JINDAL GLOBAL LAW REVIEW

Law, Culture and Queer Politics in Neoliberal Times

Special Double Issue
Part - I

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New Intimacies/ Old Desires: Law, Culture and Queer Politics in Neoliberal Times
Oishik Sircar and Dipika Jain

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We dedicate this issue in the memory of our beloved student

**Mrinaldeep Singh**

16 October 1993 – 29 September 2011
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This special double issue of the *Jindal Global Law Review (JGLR)* has been a collective effort right from the moment we conceptualised its theme.

We extend our gratitude to Prof. C. Raj Kumar, Vice Chancellor of O.P. Jindal Global University (JGU) and the Dean of the Jindal Global Law School (JGLS) for entrusting us with the responsibility of editing this special issue of *JGLR* on 'Law, Culture and Queer Politics in Neoliberal Times'. We hope that this issue will break disciplinary boundaries, and be unprecedented in terms of the breadth and depth of the theme being covered. We couldn't have carried through this project successfully without his encouragement.

We thank Prof. Y.S.R. Murthy, the Registrar of JGU for his continued support. Thanks are also due to: Neha Gupta and Alkama Raj for their administrative support; our anonymous peer reviewers for their time and close reading of the articles; our faculty colleagues at JGLS who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair.

We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of *JGLR* as a worthy venue for publishing their scholarship. It is your work that makes this special issue special.

Our student notes-editors team deserves a very special mention: Praveen Chacko, Gavin Gene Pereira and Krithika Balu have been absolutely fantastic to work with. Their dedication, enthusiasm and professionalism are reasons why we have been able to pull this issue through to fruition. We hope that working on this issue has adequately *queered* their imaginations!

Last but not the least, thank you Prof. Ratna Kapur for your inspiration and Dr. Ashley Tellis for your provocations that always ensured that we do not compromise on theory, and never suspend criticality. Your intellectual engagement and scholarship forms an essential foundation of this special issue.

Oishik Sircar & Dipika Jain
*Editors-in-Chief, JGLR*

July 2012
# Special Issue Theme Note

**Editors’ Introduction**

New Intimacies/ Old Desires: Law, Culture and Queer Politics in Neoliberal Times

*Oishik Sircar and Dipika Jain*

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‘For the Record: On Sexuality and the Colonial Archive in India’ by Anjali Arondekar
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It would not be too romantic to call this 'The Decade of Sex Rights'. Over the past ten years unprecedented legal developments have marked the recognition of the human rights of sexually marginalized people internationally: in 2006 the Norwegian statement at the UN Human Rights Council received support from 54 states; in 2007 the Yogyakarta Principles (though not international law) was adopted as a comprehensive charter of sexual rights guarantees; 2009 saw the UN General Assembly pass the Resolution on Human Rights, Sexual Orientation and Gender Identity; and in 2011 over 80 countries supported a US joint statement to end acts of violence on the basis of sexual orientation. These developments have had parallel avatars in the form of decriminalisation of anti-sodomy laws within national jurisdictions, notably the Lawrence and Garner case in the US (2003), the Fourie case in South Africa (2005) and two historic judgments from South Asia: the Blue Diamond Society case in Nepal (2008), and the Naz Foundation case in India (2009). In May 2011, a controversial anti-homosexuality law that attracted the death penalty as punishment was shelved by the Ugandan parliament after a concerted effort by human rights and sexual rights groups from across the world.

These celebratory moments for the Queer movement have also been accompanied by the brutal rise of crony capitalism, the perverse consequences of the war on terror, the institutionalisation of the industry-military complex, and the birth of a 'new' civil society, in this context the “Gay International”\(^2\): all of these armed with the virtues of liberalism and its vicissitudes in marketism, secularism, masculinism, nationalism, legalism and an unflinching belief in corporate globalisation’s

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1. A slightly altered version of this theme note was circulated as the call for papers to this issue. See H-Net Online – Humanities and Social Sciences, JGLR Queer Sexualities Issue, available at: http://www.h-net.org/announce/show.cgi?ID=185575 (last visited July 15, 2012).
magical ability to turn former Queer outlaws into entrepreneurial and consumptive citizens, provided they play by the rules of the state-market nexus.

The spate of legal recognitions is socially manifest most powerfully in our cultural and reproductive economies. Queers now occupy central screen space in several popular cultural representations like *Dostana* and *Queer Eye for the Straight Guy*, and have become targets for marketing campaigns that promote everything from queer-friendly clothing to real estate to tourist destinations to wedding planners to adoption agencies to surrogacy clinics and sperm banks. Queer subjects are now being transformed from figures of death – as primary vectors of AIDS – to figures of life and productivity – as “homonormative” subjects who reproduce heteronormativity through demands for the legal recognition of gay marriage.4

Reponses to rights demands of Queer people are being met by the enactment of laws and economic policies, and states, particularly non-Western, seem to favourably consider their claims to live up to the civilisational marker of being an evolved and progressive polity. In effect, while the borders of citizenship are expanding to include Queer subjects, the process of inclusion is also resulting in making them engage in an exercise of privatised self-governance – where the trade-off is between recognition of sexual citizenship in the public sphere, and in return the promise to conform to heteronormative governance tactics in the private.5 It isn’t a surprise that major legal decisions decriminalising anti-sodomy laws have used the ‘privacy’ argument to depoliticise the radical nature of Queer organising. On the other hand, public visibility of Queer collectivisation, particularly Pride Marches, is increasingly getting corporatised.

How does one explain the co-existence of the promise and contingent feel of Queer emancipation and the rise of insidious forms of corporeal and structural violence on the Queer body? What prompts the belief of many Queer rights groups in the law, when it is the very body of knowledge that legitimises violence against them? Can rights guarantees de-historicise the experiences of Queer resistance? Are Queer movements becoming masculinist, racist, casteist and Islamophobic? Do they reproduce gender, caste and race hierarchies while claiming to dismantle sexual ones? Are there idealised notions

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of the Queer body? Does Queer subjectivity embody disabilities? How can such experiences of embodiment help us imagine sexuality and disability differently? Should we celebrate 'The Decade of Sex Rights' or be cautious and contemplative about the slippery slopes of our locations and strategies? Can there be a right-wing Queer? What are the connections between sexual cultures and sexual economies that define the contours of the Queer revolution today? Is there a revolution actually? Can 'Queer' be de-provincialised as a move towards building solidarity across other locations of sexual marginality, particularly sex work? Does Queer theory mark the end of Feminist theory? If not, how are they encountering each other? How do Queers negotiate between conformity and subversion in their visual representations in the cultural economy? What happens to “sexual subalterns” who do not possess the currency of engaging in QueerSpeak? On what terms do they join the after-party of decriminalisation? How does one speak about Queer emancipation beyond the liberal legalese of rights? How does disease and desire interact within a heteronormative political economy? How do we read nationalism and capitalism into the methods of Queer organising today? What would a radical Queer politics look like? What constitutes a “counter-heteronormative” Queer utopia?

These questions and the concerns shared above emerge from an understanding of the present moment in the life and times of Queer struggles – both in the metropole and the postcolony – as one where new intimacies are recognised and forged – be it solidarity between disparately located sexual rights groups or alliances between agendas of corporatisation, communalisation and militarisation. The moment is also characteristic of old desires resurfacing – be it the legalistic desires for equality and justice, the humanist desire for dignity, or the orientalist desire of liberating the postcolonial Queer from barbaric cultures. Keeping these problematics in mind, this special double issue proposes to engage in a rigorous self-reflexive critique of the Queer movements' engagements, confrontations, and negotiations with modernity and its investments in liberalism and legalism, with the objective of queering the ethics of our Queer politics.

Editors' Introduction

New Intimacies/Old Desires:
Law, Culture and Queer Politics in Neoliberal Times

Oishik Sircar* & Dipika Jain**

The more expert we become in talking about sexuality, the greater the difficulties we seem to encounter in trying to understand it. Despite sustained attempts through many years to 'demystify' sex, and several decades of much proclaimed—or condemned—'liberalism' and 'permissiveness', the erotic still arouses acute moral anxiety and confusion. This is not because sex is intrinsically 'naughty', as a sensitive commentator has rightly remarked, but 'because it is a focus for powerful feelings'.

– Jeffrey Weeks

It is the affective that connects the old and the new, and we don't mean nostalgia here, but the possession of a historical imagination (much like C. Wright Mills' 'sociological imagination'). Establishing this affective link between the past and the present is a way to undo the binarised nature of the hyphenated 'pre-' and the 'post-' that characterise most temporal posturing in history. By bringing the affective in, the old and the new get reconfigured as a tactile continuum rather than as the before and after of a material flashpoint moment. Flashpoints that get treated as harbingers of history are also history vanishing moments: “a centripetal turbulence of illumination so powerful that it may blind the past even as it spotlights the present and lights up the future.” And when critique is mounted by reading history as flashpoints, it is a truncated, blinkered history that results in a compromised and sanitised politics. A

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politics that fossilises the past, valorises the present, and simply paints a 'clean' picture: no contradictions, no contestations, no mess. A picture that irons out the unruly creases of historical inexplicability and is ready to adorn the manicured walls of an aesthetically curated memory museum. It is this practice of creaseless curation of the old and the new into ornate frames of history that this special double issue of the *Jindal Global Law Review (JGLR)* aims to work against, by using the lens of queer theory to “giv[e] up notions of universality, truth and rigid identities.”

This *JGLR* special issue draws inspiration from Jeffrey Weeks' prophetic observation quoted above. It is by foregrounding the 'powerful feelings' that build the continuum between the old and the new – not on a linear temporality, but a meandering, crooked, going back and forth, up and down, inside and out way – that we plan to make some contingent sense of queer sexuality's 'histories of the present'. If these histories – as articulated by the authors in this volume – are connected in any way, it is through an abiding commitment to queering flashpoint historical moments to problematise any fixated and captive explanatory framework for understanding the interactions between law, culture, queer sexualities, and neoliberalism. These four key words animate a crisis in the current political imaginary of the idea of justice that this issue will try to work through.

To that end, the issue offers a messy miscegenation of ideas, arguments and positions that cannot necessarily be captured within neat categories of disciplines, ideologies or experiences. To be messy here is indeed a purposeful political act that resists being sucked into the binarised traps of east/ west, hetero/ homo, straight/ queer, pleasure/ pain, new/ old, base/ superstructure, theory/ practice, conformity/ subversion, modernity/ tradition, agent/ victim, and the like.

When 'powerful feelings' are injected into the practice of critical inquiry, we discover the unruly calibrations within and beyond the binaries, and we also come to recognise a breed of power that does not only operate with teeth gritting dangerous glory, but one that is insidiously benign and uses the governmentalised technology of consent to smoothly discipline our conduct in the name of welfare and self-care. In response, the authors in this volume are creatively disloyal to their disciplinary trainings and locations, and intensely committed to the practice of resistance and


radical transformation. While each essay performs the ethical task of self-reflexivity, the authors in this volume do not claim to speak in the authentic voice of the ‘true queer’. Instead of getting trapped within queer identitarian categories of authentic self-definition, they use *queering* as a method of critique. As Michel Foucault reminds us:

> A critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought, the practices that we accept rest [...] Criticism is a matter of flushing out that thought and trying to change it: to show that things are not as self-evident as we believed, to see that what is accepted as self-evident will no longer be accepted as such. Practicing criticism is a matter of making facile gestures difficult.6

To engage in *queering* then is, as Gibson-Graham tell us, “reading for difference rather than dominance.”7 This is at the core of the vision with which the issue was conceptualised, to ask, among others, the questions: what happens to queer identity when it moves out of its home base of sexuality?8 Does it lose salience when asked questions that do not necessarily have any direct connections to sex and sexuality? To ask these questions does not mean to speak of a post-identity, post-ideology politics, or to dismiss the kind of politics that we disagree with, but to question the historical antecedents that have contributed to the construction of queer subjectivities, and the flashpoint break between the pre and the post of their moments of coming into being. To what use are these identities being put? How are they being materially and symbolically mobilised at a time in history that we call neoliberal? How do queer identified subjects negotiate their everyday and ordinary lives and desires through their interactions with the law? Does this interaction turn them into museumised objects: despised and exoticised at the same time?

So, what will a new collection of essays add to an already expansive and sophisticated body of critical scholarship on law, culture and queer sexuality? Will it break *new* ground? Will it merely rehash *old* ideas? We will leave that evaluation to our readers. And in any case, we are not approaching this issue with a polarised understanding of the old and the new. It would suffice to say that the process of putting together this issue has been so exhilarating an experience that the readers also

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8. This question was raised by Janet Halley at the 2011 Institute for Global Law and Policy; The Workshop, at Harvard Law School.
sharing even a bit of that as they read through the essays that follow would suffice.

The first cause of exhilaration stems from the very fact that we were attempting to disturb the doctrinal foundational pitch of a law journal. Although JGLR’s previous issues have featured interdisciplinary work, the disciplinary location of all such work was the law, and only the law. We have inverted – in fact, queered – the pitch. A majority of our contributors are non-lawyers, and for the lawyers, their work declares a departure from the law’s disciplinary precincts. Yet, the interrogation of the law – as a discourse of power, and an experience of regulation and liberation – is never abandoned. Rather it has been strengthened by drawing on a range of inter- and cross-disciplinary perspectives, primarily from the Humanities.

