Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)

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Abstract

The essay explores the extant field queer legal studies and maps the multiple meanings of “queer” deployed within it. I distinguish queer from LGBT, but resist any further disciplining of the term. I propose instead an understanding of queer legal studies as a sensibility. Neither a prescription nor a pronouncement, the article is written as an ode to Eve Sedgwick, her axioms and her reparative readings. I offer the essay as a celebration of queer legal studies to date and of its hopeful potentialities into an unknown future.

I. Axiom 1: Queer legal theory exists.

There is a body of queer legal studies. It is not part of a fantastical yet to be realized future. It is found in the oft-cited works of Francisco Valdes,¹ Carl Stychin,² Kendall Thomas,³ and Janet Halley.⁴ But, there is so much more. And it exists independently of what might be called LGBT legal studies.

I begin with the assertion that queer legal theory exists because many who write queer legal theory begin with a counter-assertion—that there is little or no queer legal scholarship.⁵ The claim is puzzling. My discomfort with the claim is perhaps based in unrequited love, as I would locate my own work for the last two decades within the tradition of queer legal studies.

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⁵ See Halley, Split Decisions, supra note 4; Queer Theory: Law, Culture, Empire (Robert Leckey & Kim Brooks eds., 2011); Queer J. Thomas, Constructing Queer Theory in Political Science and Public Law: Sexual Citizenship, OutSpeech and Queer Narrative, 39 New Pol. Sci. 568 (2017), who each argue that there is little to no queer theory in law. I elaborate on this point in Axiom 3 below.
But, beyond that, I thought, maybe it depends where you look. There is an abundance of queer legal studies outside of the American legal academy. There are British, Australian, and Indian scholars contributing to a rich queer legal studies literature. There is a rich interdisciplinary scholarship outside of traditional legal journals contributing to queer legal studies. So perhaps the claim was really one about the North American—and in Halley’s case the American—legal academy. My first inkling was that a search of the North American legal literature would reveal a scholarship that deploys the term queer largely in a manner synonymous with LGBT. My Westlaw search of titles using the word “queering” returned ten results, the majority of which did use the term as such a synonym or self-reflexively as an umbrella term for LGBT. So, part of the puzzle lies in a misplaced convergence between what might be better called LGBT legal studies and queer legal studies, a distinction to which I return below.

My second title search using the word “queer” brought rather different returns. There were 118 articles. Admittedly, that is rather less than a title search for feminism or race would return. Another part of the puzzle then is that queer legal theory has not developed to the same extent as other critical legal projects, such as feminist legal studies or critical race studies. At the same time, it is not an insignificant number. As I began to review the articles, I found them to fall within roughly three categories of the meaning of queer: as a synonym of LGBT, as a broader term for sexual minorities/non-normative sexual identities, and as reference to “queer theory.” These three approaches do not exist entirely in equal measure, nor is each necessarily easy to categorize. But there is a not insignificant literature that is self-reflexively situated within the tradition of queer theory. Then I found a fourth category. There is the queerness that refuses the taxonomy: legal scholarship with queer sensibilities that does not expressly identify under the sign of the queer. It is scholarship that by definition would not appear in such a search, and it is a scholarship to which I will return below.


8 Halley is of course writing against what she perceives as a suffocating, saturating dominance feminism in American feminist legal scholarship, that has taken up all the room for thinking legally about sex. Her work can be seen as a kind of post-dominance feminism, if “post” is understood—as Appiah has suggested—as a space-clearing gesture. See Kwame Anthony Appiah, Is the Post- in Postmodernism the Post- in Postcolonial?, 17 Critical Inquiry 336 (1991). Her focus is the American feminist legal academy, with good reason.
As Jena McGill and Amy Salyzyn have written: “Queer theory is firmly established as a significant analytical tool in the legal domain.” This is where I begin—I take it as axiomatic that queer legal theory exists.

Of course, to claim it exists is to beg the question of what it is. I begin with what it is not.

II. Axiom 2: The queer of queer theory is not synonymous with LGBT.

In recent years, queer has often come to be used as a synonym or umbrella term for LGBT individuals and communities. There is queer parenting, queer marriage, queer community, queer activism—to name but a few—which are each used as a synonym for LGBT identity. As Leckey and Brookes have written, “At times, queer has been conscripted into service as a sexier, more marketable label for lesbian and gay identities.” LGBT, but hipper. But, in queer theory, “queer” does not mean “LGBT.” Queer theory is in fact a problematization of identity categories, seeking to deconstruct the homosexual/heterosexual opposition.

Queer theory is admittedly a tough thing to pin down. Its deconstructive nature defies any simple definition or synopsis and from its inception, it has refused the definitional. As Lauren Berlant and Michael Warner have written, “queer theory is not the theory of anything in particular.” However, if we go back to its roots, to the foundational writings of Eve Sedgwick, Gayle Rubin, and Judith Butler, amongst others, it is possible and I hope useful to identify several basic themes or critical predispositions. Its genesis can perhaps be seen to lie with Foucault’s argument that sexuality is a discursive production rather than a natural condition. Queer theory has developed as an interrogation and deconstruction of the multiple discursive productions of sexuality, seeking to denaturalize the assumed connections between sex, gender, and desire. 1990 was a big year. Judith Butler published Gender Trouble, Eve Sedgewick published The Epistemology of the Closet, and Teresa de Lauretis coined the term queer theory and was then one of the first to denounce it, describing it as “a refusal of heterosexuality as the benchmark for all sexual formations.”

