Editor’s Note, or a Weakly Normative Queer Legal Theory of Litotes

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Abstract

This Note describes and softly prescribes a queer legal theoretic sensibility, a sensibility receptive to and promotional of legal regimes least inhospitable to gender pluralism and erotic flourishing. The sensibility accretes from first, the costs of law (or the fact that laws have costs), and second, the author’s peculiar affection for his high school Latin teacher’s habitus. The Note overviews the contributions of this issue of CAL, highlighting the essays’ emphases on ungay queer subjects as well as the queerness of sexual violence politics.

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My high school Latin teacher taught us rhetorical devices, litotes among them. A litotes is the assertion of an idea through the negation of its opposite. For example: my Latin teacher was not closeted (he had a coffee mug in the dark corner of his shared office imprinted with the words “hate is not a family value,” but that was as far as it went). A litotes can take the form of a double negative, but it needn’t; and whereas a double negative is typically a grammatical error, usage of litotes is deliberate. A litotes can emphasize the opposite of the contrary position—damn, he’s not bad looking at all! he’s not the sharpest tool in the shed—but it can also, and for my purposes here, express a middle-range, better- or under-average intensity toward an object or event—the party was not unfun; lesbian separatism is not the worst idea. My Latin teacher would never have served as the faculty advisor for our gay/straight alliance, nor would he have donned a chest harness and chaps to teach the declensions.

* Associate Professor of Women’s, Gender, & Sexuality Studies, Yale University. Many thanks to Simon Stern and Markus Dubber for the privilege to edit this issue of Critical Analysis of Law, and thanks as well to all the authors herein, whose contributions, in my biased opinion, together strike that sweet spot of tenacity, irreverence and prudence that is so delectably queer. All my gratitude too to the student editors of CAL. And a final shout-out to whip-smart Rafael Walker for arguing with me over Greek and Latin rhetorical devices, litotes among them, late into the evening (but I was right).


2 See generally Laurence R. Horn, A Natural History of Negation (1989).
Litotes, in its conveyance of midrange feeling asserted through negation, might serve as a guiding metaphor for the achievements and aspirations of queer legal theory. Perhaps I am led to this proposition because law, from one vantage point, is about the institutionalization of norms; queer theory, from one (hotly contested) vantage point, is about the relentless deinstitutionalization and devalorization of gendered and sexual norms, hetero-,5 homo-,6 repro-,6 amato-,7 whatever. So perhaps a queer legal theory, in a Goldilocks algorithm that is definitely simplistic, might ask about, or advance, or historicize, or diagnose legal regimes, enforcement practices, and judicial decisions that do minimal damage toward sexual and gender pluralism, and that bear the least costs for gender and sexual minorities. In my own work, for example, I have argued that consent is likely the least bad standard for sexual assault law among the available alternatives, an assertion that seems litotes in flavor if not in technicality.8 My point is not a criterial one about what scholarship should or should not count as queer legal theory. Rather, it seems to me that much queer scholarship on law takes, or ought to take, as its point of departure, that codification and enforcement always come with costs, and that a world-building project of queer legal theory might be this: what combination of what laws is least crappy for gender and sexual minoritarian subjects (and what quantity of costs are we willing to offload onto gender and sexual majoritarian subjects, especially if those subjects are minorities along other axes of inequality)?9

I think it is my strange, queer attachment to litotes (and to rhetorical devices more generally, and to my high school Latin teacher), that spurred my request for the articles of this issue, penned by outstanding scholars of law and sexuality. I asked contributors to focus on legal issues, doctrinal developments, sexual subjects or cultural artifacts that do not chiefly fall under the taxonomy “LGBT,” and in doing so I hoped that some authors might write about contemporary politics against sexual harassment, misconduct, and violence (three of them did so). What is the relevance of litotes? In the wake of so many unprecedented legal victories for trans and gay communities along with such virulent

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backlash, it seems more important than ever to recall that non-LGBT persons and practices are not or may not be unqueer, insofar as laws and state practices criminalize or penalize non-normative yet ostensibly heterosexual sex and heterosexuals (and others). (To that degree, this issue and its conception owe a great debt to Cathy Cohen’s “Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?”)10 And in the wake of resurgent movements against (indexically hetero)sexual violence, it seems prescient to ask whether queer legal analysis could offer perspectives that might generatively contrast with or complement feminist legal analysis on law and sexual harm. This is by no means to suggest that there is a party line on law and sexual misconduct from feminist legal theory. Far from it.11 But it is to suppose that scholarship avowing what Brenda Cossman calls in this issue a “queer sensibility” could orient us otherwise to the nexus of sex, harm and law.