The second reason is the overwhelming response that we received to our call for papers. The call was verbose, opinionated and political. We were expecting very few responses given that we had purposefully narrowed down the theme so much. But even after we selected the contributions that are part of this special issue, we realised that there were so many of them that we have to spread the volume across two issues; which gave us the opportunity to carry such a fantastic collection of essays. We are certain, that across the two volumes, the essays will evince the kind of critical historical continuum that we have been discussing here. Thirdly, the issue carries the works of very established and young scholars within the same space. This co-habitation isn't just a coincidence, but a deliberate attempt at our end as editors to curate the two issues in a way that they contribute towards a more democratic and non-hierarchical practice for critical scholarship.

The second issue of this volume that will appear in a few months from now will focus broadly on the transnational universalising politics around queer organising and imagination, and its racist and imperialist proclivities. Issue 1 unpacks the experiences of the hyphenated 'post' ('-modern/' -colonial/ '-criminalisation/' '-legalisation') moments in the journey towards queer emancipation (or to use a more identitarian expression, LGBTI rights) in India and two other non-Western countries, namely Indonesia and Argentina; and certain parts of the developed world, namely Spain, Australia, UK and Canada. The essays collected here disrupt linear narratives of liberation that law and modernity expound, and also capture an occasion where the liberal law's standard of 'consent' falls woefully short of even comprehending a dissident sexual practice. Through the rest of this introduction, we provide a summary of themes that this issue hopes to engage with.
I. FROM REPRESSION TO EMANCIPATION?

Stories of queer liberation always seem to be framed within linear narratives of repression to emancipation.9 These narratives are closely aligned with our understanding of liberal rights, where the advent of democracy, constitutional legalism and capitalism are considered co-terminous with the advent of modernity and civilisation, and thus the acceptance of sexual outlaws within the fold of full and equal citizenship.

Interestingly, this linear progressive trajectory of history was also used as the justification for colonialism, and still holds tremendous purchase when it comes to claiming the identity-based LGBTI rights using the language of the law. Drawing on the colonial legacy today comes the accusation of non-Western countries being backward and homophobic, and in need for immediate law reform to decriminalise sodomy, legalise same-sex marriage and civilisationally uplift culture (which works as short-hand for religion) by opening up to secular markets. Such an explanation erases alternative histories of sexual desire and resistance, and makes us conveniently forget the colonial acts that in fact legislated homophobia into the law and subsequently into the cultures of postcolonial states.10 A linear narrative of history thus relies heavily on flashpoints to mark the civilisational break between Western progress and Eastern primitivity, where constitutional/ legal protection of LGBTI rights serves as the marker of how evolved a postcolonial democracy is (if it qualifies as a democracy at all in the West's view).

It is here that postcolonial theory and subaltern studies make an entry with theoretical tools that disrupt this neat narrative of universality to offer a queer history of layered contradictions. The essays by Brenda Cossman,11 Ratna Kapur12 and Vanja Hamzic13 are part of this disruptive tradition. Hamzic doesn't necessarily borrow entirely from these bodies of work, but shares a deep solidarity in political spirit in his discussion of alter-sexualities in the Indonesian Archipelago. A majority of essays in Issue 2 engage with this theme more closely.

9. See generally Martha Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law (2010) (Nussbaum’s work is a case in point of this repression to emancipation narrative.).
11. See in this issue, Brenda Cossman, Continental Drift: Queer, Feminism, Postcolonial.
II. FEMINISM: A STRAINED ALLY?

Cossman and Kapur's disruptions in this volume help us recognise another linear trajectory akin to the move from repression to emancipation. This one suggests that the birth (and we are attentive to the heteronormative connotation of this expression!) of queer theory happened out of feminist theory – and now they are part of the same family, sharing similar political visions and theoretical roots. And their intimacy is, "... just as in most bookstores [...] found on shelves located side by side or back to back." Yet, as the blurb on the edited collection *Feminism Meets Queer Theory* says: "[...] they can also seem like strangers, needing mediation, translation, clarification." The linear story goes that first there was feminist theory, and then came queer theory, and that is why queer theory must always pay its gratitude to feminist theory as its mother goddess. Few standard contentions that queer theory has with feminist theory are the latter's difficulty with breaking out of the male/female binary, the mounting of an analysis that is uneasy with discussing sexuality outside of its critique of reproduction and violence, the struggle to resolve whether feminism 'carries a brief' for an unambiguous and essentialist subject called 'the woman', and gender-subjugation as always understood in terms of men dominating women.

Fed up with feminism's continued discomfiture and marginalisation of queer sexuality and drawing on queer theory's commitment to an anti-identitarian politics, in 2008 Janet Halley made a charmingly provocative argument about 'how and why we should take a break from feminism' in her book *Split Decisions*. Cossman and Kapur's essays in this volume engage with this suggestion of a 'break' to understand what the consequences of such a manoeuver might be when queer theory moves to the postcolony. Does it recreate another binary of theory being Western and experience being Southern? Or does queer theory undergo a transformation through its "continental drifts"? Does theorising become the queer academic's privilege whereas identity politics remains the drudgery of the materially discriminated homosexual? While Cossman and Kapur do not suggest a complete break from feminism (they acknowledge its contribution to their own political positioning as queer feminists), they do offer insights into disruptive acts that queer theory can perform to push feminism's boundaries to imagine a "radical alterity" that makes space for solidarity building and "homosexual dissidence in law."

15. *Id.*
The strained relationship between feminism and queer sexuality has been more than apparent in India (and South Asia) as well, especially with the difficulty that the women's movement and feminist scholarship has had with speaking about lesbians and trans-women, let alone considering queer-identified women (and sex workers) part of the movement. On many occasions, queer sexuality has been considered a bourgeois issue that concerns only upper class/caste women. In India, after a conspiracy of silence on the sexuality question within the women's movement, one of the first spaces where lesbians found articulation beyond the context of violence was at the 1994 edition of the National Conference of Autonomous Women's Movement held at Tirupati. As Nivedita Menon notes:

[T]he initial response of the established leadership of the women's movement was entirely homophobic and even today the alliance is not an unproblematic one. [...] [At the Tirupati Conference] an open and often acrimonious discussion on lesbianism took place, with the greatest hostility coming from leftist groups, decrying lesbianism as an elitist deviation from real political issues.

Soledad Cutuli's essay explores similar tensions around the integration of travestis within the LGBT movement in Argentina.

III. LAW AS SPECTACLE

The law works as the most potent flashpoint moment. Queer struggles in most parts of the world work towards demanding repeal of antisodomy laws, seek legal recognition of same-sex marriage and laws to protect them from discrimination. We don't need to over-emphasise how important these efforts are. What we remain concerned about is the way in which the law is projected as the singular point where queer oppression and emancipation meet: one that is at the root of homo/trans/queer phobia, and one that is the most potent response to it. The cruelty of this experience is aptly captured in the term 'Pharmakon'. Derrida's reading of this expression, first introduced by Plato, means...
medicine that is cure and poison at the same time. Escaping this double-bind of the law’s promise of justice and reality of violence becomes a formidable task for queer struggles.

The spectacle works in such a way that legal achievements tend to anaesthetise our collective ability to gauge its consequences. Can decriminalisation of sodomy be universally emancipatory? Can it not, in fact, be a more insidious mode of surveillance and regulation? Does same sex-marriage recognition reproduce hetero-patriarchy? Can the trope of the right to privacy, that is used on most occasions to legally challenge anti-sodomy laws, become a marker of class privilege? Can the claim to privacy be a depoliticising move that domesticates sexuality? Does legal emancipation ossify sexual identities as fixed and unchangeable? Is the almost universal cry for decriminalisation part of any larger politics connected to agendas of global governance and aid politics? Do decriminalisation and same sex-marriage rights operate as civilisational markers of progress?

The Naz Foundation judgment that read down Section 377 of the Indian Penal Code (India’s anti-sodomy law), as many would argue, is an outcome of the cultural acceptance of diverse sexualities that has taken place as a result of liberalisation and globalisation, as is evident from the Delhi High Court’s constant allusions to international human rights law and precedents, primarily from the United States. These references made apparent the cultural logic behind the court’s reasoning: India needs to live up to the progressive developments in other parts of the (Western) world by decriminalising sodomy. As Anjali Gopalan, founder of the petitioner organisation Naz Foundation said after the judgment was delivered, “Oh my God, we’ve finally stepped into the 21st century!” The excitement of the moment notwithstanding, this spectacular declaration is indeed a history-vanishing flashpoint moment — where the ostensibly progressive present contributes to the making of queer emancipation at the cost of blinding us from a historicised understanding of the cruelly liberal genealogy of this very moment.

It cannot be denied that the judgment is progressive and historic. Upendra Baxi’s celebratory declaration was that it marked an “exceptional’ adjudicative moment.” What Baxi missed was how this spectacular exceptionalism worked as a blinding flashpoint that sought

23. These arguments have been drawn from Oishik Sircar, Spectacles of Emancipation: Reading Rights Differently in India’s Legal Discourse, 49 (3) Osgoode Hall L. J. (forthcoming 2012).
to recognise only the rights of those homosexual men who have the privilege of access to private space. The primacy put on private sex is clearly an elitist qualifier to read down the law, because it excludes from its purview a whole range of non-elite and indigenous sexually marginalised people who do not enjoy the privilege of private space. 25

The 'privacy' standard is a myth, because those who do have access to private space were already outside of the reach of the law. As Ashley Tellis questions, “What is the point of allowing consensual sex between private adults of the same sex when most violations are of us in the public realm: in institutions, on the streets, in parks, toilets and wherever else?” 26 Jason Fernandes has noted that the judgment prioritises the interests of urban, English-speaking, middle-class leaders of the queer rights movement in India, by overshadowing those very sexually marginalised (Hijras, Kothis, Panthis) 27 who they claim to represent. 28 The reading down of the law may thus now ostensibly allow for same-sex acts within private spaces, yet it ironically offers no protection for same-sex practices outside the normative parameters of home and domesticity. 29

Wendy Brown notes in the American context of decriminalisation of sodomy on the grounds of privacy:

Privacy, for example, is for many feminists a site that depoliticizes many of the constituent activities and injuries of women: reproduction, domestic assault, incest, unremunerated household labour, and compulsory emotional and sexual service to men. Yet for those concerned with sexual freedom, with welfare rights for the poor, and with the rights to bodily integrity historically denied racially subjugated peoples, privacy generally appears unambiguously valuable [...] Like rights themselves, depending on the function of privacy in the powers that make the subject, and depending on the marked identity that is at issue, privacy will be seen variously to advance or deter emancipation, to cloak inequality or procure equality. 30

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27. These are identity categories that non-elite sexually marginalised persons use in India, instead of using the category of gay. Culturally, the performance of these identities are also very different from being gay or just homosexual.
The lesson, then, is to not treat the liberal virtues of privacy as a universal emancipatory idea but, rather, as one that also has the ability to disenfranchise. Pharmakon again.

A large number of essays in Issue 1 engage with the 2009 flashpoint judgment of the Delhi High Court (HC) in the *Naz Foundation* case. There has been so much written on *Naz* since then but the postcolonial and queer critiques that authors in this volume offer have been sadly absent from much of what has been published so far, barring a few exceptions. Scholarly and activist writing on law, sexuality and culture in India – both pre and post *Naz* – that have used the 'queer' tag in the naming and framing of their work have continued to do so within the identity politics framework where *queering* as a method of critique was given short shrift.

Contributions in this volume hope to make a departure on that front. While Cossman and Kapur extend their 'taking a break' analyses into the realm of the *Naz* judgment, Neil Cobb's, Ashley Tellis' and Zaid al Basset's essays in this volume provide nuanced and novel readings of what the future of *Naz* might hold for queer emancipation in India. A queer rereading of *Naz* – in ways that are interested in cutting through the rhetoric of magic and celebration that seems to surround it all the time – while we wait for the Supreme Court of India (SC) to decide on Sec. 377's fate is imperative, not because the SC might overturn or uphold the HC judgment, but because *Naz* and the cultural, bio-

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31. Two notable collections that were published post the *Naz* judgment are the special issue of the NUJS Law Review [*2 NUJS L. REV. (2009)*] and *Law Like Love: Queer Perspectives on Law* (Arvind Narain & Alok Gupta eds., 2011); *See particularly Ratna Kapur, Out of the Colonial Closet, But Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in De-radicalising the Rights Claims of Sexual Subalterns, 2 NUJS L. REV. 381 (2009); Fernandes, *supra* note 28.

32. *See generally Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Ruth Vanita ed., 2002); *Because I Have a Voice: Queer Politics in India* (Arvind Narain & Gautam Bhan eds., 2005); *Law Like Love: Queer Perspectives on Law* (Arvind Narain & Alok Gupta eds., 2011) (An edited volume that attempted a move away from discussing sexualities only from an identitarian lens but ultimately couldn't escape fixed notions of queer identities is *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (B. Bose & S. Bhattacharya eds., 2007). An edited volume that attains some success by not letting identity politics overshadow the engagement with critique is Menon, *supra* note 18 (though it does not offer anything specific as a queer critique of sexualities.)).