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10 Leckey & Brookes, supra note 5, at 14.
11 David Halperin writes, “Queer... does not designate a class of already objectified pathologies or perversions... Rather, it describes a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be limited in advance.” David Halperin, Saint Foucault: Towards a Gay Hagiography 62 (1995).
Butler took aim at the identity and essentialist constructions of gender, insisting that chromosomal sex, gender, and desire are discursively produced and performed. Sedgwick centered the critical analysis of the homosexual/heterosexual dichotomy. Through these works, queer theory took aim at the dichotomy between gay and straight, homosexual and heterosexual, suggesting that these dichotomies were themselves part of the problem. The homo/hetero distinction normalized heterosexuality and reinforced the very static and essentialist conceptions of sex, sexuality, gender, and desire. It was similarly a critique of identity—specifically, gay and lesbian identity claims—problematicizing the essentialization of gay identity against a heterosexual norm.

Queer theory emerged as a lens to focus on sex and sexuality independently from gender. Rubin challenged feminism’s claim to have occupied the sexuality field, and argued that it was essential “to separate gender and sexuality analytically to more accurately reflect their separate social existence.”\(^\text{16}\) It was time, she argued in 1984, to develop an “autonomous theory and politics specific to sexuality.”\(^\text{17}\) In *Epistemology of the Closet*, Sedgwick argued in her famous Axiom 2 that “the study of sexuality is not coextensive with the study of gender; correspondingly antihomophobic inquiry is not coextensive with feminist inquiry.”\(^\text{18}\) The emerging body of queer theory was demarcating an area of studying sexuality, without gender, and without feminism, producing a sophisticated body of work on sex and sexuality that troubled heteronormativity independent from feminism’s focus on male/female relationships. Sociologically speaking, queer theoretic work investigates sex/gender hierarchies irreducible to male over female (m>f). Psychoanlytically speaking, queer theoretic work—when not rejecting psychoanalysis altogether—investigates non-genitalized, not-always avowed pleasures, desires, and drives underexplained by sexual difference.

Queer theory was also positioned as a critique of the normal, and by extension, of normative sexuality. David Halperin described queer as, by definition, whatever is “at odds with the normal, the legitimate, the dominant.”\(^\text{19}\) He elaborates: “Queer demarcates not a positivity but a positionality vis-à-vis the normative—a positionality that is not restricted to lesbians and gay men but is in fact available to anyone who is or who feels marginalized because of her or his sexual practices.”\(^\text{20}\) Or as Kathryn Stockton Bond puts it, “It’s the strange we like, if we’re for the queer.”\(^\text{21}\) Queer theory emerged as a critique of and resistance to sexual regimes of normalization.

\(^{16}\) Rubin, supra note 13, at 308.

\(^{17}\) Id.

\(^{18}\) Eve Kosofsky Sedgwick, *Epistemology of the Closet* 27 (1990). She adds, “[T]he question of gender and the question of sexuality, inextricable from one another though they are . . . are nonetheless not the same questions, that in twenty-first-century Western culture, gender and sexuality represent two analytic axes that may productively be imagined as being distinct from one another.” Id. at 30.

\(^{19}\) Halperin, supra note 11, at 62.

\(^{20}\) Id.

These three themes—anti-identitarian disrupting the sex/gender/desire matrix, exploring sexuality as a distinct field of study not reducible to gender and feminism, and a critic of regimes of normalization—can be seen across much of the early queer theory writing.

“Queer theory” is still in the process of being written. It remains, as Judith Butler argued some time ago, a category in constant formation: “It will have to remain that which is, in the present, never fully owned, but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purpose.” Queer theory has come a long way from its beginnings. It has taken twists and turns, from the affective to the temporal, from the non-human to the transnational. It is an enormously heterogeneous, interdisciplinary, and unruly field, that may or may not have an object or a method; it is not “a theory of anything in particular.”

Despite this heterogeneity, nowhere in its history or present has the queer of queer theory been synonymous with LGBT identity. It is axiomatic that queer theory was intended to trouble identity: to explore and deconstruct the discourses producing gay identity. Yet, today, the word “queer” has muted and transformed. We have queer marriage and queer archives; queer neighborhoods and queer cruises. This is not a new problem. Annamarie Jagose wrote in 1996 that “[i]n some quarters and in some enunciations, no doubt, queer does little more than function as shorthand for the unwieldy lesbian and gay, or offer itself as a new solidification of identity, by kitting out more fashionably an otherwise unreconstructed sexual essentialism.”

But it is one that continues today and that has migrated to legal studies.

