes:

[M]ost gay antidiscrimination claims don't involve sodomy at all: the gay plaintiff may never have engaged in anal intercourse, cunnilingus, or fellatio with anyone, much less with another person of his or her own sex; and the feature in the plaintiff that the defendant discriminated against is almost always an act of coming out, or an act of gender nonconformity, not a sex act. Antidiscrimination claims are almost always about public, even civic, relations: what has sodomy got to do with them?⁷

Sodomy (Gay sexuality) has everything to do with them. There really is no separation. "Gay" is both adjective and noun. It is possible (although increasingly unlikely) that there are Self-identifying Gay people who have not had Gay sex, but that is beside the point. The act is inferred from the status as frequently as the status is inferred from the act, if not more so. Claiming that status can theoretically exist without act is akin theoretically to "love the sinner, hate the sin." It is an intellectual limitation that doesn't work well for Gay people as a theology and hasn't worked very well for us as legal theory either.

As some advocates are wont to do, Halley singles out gender as independent of sexuality for a dubious privilege ("an act of gender nonconformity, not a sex act"). But the perceived gender transgression that, concededly, usually triggers heterosexist discrimination against Gays is really a discursive cue about a sex/uality trait that must be punished because the sex/uality involved has been adjudged immoral from the perspective of heterocentric morality. Anti-Gay discrimination might be gendered, but it is also thoroughly sexual.

⁷ JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 13 (1999).

Remembering that it is the politicization of sex itself that created and that maintains sexuality as a system of governance reveals that punishment of gender transgression (which sometimes amounts to little more than fucking someone of the same sex without actually displaying “feminine” attributes [in the case of men]) to ensure that a crisp distinction is maintained between the sexually superior (heterosexual) and sexually inferior (homosexual) castes is sex/uality discrimination. In this analysis we see the place of gender in sexuality and, indeed, the place of sexuality in gender. I do not mean to suggest that gender never operates in other, less obviously sexual capacities – for example, as the script that delineates the perimeters of male over female domination within heterosexuality. But even here gender is operating within a (hetero) sexuality. The root of gender is irreducibly sexual.

In this sex/uality system, the heterosexual defines the homosexual. Homosexuals are defined as rebels because the failure to acquiesce in the sexual politics of gender imperils the system in which men are to be dominant and in which heterosexuality (man over woman) equals dominance. Gays are, therefore, from the straight perspective, outside of – alien to – the gender script, although, as I will show in this book, Gays import some of the most destructive aspects of gender into our own lives in an effort to assimilate. In this system, the discriminatory reaction against gender nonconformity is not a reaction to a different gender script; it is a reaction to a blatant and (from the straight perspective) willful alienation from it.

A useful way to conceptualize this is to consider the discursive content of sexual violence. Women are the object of violence because in a patriarchal culture violence *is* sex, sex *is* violence. As I have posited, the politicization of the sex act, turning it into a weapon for the enforcement of patriarchy, creates gender, which is the social script by and through which society operates. Violence against women is a fulfillment of the social script, from the straight perspective: hence natural, neat, orderly. Thus, what Mary Daly termed *gynocide* is the ever-present reality of life lived by women.

Violence against Gays is different in origination but similar in operation. As objects of systematic violence, Gays are not fulfilling a role – we are outside of the gender script. Instead, Gays stand in direct contravention of the principle that sex must be had between gender unequals and, from the straight perspective, in the case of Gay males at least, for the proposition that men can be sexually violated. In a subject–object social system, in which the subject (the man) becomes the subject by fucking, literally, the object (the woman),⁸ the

⁸ See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 124 (1989) (“Man fucks woman; subject verb object”).

possibility that men can also be fucked is earthshaking. This is an intolerable risk to the patriarchal/heteroarchal imperative that castes be pure, distinctions crisp, not blurred. In the gender metascript there is no neuter declension; deviations from the caste-based roles must, then, be destroyed.

Violence against Gays was first systematized through prohibitions on sodomy and their attendant death penalties. But as gender-norm violations became more flagrant, obvious outside the realm of sex only, the violence became more widespread and systematic. While gynocide, then, may be seen as a part of gender convention, *gaynocide* is more properly understood as a reaction to that which is totally alien to the gender system – neither subject, nor object, but indescribably *other*.⁹ Gaynocide is not a mistake, nor is it random. It is the reality of life lived by Gay people – the systematized domination to the point of death that manifests itself in Gay bashings and murders, but also in less visible ways, namely the epidemic of suicide among Gay youth.¹⁰ It is the product of a socio-legal system that refuses to see the systemic nature of this problem, preferring instead to see individuals harmed by some other individuals, often provoked in particular ways and apologized for, legally, as in the case of the “gay panic” defense.¹¹ In order to survive this, Gay people must understand what is being done to us. That means that we have to overcome the identity we have been raised to, which has been primarily the masochistic counterpart to heterosexuality’s sadism. If gender is their means of getting off, then attacking it is our means of getting over.

Public/Private

This volume necessarily engages and criticizes the prevailing way in which power has been theorized in relation to the law in the form of the public–private distinction. The criticism is necessary given what the public–private

⁹ A theory of the relationship of sexuality to gender (and vice versa), with transsexualism as its locus, is detailed in Chapter 8, this volume.