34. *See in this issue, Ashley Tellis, Disrupting the Dinner Table: Re-thinking the ‘Queer Movement’ In Contemporary India.*

35. *See in this issue, Zaid Al Basset, Section 377 and the Myth of Heterosexuality.*

36. *See Engel, supra* note 4 (“Queer theory [...] is a politics of language and a technique of rereading rather than of taking part in the process of resubjectivation – the mobilization and transformation of desires, the cultivation of capacities, and the making of new identifications.”).
medical, governmental and developmental mobilisations around it have seldom been subject to deep scrutiny. In a similar vein, Susana Lopez Penedo's article interrogates the complicated and limiting outcomes of same-sex marriage legalisation on the LGBTIQ movement in Spain.37

The law distinguishes between 'good' and 'bad' sexuality by primarily using the barometer of 'consent' and limitations to measuring of legal consent in sexual relations and transactions are very well theorised.38 The law still persists and consent is indeed the most effective qualifier for which kinds of sexual interactions should and should not be criminalised. Of course, when it comes to dissident sexual acts like sodomy, the law conveniently suspends legality, embraces conservative morality and makes consent irrelevant. Ingrid Olson's essay powerfully challenges the law's spectacle by looking at the cultural limits of sexual consent in the case of sadomasochism: a practice that continues to be tabooed and censored even within queer and sexuality-affirmative circles and literature.39

IV. NEOLIBERAL TECHNOLOGIES

Neoliberalism is the proverbial elephant in the room when it comes to liberal discourses on queer emancipation. There are several political-economy definitions of what it is and why it is dangerous,40 but we would like to work with a tentative definition that understands neoliberalism as 'the cultural technology of disciplining conduct'. While capitalism as an ideology puts into operation a political formation of governance like liberalism, neoliberalism is the condition where practices of liberalism get naturalised, internationalised and internalised by individuals who inhabit liberal or liberal-aspiring state formations.

Culturally, neoliberalism has very smoothly done three things to ensure its robust and brutal longevity: first, it has enabled the mutation of the state into a firm; second, it has given birth to the responsibilised and self-governing citizen; third, it has constantly projected experiences

37. See in this issue, Susana Lopez Penedo, Queer Politics In Spain: There Is Life After Same-Sex Marriage Legislation.
38. See generally A. Wertheimer, Consent to Sexual Relations (2003).
39. See in this issue, Ingrid Olson, Asking For It: Erotic Asphyxiation, And The Limitations Of Sexual Consent.
40. One of the most widely accepted definitions is from D. Harvey, A Brief History of Neoliberalism 2 (2007) ("Neoliberalism is in the first instance a theory of political-economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.").
of human precarity and risk as entrepreneurial/developmental/funding opportunity. These three ramifications of neoliberalism on human minds and bodies have had arresting consequences on the idea and practice of legally claiming LGBTI rights.41

The new mantra of citizenship under neoliberalism is one where every individual is told that they can be citizens with rights as long as they perform certain prescribed codes of respectable citizenship which are for their own good. Under neoliberalism, the script of this seduction is not a preserve of the state any longer but authored under the demands of transnational market forces. The promise of integration is a difficult temptation to resist for those who have historically been outside of the folds of formal citizenship. Not being integrated is to not be treated as a citizen with rights and being incorporated into the folds of citizenship might afford you rights but those rights also result in initiating a unique form of self-surveillance and regulatory technology. Pharmakon redux. So what exactly does the seduction of the state/market complex do to the queer person? As Jasbir Puar in her reading of the situation in the US notes:

[T]here is a transition under way in how queer subjects are relating to nation-states, particularly the United States, from being figures of death (i.e., the AIDS epidemic) to becoming tied to ideas of life and productivity (i.e., gay marriage and families). The politics of recognition and incorporation entail that certain – but certainly not most – homosexual, gay and queer bodies may be the temporary recipients of “the measures of benevolence” that are afforded by liberal discourses of multicultural tolerance and diversity. This benevolence towards sexual others is contingent upon ever-narrowing parameters of white racial privilege, consumption capabilities, gender and kinship normativity, and bodily integrity.42

The experience in India will not be very different where Naz marks this flashpoint moment of integration and it will not come as a surprise if the terms of recognition for queer subjects are predicated on the hegemonic constructs of the Hindu nation, the heteronormative Indian family and the universal image of the chic, entrepreneurial and consumer citizen – one who is both culturally and economically disciplined to serve the ends of neoliberalism. Brenda Cossman pithily captures the characteristics that this newly crowned sexual citizen will fashion:

42. JASBIR PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES xii (2007).
They are experts in the arts of self-conduct. And they shop. Their citizenship is sexualized beyond heterosexuality, commodified through a celebration of market consumption, and domesticated through a new emphasis on the intimate sphere not only as a site for caring for others but for care of the self. They are citizens who are sexed but not too much; citizens who not only consume but better yet, teach each other to do so; citizens devoted to the conduct of self and other improvement [...] The process of becoming citizens is one that operates its own technologies of inclusion and exclusion and constitutes subjectivities through these technologies. I argue that the new modality of sexual citizenship is one that is privatized, domesticated and self-disciplined.43

Cossman's context is also the US, yet the trends she points at are already underway in India with popular media and advertising opening up to recognising queers as consumers. Understanding the cultural ramifications of decriminalising adult, consensual and private sex in the *Naz* judgment also helps us unpack this better. Similarly, Damien Riggs' essay points at the conservativeness and racist overtures in the representation of happy, homosexual and domesticated couples in the popular media in Australia.44 In the Indian context, Ashley Tellis', Neil Cobb's and Aniruddha Datta's45 essays point at the mutation of neoliberal disciplining technologies informed by the discourses of global governance, biopolitical technologies of public health, queer organising around HIV/AIDS interventions for the pathologically created category of Men-Who-Have-Sex-With-Men (MSM) and the use of the medium of Bengalee music that appeals to middle-class sensibilities. All of these disciplinary methods have close links with the markets of international aid, discourses of developmentalism and the aesthetic morality of respectability. While all these essays unmask the troubling consequences of the neoliberal construction of sexual citizenship as ostensibly liberating for queer subjects, they also foreground the quotidian practices of resistance in the “political society”46 of the postcolony by subaltern queer subjects against their assimilation into neoliberal nations and markets and it is the practice of this resistance that continues to fuel the imagination of a radical queer futurity.

44. **See in this issue, Damien Riggs, 'Paradoxes of Visibility': Lesbian and Gay Parents in the Australian Print Media.**
45. **See in this issue, Aniruddha Dutta, Claiming Citizenship, Contesting Civility: The Institutional LGBT Movement and the Regulation of Gender and Sexual Dissidence in West Bengal, India.**
V. APOLGIA AND AUTOCRITIQUE

I am permanently troubled by identity categories, consider them to be invariable stumbling-blocks, and understand them, even promote them, as sites of necessary trouble.

– Judith Butler

A dislocation of identity as the primary foundation for solidarity opens up space for the creation of “affective communities” connected by ‘powerful feelings'. Butler's provocation gives us, as editors, the opportunity to unburden (not resolve) ourselves of an ethical dilemma: what does it mean when two married, heterosexual people (a man and a woman) with declared queer-feminist and Marxist ideological positions edit a journal on queer sexualities? Is this part of the hegemonic script of appropriation? Is this the classic retelling of the liberal normative framework being inclusive, and thus legitimate, expecting the non-normative to eventually assimilate into its fold? What right do we have to represent queers? In the spirit of this journal's theme we must say: we don't have a right, we have a critique! A critique that, as Janet Halley writes, “argues that identity is not the core truth and safe zone of authenticity and authority posited by our most widely shared assumptions about identity politics; instead it suggests that identity may be part of the problem.”

If we are approaching this project as editors by foregrounding our sexual identities as straight people, who of course by virtue of their class, caste and marital status, have already accrued privileges that are symbolically too powerful to ignore, what does it mean to have this conversation? Are we engaging in a confessional of sorts to gain higher moral ground? What drives our desires to curate this collective project of queer critique? Are we fetishising 'queer'? Does it serve our moral interests in publicly showing how our scholarship is so 'open' and

49. We borrow the template for this response from Wendy Brown & Janet Halley, Introduction, in Left Legalism/ Left Critique 1 (Wendy Brown & Janet Halley eds., 2002) (“A colleague of ours was giving a paper on the vexed problem of veiling among contemporary Islamic women and Western feminist responses to it. From the audience, and American woman of South Asian descent challenged our colleague, a feminist Arab secularist, for intervening in a domain properly belonging to religious Arab women: “What right do you have to be saying such things?” “Right?” our colleague responded. “I have no right—I have a critique!”” [emphasis in original]).
'progressive? Rather than arguing in defence of us assuming the position of editors, we hope that readers and our authors would treat this as the inauguration of a friendship that does not use identity as the sole qualifier for constructing ideas of belonging but one that is built on the values of ethical representation, a relationship of accountability and a shared challenge against heteronormativity and its mutations inside capitalism, patriarchy, caste, religion and all other structures of domination. As editors, we are driven by a commitment to political transformation and a belief in queer theory's critical and utopic possibilities, in the hope that, as the late human rights lawyer and activist K. Balagopal said, in the process of condemning oppression, we would “condemn a bit of ourselves.”51 Actually, so much more than a bit.

This self-reflexive practice of condemnation must also extend to asking questions about our location as academics in the heart of the neoliberal academy. Isn't this exactly the kind of seductive assimilation that we cautioned against a little earlier? It is this very contradictory nature of identity, location and ideology that we want to engage in this special double issue and we hope this brief reflection in autocritique bears out that commitment. A commitment that does not assume that identitarian or ideological locations of being feminist, queer or Marxist can in themselves be emancipatory or that they can respond favourably to other experiences of exclusion. As one of the editors has argued elsewhere about queer exclusionist tendencies in India:

> [The queer] movement [in India] is not immune to racist, casteist, sexist or religious prejudice. We must not shy away from asking: can there be a right-wing queer? Can sexual liberation come at the cost of religious domination? Could we have had several queer people voting for Modi in Gujarat? If yes, what would we see them as – Hindus or homosexuals? Are we comfortable with Hindu homosexuals voting for a Hindu nation? What are the connections between queer emancipation and economic liberalization? Can there be a lesbian woman, a senior executive who works with Vedanta [aluminum], who wants to blast off the Niyamgiri hills, blames the Dongria-Kondh for being primitive beasts, and chastises her heterosexual sister for falling in love with a lower-caste man? Has globalization benefitted queers, or has it in fact entrenched class prejudice within the movement?52


In conclusion, we'll return to where we started: the affective connections between the old and the new. These connections, in fact, animate a similar set of contradictions. For example, the new intimacies between sexuality and neoliberalism that celebrate modernity and the birth of the disciplined sexual citizen are nothing but reproductions of the old colonial desire of civilising the native. In the case of colonialism, the native was being disciplined to be brought into the folds of civilisation and today the queer is being tamed and brought into the folds of the secular market and nation-state. The new intimacy between queer organising and the law is akin to the old and continuing desire for legalism and rule of law in the postcolony that will help it to become a democracy. The new intimacy between public health and queer visibility is a very sophisticated repetition of colonial quarantine measures and methods of surveilling bodies that carried 'contagious diseases'.

This volume aims to offer no closure to this continuum of contradictions but acknowledges that these are deep ethical concerns that must be confronted if we wish to seriously interrogate meanings of queer emancipation beyond the modernist, governmentised legalism that seduces us with aplomb. The politics of emancipation is a failed project if it talks of closures. As Nivedita Menon inspiringly reminds us:

I understand emancipation as a process without closure, it is not a goal that we can reach. Each victory becomes the site of a fresh cooptation, but conversely too, each defeat releases new potential to resist oppression. To move away from legal and state-centered conceptions of political practice is to recognize political practice as the perpetual attempt to eliminate oppression rather than the achievement of this elimination. Nevertheless 'emancipation' remains a horizon that should drive our political practice.53

This special issue is a modest contribution towards recognising this "indefiniteness of [our collective] struggle[s],"54 and hopes to keep our 'powerful feelings' alive.

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54 Michel Foucault, Body/Power/Knowledge: Selected Interviews and Other Writings 1972-1977 56-7 (1980) (“For each move by one adversary, there is an answering one by another [...] one has to recognize the indefiniteness of the struggle.”).
Continental Drift: 
Queer, Feminism, Postcolonial

Brenda Cossman*

In this article, I tell a story of drifts - of continental drifts from feminism to queer theory, drifts between continents, from West to East and back again. From its genesis in the works of Eve Sedgwick and Gayle Rubin, queer theory emerged as a project of theorising sex and sexuality in an analytical framework independent of feminism. Others, like Judith Butler have resisted the bracketing of gender and the break of feminism, insisting instead that neither feminism nor queer theory should have such clearly delineated ‘proper objects’. I seek to bring the continental drift to the question of queer theory’s relationship with feminism, and its location in the postcolonial. While the story starts in the West, where queer theory first emerged, it drifts eastward. But continental drift is not a story of movement from West to East; it is a story of the movement of the Earth’s continents relative to each other. Shifting tectonic plates produces more than a little deep structural change. So too does the drift of queer theory toward the postcolonial, and the postcolonial toward the queer.