I agree with Butler and others that queer theory itself is a contested terrain, an ongoing critical project without ownership. This would seem to suggest, by extension, that there can be no ownership over the term “queer,” nor can there be queer purity guardians, policing the boundaries of the legitimate deployment of queer. Yet I cannot help but maintain a discomfort with the deployment of queer as a mere synonym for “gay”—the very thing that Sedgwick argued against. For me, queer theory offers a powerful, anti-identitarian lens to explore sex, sexuality and desire.

As I return to the legal, I am left wondering what to do with the broadly deployed use of queer as a synonym or umbrella term in legal studies. Can we be true to the intellectual roots of queer theory, while not policing the deployment of the term as having a proper object? Or do we need to carve out a distinction, of some variety, between LGBT legal studies and queer legal studies? What will the “queer” of queer legal studies look like?

Before turning to what it is, or might be, I turn to a very different claim, namely, that it doesn’t exist.

22 Butler, Bodies That Matter, supra note 13, at 228.
23 Berlant & Warner, supra note 12.
24 “My first aim is to denaturalize the present, rather than the past—in effect, to render less destructively presumable ‘homosexuality as we know it today.’” Sedgwick, supra note 18, at 48.
III. Axiom 3: Queer legal theory often begins with a performance of its absence; that is, with the assertion that there is little or no queer theory in legal scholarship. These explanations for this absence play into the very dualistic thinking that queer theory eschews.

Janet Halley, one of the foremost scholars of queer legal studies, often laments the relative absence of queer theory in law. She begins her moving remembrance to Eve Sedgwick with this very performative: “Why has queer theory been so productive in the humanities and so scarce in law schools?” In After Sex, Halley and Andrew Parker noted that their edited collection of essays was characterized by a “near total absence of essays from people working primarily in law.” In “Queer Theory by Men,” which formed the basis of a chapter in Split Decisions, Halley describes a 1992 article by Duncan Kennedy—“sorry, folks!—the only sophisticated legal analysis of American sexual regulation that I am tempted to call queer.” Halley is not alone. Queer J. Thomas, in an exploration of queer theory in political science and law, opens their essay with the assertion that “[q]ueer theory is nearly absent from political science, including public law.” Robert Leckey and Kim Brookes, in their introduction to a collection of essays, similarly observe the absence of queer theory in law.

Beyond noting the apparent irony of those writing queer theory in legal scholarship repeatedly reiterating the absence of queer theory in law while writing queer theory in law, it is more revealing to explore the explanations offered up for this absence. The various performances of the lack of queer theory in law share a common theme: the incompatibility of law and queer theory. There are various versions of this claim.

Halley and Parker describe this absence—or, in their case, the unresponsiveness of

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26 Halley, Paranoia, supra note 4, at 123.
28 Halley, Queer Theory by Men, supra note 4, at 14 (citing Duncan Kennedy, Sexual Abuse, Sexy Dressing, and the Eroticization of Domination, 26 New Eng. L. Rev. 1309 (1992)). There is admittedly here a larger claim—not just the absence of queer theory in law, but rather the absence of a queer theory in a sophisticated theory of law.
29 Thomas, supra note 5.
30 Leckey & Brookes, supra note 5, like Thomas, supra note 5, refer to Halley for the proposition that there is little queer theory in law, rather than arguing it themselves. While it initially seems like they might be taking an agnostic position, the rest of the paragraph suggests that they agree with her diagnosis:

Recent years have witnessed sustained work on the legal developments in terms of civil rights and relationship recognition for same-sex couples. But such work is usually taken up through a presumptively unqueer lens of liberal legalism, including the courts’ responses to activists’ deployment of liberal rights instruments. Much of this research connects itself explicitly to a gay rather than a queer politics (e.g. Pierceson 2005; Smith 2008), although some critical work with a queer edge embeds legal changes in relation to same-sex couples in larger movements of neoliberal governance (Osterlund 2009). It is against that backdrop that this collection brings queer theory to bear on law, culture, and empire.

Leckey & Brookes, supra note 5, at 15.
legal scholars to their invitation to participate—having multiple causes:

The simple temporal lag (queer theory started elsewhere); the failure of queer theory to engage the critical tradition in legal studies . . . ; hostility in centrist legal studies both to the a-rationalist traditions of thought that have provided so much to queer theory, and to theoretical approaches that do not quickly produce a policy “recommendation”; the plentitude of legal problems that have nothing to do with . . . sex; and the usual politics of law-as-praxis versus humanities as theory, with all the angst of unrequited love it has produced on both sides of the divide.31

With the exception of the temporal lag factor, which would suggest that law simply needs to “catch up”—a kind of law “behind the times” progress narrative of the eventual migration of theory into law32—the other factors each suggest a fundamental incompatibility between law and queer theory.

