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SYMPOSIUM ON QUEERING INTERNATIONAL LAW

QUEER JURISPRUDENCE: REPARATIVE PRACTICE IN INTERNATIONAL LAW

Odette Mazel*

Queer theory's commitments are radical and disruptive. They have operated to interrogate the definition and reinforcement of sexuality and gender categories, and to expose and problematize normalized relations of power and privilege in the institutional structures and systems in which we live and operate. Queer's deconstructive and anti-normative (or non-conformist) tendencies, however, can be antithetical to international LGBTQIA+ law reform projects.¹ In much of queer scholarship, human rights activism is framed as reinforcing heteronormative structures of knowledge and power and promoting fixed ideas of monogamy, social reproductivity, and gender identity.² In this essay, I work with the tension between queer theory and the law to frame the continued pursuit of human rights by LGBTQIA+ people as queer jurisprudence. I do so by drawing on the methodological tools provided by Eve Sedgwick's technique of reparative reading³ and Michel Foucault's ethics of care of the self⁴ to focus on the lived experience of LGBTQIA+ people. What emerges through the stories of LGBTQIA+ commitments to human rights and legal activism are not themes of naivety, compliance, or assimilation, as often charged, but ongoing efforts toward disruption, creativity, and hope.

Queer Tendencies

Queer theory has operated to denaturalize dominant understandings of gender and sexuality and to expose them as provisional, contingent, and in need of reconsideration.⁵ As a form of intersectional curiosity offering a more radical critique, queer theory has worked not only to destabilize and deconstruct identity categories, but the systems based on those categories.⁶ Law, in this context, is understood as central to the production of

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¹ Aleardo Zanghellini, *Queer, Antinormativity, Counter-Normativity and Abjection*, 18 GRIFFITH L. REV. 1 (2009); Janet Halley & Andrew Parker, *Introduction*, in *AFTER SEX? ON WRITING SINCE QUEER THEORY* (Janet Halley & Andrew Parker eds., 2011).

² Aeyal M. Gross, *Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law*, 21 LEIDEN J. INT'L L. 235 (2008); Ratna Kapur, *The (Im)Possibility of Queering International Human Rights Law*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* (Dianne Otto ed., 2018).

³ EVE KOSOFKY SEDGWICK, *TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY* (2003).

⁴ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE CARE OF THE SELF, VOL. 3* (Robert Hurley trans., 1978).

⁵ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION, VOL. 1* (Robert Hurley trans., 1978); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

⁶ Dianne Otto, *Introduction: Embracing Queer Curiosity*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS*, *supra* note 2, at 2; JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

the homosexual subject and the categorization of homosexuality as “deviant” and in need of control for the moral good.⁷ By claiming to speak the truth, legal discourse has contributed to maintaining structures of sexual and gender hierarchy and regulating that which it defines as outside normality.⁸

Reflecting the transgressive and defiant activism that queer theory was built on, queer theoretical scholars have drawn attention to the violence of hegemonic social structures, rejecting campaigns for political acknowledgement, legal inclusion, or tolerance, and have called for more thorough forms of resistance.⁹ Lisa Duggan, for instance, has warned against depoliticized assimilation, or “homonormativity,” suggesting that freedom and liberation sought through these terms marks the development of a queer liberalism that puts at risk a thorough examination of the inequalities in society.¹⁰ Queer theory, by and large, has come to represent an anti-normative or non-conformist project that rejects the possibility of operating within the structures of power, for, as long as political intervention is constrained by the very system it opposes, political success itself is seen to be constrained.¹¹

Similarly, queer legal scholars working with philosophies of deconstruction have problematized how inclusion within the legal system reinforces a set of conditions that legitimate and recreate dominant culture, keeping intact heterosexual standards and structural subordination. As Wayne Morgan argues, working within the law to demand the same rights as everyone else marks the inevitable “suppression of diversity,” for the “project of the legal system is the project of universalization.”¹² While acknowledging the necessity of pursuing human rights as a political project, Ratna Kapur warns of its limited possibilities and the “lure of normativity and glitter of respectability.”¹³ Queer human rights interventions, she argues, become implicated in the production of governmentality by necessitating collaboration with the very system of power they set out to challenge.¹⁴

The relationship between law reform and queer theory, then, can be understood as existing in tension, with many queer legal scholars sounding a note of caution about law’s capacity to remedy the harms it has been instrumental in producing. “How law,” Adam Romero asserts, “could ever be ‘queer’ is something of a mystery.”¹⁵ While queer legal theory, as a critical enquiry, remains essential for shedding light on the shortcomings of law, it is also limited in its capacity as an analytical tool that remains in opposition to law and legal things. But “[w]hat” as Robyn Wiegman and Elizabeth Wilson ask, “might queer theory do if its allegiance to antinormativity was rendered less secure?”¹⁶ If, as Sedgwick envisioned, queer is “a continuing moment, movement, motive,”¹⁷ how might we move beyond critique to read LGBTQIA+ peoples’ pursuit of legal reform not as co-option or assimilation, but as queer jurisprudence?