The relationship between feminism and queer theory has long been a contested one. From its genesis in the works of Eve Sedgwick and Gayle Rubin, queer theory emerged as a project of theorising sex and sexuality in an analytic framework independent of feminism. As Rubin wrote in Thinking Sex:

In the long run, feminism’s critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism. But an autonomous theory and politics specific to sexuality must be developed.1

Others like Judith Butler have resisted the bracketing of gender and the break of feminism, insisting instead that neither feminism nor queer theory should have such clearly delineated proper objects, and

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that more is to be gained from a kind of 'intellectual trespass' between them. Indeed, Butler's work on gender performativity, so foundational to queer theory, was itself an intervention in feminist debates.

In this article, I tell a story of drifts – of continental drifts from feminism to queer theory, drifts between continents, from West to East and back again. Much of my own work has been located in these drifts. It is located in the drift away from feminism to queer theory. I turned to the sex radical work of Rubin and became more engaged with questions framed by Michel Foucault, Eve Sedgwick, and Judith Butler. Yet I never fully repudiated feminism: I remained committed to the idea of its continued analytical purchase. My drift away from feminism to queer theory also involved going back again. Much the same can be said of my work in terms of drifts between continents. It has been located in the West and in India, sometimes sequentially, sometimes simultaneously. The temporal, spatial and theoretical drifts back and forth have produced a slightly dislocated and disoriented body of work that sometimes speaks parochially and other times speaks between and across. In this article, I seek to bring that continental drift to the question of queer theory's relationship with feminism and its location in the postcolonial. While the story starts in the West, where queer theory first emerged, it drifts eastward (or westward depending on one's flight route). But continental drift is not a story of movement from West to East; it is a story of the movement of the Earth's continents relative to each other. Shifting tectonic plates produce more than a little deep structural change. So too does the drift of queer theory toward the postcolonial and the postcolonial toward the queer.

I. Queer Theory?

Queer theory is a tough thing to pin down. Its deconstructive nature defies any simple definition or synopsis and from its inception, it has

2. Judith Butler, Against Proper Objects, in Feminism Meets Queer Theory (Elizabeth Weed & Naomi Schor eds., 1997).
3. See for example Shannon Bell, Lise Gotell, Becki Ross & Brenda Cossman, Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision (1997); Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (2007).
refused the definitional. 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 believe useful, to identify several basic themes or perhaps 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 denaturalise the assumed connections between sex, gender and desire. Teresa de Lauretis, the first to coin the term and one of the first to denounce it, described queer theory as “a refusal of heterosexuality as the benchmark for all sexual formations.” It was a critique directed to “recast or reinvent the terms of our sexualities, to construct another discursive horizon, another way of thinking the sexual.” Perhaps at its most general, queer theory can be seen as an interrogation and denaturalisation of the sex, gender, desire matrix. As Annamarie Jagose has described:

Broadly speaking, queer describes those gestures or analytical models which dramatise incoherencies in the allegedly stable relations between chromosomal sex, gender and sexual desire. Resisting that model of stability – which claims heterosexuality as its origin, when it is more properly its effect – queer focuses on mismatches between sex, gender and desire.

Judith Butler's groundbreaking work in *Gender Trouble* and *Bodies that Matter* took aim at the identity and essentialist constructions of gender, insisting that chromosomal sex, gender and sexuality are discursively produced and performed. In *Epistemology of the Closet*, Eve Sedgwick centred the critical analysis of the homosexual/heterosexual dichotomy. Through these works, queer theory deconstructed the dichotomy between gay and straight, homosexual and heterosexual, suggesting


11. *Id.*

that these dichotomies were themselves part of the problem. The homo/hetero distinction normalised heterosexuality and reinforced very static and essentialist conceptions of sex, sexuality and desire. It was similarly a critique of identity – specifically gay and lesbian identity claims – arguing against the essentialisation of gay identity against a heterosexual norm.

Secondly, queer theory was 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.”

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.

Michael Warner, for example, in *The Trouble with Normal* focused queer on resistance to regimes of normal, particularly, to sexual regimes of normalisation. This critical positionality against regimes of sexual normalisation and normative sexualities teeters at times towards a more normative celebration or affirmation of sex, particularly of 'non-normative' sexual practices. Although this normative pro-sex affirmation sits uncomfortably with queer theory's critical and more poststructuralist tendencies, it gestures towards an underlying if not always stated normativity. Indeed, some, like Gayle Rubin, argue for an ethics of sexual pluralism that expressly affirms the non-normative. While the underlying normativity of queer theory remains contested and unresolved (perhaps irresolvable), the interrogation of normative sexuality and the implicit embrace of non-normative sexualities can be seen as a thematic gesture that runs through much queer theory.

Thirdly, queer theory seemed to emerge as a lens to focus on sex and sexuality independently of gender. It was articulated by Rubin and Sedgwick as a kind of break from feminism and the colonising lens of gender, arguing that much could be gained by exploring sex and sexuality through its own unique lens. Rubin challenged feminism's claim to have occupied the field of sexuality and argued that it was essential to “separate gender and sexuality analytically to more accurately reflect

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14. Id.
16. Rubin, supra note 1, at 283 ("A democratic morality should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion and the quantity and quality of the pleasure they provide.")
their separate social existence." It was time, she argued in 1984, to develop an “autonomous theory and politics specific to sexuality.”

Sedgwick picked up on Rubin's call and argued in *The Epistemology of the Closet* that it was axiomatic that “the study of sexuality is not coextensive with the study of gender; correspondingly antihomophobic inquiry is not coextensive with feminist inquiry”:

> [...] the question of gender and the question of sexuality, inextricably from one another though they are [...] are nonetheless not the same questions, that in twentieth century Western culture, gender and sexuality represent two analytic axes that may productively be imagined as being distinct from one another.

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 of feminism's focus on male/female relationships.

Some have since declared queer theory as over, dead or passé. Yet others continue to work with a queer lens. Given Lee Edelman's work on queer time, Judith Halberstam on queer time and space, Elizabeth Freeman's on queer temporarilities and histories, and Kathryn Bond Stockton on the queer child, to name but a few of the more haunting works of the last decade, queer still appears to have more than a little intellectual energy pulsating through its veins, rendering its pronouncement as dead a bit premature. Queer is still in the process of being written. It remains, as Judith Butler has argued, “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.

18. *Id.*
20. *Id.*
21. See for example Jeff Nunokawa, *Queer Theory: Postmortem*, 106 (3) *South Asian Quarterly* 553-563 (2007) (Others, less quick to declare its death, have explored its present and future.); See for example Special Issue, Social Text: What is Queer about Queer Theory Now? 84-86 (David Eng, Judith Halberstam & Jose Esteban Munoz eds., Fall/Winter 2005); *After Sex: On Writing since Queer Theory* (Janet Halley & Andrew Parker eds., 2010).
These themes or analytic predilections, which no doubt oversimplify the contested terrain of queer theory, remain compelling and analytically useful. I believe that they can usefully be brought to bear on what passes for queer theory these days, which in its less complex modalities, borders on reconstituting queer simply as gay. Indeed, this is where I risk becoming an unreconstituted queer theorist, or Sedgwickian, insisting perhaps a little too strongly on some of queer theory's originalism as an anti-identitarian project. Eve Sedgwick once said that almost every attempt to deploy Foucault's repressive hypothesis has gotten it exactly wrong. I think that the same may be said of Sedgwick's work. 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. While I agree with Butler and others that queer theory itself is a contested terrain, an ongoing critical project, without ownership, I cannot help but recoil from the deployment of queer as a mere synonym for 'gay', only hipper. Queer parenting, queer marriage, queer community – while I do not suggest that the practices of parenting or marriage or community could not in fact be queered, I question the extent to which the mere insertion of queer as an adjective in front of those practices does so. For me, queer theory offers a powerful, anti-identitarian lens to explore sex and sexuality. If this makes me an unreconstructed Sedgwickian, so be it, but acknowledging it may allow the reader to make their own judgments.

II. Feminism?

The rupture between feminism and queer has, as I have suggested above, been productive. Yet there is also a way in which it has been stultifying. As Judith Butler has argued, each has been given its proper object: gender is allocated to feminism while sexuality is allocated to queer theory. The two are cast in an antagonistic relationship, their differences incommensurable. For queer theory, feminism is reduced to one side of the sex wars – those that seek to regulate the harms that sexuality presents for women - while casting itself as a more liberatory politics that seeks to destabilise the disciplinary regulation of sexuality. For feminism, queer theory is reduced to a sexual libertarian and representation politics, overly male in orientation, devoid of ethicality, unconcerned with the material conditions of women and the role of

27. Sedgwick, supra note 19, at 48 ("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.").
sexuality in producing inequality. This is an unproductive dichotomy, trafficking in caricatures and stereotypes that fails on the one hand to recognise the contribution of different currents of feminism, while erasing debates within queer theory around gender, ethicality and political engagement on the other. Feminism becomes equated with dominance feminism. As Butler has argued:

"feminism becomes identified with state allied regulatory power over sexuality [...] and these feminist positions which have insisted on strong alliances with sexual minorities and which are skeptical of the consolidation of the regulatory power of the state have become barely legible as 'feminist'."

It is a divide that fails to interrogate the more productive potential of analyses that might lie in the interstices of gender and sexuality, feminism and queer theory.

In a more recent intervention in the feminism/ queer theory debates, Janet Halley has provocatively argued that it is time to “take a break from feminism.” Halley has demonstrated the conflicts between dominant variants of feminist critique and queer theory in the context of sexual harassment law, with feminist “victories” producing queer theory losses. She argues that it may be time “to urge feminists to learn to suspend feminism, to interrupt it, to sustain its displacement by inconsistent hypotheses about power, hierarchy and progressive struggle.” She defines feminism as having three shared features: “First, to be feminism, a position must make a distinction between M and F ... [S]econd ... a position must posit some kind of subordination as between M and F, in which F is the disadvantaged or subordinated element.” Finally, a position must advocate against this subordination, or in Halley's words, it must “carr[y] a brief for F.” This concern with the distinction and subordination between male and female, men and women, particularly as it has sedimented in dominant or 'governance feminism' operates to preclude a range of alternative insights into the workings of sexuality

30. Halley et al., supra note 29, at 604.
31. Id.
32. See Janet Halley et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J. L. & GENDER 335, 340 (2006) (Janet Halley coined the term "governance feminism" to "refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power.").
that could be seen through an alternative theoretical lens, such as queer theory.\textsuperscript{33}

Halley's methodology allows her to produce counter-narratives of the operation of power on the terrain of sexuality, narratives that were obscured from within feminism's male/female binary. Yet, as a methodology, taking a break from feminism runs the risk of reproducing some of the problematic effects of the feminism/queer theory rupture. While Halley recognises the diversity within feminism and the deep ideological divisions within feminism on issues of sexuality, thereby avoiding the simplistic feminism/queer theory, gender/sexuality dichotomies, “taking a break” from feminism risks leaving in place rather than “moving between” the polarised worlds.\textsuperscript{34}

In my debates with Halley, I argued that a return to feminism might mitigate these risks.\textsuperscript{35} I argued that feminism's focus on gender as an axis of power continued to have analytic purchase. Gender when understood broadly as, in Joan Scott's words, “a primary way of signifying relationships of power,”\textsuperscript{36} a way in which material and symbolic resources are produced and distributed in asymmetrical ways, remains an important foundational and analytical frame for feminism. Gender still matters in the world in real and symbolic, discursive and material ways. But in keeping with the influence of queer theory I argued that it should not be an exhaustive analytic frame: “Feminism as an analytic lens on gender as an axis of power” could “be supplemented, challenged, and confused by other theoretical and analytic frames.” \textsuperscript{37}

Gayle Rubin gestured towards a possible rapprochement of sexuality and gender “in the long run.” Others, notably Butler, have mused on whether the long run has since arrived. My argument with Halley would suggest

\begin{itemize}
\item[33.] Halley, \textit{supra} note 29, at 604 (Halley’s idea of “taking a break from feminism” is not a renunciation of feminism, nor an anti-feminist position. It is simply a bracketing of feminism’s questions and its focus on the masculine/feminine distinction. Although she is extremely critical of “governance feminism” - the alliance of liberal, radical, and cultural feminism that has informed a range of regulatory approaches - she does not condemn all feminism with the same brush stroke. Her argument is often misconstrued as an anti-feminist renunciation. A more careful reading of her work reveals that it is not.).
\item[34.] \textsc{biddy martin,} \textit{Sexuality without Genders and Other Queer Utopias, in Femininity Played Straight: The Significance of Being Lesbian} 3 (1996) (The idea of “moving between” polarised positions is borrowed from Biddy Martin’s piece. Halley’s focus on governance feminism - radical and culture feminism - similarly runs the risk of obscuring the potential insights of the multiple variants of more marginal feminisms that live more closely on the porous borders between the feminist and the queer.).
\item[35.] Cossman \textit{et al.,} \textit{supra} note 4, at 601; Brenda Cossman, \textit{Sexuality, Queer Theory and Feminism After: Reading and Rereading the Sexual Subject,} \textit{49} McGill L. J. 847 (2004).
\item[36.] Joan Wallach Scott, \textit{Gender and the Politics of History} \textit{42} (1988).
\item[37.] Cossman, \textit{supra} note 35, at 853.
\end{itemize}
I agree. But I must admit to a continuing apprehension. If the long run has arrived, and it is time for more “intellectual trespass” between the two, the rapprochement must be a careful and contingent one. Gender still has – has always had – analytic purchase in the study of sex and sexuality. But feminism has not always been a humble discourse. It can no longer seek the first and last word. It should begin by recognising the limits of its own imagination. It simply cannot see everything in its lens or mind's eye. I have argued that it may be theoretically productive to leave feminism behind – and its expertise on gender – to allow for a critical engagement beyond its own borders. Queer theory allows for, indeed demands, a multiplicity of readings that bring a different set of questions into sharp relief.