Halley further articulates this incompatibility and unrequited love in “Paranoia, Feminism, Law,” her moving tribute to Eve Sedgwick, which she describes as “trace[ing] the trajectory of our friendship as a story about queer theory transiting from humanities to law.”33 Halley provides two reasons for the scarcity of queer theory in law schools. First, the hyperrationality of law and current legal scholarship, in contrast to queer theory’s attention and appreciation of “irrational forces in human life.”34 Second, she argues, is queer theory’s vision of law which “venerates rights while representing the actual state as an evil empire,”35 in contrast to the dominance of legal realism in legal scholarship and its rejection of the state as monolithic.36

Halley’s diagnosis of the impasse should perhaps be read within the confines of its specific intention—she was describing her experience of moving between the two worlds (and her frustrations with MacKinnon feminism taking up all the air in the room). Ironically, while she engages with Sedgwick’s paranoid versus reparative reading,37 Halley’s diagnosis

31 Halley & Parker, supra note 4, at 423.
32 Underlying the time-lag thesis is also a kind of unstated and perhaps unconscious careerist move—“look at me, I got here first.” It is a claim to novelty, which may or may not be entirely warranted.
33 Halley, Paranoia, supra note 4, at 124.
34 Id.
35 Id.
36 Id. at 125.
37 Eve Kosofsky Sedgwick argued against the “hermeneutics of suspicion” that had so thoroughly saturated critical thought, including that associated with queer critiques. Eve Kosofsky Sedgwick, Paranoid Reading and Reparative Reading: Or You’re So Paranoid You Probably Think This Essay Is About You, in Touching Feeling: Affect, Pedagogy, Performativity 123 (2003). Paranoid queer theory provided a set of analytic tools that helped to reveal the deep structures and discourses of homophobia. But it also led to a kind of reading that was negative and rigid; one that did not like surprises; one that relied on exposure sought to reveal deep truths that lay beneath texts. Sedgwick argues in favor of more reparative readings: “[T]he desire of a reparative impulse . . . is additive and accretive.” Sedgwick did not provide a blueprint for reparative reading, if such a blueprint were even possible. But she gestured towards different ways of reading:

To read from a reparative position is to surrender the knowing, anxious, paranoid determination that no horror, however apparently unthinkable, shall ever come to the reader as new, to a reparatively positioned reader, it can seem realistic and necessary to
is ripe for a paranoid reading—it posits law/legal scholarship and queer theory as having underlying truths that are fundamentally at odds. “Law is this, queer theory is that,” even as both are presented as non-monolithic. I will return to give Halley’s analysis a more reparative reading, or more specifically, to offer a reparative reading of my own paranoid critique of Halley’s essay on paranoia, as I seek to hedge against the problem of infinite regress. But for the moment, I point out the paranoia of her diagnosis.

Others have picked up on the Halley diagnosis. Thomas for example further elaborates on the “this/that” distinction. They argue that:

> Queer theory and common law are fundamentally at odds. Queer theory projects seek to disrupt the status quo; law reflects the status quo. Queer defines itself against the normal and stands in opposition to systems of sexual citizenship, where citizens receive certain liberties, equalities, and dignities based on adherence to sexual norms. Pithily, sexual citizenship consists in adhering to norms, queerness is an ideological commitment to transgressing norms.  

Thomas’s argument is that queer theory is fundamentally disruptive, while law—through its heteronormative and homonormative institution of the courts—is fundamentally assimilationist. Many things could be said of Thomas’s intervention: it is located within political science, not law, and often conflates the methods; it is more located with the sexual citizenship scholarship than critical legal scholarship. But it is nevertheless a performance of the this/that binary: “[T]here is seemingly little common ground between extant legal and queer theories to create something we might call ‘queer legal theory’ because the two are fundamentally at odds.”  

It is a thoroughly paranoid reading. Halley’s claims loom large here.

Halley is right about unrequited love and two solitudes. Her encomium to Sedgwick is itself a performance of unrequited love—because the queer theorists don’t understand law, and/or have a reductionist and paranoid version of it. Of course they do. They are not trained in law, let alone the tradition of critical and realist legal studies. Yet the “law is this, queer theory is that” is also a performance of the very binary modes of thinking that queer theory and its poststructuralist antecedents eschew. Sedgwick of course called for the deconstruction of the homosexual/heterosexual binary. Butler, for the deconstruction of sex/gender binary. Derridean deconstruction is premised in exposing how these oppositions work: in critiquing and analyzing how they work, how they produce meaning,

experience surprise. Because there can be terrible surprises, however, there can also be good ones. Hope, often a fracturing, even traumatic thing to experience, is among the energies by which the reparatively positioned reader tries to organize the fragments and part-objects she encounters.

Id. at 146. As Heather Love has described, “Reparation in the essay is on the side of multiplicity, surprise, rich divergence, consolation, creativity, and love,” Heather Love, Truth and Consequences: On Paranoid Reading and Reparative Reading, 52 Criticism 235, 237 (2010).

38 Thomas, supra note 5, at 574.

39 Id. at 575. But see also Jerry Thomas, Queer Sensibilities: Notes on Method, 5 Pol., Groups, & Identities 172 (2017), where he articulates a series of queer sensibilities, or methods, that might help the migration of queer theory from the humanities to the social sciences.
and how they might be seen differently. “Law is this/queer theory is that” sits in awkward juxtaposition to the work that Halley has long been doing, deploying queer insights with critical legal studies methods. It is particularly out of sync with her nothing-short-of-brilliant call for more reparative readings. Halley is writing queer legal theory. To the extent that there is a queer “failure” to develop a more engaged and critical theory of law, it is our fault—and our responsibility. We—critical legal scholars interested in issues of sex, sexuality and desire, informed by queer sensibilities—are the ones who must write it. But, contra Halley, we are the ones who have also been writing it. More unrequited love. And so, I will offer a more reparative reading of Halley’s reparative reading. We need to not only deconstruct “law is this/queer is that” but also find ways to read law’s relationship to the queer otherwise.