Kendall Thomas introduces our issue, Queer Legal Studies: Provocations. Thomas, an inaugural voice in Critical Race Theory,12 is also an inaugural, field-forming voice in queer legal studies.13 Thomas takes the opportunity here to problematize the self-evidence of queer legal theory as necessarily critical. Or to put this differently, one could trace an intellectual lineage from Critical Legal Studies to Critical Race Theory to queer legal theory (more on feminist legal theory below), and assume that “queer” does the same conceptual work as “critical,” such that something like “critical queer legal theory” or “queer critical theory” would be redundant, insofar as queer and critical register similar or identical commitments to, say, denaturalization, deconstruction, demystification, and so on. This equivalence is mistaken and misleading, writes Thomas, who perceives that queer interventions tend toward telling us something about the subjectification of the subject; the “critical,” proposes Thomas, helps us see things about the “subjectification” of the state, or other structural institutions, or other third parties (like theory itself). Thomas proposes that a queer critical legal theory might help us make sense, for example, not only of how same-sex marriage interpellates spouses (and singles), but also of how same-sex marriage has generated new and intimate forms of state and bureaucratic power. It is my sense that the articles in this issue, to varying degrees, abide by Thomas’s call, registering how newfound recognitions and regulations of intimacies, sex practices, and genders may extend outward to reshape power/knowledge formations.

Brenda Cossman points out, with myriad examples across space and time, that an interdisciplinary field of queer legal studies does, in fact, exist, despite persistent claims to the contrary. Cossman masterfully rehearses the multiple ways scholars of law and legal theory employ queer theoretic analysis (and/or utilize term “queer”; and/or approach the

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12 Critical Race Theory: The Key Writings That Formed the Movement (Kimberlé Crenshaw et al. eds., 1995).
law queerly, without announcing as much), and from that survey grounds some speculations as to why so many scholars, this author included, repeat the mantra that queer legal theory does not exist. Triangulating her intervention from Eve Sedgwick in her axiomatic mode,\(^\text{14}\) Eve Sedgwick in her reparative mode,\(^\text{15}\) and devotees of bimodal Sedgwick (all of us, but namely Janet Halley\(^\text{16}\)), Cossman invites her readers to think queer legal theory as a sensibility, not a pronouncement. Cossman’s queer legal sensibility opens up to remediate, without foregone conclusion, an array of objects, laws, doctrines, affects and temporalities. Queer studies outside law has done a spectacular job approaching all kinds of subjects not taxonomically L, G, B, or T. Queer studies in and of law, not so much. Cossman, then, clears the ground for the contributions that follow, a set of queer legal interventions ungay in their orientations and propositions.

Ummni Khan and Srimati Basu shine analytic light on queer subjects who at first blush seem not so queer: hetero-identified men who adamantly reject the cultural imperatives and emotional attritions demanded by the monogamous, amatonormative\(^\text{17}\) couple form; or in a word, heteronormativity.

Khan interfaces the discursive history of the “john” and Canadian law reforms regarding commercial sex with comic artist Chester Brown’s graphic memoir, Paying For It.\(^\text{18}\) Khan’s caring, careful reading of Brown’s memoir finds, in its style and substance, possibilities of sociality and intimacy too often caricatured, pathologized or criminalized. Basu’s engagement with her subjects is similarly critical yet sympathetic. Basu introduces us to a comparatively cultured subgroup of Indian Men’s Rights Activists. Rather than conducting the predictable sort of investigation—say, documenting and analyzing their policy agendas or opinions on gender roles—Basu explores the activists’ attachments to their favorite Bollywood films. What she locates in those attachments is somewhat astonishing: inter alia, transvestic and transgender identifications (unarticulated as such); unembarrassed homosociality; developed criticisms of hegemonic masculinity; and still, ressentiment.

Khan’s and Basu’s men, sex worker clients and men’s rights activists, respectively, do not aspire to lifelong possessive partnerships of obligation, nor do they want to want such partnerships. Mediated by cultural artifacts—comic strips and films—their subjects’ stylizations, espoused beliefs, and comportment to the world radiate as queer, disturbingly or inspiringly, depending on your priors (and all the contributions of this issue, to varying degrees, solicit readers to reconsider or at least avow their priors).


\(^\text{15}\) See Eve Kosofsky Sedgwick, Paranoid Reading and Reparative Reading, in Eve Kosofsky Sedgwick, Touching Feeling: Affect, Pedagogy, Performativity 123 (2003); Sedgwick, Melanie Klein, supra note 1.

\(^\text{16}\) See Halley, supra note 1.

\(^\text{17}\) See Brake, supra note 7.

\(^\text{18}\) Chester Brown, Paying For It (2011).
A discussion between Paisley Currah and Aeyal Gross, moderated by myself, serves as an interlude, or a bridge not unserviceable (there’s your queer litotes) between retheorizing (hetero)sexual subjects (men) and reconstructing sexual misconduct. There, we think collaboratively and occasionally conflictingly about the roles of law and legal advocacy in our pursuit for sexual and gender justice (litotes-inflected: in our pursuit of a world less phobic to sexual and gender pluralism, a world that does not doubly privilege socially restrictive norms with institutionally restrictive sanctions).