III. POSTCOLONIAL?

It has not escaped my attention that my discussion has been focused exclusively on Western texts and located exclusively within Western debates on feminism and queer theory. The invocation of the “we” has been in terms of the arguments that I have made in my work, engaging a predominantly Anglo-American audience. And so what if any purchase should any of this discussion have in the postcolonial, post-globalising, post-Naz mobilisation moment in India? One entirely legitimate response would be “absolutely nothing at all.”

Admitted, at the heart of queer theory, in its Sedgwickian origins, is an assertion about western culture and the overwhelming focus has been on the production and deconstruction of heteronormativity and queerness in western culture. Foucault's work, including the volumes on the History of Sexuality has been thoroughly criticised for its failure to engage the histories, knowledges and subjects of colonial/postcolonial experiences. Yet the most basic insights of Foucault inspired queer theory, that is, of the social and regulatory production of sexual subjects in historically specific discourses, are worthy of analytic pursuit beyond this massive failure. Queer theory traction, at a minimum, might lie in the questions that it can ask: how are sexual subjects produced? What are discourses of inclusion and exclusion? How, if at all, are subjects produced through discourses of heteronormativity?

Not all would agree. Joseph Massad in *Desiring Arabs* takes postcolonial aim at the universalising Western discourse of gay and lesbian rights. Following in the intellectual tradition of Edward Said, Massad argues that the promotion of the concept of gay rights in the Arab world has been an orientalising and colonising one, a missionary campaign by Western gay activists, “produce[ing] homosexuals, as well as gays and lesbians, where they do not exist.” Massad argues that it is not that same-sex activity does not exist but homosexual identity that did not exist prior to the intervention of the 'gay international':

The new and refined universal human subjectivity that they are proselytizing to the rest of the world is not that of including the homosexual but that of instituting the very binary which will exclude the homosexual that it created in the first place, and all that is carried out in the name of 'liberation' for oppressive cultures and laws.

Massad’s critique is not intended to be particularly queer-friendly. Yet I would argue that it is one with queer overtures. His rejection of the essence of homosexual identity and interrogation of the multiple discourses producing the gay subject in the Arab world is one consonant with queer theory’s insistence on the artificiality and centrality of the homo/hetero dichotomy in Western culture. While it stands as perhaps the most controversial and damning postcolonial critique of the emergence of the postcolonial gay and lesbian subject, theoretically it does not do the work to displace the critical moves of queer theory.

Other postcolonial and transnational theorists are rather less overtly hostile to the critical manoeuvres and analytic gestures of queer theory. Many scholars have in recent years begun to interrogate both the limitations of Western queer theory and the electrifying challenges of transnational sexuality and queer studies. Gayatri Gopinath, for

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40. **Id.** (“The categories gay and lesbian are not universal at all and can only be universalized by the epistemic, ethical, and political violence unleashed on the rest of the world by the very international human rights advocates whose aim is to defend the very people their intervention is creating.”).
41. **Massad, supra** note 39, at 41.
example, offers a provocative and compelling deployment of queer in a postcolonial context. In *Impossible Desires*, Gopinath sutures 'queer' with 'diasporic' as a corrective lens for both queer and diasporic studies.\(^{43}\) Her deployment of queer is, on one level, quintessentially queer: “On the most simple level, I use queer to refer to a range of dissident and non-normative practices and desires that may very well be incommensurate with the identity categories of gay and lesbian.”\(^{44}\) Yet Gopinath’s deployment of the queer diaspora is expressly intended to move beyond the “homonormativity of certain strands of Euro-American queer studies that center white, gay, male subjectivity” and part of the collective project of decentring whiteness and dominant Euro-American paradigms in theorising sexuality both locally and transnationally.”\(^{45}\) She challenges the “Gay International” yet she does so through the deployment of a more nuanced and postcolonialised queer rather than in Massadian opposition to it.

Gopinath’s work also foregrounds the feminist alongside the queer, in so far as she centres queer female diasporic subjectivity. She seeks to uncover articulations of queer female desire in a range of diasporic cultural representations, often in places where such desire would seem most impossible. Gopinath builds on the work of postcolonial feminist scholars who have revealed the discursive role of woman in the projects of nationalism but have failed to interrogate the particular role of “heterosexuality as a key disciplinary regime.”\(^{46}\) She is explicit about her theoretical location:

> [...] while this project is very much situated within the emergent body of queer of color scholarship [...] it also parts way with much of this scholarship by making a queer female subject the crucial point of departure in theorizing a queer diaspora. In so doing, Impossible Desires is located squarely at the intersection of queer and feminist scholarship and therefore challenges the notion that these fields of inquiry are necessarily distinct, separate and incommensurate. Instead the book brings together the insights of postcolonial feminist scholarship on the gendering of colonialism, nationalism and globalization with a queer critique of heteronormativity of cultural and state nationalism formations.\(^{47}\)

\(^{44}\) Id. at 11.
\(^{45}\) Id.
\(^{46}\) Id.
\(^{47}\) Id. at 16.
Her work is postcolonial, queer, feminist, pushing each beyond their own blinders.

Jasbir Puar similarly propels queer theory beyond many of its self-imposed boundaries to explore the role of heteronormativity in US nationalism and its production of the terrorist subject as insidious, violent outsider. Queer is deployed as a regulatory norm, which in the post 9/11 war on terrorism, becomes implicated in the racialisation of Muslim terrorist subjects. Puar develops the idea of queer assemblages, a kind of Deleuzian assemblage 'of dispersed but mutually implicated networks' in which “queerness [comes] forth at us from all directions, screaming its defiance.” For Puar: “Queerness as an assemblage moves away from excavation work, deprivileges a binary opposition between queer and not-queer subjects, and, instead of retaining queerness exclusively as dissenting, resistant, and alternative (all of which queerness importantly is and does), it underscores contingency and complicity with dominant formations.”

Amongst her many critical moves and insights, Puar observes an archetypical failure of Foucault's repressive hypothesis of the sort identified by Sedgwick. In her critical reading of the Abu Ghraib “sexual torture scandal,” Puar demonstrates the ways in which queerness colluded with American nationalism in many gay/lesbian/queer commentators. The photographs were framed “as evidence of rampant homophobia in the armed forces,” with scarce mention of the linked processes of racism and sexism. Even more troubling was the reason given for the particular efficacy of the torture: the taboo, outlawed, banned, disavowed status of homosexuality in Iraq and the Middle East, complemented by an aversion to nudity, male-on-male contact, and sexual modesty with the rarely seen opposite sex.” Puar notes the stunning failure to recognise the most basic of Foucault's insights:

[In the uncritical face-value acceptance of the notion of Islamic sexual repression, we see the trenchant replay of what Foucault termed the “repressive hypothesis”: the notion that a lack of discussion or openness about sexuality reflects a repressive, censorship-driven apparatus of sexual desire.]

It is but one of her countless deployments and redeployments of queer theory, highlighting the potential analytic purchase of queer assemblage

48. Jasbir Puar, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007); See also Jasbir K. Puar, Queer Times, Queer Assemblages, 23 (3-4) Social Text 121-139 (2005).
49. Puar, supra note 48, at 127.
50. Id. at 121-122.
51. Id. at 123.
52. Id. at 125.
in engaging the postcolonial. Puar's is an exhilarating, high-voltage intellectual assemblage, taking the queer to unchartered territory, with multiple intellectual trespasses across a broad range of critical theoretical interventions.

Gopinath and Puar are but two particularly brilliant visions of the queer in the postcolonial and counter-narratives to Massad's rather more negative prognosis. Queer theory – even in its more narrow pre-Puar/ Gopinath instantiations – has a range of questions apposite for the postcolonial context. Without presupposing the range of intellectual frameworks that the answers may need to deploy, queer theory can ask questions about the discourses through which contemporary postcolonial sexual subjectivities are constituted. How are sexual subjects naturalised? What ideologies of nationalism, postnationalism, colonialism and postcolonialism are deployed in naturalising some sexual subjects and exiling others? What discourses of resistance are deployed? And in a more post-Puar, post-Gopinath modality, queer theory might ask about the multiple ways that queer assemblages are ever-present in producing citizens and racialised deviants, postcolonial nationalisms and their sexualised, racialised others.

IV. QUEER INDIA?

Queer has recently emerged as a site of scholarship and activism in India.\(^53\) Ruth Vanita's ground-breaking edited collection *Queering India* first put the sign of queer on the Indian academic map.\(^54\) Several important recent anthologies have invoked the queer, most notably perhaps, Brinda Bose and Subhabrata Bhattacharyya's *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*\(^55\) and Arvind Narrain and Gautam Bhan's *Because I have a Voice: Queer Politics in India*.\(^56\) The essays that make up these volumes have produced diverse critical genealogies.


of sexual identities and practices in India. Narrain and Bhan specifically invoke “queer” both in their title and the framing of their theoretical lens. Although contested and evolving, a certain usage of queer appears to be emerging in much of the literature. Consider, for example, the glossary entry in a recent article on transgender rights in India.\footnote{57}

Queer: The word queer is increasingly being used in India to connote a diversity of ways of living that contest the embedded nature of heterosexism in law, culture and society. The term denotes a diversity of sexual orientations and gender identities in the Indian context that includes hijra, kothi, transsexual, and intersexed persons.\footnote{58}

Narrain and Bhan deploy queer in not dissimilar terms, careful to insist that it is not synonymous with LGBT. Queer, they argue:

captures and validates the identities and desires of gay, lesbian, bisexual and transgender people, but also represents, for many, an understanding of sexuality that goes beyond the categories of “homosexual” and “heterosexual.” It speaks, therefore, of communities that name themselves (as gay and lesbian, for example) as well as those who do not, recognizing the spaces for same sex desire and sexuality that cannot be captured in identities alone.\footnote{59}

Queer politics, they insist, is not simply a minority issue of communities defined by their sexual orientation but a broader questioning of normative assumptions around sexuality and gender.\footnote{60}

Bose and Bhattacharyya pick up from this usage of queer, both affirming it as a place to locate current discussions of LGBTQ identities, practices and politics in India while also mobilising a more theoretically complex engagement with the genealogy of queer theory and its transnational machinations.\footnote{61} They frame their project as one of interrogating the contemporary politics of sexualities in India, seeking to highlight the emerging politics of non-normative sexualities. Bose and Bhattacharyya transitively deploy the concept of alternative sexualities but replace 'alt' with queer along the way. While noting the many sexualities and practices that lie outside the “narrow berth” of the normative in India, they adopt the term queer more narrowly:

For the particular political usages of this anthology, we shall take, in the main, the sexual constituents of queer – lesbian, gay, bisexual,

\footnote{57. Id.}
\footnote{58. Siddharth Narrain, Crystallising Queer Politics: The Naz Foundation Case And Its Implications For India’s Transgender Communities, 2 NuJS L. Rev. 455 (2009).}
\footnote{59. Bhan & Narrain, supra note 56, at 4.}
\footnote{60. Id.}
\footnote{61. Bose & Bhattacharyya, supra note 55.
transgender – as the primary signifier of the “other” of sanctioned sexual identity as the LGBT movement quite justifiably exposes the absence of a level playing field whenever its battles are seen as analogous to those amongst the heterosexual community who feel beleagured for a variety of impediments in the pursuit of their desires.62

Bose and Bhattacharyya’s subsequent questioning of the appropriate theoretical framing for these interrogations engages the fraught relationship between sexuality and gender and seeks to locate the work within an emerging cosmopolitanism, attentive to both global processes and local heterogeneities. The volume is ultimately framed as one of sexuality studies but wherein the queer, as signifying LGBT identities, politics and practices, are in the sharpest relief. The essays that follow – richly textured genealogies of queer sexualities across cultural and literary studies – engage these heterogeneities; sometimes explicitly invoking the queer theory of the West, often assuming familiarity but moving to more cosmopolitan and culturally-specific interrogations.