IV. Axiom 4: We cannot know in advance what queer legal studies will look like, and what queer will mean.

So what then is queer legal studies? What is the queer of queer legal studies? How do we know it when we see it? Is any deployment of the term queer sufficient to make the scholarship queer? Can it be identitarian and anti-identitarian at the same time, particularly when the intellectual history of queer theory was explicitly anti-identitarian? I start from the proposition that we cannot know in advance what queer legal theory will be or become.

One place to start this inquiry is by identifying the various deployments of “queer” in legal studies. Just as feminist legal scholarship has identified various approaches and theoretical traditions, perhaps it is time, as queer legal studies grows up, to do the same. As I mentioned above, I found four approaches to the use of the term “queer:” queer as LGBT, queer as umbrella term for non-normative sexualities, queer as a referent to queer theory, and finally a no-name queer. These are not always discrete approaches—queer may be simultaneously deployed as a referent to non-normative sexualities and as a referent to queer theory. In others, queer may vacillate between LGBT and a broader set of non-normative sexualities; an umbrella term that is broader than just LGBT. I think it is useful for queer legal studies to keep these distinctions in mind, and to be attentive to their differences. For example, even though a particular article might conflate the queer with both LGBT and non-normative sexualities, queer legal studies should be on the lookout for various kinds of gay/lesbian affirmative thinking or reasoning that might jeopardize or weaken protections for other non-normative sexual or gender identities. These four approaches gesture to very different meanings.

1. **Queer as Synonym/Umbrella Term for LGBT**

The term “queer” has been broadly appropriated as a synonym for LGBT people, identities, and strategies. A review of the legal literature reveals many articles in which “queer” is deployed as a noun and “queering” as a verb to highlight the impact or implications of laws
and policies on LGBT people. There are “queer refugees,”[^40] “queer parents,”[^41] “queer families,”[^42] “queer adoption,”[^43] “queer youth.”[^44] Similarly, there are projects of “queering” areas of law, which means expanding the law to include LGBT subjects. There is “queering sexual harassment,”[^45] “queering domestic violence,”[^46] “queering asylum law.”[^47] The term queer is defined as an umbrella term for LGBT individuals. Sonia Rene Martin, in her article on gay children, explicitly writes: “The term ‘queer’ is used as an umbrella expression for gay, lesbian, bisexual, transgender, transsexual, and questioning individuals.”[^48]

Similarly, Sarah Valentine’s work on LGBT youth and children uses “queer” as a synonym, defining “queer kids” as children “who are, who may be, who are questioning whether or not they are, who may be seen as being, or who are targeted for being lesbian, gay, bisexual, transgender, or gender nonconforming.”[^49] Another example is found in Brian Soucek’s work entitled “Queering Sexual Harassment Law,”[^50] which tells an important story about sexual harassment of a lesbian firefighter, arguing that it illustrates the extent to which sexual harassment is not about sex per se, but about maintaining gender roles and hierarchies. It is framed in the discourse of queer: “Queering our view of sexual harassment law thus helps us better understand and prevent the workplace harassment of those who identify as queer.”[^51] But here, queer becomes a synonym for sexual orientation minorities.

[^49]: Valentine, supra note 44; cf. Clifford J. Rosky, Fear of the Queer Child, 61 Buff. L. Rev. 607 (2013). It is interesting to note that “gender non-conforming” is a relatively newer term; one found increasingly in popular usage but not yet in the legal literature. There may be a way in which “gender nonconformity” now does the task queer was initially assigned—of deconstructing gender and sexual identity binaries.
[^51]: Id. at 69.
“Queering Title VII” is about making it inclusive of sexual orientation discrimination.\(^{52}\)

These are excellent articles—I cast no aspersions on their critical insights and legal analysis. I only point out the extent to which the deployment of the term queer is a synonym or umbrella term for LGBT sexual minorities. But they are distinct from the anti-identitarianism of queer theory. While I am reluctant to police the use of the term “queer,” it would seem more apt to classify these writings as LGBT legal studies. This is not a suggestion that LGBT legal studies is in any way inferior or less valid. Just that it is different. Indeed, in my own writing, I can distinguish between those articles that I would classify as LGBT legal studies and those that I would classify as queer legal studies.\(^{53}\)

2. **Queer as Sexual Minorities and Non-Normative Sexual Identities**

A second use of the word “queer” is in relation to sexual minorities more broadly, attempting to capture identities beyond the four initials of LGBT. An excellent example of this approach is found in “Queer Ruralism,” wherein Bud W. Jerke describes his use of “queer” as “an umbrella term to encompass a range of sexual minorities.”\(^{54}\) He cites with approval a definition of queer as “[a]n umbrella term which embraces a matrix of sexual preferences, orientations, and habits of the not-exclusively-heterosexual-and-monogamous majority,” and continues, “Queer includes lesbians, gay men, bisexuals, transpeople, intersex persons, the radical sex communities, and many other sexually transgressive (underworld) explorers.”\(^{55}\)