¹⁰ As I wrote this chapter, a spate of Gay youth suicides – dispatches from the holocaust that is Gay life – were reported in the mainstream media. See, e.g., Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010 (noting the suicide-deaths of thirteen-year-old Seth Walsh, eighteen-year-old Tyler Clementi, fifteen-year-old Billy Lucas, and thirteen-year-old Asher Brown). Most Gay suicides, like most Gay killings, go unnoticed and undocumented. For the staggering statistics on Gay youth suicide, see Chapter 4, this volume. See also SHANNON GILREATH, *SEXUAL IDENTITY LAW IN CONTEXT: CASES AND MATERIALS* (2007) (collecting data).

¹¹ Zach Christman, *Gay Panic Defense Gets Murder Defendant Off*, NBC Online (2009), <http://www.nbcchicago.com/news/local-beat/Gay-Panic-Defense-Gets-Murder-Defendant-Off.html>.

distinction has meant for Gays in the wake of *Lawrence v. Texas*, which drew a sharp distinction between the liberty afforded Gays in private, on the one hand, and citizenship more fully understood, on the other.¹² The private, as best understood in the American tradition, has generally been where power is left alone with itself. The Supreme Court's decision protecting a man's possession of obscene (and therefore illegal) material in his home is a prime example.¹³ The injuries worked by the public–private distinction are subtle (to those who never experience them) and therefore must be teased out. So let me state *Stanley v. Georgia* again in its own terms: A man may not be prosecuted for possession of obscene materials in *his* home.¹⁴ This is the judicial equivalent of “a man's home is his castle.” The decision does not inquire into reality to any greater extent than is necessary to accomplish its end, namely to leave power alone with itself. The decision does not consider who else might be in the house. Are there women? Children? Subordinated men? Others on whom the pornography at issue might be used, imposed, forced? What are the consequences for women, children, other men when the pornography user leaves his house? Won't he take what he internalizes from the pornography he uses in private into his public interactions, whether or not they become private? Underlined here is Catharine MacKinnon's observation that “privacy as an ideal has been formulated in liberal terms [and] holds that so long as the public does not interfere, autonomous individuals interact freely and equally.”¹⁵

Women, children, and to this list must be added Gays, also have been relegated to the private, but unlike for straight men, this privatization entails no power. For the women, children, and Gays so relegated, the private most often means invisibility, marginalization, contempt, violence – powerlessness. For example, abortion is relegated to the private (the right to privacy), ensuring that the state need not facilitate access to reproductive control for women – especially not for the women most in need of it (poor and minority women).¹⁶ The right to engage in Gay sex, too, is construed in terms of privacy – either to say that no such privacy exists, so that even Gay people's most intimate

¹² See Chapter 3, this volume.

¹³ *Stanley v. Georgia*, 349 U.S. 557 (1969).

¹⁴ *Id.* at 565. “These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library.”

¹⁵ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 99 (1988).

¹⁶ *Harris v. McRae*, 448 U.S. 297 (1980).

moments may be regulated by the state,¹⁷ or to say that the privacy is nearly absolute, so that those shrouded in it must deal alone with its consequences.¹⁸

The limits of the private constitute the boundaries of the public, boundaries beyond which Gay people are rarely present. When we are present, we are subordinated. *Lawrence v. Texas* understands the right to have Gay sex as a private right.¹⁹ The Supreme Court is careful to point out that the opinion does not cover “public conduct.”²⁰ Analyzed only in familiar, straight terms, this looks quite reasonable. As Justice Blackmun dissented in *Hardwick*, the issue of what kind of sex a person may have involves the most fundamental of rights – the “right to be let alone.”²¹ Both Gay and straight are to be let alone after *Lawrence*. But being let alone has an entirely different meaning for Gays than for straights. For Gays it can still mean victimization, this time by the absence of law.²² And transgressing the boundary into the public has different consequences depending on the group to which one belongs.²³ The status and prerogative of straight people in public still authoritatively constitute the definition of citizenship. For straight people on their own terms, the terms of an individual exercising nearly unfettered liberty (power), the private is a shelter. For Gays, it can be a prison where the deepest deprivations of personhood take place. Privacy rights are prime exemplars of individual rights – the mantra of both conservatism and liberalism converging in a vortex. Privacy rights can be exercised only on an individual basis, even when you are assigned to the private based on your group identity. It is a matter of no small significance, then, that the very conduct by which Gays are defined – homosexual sex – is considered, socially, politically, legally – quintessentially – private.

Equality/Sameness/Difference

Equality rights, by contrast, are group-based rights, public in their very essence. Surely, individuals may suffer discrimination, or may feel its effects,

¹⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁸ *People v. Onofre*, 415 N.E.2d 936 (1980); *Powell v. Georgia*, 510 S.E. 2d 18 (1998).

¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁰ *Id.*

²¹ *Bowers*, *supra* note 17, at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 [1928]).

²² Data show that domestic violence in same-sex relationships is at least as great as, if not greater than, that in straight relationships, and underreported to an even greater degree. In many states, access to protective orders in such situations is severely restricted or nonexistent.

²³ Even after *Lawrence*, some states continue to enforce sodomy laws against Gay sex in areas denominated “public,” visiting Draconian penalties on Gays when analogous sexual conduct by straights (i.e., vaginal intercourse) in the same setting would warrant considerably less criminal sanction. Often the difference is between felony prosecution and sex-offender