⁷ Janet E. Halley, *The Construction of Heterosexuality*, in [FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY](#) (Michael Warner ed., 1993).

⁸ [FOUCAULT](#), *supra* note 5; CARL STYCHIN, [LAW’S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE](#) 7 (1995).

⁹ Michael Warner, *Introduction*, in [FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY](#), *supra* note 7, at xxvi.

¹⁰ LISA DUGGAN, [THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY](#) 50 (2003); David L. Eng, Judith Halberstam & José Esteban Muñoz, [Introduction: What’s Queer About Queer Studies Now?](#), 23 *SOCIAL TEXT* 1, 11 (2005).

¹¹ ANNAMARIE JAGOSE, [QUEER THEORY: AN INTRODUCTION](#) 106 (1996); [WARNER](#), *supra* note 9; LAUREN BERLANT, [CRUEL OPTIMISM](#) (2011).

¹² Wayne Morgan, [Queer Law: Identity, Culture, Diversity, Law](#), 5 *AUSTRALASIAN GAY & LESBIAN L.J.* 1, 29 (1995).

¹³ [Kapur](#), *supra* note 2, at 132.

¹⁴ *Id.* at 146.

¹⁵ Adam P. Romero, *Book Review: Split Decisions: How and Why to Take a Break from Feminism by Janet Halley; Methodological Descriptions: “Feminist” and “Queer” Legal Theories*, 19 *YALE J. L. & FEMINISM* 227, 248 (2007).

¹⁶ Robyn Wiegman & Elizabeth A. Wilson, [Introduction: Antinormativity’s Queer Conventions](#), 26 *DIFFERENCES: J. FEMINIST CULTURAL STUD.* 1, 1 (2015).

¹⁷ EVE KOSOFKY SEDGWICK, [TENDENCIES](#) xii (1993).

Reparative Practices and an Ethics of Care of the Self

Despite being one of queer theory's founding scholars, Sedgwick was early to question the centrality of critique in queer theorizing, as well as its role in reinforcing dualities.¹⁸ In her later scholarship and building on the work of psychoanalyst Melanie Klein, Sedgwick advocated a reparative/depressive position, as compared with a paranoid/schizoid position.¹⁹ According to Sedgwick, the paranoid/schizoid position (the basis of critique) is important for exposing structures of power and the binaries that inform notions of sexual and gender differences. However, the position is itself based on the dualistic assumption that a sense of agency, or sense of the self, can only occupy one of two positions—powerless (repressed) or omnipotent (empowered).²⁰ By perpetuating the paranoid position and continuing to frame the relationship between power and (homo)sexuality as repressive, queer work, she suggests, becomes limited in its scope and, in fact operates to reinforce the binary oppositions that queer theory seeks to overcome.²¹ Sedgwick warns that through this process, we lose sight of the “middle ranges of agency,” or “the ability to be empowered or disempowered without annihilating someone else or being annihilated.”²² Sedgwick's question then is: How do we break with the “conceptual impasse” and interrupt the “baleful circuit” of the disciplinary space called queer?²³

Taking her lead from Klein, Sedgwick rejects the dialectic of powerlessness and omnipotence and elaborates on the depressive position that is premised on the understanding that good and bad are in fact inseparable, and that human agency, or intellectual and emotional creativity can be an empowering and reparative force.²⁴ The reparative/depressive position brings into focus individual experience as the locus of inventiveness.²⁵ It is a turn to one's own resources to assemble or “repair” in an effort to nourish and comfort. It is how disenfranchised people find ways of empowering themselves within a dominant culture that is unsupportive of them.²⁶ Sedgwick describes this method of privileging the depressive position in the context of her literary work as “reparative reading”—the act of reading texts and semiotic practices in terms of their empowering and productive capacities, rather than for their deficient or problematic elements. She argues that one way of approaching reparative practice is by paying attention to the “middle ranges of agency” and asking new questions about phenomenology and affect to examine the texture of the lived life.²⁷ By attending “to the intimate, proximate and present,” Sedgwick suggests, we can “understand in a deeper and more nuanced way the world in which we live”²⁸ and the ways in which we enact “effectual creativity and change.”²⁹

¹⁸ Eve Kosofsky Sedgwick, *Introduction: Queerer than Fiction*, 28 *STUDIES IN THE NOVEL* 277 (1996).

¹⁹ MELANIE KLEIN, *LOVE, GUILT AND REPARATION AND OTHER WORKS 1921–1945* (1975).