This is an approach that approximates the idea of queer as a referent to “the stubbornly minoritized sex,” and to early queer theory that focused on non-normative sexualities. Yet, to me, this seems to unduly narrow the reach of queer legal commentary. It can certainly be queer to explore non-normative sexualities. But it should not exhaust the queer. Indeed, in this second “queer” move, sexuality seems to remain sutured to the

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\(^{52}\) Cf. Janet Halley, Sexuality Harassment, in Left Legalism/Left Critique 80 (Wendy Brown & Janet Halley eds., 2002).

\(^{53}\) For my LGBT legal studies writing, see, e.g., Brenda Cossman, Exporting Same-Sex Marriage, Importing Same-Sex Divorce (Or How Canada’s Marriage and Divorce Laws Unleashed a Private International Law Nightmare and What to Do About It), 32 Can. Fam. L.Q. 1 (2013); Brenda Cossman, Lesbians, Gay Men and the Charter of Rights and Freedoms, 40 Osgoode Hall L.J. 223 (2002); Brenda Cossman, Canadian Same Sex Relationship Recognition and the Contradictory Nature of Legal Victories, 2000 Clev. St. L. Rev. 49. Each of these articles seeks to make interventions in the legal regulation of gay men and lesbians. While I seek to tell a complicated legal story, I make no claims to those stories being located within the queer.


\(^{54}\) Bud Jerke, Queer Ruralism, 34 Harv. J.L. & Gender 259 (2011).

\(^{55}\) Id. (citing Eli Green & Eric N. Peterson, LGBTTSQI Terminology, Trans-Academics.org, 7 (2006) (http://www.trans-academics.org/lgbttsqiterminology.pdf)).
identitarian, locating itself upon discrete persons of minoritized sorts. But queer legal studies should be turning its attention beyond: heteronormativity, an ongoing concern of things queer, also regulates the stubbornly majoritized sex: the sexually normative as well as the sexually non-normative. There seems to me to be no reason that queer commentaries should not be brought to bear on any and all sexualities, sexual practices, and desires. Indeed, there is every reason to believe that adultery laws, obscenity laws, sexting laws, and many other forms of regulation that do not specifically target sexual minorities should come under the critical light of the queer.

3. Queer as Referent to Queer Theory

The third category—queer as an explicit referent to queer theory—is itself far from monolithic. Typically, the scholarship cites a combination of Foucault, Sedgwick, and Butler. The references are more often than not to each of their earlier works—The History of Sexuality, Volume I, Epistemology of the Closet, Gender Trouble, and Bodies that Matter. Some add Rubin, Halperin, and Warner. My own work would be so characterized—the reference to queer theory being to its early interlocutors. There are of course exceptions. For example, Halley’s work builds on the work of Leo Bersani and the later Sedgwick.56 Jasbir Puar’s work on homonationalism has begun to make an appearance, particularly in work with a transnational or international orientation.57 I offer three examples of this queer theory legal scholarship: Janet Halley, Libby Adler, and Teemu Ruskola. I do not claim that they are representative of this scholarship as a whole. I simply offer them as three very different examples of legal scholarship that explicitly incorporates queer theory.

There is, of course, Janet Halley’s work, as an example of not only the older, classical queer theory, but also of adapting to its newer incarnations. Her engagement with Sedgwick’s reparative reading is wonderful, in the sense of both delightful and full of wonder. Halley argues that critical legal scholarship has been overwhelmingly paranoid in its readings, and she creatively introduces the possibilities of reparative readings in law; “[r] reparative reading [is] reading in search of pleasure, positive affect and ameliorative possibilities.”58 Halley does not provide a blueprint for how to read law reparatively, just as Sedgwick did not provide one for reparative reading more generally.59 One could give Halley’s essay a more paranoid reading; as I noted above, it does make some rather determinative statements about law and queer theory, seeking to reveal underlying truths. There is also a way in which even here, “reading in search of” could be framed as a reading animated by a foregone conclusion and the affirmative of a known value. But her essay can also be read reparatively. Halley celebrates the potential of a critical reading journey that

56 Leo Bersani, Is the Rectum a Grave?, 43 October 197 (1987); Leo Bersani, Homos (1996); Leo Bersani, Is the Rectum a Grave and Other Stories (2009).


58 Halley, Paranoia, supra note 4, at 132.

59 See discussion supra note 37.
might read law otherwise and allow us to find new and creative possibilities for "sexual, erotic and gendered life." Halley’s essay is, in the words of Heather Love, “a reading of multiplicity, surprise, rich divergence, consolation, creativity, and love;” it is a celebration of a friendship with Eve. Halley’s essay is part of an extraordinary queer present in law, and gestures towards the exciting possibilities of its reparative futures.