Not all of those working on sexuality in India have embraced the sign of the queer. Ratna Kapur’s work on the sexual subaltern, while having a decidedly queer bent, never invokes queer theory.63 Indeed Kapur gets to the sexual subaltern through a different theoretical trajectory. Her work is located within postcolonial theory, feminism and subaltern studies. Kapur defines the “sexual subaltern” to capture the diversity of counter-heteronormative sexual identities and sexual practices in India, including:

gay, lesbian, bi-sexual, transgendered, khush, queer, hijra, kothi, panthis and many more. They have also included sexual practices and behaviours such as adult and consensual pre-marital, extra-marital, non-marital, auto-erotic/masturbatory, promiscuous, and paid-for sex, as well as MSM (men who have sex with men). It is this diversity of identities and range of practices that cannot be captured within the acronym ‘LGBT,’ and why there is a need to articulate the politics of sexual subgroups from within a postcolonial context rather than to borrow theories or politics from elsewhere, a move that is both decontextualised and dehistoricised.64

62. *Id.* at XXI.
63. See Ratna Kapur *Erotic Justice and the New Politics of the Postcolonial* (2005); *See also Sexualities* (Nivedita Menon ed., 2008) (She argues in favour of the politics of ‘counter-heteronormativity’, in and through an expressly feminist lens. For Menon, counter-heteronormativity refers to a range of political assertions that implicitly or explicitly challenge heteronormativity and the institution of monogamous, patriarchal marriage.).
Kapur has eschewed the sign of queer in favour of the sexual subaltern because of its better historical fit in the Indian context.\textsuperscript{65} Yet there is an obvious way in which her ground-breaking work on non-normative sexualities in Indian law, culture and history evokes theoretical hauntings not dissimilar to queer theory. While explicitly located in the subaltern tradition,\textsuperscript{66} Foucault, Rubin and Butler make their appearances. My point in drawing out the resonance between Kapur’s sexual subaltern and queer theory is not to suggest that her work is really queer. It is rather to suggest that critical genealogies of sexual identities and practice consonant with queer theory may be found in many places.\textsuperscript{67} The very theoretical orientation of queer theory has been to find non-heteronormative identities, practices, discourses and possibilities at the margins of culture and history. It need not claim these critical genealogies under an imperialising sign of the queer.

V. AND BACK AGAIN?

So, what of the queer and what then might be learned of these multiple encounters? What is the relationship of the deployment of queer in India with queer theory in the West? I ask this question not to measure queer studies in India against the norm of queer theory in the West. Rather I am seeking to interrogate and compare the theoretical assumptions and heuristic twists and turns in each. Comparison is a multidirectional exercise.\textsuperscript{68} If we turn the comparative gaze back on itself, what might queer theory in the West learn from its encounter with the postcolonial?\textsuperscript{69}

I began by highlighting three basic themes or analytic predictions of queer theory in the West that I argued continue to have purchase. But

\begin{itemize}
\item \textsuperscript{65} Id. at 383 (Kapur argues, that both LGBT studies and queer theory “are seen to emanate primarily from ‘the West’, and neither captures the nuances and complex histories within which the sexual subaltern has emerged.”).
\item \textsuperscript{67} Indeed, it is precisely this kind of move that Kapur makes in her intervention in this volume; in shifting to a more explicit engagement with the sign of the ‘queer’ in the postcolonial and Indian context, Kapur explores the dissident and regulatory potentials of queer.
\item \textsuperscript{68} See Cossman, supra note 6.
\item \textsuperscript{69} Nishant Shahani, After the Fire: India Is Burning, 15 (1) GLQ 180 (2009) (As Nishant Shahani writes in his review of Bose and Bhattacharyya’s edited volume The Phobic and the Erotic: The Politics of Sexualities in Contemporary India: “if queer politics in India can learn something from queer theory in the West, can queer theory in the West learn anything from politics in India?”).
\end{itemize}
what becomes of these ideas in the continental drift? First, there was
the interrogation of the sex/gender/desire matrix, which is of course
a central dimension of sexuality studies in India, sometimes naming its
intellectual influences in Western queer theory and other times seeking
to unmoor the inquiry from Western scholarship, to produce more
culturally and historically specific knowledges. Again, this is not about
claiming such knowledges as “queer theory.” It is rather to unearth the
continuing traction of explorations into this matrix. But the queer theory
I described is one that is avowedly anti-identitarian in its exploration of
this matrix. As Ratna Kapur has argued in her article in this volume, there are visions of identity being reinscribed in the deployment of queer
in India. On this count, there is indeed some considerable conflation
with the usages of queer in the West where despite its anti-identitarian
roots, queer has often become an identity. As I confessed above, this
is to me a problematic deployment of queer, analytically at any rate. I
believe that the more anti-identitarian spirit of queer theory continues to
have explosively subversive potential.

Inspired as always by Foucault, I would suggest that the exploration
of the proliferation of sexualities challenging the sex/gender/desire
matrix is not enough. Queer, as it is emerging in the literature, although
producing some wonderfully rich genealogies of sexual subjects, past
and present, under its sign, could be pushed to more critique. As I
have argued elsewhere, critique is about identifying the many ways
that power and knowledge produce the objects, discourses and fields
under study. But it is also about pushing on those fields of knowledge to
their “breaking points” to:

the moments of its discontinuities, the sites where it fails to constitute
the intelligibility for which it stands. What this means is that one looks
both for the conditions by which the object field is constituted, but
also for the limits of those conditions, the moments where they point
up their contingency and their transformability. In Foucault's terms,
“schematically speaking, we have perpetual mobility, essential fragility
or rather the complex interplay between what replicates the same
process and what transforms it.”

70. See in this issue, Ratna Kapur, Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law.
71. Brenda Cossman, Feminism in Hard Times: From Criticism to Critique (forthcoming 2012), in Feminisms of Discontent (Ashleigh Barnes ed.).
The anti-identitarian impulse of queer theory, in interrogating and deconstructing the sex/ gender/ desire matrices, fits with this spirit of critique; of not only taking apart but of looking deeply at how the very subjects and practices under study produce the knowledges through which we are studying them and limits of field of vision. Queer theory, I believe, can help push our fields of knowledges to these productive, if disorienting, breaking points.

The second theme was the critical interrogation of the normal and the embrace of non-normative sexualities. On this theoretical count, queer studies in India has perhaps surpassed its Western counterpart. In the very descriptions of the queer, the non-normative repeatedly takes definitional precedence, often outweighing the identitarian tendencies of the term. Western queer theory has been rightly criticised as centring the gay male subject, despite its anti-essentialist claims. While, as Kapur has argued, there is an emerging identity in the deployment of queer, it is an identity that self-reflexively extends well beyond the gay male subject to the panoply of non-heterosexual subjects: lesbian, bisexual, transgender, *hijra, kothis*. Queer – in most of its iterations – interrogates those sexual desires and practices as non-normative. Only a few scholars, however, take it beyond the non-heterosexual. Kapur, uncomfortable with the term queer itself and preferring sexual subaltern, extends her analysis to the many forms of non-normative sexualities, homo and hetero alike, bringing sex workers and young straight lovers expressing their desire on screen, into the embrace. This is perhaps a common, unresolved tension in queer's meaning. Despite Halperin's assertion of the potential queerness of straight subjects who operate outside the norm, this has not – at least until very recently – been within the purview of most queer theory in the West. The anti-identitarian, anti-normative impulse of queer theory seems to stall at the very edges of the binary that queer theory initially set out to deconstruct.

The third theme – of examining sex and sexuality independently from gender and feminism – is in and of itself a more problematic one, given the temporality questions of whether the long run has arrived and whether continental drifts even occupy the same temporality. There is no doubt that sexuality/queer studies in India has emerged distinctively from feminism; although it has been produced by those who are located at the intersections of feminism and sexuality. It may also be that the historically and culturally-specific iterations of the sexual have produced a different kind of relationship with feminism. Narain and Bhan speak of gender as a crucial dimension of queer inquiry yet do not deploy the
language of feminism nor do they often return to questions of gender per se. Kapur's work on the subaltern on the other hand is decidedly feminist if also subversive of many of its orthodoxies. Bose and Bhattacharyya's volume speaks of the liminal space between sex and gender and many of the contributors explore this liminal and fraught space. Some point out the limits of feminism – indeed the outright heterosexism or homophobia of feminism – while also gesturing toward the need to integrate an interrogation of sexuality into feminism and feminism into sexuality. These gestures toward the conversation and the resistance to the polarisation of feminist and queer articulated by many may be indicative of a nascent trajectory that sidesteps the fraught history of the West. Indeed the very questions posed and the essays published in this volume are indicative of this emerging conversation.

What might be learned about feminism's relationship with the queer in and through the postcolonial? The postcolonial work of Puar and Gopinath is already located within a dialogue between queer theory and feminism, amongst a multiplicity of other critical lenses. Kapur's work on the sexual subaltern is one with more than a twist of Butlerian and materialist feminism. In these works, feminism and its analytic lens is present yet not privileged, decentred but not disclaimed. Indeed these are works that lead the way in intellectual trespass, richly weaving together the treads of diverse critical theories into vibrant “queer assemblages.” Turning the gaze back on itself, queer theory may well stand to learn that in the postcolonial the long run has indeed arrived.

Continental drift is, after all, a drift of tectonic plates in relation to each other. The continental drift of the postcolonial and the queer, of these shifting tectonic plates, creates permanent, rupturing, seismic change. If we return for a moment to Butler's admonitions that queer is not to be owned but a category in constant formation, we can see the postcolonial/ queer encounter as precisely such a moment of the queer being “always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purpose.” The queer/ postcolonial encounter is one that may be queering queer from its prior usage and is certainly one taking it in urgent political directions.

73. Butler, supra note 72.
Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law

Ratna Kapur*

This article interrogates how the term ‘queer’ has come to be used in law. I ask whether ‘queer’ performs the same analytical work as ‘sexual subaltern’, or whether it has become aligned to a more sanitised LGBT politics based on fixed identities and positionalities. Reading the Naz Foundation judgment delivered by the Delhi High Court in 2009 and its legal aftermath, I argue that the voice of the sexual subject emerges as somewhat muted in comparison to its articulation in broader cultural and public spaces within which queer agitation has occurred. Exploring the limits and possibilities of ‘queer’ in the law, I interrogate, above all, what ‘queering the law’ might entail.

When I first began to write about sexuality in the context of violence against women and subsequently in the context of sex work and sex talk, my primary focus was to trace the critical genealogies that informed understandings of sexuality in the postcolonial world.1 While my work was initially greatly influenced by the position of dominance feminism, in particular, Catharine Mackinnon’s scholarship, I began to question a position that focused almost exclusively on gender as a primary tool for the purposes of feminist engagements with law.2 The subsequent critiques of her work especially by black feminists as well as those working on issues of sexuality reinforced my concerns.3

Sexual violence was the primary focus of feminist engagements with law in the 1980s. In the 1990s, 'sexual subalterns,' including gays and

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lesbians as well as sex workers, drew attention to the emergence of a diverse array of sexual subjects in India. The increased visibility of sexual subalterns challenged feminists on two fronts. The first was the equation of gender almost exclusively with the category of woman. Secondly, feminist scholars who addressed the issue of gender and sexuality in a more complicated way continued to do so within a heteronormative framework. The failure to address the question of lesbianism or homosexuality was often met with an apology thus staving of any critique of neglect or privilege. The issue of sexuality has continued to trouble feminists especially when it is addressed outside of the rather airtight compartments of gender categories and through the lens of violence, victimisation and sexual negativity. The challenges posed by the increased visibility and advocacy of diverse sexual subjects has forced a deeper interrogation of the ways in which both sexuality and gender have operated within the matrix of power arrangements that also implicate the positions of progressive scholars and advocates. It was in this moment that I began a mapping of the critical genealogies that informed the legal regulation of sexuality as well as gender.

Such a move enabled me to excavate how issues of sexuality were taken up within postcolonial contexts. The literature reveals how issues of law reform and violence against women were integral to the colonial encounter in the late nineteenth century and the struggle for freedom. Historians have examined how issues of widow remarriage, rape and age of consent to marry were all taken up and understood within the context of the broader struggle over the assertions of autonomy for the subjugated native and efforts by the colonial power to extend the tentacles of power into the private domain in pursuit of its civilising mission. Locating issues of sexuality within these broader debates on tradition, nationalism, culture and the struggle for power provides the postcolonial scaffolding that frames these concerns.

5. See John & Nair, at 36.
It is against this historical backdrop and for these reasons that issues of rape, sexual assault, sexual harassment, and sexual exploitation in the postcolonial present cannot be fully understood or explained within the terms of dominance feminism. Dominance feminism as articulated by Catharine MacKinnon posits that sexuality is constructed along the lines of female subordination and male domination. As MacKinnon states: “what [women] have in common is not that our conditions have particularity in ways that matter. But we are all measured by a male standard for women, a standard that is not ours.” In her analysis, sexuality and sexual relations remain central to women's oppression: “If sexuality is central to women’s definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition.” In her view, all women experience oppression at the hands of patriarchal power and she argues that power is invariably male. In law, it is expressed through 'male laws' and 'male' systems of justice. Rape, sexual harassment and other forms of sexual violence are used to generate gender and the distinction between men as superior and women as subordinate or inferior. And heterosexuality has institutionalised the construction of male sexual dominance and female sexual submission. Thus sexuality becomes the lynchpin of gender inequality.