²⁰ Sedgwick refers here to Freudian analytic theory in which power is understood as implicitly omnipotent and takes issue with Foucault's repressive hypothesis that has been influential for much of the queer theory scholarship: Eve Kosofsky Sedgwick, *Melanie Klein and the Difference Affect Makes*, 106 *S. ATL. Q.* 625, 633 (2007); SIGMUND FREUD, *STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS* (James Strachey trans., 1953); *FOUCAULT*, *supra* note 5.

²¹ *Sedgwick*, *supra* note 20, at 640.

²² *Id.* at 632.

²³ *Id.* at 635–36.

²⁴ Melanie Klein, *Notes on Some Schizoid Mechanisms*, in *OBJECT RELATIONS THEORY AND PRACTICE: AN INTRODUCTION* (David E. Scharff ed., 1996); *Sedgwick*, *supra* note 20, at 636.

²⁵ *Sedgwick*, *supra* note 20, at 629.

²⁶ *SEDGWICK*, *supra* note 3, at 150–51; *Sedgwick*, *supra* note 20, at 637.

²⁷ *SEDGWICK*, *supra* note 3, at 17.

²⁸ *Id.* at 165–66.

²⁹ *Id.* at 13.

Like Sedgwick, Foucault in his later work reflects more deeply on the possibilities of operating beyond oppositional constructs and thinking differently about repression and power relations. The challenge that Foucault sets out is understanding how we might engage with existing structures of power, while at the same time working to transform them. Foucault directs us toward considerations of morality and ethos and the transformative qualities of counter-conduct.³⁰ Employing the idea of technologies of the self, he sets out an ethics of care of the self and self-inquiry that involves embracing those aspects of one's self that might be normatively "different," or that have been defined as deviant, and reframing these as empowering, creative, and sustaining.³¹ Far from being individualistic or indulgent, the process of care of the self through reflection and self-formation has political and structural change as its goal. Lives, or actions that are conducted in non-normative or non-conforming ways, Foucault suggests, contribute to pushing at the boundaries of what might be, at present, unimaginable.³² These acts, described in his work on governmentality as counter-conduct,³³ embrace both a critique of existing norms, and active development or enactment of new and emancipatory ways of living. Foucault thus moves beyond the binary opposition of power and repression to understand that multiple sites of power can co-exist.

Sedgwick's call to reparation, and Foucault's appeal to an ethics of care of the self, signal the need to counterbalance the preoccupation with paranoia in queer theorizing. They are calls to pay attention to the modes of existence or practices that emerge from queer experiences, but that have been rendered invisible by the over-emphasis on the "paranoid optic."³⁴ Paying attention to the middle ranges of agency and the ethics of care of the self provides an opportunity to reframe law as a useful tool in queer projects.³⁵ By understanding agency and transformation as operating through multiple sites of power, "queer" can be applied to LGBTQIA+ efforts for legal reform as something more complex than co-option or resistance. To read LGBTQIA+ efforts toward law reform reparatively *is* to read them queerly—as creative pursuits for transformative social and legal change.

LGBTQIA+ Legal Activism as Queer Jurisprudence

In Australia, where I work and live, LGBTQIA+ activists have sought justice through international law where domestic state or federal laws have failed them. In *Toonen v. Australia*,³⁶ Tasmania's laws criminalizing sodomy were found to contravene Articles 17 (the right to privacy) and 2(1) (prohibition of discrimination) of the International Covenant on Civil and Political Rights (ICCPR).³⁷ *Toonen* was the first case in international law to recognize LGBTQIA+ people's human rights, and it broadened the interpretation of the word "sex" to include "sexual orientation." The case paved the way for the development of UN policies and practices as well as foreign legislation

³⁰ MICHEL FOUCAULT, [SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–78](#) (Michel Senellart ed., Graham Burchell trans., 2007).

³¹ FOUCAULT, *supra* note 4; 1 MICHEL FOUCAULT, [ETHICS: SUBJECTIVITY AND TRUTH: THE ESSENTIAL WORKS OF FOUCAULT 1954–1984](#) (Paul Rabinow ed., 1997).

³² FOUCAULT, *supra* note 30.

³³ *Id.* at 201.

³⁴ SEDGWICK, *supra* note 3 at 147.

³⁵ See also Janet Halley, *Paranoia, Feminism, Law*, in [NEW DIRECTIONS IN LAW AND LITERATURE](#) 123 (Elizabeth S. Anker & Bernadette Meyler eds., 2017); Brenda Cossman, [Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick \(and Others\)](#), 6 CRITICAL ANALYSIS L. 23 (2019).

³⁶ *Toonen v. Australia*, Comm. No. 488/1992, 50th Sess., UN Doc. CCPR/C/50/D/488/1992 (1994).