But Halley is not alone. In the Sedgwickian spirit of “and others,” there are in fact others. Libby Adler in *Gay Priori* explicitly frames her analysis as queer, and describes her deployment:

> I have approached queer theory as lawyers notoriously do history, economics, psychology and other fields: to pillage. The question animating my visit to queer theory has been: What here could be of utility to those interested in social, economic, and racial justice on behalf of people marginalized by virtue of their gender or sexuality. The argument therefore takes up only a fraction of what queer theory has to offer. The primary current of queer theory that runs through *Gay Priori* concerns the power of discourses to produce identity and desire.

In her pillage methodology, Adler invokes Sedgwick, Bersani, Puar, and Muñoz, among others, as needed to elucidate her critique of LGBT law reform. It is not an attempt to synthesize queer theory, nor queer legal theory. It is a critical deployment of insights pillaged from queer theory, which ultimately draws in greater measure from redistributive theories of social justice. Its focus is on LGBT equal rights discourse, and she uses queer theory to illustrate the ways in which this discourse has itself produced LGBT identities and desires, including some goals and excluding others. While focusing on LGBT issues, it is not a queer-as-synonymous-to-LGBT approach. Rather, Adler selectively deploys queer theory to deconstruct things LGBT, to show their contingency, their constituted nature, and their exclusions. She makes no grand claims on the nature of queer legal studies; she “just” insightfully integrates queer sensibilities, old and new, into her critique.

Teemu Ruskola’s article “Raping Like a State” deploys queer theory in a very different direction, operating outside of “proper objects.” As he describes, “My invocation of queer theory is a commitment to a mode of analysis, not to the study of a given subject or set of subjects.” He uses queer theory as a set of propositions through which he examines the rhetoric of colonial international law in relation to China, arguing that “a queer analysis suggests that the homoerotic violation of non-Western states is a condition of possibility of fully realized (Western) sovereignty.” He elaborates on his deployment of the term queer:

> I use the word queer to refer to a range of non-normative subject positions. These positions are at once sexual, social, and political. Thus defined, queer positions are occupied by all subjects at some point (whether they wish to acknowledge it or not) and by no subject at all times (even if they so desire). To be completely antinormative would be to be mad, and

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60 Halley, Paranoia, supra note 4, at 141.
62 Teemu Ruskola, Raping Like a State, 57 UCLA L. Rev. 1477 (2010) [hereinafter Raping Like a State]; see also Teemu Ruskola, Notes on the Neutered Mother, or Toward A Queer Socialist Matriarchy, 67 Emory L.J. 1165 (2018).
63 Ruskola, Raping Like a State, supra note 62.
to be perfectly normative would be no less psychotic. Queer theory provides a method for analyzing how queer and normative subject positions are constituted in relation to one another and how they are secured, but also how they remain necessarily unstable and provisional. In short, it is a method for analyzing the discursive dynamics by which subjects are made and unmade, maintained and destabilized.\textsuperscript{64} Ruskola’s is a queer analysis, with clear Sedgwickian and Butlerian influences, applied beyond the traditional sexual subjects seen in much queer legal scholarship, in this case to China as a queer subject.

4. \textit{No-Name Queer}

There is another queer theory in legal studies; a more opaque one that does not announce itself under the banner of Queer Theory. There are all of those critical scholars, particularly those working in and around issues of sexuality, that are obviously influenced by the work of queer theory: by the work of Foucault, and Rubin, and Sedgwick, and Butler. I am thinking here of the work of the likes of Katherine Franke, Bernard Harcourt, and the contributors to this issue—like Noa Ben-Asher and Aya Gruber. Many of the ideas of queer theory—of sexuality and sexual subject positions as discursively constituted, unstable, fluid—are deeply ingrained in much critical legal scholarship on issues of sex and sexuality. It is queerly influenced: Foucault, Rubin, and Butler cast long shadows over this work, even if it is not always done by name. It is an understanding of sexuality that has become axiomatic.

Queer theory as it has flourished in the humanities does not always announce itself as queer theory; it does not begin by synthesizing all of queer theory that has come before, and apply queer theory to x.\textsuperscript{65} When legal scholars bring a feminist or gendered analysis to law, they/we do not launch into a history of feminist legal theory, its basic precepts, and/or its historical antecedents. Nor should we expect legal scholars with queer sensibilities but not necessarily a queer label to do so. It is a no-name queerness that is queer nonetheless; possibly even queerer for not identifying with queerness.

And so?

The “queer” of queer legal studies is then many things. Just as the “queer” of queer theory is contested and capacious, so too is the “queer” of queer legal theory. My taxonomy above of four different approaches to the “queer” may itself be very unqueer—putting things in clearly demarcated boxes. I do not claim that this taxonomy encapsulates all possible uses of queer in queer legal scholarship and that all queer legal scholarship ought to go into these boxes. Queer legal theory, by its very nature, must remain more opaque and indeterminate.\textsuperscript{66} Indeed, it could fairly be framed as a thoroughly paranoid reading,

\textsuperscript{64} Id. at 1480-81.
\textsuperscript{65} Berlant & Warner, supra note 12.
\textsuperscript{66} I am reminded of Janet Halley’s moving footnote in her version of “Queer Theory by Men” in Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations 7 (Martha Fineman et al. eds., 2009), in which she rethinks her earlier more maximalist queer theory claims, in favor of a “politics of theoretical indeterminacy.” Id. at 28.
contra later Sedgwick, seeking to reveal the underlying truths of queer legal studies. But, I have found it useful to parse out some of the different meanings that I have found in the scholarship. My mapping is not meant to occupy the field in some definitive way; it is rather intended to gesture to the multiplicity of meanings, now and into the future. The queer of queer legal studies is “a category in constant formation.” Critical legal studies can benefit in ways yet unknown from attention to queer affect, queer time, queer space, queer inhumanisms, queer transnationalities, reparative readings, and whatever comes next. We cannot know in advance what it will be, nor how far queer theory and queer legal theory can travel together.