MacKinnon’s work has had an unparalleled influence on the feminist agenda in the international legal arena as well as on domestic feminist (and non-feminist) agendas that focus on violence against women. In contemporary India, feminist engagements with law have focused on sexual violence as a condition of female subordination and male domination. While this is not to say that feminists have not been aware of the historical legacy that has framed understandings of sexual violence, in the arena of law particularly, sexuality continues to be framed within

10. Id. at 172.
12. Mackinnon, supra note 8, at 515.
binary terms, where women are victims of male power. While such a position has been used to lobby for legal reform, it has aligned feminism with the regulatory state apparatus primarily in the form of reform of the criminal law. These interventions have resulted in reinforcing women as victims incapable of exercising sexual agency.\textsuperscript{14} They have also left unproblematised normative understandings of female and male sexuality against which access to rights are determined. Juridical entitlements are contingent on conformity with sexual norms. This approach to sexual issues not only produces a perpetually traumatised sexual subject, it also renders other feminist positions almost inaudible. The critical genealogies within which the feminist project needs to be understood are totally marginalised.

While there is no question that women have struggled as victims to subvert power, that power has not emanated from a single source: men. The almost universal voice with which Mackinnon has cast the feminist position has also found many critics, including postcolonial feminist scholars. While these critiques are well-rehearsed in the literature, I elaborate briefly on the central concerns they raise.

Resistance to the colonial encounter was central to the experience of subordination for women on the Asian subcontinent. This history cannot be understood simply in terms of the history of gender subordination or sexual violence perpetrated by men against women. It was also about the broader economic and political subordination and expropriation of other nations' labour, resources, land, raw materials and market, and the exclusion of the native – both men and women – from sovereignty and legal entitlements. Resistance therefore had to be understood in terms of resistance to the imperial project and the processes of Empire and not just opposition to men.

At the same time, some postcolonial feminist scholars have complicated notions of agency as resistance, arguing that it remains located primarily within a logic that frames freedom within the liberal imaginary. They argue against a presumption that a universality of desire for freedom and autonomy as prescribed by liberalism exists among women. They counter the idea that the end goal of resistance is confined to the toppling of the patriarchal order. Agency needs to be complicated, traced, unpacked, and understood in contexts that seem

\textsuperscript{14} \textit{Third Wave Feminism: A Critical Exploration} (Stacy Gillis et al. eds., 2007) (Third wave feminism in western scholarship has drawn specific attention to the issue of sexual agency and how female sexual pleasure found little or no space for articulation in a politics focused on sexual violence and victimisation.).
to be antithetical to the goals of feminism. For example, Saba Mahmood unpacks understandings of freedom and resistance within the context of the Islamic women who practice veiling in the mosque movement in Egypt. Her discussion indicates how feminism has remained blind to the different articulations of agency that may seek liberation through practices that are neither comprehensible nor envisaged by liberal understandings of freedom nor are they purely subversive or resistive.\textsuperscript{15} Similarly, Gayatri Spivak calls for a feminism that does not seek to usurp the voice of the subaltern or demand that the subaltern speak in the voice of Western feminism. She uses the example of \textit{sati} not only to illustrate how colonialism was partly a mission by “white men to save brown women from brown men,” but also indicative of the complicity of the white, western woman in this endeavour. The move by feminists served to consolidate the sovereign notion of self within the liberal tradition. It constructed the sovereign subject it wanted, and its interventions as that of a benevolent saviour failed to attend to the claim of nativists that the women who commit the act of \textit{sati} actually want to die.\textsuperscript{16} These critiques caution against articulations of agency that merely reproduce the atomised liberal subject as the antidote to a victim-centred politics.

While postcolonial feminist scholars have problematised a politics of gender and sexuality based on the victim subject, other scholars have called for a 'break from feminism' in order to explore issues of sexuality through different analytical lenses. Janet Halley is the primary exponent of this position.\textsuperscript{17} She sets out the central ingredients of what she identifies as the dominant strain of feminism, that is 'governance feminism'. Halley describes governance feminism in the context of international criminal law addressing sexual violence as “a new feminist organisation’s style.” Governance feminism is described as “muscular” and results in the “installation of feminists and feminist ideas in actual legal-institutional power.”\textsuperscript{18} It seeks to move feminist justice projects off the streets and

\begin{itemize}
  \item \textsuperscript{15} Saba Mahmood, \textit{The Politics of Piety: The Islamic Revival and the Feminist Subject} 9 (2005) (As Mahmood states, “Does the category of resistance impose a teleology of progressive politics on the analytics of power – a teleology that makes it hard for us to see and understand forms of being and action that are not necessarily encapsulated by the narrative of subversion and inscription of norms?”).
  \item \textsuperscript{16} Gayatri C. Spivak, \textit{Can the Subaltern Speak?}, in \textit{Marxism and the Interpretation of Culture} 308 (Cary Nelson & Lawrence Grossberg eds., 1988).
  \item \textsuperscript{17} Halley, supra note 3; Janet Halley, \textit{Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law}, 30 MIch. J. Int’L L. 1 (2009); See also Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, \textit{From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism"}, 29 Harv. J.L. & Gender 335 (2006).
\end{itemize}
into the state and to harness institutional power. It seeks change from within mainstream institutions. The theoretical position of governance feminism is informed by dominance feminism. It operates against fixed anatomical categories of gender, a clear distinction between males and females, where female/ feminine invariably exists in a situation of coercive domination by male/ masculine in the area of sexuality. And it carries a brief for feminism. This brand of feminism has operated to marginalise other insights into the mechanics and operations of sexuality. While it may not be necessary to stage a break with feminism, Halley argues that it may be more productive to de-link from this particular strain of feminism that has become so prominent.19

In my own work, I have pursued a postcolonial feminist analysis of sexuality in and through the analytical category of sexual subalterns.20 I argue in favour of critical genealogies which are historical, materially based as well as discursively specific. The sexual subaltern traces out sexual identities, practices, counter normative discourses and histories that are hidden at the margins partly because of the ways in which heteronormativity was produced in and through the colonial encounter. The sexual subaltern challenges some of the binary categories of male/ female, victim/ agent, heterosexual/ homosexual, that characterise the field of sexuality as well as feminist studies.21 While the category of the sexual subaltern includes all those practices and identities excluded or marginalised by sexual normativity, it is also an analytical device intended to unearth, expose, and challenge these very norms.

18. See Halley, supra note 17, at 3 (While these muscular formations are generally in the form of non-governmental organisations, they are not exclusively so); See also Halley, supra note 3, at 20-22.
19. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); EVE SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990) (Both scholars have developed analyses of both gender and sexuality, which do not adhere to the strain of feminism critiqued by Halley.).
20. KAPUR, supra note 2, at 20-28.
21. Rosalind O’Hanlon, Recovering the Subject: Subaltern Studies and Histories of Resistance in Colonial South Asia, in MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL 72-115 (Vinayak Chaturvedi ed., 2000); Dipesh Chakrabarty, Radical Histories and Questions of Enlightenment Rationalism: Some Recent Critique of Subaltern Studies, in MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL 256-280 (Vinayak Chaturvedi ed., 2000) (The subaltern studies project was initially focused on capturing the nuances of agency of the colonised by foregrounding the spaces of resistance in the discourse of anti-colonialism. The project was initially grounded in historical materialism and a search for an essential peasant consciousness. The project ultimately bifurcated, with the emergence of subaltern critiques that sought to challenge all traditions and disciplines defined within the logic or rationale of the Enlightenment project. It moved away from a preoccupation with the idea of a peasant as an autonomous political subject who writes her own history and an economic analysis as the primary zone of power, to unpack the multiple sites and locations of power through a discursive and textual analysis. The sexual subaltern emerges from this tradition, that is, it regards subaltern as critique rather than as an identitarian category.).
Amongst those who have been at the forefront of producing such challenges in India is the sex workers movement. The sex worker has instantiated herself into the debates on sexuality trying to disinvest sexuality from its moral attachments, relational structures and gender binaries, to produce a social space for sexual alterity and sexual pleasure. While the movement is dispersed and heterogeneous, one position has challenged the very terms of sexual normativity in the course of the sex workers’ agitation for sexual rights as a central obstacle to full legibility of the sexual subject.22 Framed within a postcolonial trajectory, this position also foregrounds the tensions produced between sexuality and culture and how sex workers have challenged this opposition by complicating the relationship between sexuality and culture while also deconstructing the terms on which each is grounded. The sex workers operate as sexual subalterns to produce counter-narratives about sexuality that are obscured by a dominance feminist lens as well as fossilised understandings of “Indian culture.”23

Gays and lesbians have also been providing a challenge to the ways in which sexuality is understood within the public space as well as complicating the terms of gender. The challenges by gays and lesbians mark a further stage in the production of multiple discourses on sexuality. Much like feminism, there have been colliding positions on how LGBT politics should be articulated in law. The term queer has emerged as highly contested with various constituents attributing to it different meanings and capacities. In the remainder of this paper, I unpack how the term queer has come to be used in relation to law. I discuss whether the term performs the same work as sexual subaltern or if queer has become aligned with a more sanitised LGBT politics, based on a grid of fixed identities and positionalities. While the term queer seems to expand and contract depending upon its space and location, I discuss how the elasticity of queer becomes cabined and somewhat confined when it arrives in the courtroom. In the last section, I provide a reading of the *Naz* decision and how the voice of the sexual subject emerges as somewhat muted when compared to the broader cultural

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and public spaces within which queer agitation has occurred. What are the limits and possibilities of 'queer' in law? Can law be queered? And what exactly does queering law mean: inclusion, dissidence, subversion, or normalisation?

I. EXHUMATION, RECOVERY AND RADICAL ALTERITY

Like the term sexual subaltern, the critical genealogies of the term queer are important to understand in order to comprehend the work that queer does or is capable of doing. The term queer has its origins primarily in western scholarship and, at times, is used in a number of problematic ways. The critical capacities of queer nevertheless have relevance within a postcolonial context as its critical guise is closely aligned with postcolonial theory.

While there has been a good deal of writing on homosexuality in the 1980s and 90s in India, most of it was in the form of anthologies, memoirs and fiction. The primary impulse of this writing was to provide validation to the existence of lesbians and gays in Indian history and Indian culture. The desire to ensure that homosexuality emerged as legitimate, familiar and respectable required excavation work and a tracing of this subject in some long-lost ancient Indian cultural past.

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24. Naz Foundation v. Government of the National Capital Territory of Delhi, (2010) Crim. L. J. ("Del.") 94 (India) (where the court read down the scope of Section 377 of the Indian Penal Code, 1860, criminalising sodomy, holding that it only applied to non-consensual sexual conduct.).

25. Sedgwick, supra note 19; Butler, supra note 19; Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in The Lesbian & Gay Studies Reader 3 (Henry Abelove et al. eds., 1993).

26. See Judith Butler, Critically Queer, 1 (1) GLO: A Journal of Lesbian & Gay Stud. 17 (1993) (For example, Judith Butler discusses how queer has historically been deployed as a homophobic expression for the purposes of shaming. She interrogates queer’s capacity to be taken up and reclaimed and critiques the ways in which the term ends up enforcing overlapping divisions between who is entitled to use the term and with what meaning.).

27. Rakesh Rati, Lotus Of Another Colour: Unfolding of the South Asian Gay and Lesbian Experience (1993); Nayan Shah, Sexuality, Identity and the Uses of History, in Social Perspectives in Lesbian and Gay Studies: A Reader 119, 122-24 (Peter M. Nardi & Beth E. Schneider eds., 1998) (with the exception of Nayan Shah’s article that challenges an excavation mode of engagement with the colonial archives as a way to legitimise the existence of homosexuality in India); Ruth Vanita & Saleem Kidwai, Same-Sex Love in India: Readings From Literature and History (2001); See also Ruth Vanita, Introduction, in Queering India: Same-Sex Love and Eroticism in Indian Culture and Society 1-14 (2002); Facing the Mirror: Lesbian Writing From India (Ashwini Sukthankar ed., 1999); Devdutt Pattanaik, The Man Who Was a Woman and Other Queer Tales of Hindu Lore (2002); See for example Queer-Ink, www.queer-ink.com (Access to a good deal of this material has now become available on various websites.).

28. See for example Giti Thadani, Sakhyan (1996) (which seeks to illustrate the abundance of Hindu iconography and depictions of same-sex sexual behaviours.).
The term queer was rarely used and most writing tended to focus on lesbian and gay identity. The work of Ruth Vanita and Saleem Kidwai was foremost in locating lesbian and gay identity within the historical context of India drawing on what they describe as a 2000 year-old tradition of homosexuality. The text provides details of homoerotic love in the historical traditions of India. The erasure or marginalisation of such literature and expressions of love are attributed by the authors primarily to the imposition of the British anti-sodomy law in India which imported a Victorian morality. The book served in part to counter the homophobic myth existing in India that homosexuality was an import and not a part of Indian cultural values, as frequently alleged.