Aeyal Gross retrieves a notion of queer as queer-as-critique, which he wedges apart from queer-as-ideological (for example, always already hating on same-sex marriage as complicit, assimilationist, etc.) or queer-as-yay-gay (for example, lauding same-sex marriage as the telos of gay politics). Paisley Currah upholds and extends the retrieval, advising us to replace an understanding of the State as juridical and capital S with an understanding of the state as a patchwork of practices, norms and functions, each with their own and sometimes incongruent operative definitions of “sex.” Embedded in our discussion is fidelity to pragmatism, to surveying the range of costs and benefits for erotic flourishing and gender diversity of this or that rule, enforcement practice, or reform advocacy. Such pragmatism may be a hallmark of, but is by no means exclusive to, queer legal theory.19

The final three articles filter sexual misconduct through queer sieves, which turns out not to mean that sexual violence is thereby trivialized or denied.

Aya Gruber notices that shared across much feminist and queer debates around sex laws, sex practices and sexual representations is a presumption of sex’s specialness, sex’s high-stakesness, a presumption that betrays Gayle Rubin’s famous admonition that “sexual acts are burdened with an excess of significance.”20 Intervening on contestations between dominance feminism and sex-positive, sometimes sex-spectacularizing, queer studies, Gruber contemplates the social benefits and legal rules that might accrue should we see sex first as benign rather than awesome or awful.21

Rather than queer #MeToo, Gowri Ramachandran makes the case that #MeToo is already irrevocably queer, and that’s a good thing, too. Ramachandran recalls that “me too” started off as a legal pejorative in the 1990s to discredit complainants in sexual harassment cases, rendering the feminist solidarities ushered in by the hashtag that much more striking. For Ramachandran, the queerness of the movement consists in its insistence on reallocating 19 See, e.g., Janet Halley, The Politics of Injury: A Review of Robin West’s Caring for Justice, 1 Unbound 65, 85 (2005) (“[A]fter all, a fully pragmatic assessment of any feminist legal rule reform would want to assess not only the harm to women it seeks to minimize but the harm it might impose on men in the process; it would want to worry about the ways in which unharmed women might even be able to deploy it to harm men; it would surely ask whether intensifying the social status of women’s harm creates more of it; and so on.”); Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699 (1990).


21 Id.
sexual pleasure, power, and entitlement, and in its vocal refusal to accept corrosive norms of gender and sex. Ramachandran’s account of sexual power, pleasure and injury as allocated and re-allocatable resonates with Libby Adler’s recent and redistributivist queer legal agenda.\textsuperscript{22}

Like Gruber, Noa Ben-Asher reconstructs the sexual harassment claims against, and sensational media coverage surrounding, New York University Professor Avital Ronell. Whereas Gruber deploys her theory of sexual indifference to excavate otherwise obscured and more ecological problems of elitism, inequality, and scarcity in the American academy, Ben-Asher restates the Ronell case to push back against the notion that sex across power differences is invariably, by virtue of the power difference, sexual abuse. Moreover, reminds Ben-Asher, popular and scholarly narratives that ascribe omnipotence to one partner in a sexual exchange and total powerlessness to the other are facile and dangerous. And whereas Ramachandran gleams from congressional hearings on Brett Kavanaugh’s appointment to the United States Supreme Court an object lesson on the ways terms and principles of liberal law emanate hegemonically outside law to smother allegations of sexual assault, Ben-Asher perceives an altogether different message: that trauma has become our preferred way to register sexual injury and victim credibility. Indeed, Ben-Asher is not so sanguine about contemporary movements against sexual misconduct. She worries that our current path toward sexual justice may entrench rather than alleviate sexual injury, and that we may be propelling rather than queering the surprisingly powerful undertow that “[s]ex is presumed guilty until proven innocent.”\textsuperscript{23}

For many if not all of these articles, and especially the final three, “feminist legal theory” stands in contrast yet also in collaboration with “queer legal studies,” although these designations are clearly analytic only. In any case, in positioning our contributions, explicitly or implicitly against or alongside feminist legal theory, obscured is the great degree to which these essays, and queer legal studies generally, developed out of Critical Race Theory—scholarship that, by so richly interrogating the micro and macro ways law and legal scholarship sustain racism and racial hierarchies, compellingly provides alternatives to facilitate racial justice and equality.\textsuperscript{24} Certainly, much of critical race theoretic scholarship is not litotes in flavor, offering strongly normative proposals for legal transformation.\textsuperscript{25} And yet, so many of the essays herein adopt CRT methods: storytelling; marshaling evidence not only from legal cases and statutes but also from film, literature, and beyond; deep skepticism

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\item Rubin, supra note 20, at 11.
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toward liberal legal claims of neutrality; and attention to the ways laws and legal practices ostensibly not-sex-related (or not-race-related) disparately impact women and gender and sexual minorities (or racial minorities). I conclude this note then as a reminder of CRT’s enduring influence well beyond its jurisdiction, as it were, and as a reminder too that “outsider jurisprudence” is strengthened by alliance and solidarity.²⁶ Or: queer world-building in law is not unrevolutionary.

²⁶ See Matsuda, supra note 25.