V. Axiom 5: Queer legal sensibilities can bring a critical, disruptive, creative approach to critical legal studies. While beginning with the matrix of sex, gender, sexuality and desire, queering sensibilities need not be constrained or disciplined to these “proper objects.”

There is no pure queer theory; there is, as Lauren Berlant and Michael Warner have argued, no singular answer to what queer theory can teach us about x. There are queer sensibilities and commentaries that seek to reveal and disrupt narratives, discourses, institutions, and identities structured around sex, sexuality and desire. There are queer methods that can explore affect, time, space, beyond the proper object of sex and sexuality. Law can continue to be queered in new, critical, disruptive, and exciting ways. Queer, in its critique of heteronormativity, was and continues to be marshalled to identify the ways certain kinds of sex, stylizations of gender, and modes of intimacy are awarded gold-star status. It is an important critical edge that we ought to retain, while remaining attentive to the perils of going full throttle paranoid. Sedgwick herself recognized that paranoid readings are in fact good at some things, just not all things. Queer legal sensibilities can, as others have suggested of theory after Sedgwick, interdigitate the paranoid and the reparative. It surely would be too dichotomous and not queer at all to simply choose one side or the other.

To continue to queer law and critical legal studies can mean many things. Queering legal studies can include refusing its proper objects. It need not be about non-normative sexualities; indeed, it need not be about sexuality at all. Queer sensibilities might be brought to bear on any number of improper objects from contract to dispute resolution. How might attention to desire and desiring subjects cast a different hue of light on the subjects of contract negotiation? How might attention to fetishism open new possibilities of understanding law and economic approaches to market transactions? How might queer theories of affect and trauma allow us to reimagine legal harm? And with it, alternative modes of dispute resolution?

Queer needs to be kept open to multiple readings. Just as “queer theory is not the theory of anything in particular,” queer legal theory cannot be the theory of anything legal in particular. As a sensibility, we need to refuse its rigidification as a theory of law about x. In asking “how do we do queer things in law,” we need to remain open to unknown futures.

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67 Sedgwick, supra note 37, at 130.
Scholarship—queer by name or otherwise—might explore the potential of queer temporalities and queer spaces for thinking about law. Legal history could certainly benefit from the creative possibilities of feeling backwards and the multiplicities of queer temporalities. Legal geographies could similarly have much to learn from the inquiries of queer spaces.

As for my own queer legal studies? For me, queer theory continues to offer a powerful, anti-identitarian lens to explore sex, sexuality and desire, which is often the focus of my scholarship. It has been strongly influenced by the work of Foucault, Rubin, Sedgwick, and Butler. I approach normative and non-normative sexualities alike as socially constituted and fluid. But the queer of my queer legal studies is not only this; it is a “category in constant formation.”68 It evolves with the “queer” of queer theory. My earlier work was a kind of unreconstructed Sedgwickism. I took from Sedgwick, buttressed by Rubin, the freedom to explore sexuality as its own sphere of inquiry, unobstructed by gender or feminism. My methodology, never fully articulated, was one of the epistemology of the closet, seeking to reveal the many ways that heteronormativity infused law and constituted legal subjects. I remained in conversation with feminism, but I also insisted that a queer lens could produce knowledges that would have been obscured by a gendered lens.69

I am now a modestly reconstructed Sedgwickian, or at least I aspire to be. Law and legal scholarship need reparative readings. And finding joy, pleasure, and love—amongst other affirmations—in law is no small challenge. But a commitment to the reparative does not mean that the paranoid can be left behind, as if it were even possible. I continue to be interested in issues of the legal regulation of sex and sexuality. There remain many ways, known and not yet known, in which the concept of heteronormativity of earlier queer theory continues to have far too much analytical traction in this legal regulation. Exposing what we—or some of we—already know cannot be the only methodology of critique. Yet, in our current political moment, it remains an urgent one. Indeed, the current political moment is one characterized by an increasingly collective amnesia, forgetting much of what we already knew. I do not see how we can afford to entirely abandon a hermeneutics of suspicion. But, a reparative reading, of rethinking the possibilities of sustainable life, is an equally urgent project. My queer legal sensibilities will seek to do both.

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68 Butler, Bodies That Matter, supra note 13, at 228.

69 See, e.g., Cossman, Sexuality, Queer Theory and “Feminism After,” supra note 53; Cossman, Sex, Gender, and Feminism After, supra note 53.