³⁷ [International Covenant on Civil and Political Rights](#), Dec. 19, 1996, 999 UNTS 171.

relating to sexual orientation and gender identity.³⁸ In *Young v. Australia*,³⁹ the United Nations Human Rights Committee (HRC) found Australia in breach of Article 26 of the ICCPR for denying Edward Young a state pension as a dependent of a deceased war veteran, because he and his deceased partner were a same-sex couple. The decision went beyond *Toonen* to apply the principles of non-discrimination and equal protection to civil, economic and social entitlements.⁴⁰ Before marriage equality was legislated, in *G v. Australia*,⁴¹ the HRC concluded that laws preventing a married trans woman from changing her sex on her birth certificate, without first getting a divorce, violated Articles 17 and 26 of the ICCPR. And in *C v. Australia*,⁴² Australia was again found in contravention of Article 26 of the ICCPR by prohibiting access to divorce proceedings for same sex couples married overseas.

Behind each of these claims are LGBTQIA+ people who have experienced discrimination sanctioned by the law. They have felt, firsthand, the normalizing force of the legal system and the effects of being “othered” by it. Instead of rejecting law altogether, however, they have drawn on these experiences as an empowering force to pursue legal reform with a reparative impulse. Rodney Croome, who I interviewed for my PhD, was an activist with the Tasmanian Gay and Lesbian Rights Group and Nicholas Toonen’s partner at the time the case went to the Human Rights Committee. He later took the Tasmanian government to the High Court of Australia to force the implementation of the Committee’s decision.⁴³ While “prejudice and hate can always be legitimated by law,” he argues, it is also possible and important to “use the law to change the law.” “Law” he acknowledges, “as an institution will not be abolished” but law as a “bastion where prejudice and hate find refuge” can be transformed. Far from pursuing a “politics of compromise,” Croome says legal reform “mandated by the people most affected” has immense influence not only on the lived experience of those people, but on law and society as a whole.⁴⁴ Bringing these claims to the Human Rights Committee were not acts of naivety about the nature of law, nor were they appeals for assimilation into a heteronormative ideal. They were, instead, acts of courage and defiance, commitments to carving a space in international human rights law where there had been none before. These queer jurists sought not to dilute their differences, but to embrace them, disrupting established norms about who is inside or outside of the law, who the law is for, and how it operates. These were queer, creative, and radical acts. They were acts of counter-conduct driven by an ethics of care of the self that have influenced transformative social and legal change.

Conclusion

Paranoid and reparative readings/practices are not mutually exclusive. They are interdependent, relational, and oscillating.⁴⁵ Paying attention to the middle ranges of agency, to the technologies of the self that encapsulate a form of relationality—understanding “that you can be relatively empowered and disempowered”⁴⁶—offers a less binary conceptualization of power. This allows us to explore the ways LGBTQIA+ people actively formulate and narrate their worlds. Reparative practices and an ethics of care of the self provide us the methodologies through which to reframe, not only LGBTQIA+ legal activism, but all activism that has been labelled as complicit in relation to the

³⁸ Giulia Dondoli, *LGBTI Activism Influencing Foreign Legislation*, 16 MELBOURNE J. INT’L L. 1, 9 (2015).

³⁹ *Mr. Edward Young v. Australia*, Comm. No. 941/2000, 78th Sess., UN Doc. CCPR/C/78/D/941/2000 (2003).

⁴⁰ Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689, 1701 (2004).

⁴¹ *G v. Australia*, Comm. No. 2172/2012, 119th Sess., UN Doc. CCPR/C/119/D/2172/2012 (2017).

⁴² *C v. Australia*, Comm. No. 2216/2012, 119th Sess., UN Doc. CCPR/C/119/D/2216/2012 (2017).

⁴³ *Croome v. Tasmania*, 191 CLR 119 (1997) (Austl.).

⁴⁴ Personal Communication, Rodney Croome, Apr. 16, 2019, Tasmania, Australia.

⁴⁵ Sedgwick, *supra* note 22, at 631.

⁴⁶ *Id.* at 631–32.

dominant discourse, and to reread these actions for their disruptive, complicating, and transformative qualities. Through these stories of law,⁴⁷ we can come to understand queer jurisprudence in operation, to see acts of counter-conduct, hope, repair, and love in the efforts toward legal reform, and to recognize these as queer, creative, transformative, and complex—as “jurisgenerative”⁴⁸ and queer “world building.”⁴⁹

⁴⁷ Ann Genovese, Shaun McVeigh & Peter D. Rush, *Lives Lived with Law: An Introduction*, 20 L. TEXT CULTURE 1 (2016).

⁴⁸ See Robert M. Cover, *The Supreme Court, 1982 Term - Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1984).

⁴⁹ *Id.* at 4.