In the introduction to the text, Kidwai and Vanita state their conscious decision not to use the term queer in their work. They understand the term as encompassing “unconventional” or “strange” sexual behaviour and argue that in the texts they deal with, the behaviours and people are “not only not represented as strange or deviant, but are upheld by the texts as admirable.” Somewhat contradictorily, they go on to state that the term queer is “too wide” for their purposes as it includes all sorts of behaviour “from fetishism to exhibitionism,” which are not included in their study. While the authors acknowledge that some of the work included in their book that refers to sex change could be read as being about transgender, transsexual or intersexed subjects, they insist that their focus is on the “homoerotic” dimensions of sexuality. There is a clear desire to distance their work from what they regard as the more edgy practices associated with the term queer. Same-sex love is confined primarily to viewing gender in binary terms and homoeroticism as equated with gay and lesbian sexual practices. It exhumes the homosexual body and seeks to place same-sex practices on equal terms with heterosexual love and thus continues to operate along a hetero/homo binary. Kidwai and Vanita's work is indicative of the reluctance to use the term queer partly out of a concern that its ostensible association with more extreme and deviant sexuality as well as confusion of gender identities will deflect attention from the more well-defined categories of same-sex relationships.

During the course of the past decade, the term “queer” has acquired considerable prominence in a number of postcolonial scholarly and theoretical texts. It has become the new graffiti of most academics and

activists working in the field of sexuality and sexuality studies. And the meaning ascribed to queer has multiplied and taken on a number of hues. Arvind Narrain and Alok Gupta develop an argument in favour of a queer perspective on law where queer is intended to engage in multitasking. They present an argument for recovering queer voices from a putatively more tolerant pre-colonial era when it was ostensibly not subject to official disciplinary regulation. They argue in favour of performing queer intersections where queer aligns with other excluded subaltern voices. In both instances, the authors are in search of a subject who can speak, without contemplating the impossibility of such a position.

Sometimes they use the term as simply a substitute for LGBT. For example, the authors state that the Naz decision marked the beginning of the process when “queer people” became the subjects of rights. The term “queer people” is used repeatedly as an identity category. It is a somewhat nostalgic turn where queer remains structured along fixed notions of identity and operates as an umbrella term that embraces diversity. At other moments, the term queer is clearly intended by the authors to also perform a more critical function.

Queer politics does not speak only of the issues of these communities (lesbian, gay, bisexual, transgender) as ‘minority issues,’ but instead it speaks of larger understandings of gender and sexuality in our society that affect all of us, regardless of our sexual orientation. It speaks of sexuality as a politics intrinsically and inevitably connected with the politics of class, gender, caste, religion and so on, thereby acknowledging other movements and also demanding inclusion within them.


31. Gayatri Spivak, Can the Subaltern Speak?, in The Post-Colonial Studies Reader 24-34 (Bill Ashcroft et al. eds., 1995); Anjali Arondekar, For The Record: On Sexuality and the Colonial Archive in India (2009) (In contrast to Narrain and Gupta who attempt to excavate the voice of the sexual subject in the sodomy case of the Queen Empress v. Khairati, I.L.R. 6 (ALL.) 204 (India) Arondekar argues that such a retrieval is impossible. She proposes a reading of the archives that does not simply serve as a repository of missing voices, but also represents how the archive itself is an exercise of power/ knowledge production, where the absence of the sexual subject itself is one of the effects. Arondekar warns against the possibility of recovering the lost or submerged contents of the colonial archive. It may be that there are only traces that remain and hence only a fictionalised account of the subject that can be produced. She argues in favour of a “thicker” reading of such traces, which is multilayered and interdisciplinary. For Arondekar, the queering process involves a need to move beyond the content of the exercise of fact-finding, to address the particular form and context of the material.); See also Gayatri Spivak, The Rani of Sirmur: An Essay in Reading the Archives (1985).

32. Narrain & Gupta, supra note 30, at xii.

Queer emerges in its critical guise as a normatively disruptive concept. The authors argue that the challenge to Section 377 not only generated concerns over the legitimising of non-procreative sex, but also about “forms of intimacy which the social order finds disturbing.” Such transgressions are regarded as having a relational affinity to other forms of transgression. The authors thus locate the queer struggle within larger struggles against social subordination. As the authors argue, “what links queer people to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process, disrupting existing lines of social authority.”

While there are constant slippages back into aligning queer with an identity category, which at times renders its usage confused and awkward, it is the critical features of queer that inscribe it with disruptive and transformative possibilities. It is in the recognition of the politics of love as transgressing social norms and dominant heteronormative practices where the analysis is strongest. The authors refer to the killings that take place to avenge the ostensible “loss of honour” when lovers transgress the boundaries of caste, religion as well as sexuality. It is this defiance of norms and practices and the formation of radical alternative alliances that provides queer in this text with a more robust, critical impulse. Perhaps a central underlying tension that exists over the use of the term queer is the desire to disassociate or de-link homosexuality from its western moorings and to situate it within the national and historical consciousness of postcolonial India. Such a recovery of tradition has the potential to refute allegations that homosexuality is a western contaminant and that the phobias associated with homosexuality are

34. Narrain & Gupta, supra note 30, at xiv (Section 377 of the Indian Penal Code, 1860 criminalises carnal intercourse against the order of nature, and has been used to target men engaging in sodomy as well as to harass homosexuals.).
35. See Id.
36. Narrain & Gupta, supra note 30, at xxix and xxx; See also Arvind Narrain, A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation, in Law Like Love: Queer Perspectives on Law 253-77 (2011) (where the author uses the term LGBT persons throughout his discussion of the Naz decision and other cases, implying that the term queer and LGBT are interchangeable. In the same collection, Narrain develops queer through the notion of intersectionality as well as through the politics of radical kinship with other subordinated and marginalised groups, fugitives and outsiders.); See also, Arvind Narrain, Queering Democracy: The Politics of Erotic Love, in Law Like Love: Queer Perspectives on Law 3-23 (2011).
37. Narrain & Gupta, supra note 30, at xxxiv.
38. Jyoti Puri, Women, Body, Desire in Post-Colonial India: Narratives of Gender and Sexuality 176-83 (1999) (Jyoti Puri examines how queer narratives within postcolonial India have been imbricated in discourses of nationalism. She argues that in the process of securing sexual rights claims, gays and lesbians have often done so in ways that also affirm their nationalist credentials. These include moves to appropriate the past as a means for establishing belonging and interiority.).
western imports, introduced through legal codes and medical texts as well as a Victorian sensibility. While securing legitimacy becomes an important political end goal, in the process sexuality becomes an important site for state regulation to protect national interests. Such regulation includes enabling “good” homosexuals who are regarded as respectable and encouraged to behave through state prescriptions of normality and penalising “bad” homosexuality which continues to be cast as deviant.

While there is an internal move to establish legitimacy for same-sex desire, there is at the same time an equally intense desire to counter hegemonic Euro-American signifiers for same-sex love/non-heterosexual desire, which are fast becoming the prescribed blueprint across the world. The prescriptive gay subject is based on specific assumptions including the idea that this subject exists in opposition to heterosexuality and that the fulfilment of same-sex desire and identity can be found through public visibility and a departure from heteronormative structures and the patriarchal institutions of the family. This powerful articulation of the end goals of same-sex desire marginalises and de-legitimates other articulations and subjectivities in non-Euro American contexts. The ultimate performance of this identity rests in an “out of the closet” LGBT identity that is prescribed as the antidote for all Third World settings. A strategy based on the recovery of queer voices or same-sex desire is not up to the task of countering the newly emerging hegemonic, colonising queer.

There is a proliferation of scholarship that rejects the mode of recovery as it does not engage the complexities of nationalist as well as neo-colonising moves that enact the erasure of same-sex desire in the postcolonial context. Gayatri Gopinath dislodges fixed, prescriptive understandings of same-sex desire, using a “queer diaspora” framework and her specific focus is on queer female diasporic subjectivity. In order to understand the relationship between the diaspora, nationalism and the processes of transnational capitalism and globalisation, Gopinath argues that it is critical to recognise how these linkages are mediated through

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39. *Id.* at 184.
41. *Id.* at 166.
powerfully gendered and sexualised discourses. Her understanding of queer examines recognisable cultural texts such as musical genres, films, novels and videos that are both transnational as well as rooted in the politics of the local.⁴⁵

In her discussion of Hindi cinema, Gopinath illustrates how a genre that has functioned as a central way in which the homeland, nostalgically invoked in diasporic communities, also produces space for the production and representation of queer female desire.⁴⁶ Such readings are particularly evident in the song and dance sequences that constitute a central part of Hindi formula films which given their detached existence from the exigencies of a coherent narrative are amenable to dissemination independently from the film.⁴⁷ She examines how such readings are lost in translation and abruptly closed in the work of female South Asian diasporic filmmakers operating within the realist demands of Hollywood.⁴⁸ She traces this absence in the context of popular films such as Mira Nair's *Monsoon Wedding* (2001) or Gurinder Chadha's *Bend it Like Beckham* (2002), as well as Deepa Mehta's *Bollywood/Hollywood* (2001), illustrating how each film ends up being complicit with ideologically oppositional conservative agendas. The queer female subject is effaced or disavowed from any possibilities, often left out in the exchange between a feminist focus on gender transgression at the cost of transgressive sexuality. In all three films, queerness is displaced onto a male figure by these avowedly feminist South Asian filmmakers in contrast to the female homoeroticism made possible in Hindi films.⁴⁹ The salience of Gopinath's focus on queer female subjectivities in popular culture is that it not only disrupts the representations of nationalist, jingoistic, anti-foreign narratives that are closely aligned with Indian national identity,⁵⁰ it also disrupts the male-male relationship that finds its way into such narratives as a part and parcel of the patriarchal, national narrative.

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⁴⁵. *Id.* at 21.
⁴⁶. Gopinath, supra note 44, at 94; *See also for example Shohini Ghosh, Fire: A Queer Classic* (2010) (who discusses the implications of Deepa Mehta’s film *Fire* as well as the debates on sexuality, representation and rights that were triggered by the film both in India and globally.).
⁴⁸. Gopinath, supra note 44, at 120.
⁴⁹. *Id.* at 125.
Gopinath offers a postcolonial, queer reading that stands in sharp contrast to the ideological grain of progressive, liberal, feminist and first world signifiers of non-heterosexual sexualities. Tracing a “lesbian” in Hindi cinema would simply reproduce the logic of visibility dominant in Euro-American constructions of gay and lesbian identity. Gopinath resists any effort to resurrect a third world, authentic lesbian subject as a counter to the franchise on the 'gay international' emerging from within a Euro-American context which is going viral as well as global. Queer is deployed by Gopinath to disrupt homonormative imaginings and prescriptions of same-sex desire or the 'Rainbow Flag' world view which erase such possibilities. Her position is not to eulogise the formation of a postcolonial, queer, female subject within Indian popular culture, but to illustrate how such formations are both capable of migrating and pollinating other cultural spaces in ways that do not fit within a homosexual/heterosexual, male/female binary. Echoing the analyses Mahmood and Spivak offer, she clearly states that these translations are not always progressive or liberating.

Gopinath centres queer female sexual subjectivity not through the excavation of some long-lost, submerged lesbian existence, but rather in spaces where the initial impression implies the near impossibility of the existence of such desire and subjectivity. She deploys what she describes as a “scavenger” methodology to unearth “evidence of queer diasporic lives and cultures, and the oppositional strategies they enact in the most unlikely places.”

Jasbir Puar's work has also complicated the deployment of queer that moves beyond the “recovery” mode of analysis and also the “gay international,” both of which work with fixed categories. She deploys queer in relation to assemblages as opposed to binaries or excavations. Puar tracks how queer can be deployed in ways that are complicit with dominant formations of sexuality. Queer assemblages consist of US sexual exceptionalism which relates to the successful management of life in regard to people that is both heteronormative and homonormative. This exceptionalism operates to include some homosexuals, that is those who conform or assimilate, but not others. Part of the assimilative project is the indoctrination of the sexual subject into a belief in the superiority and exceptionalism of the US as a nation and a culture.

51.  Id. at 103.
52.  Chakravartih, supra note 50, at 22.
In Puar's work, queer operates in relation to sexuality in the way gender has operated in relation to governance feminism. As Janet Halley has discussed in governance feminism, gender has aligned with the regulatory apparatus of the state and walks in the corridors of power. In a similar way, queer has become integral to the way in which imperial or US exceptionalism is constructed – as democratic, inclusive, liberal and exportable. It is implicated in dominant formations and colludes with a nationalist narrative and representation of American exceptionalism that reinforce the US as a culturally and civilisationally superior state. Examining the responses to the Abu Ghraib prison torture, Puar illustrates how queer assemblages provide a way in which to understand what is excluded or marginalised in assessments of these events based exclusively on homophobia. These include the racial and sexist dimensions that fall out of the narratives as well as the uniformly unquestioned position that homophobia and sexual repression is the default position of the cultural other – that is – the Islamic.

Puar opens up the possibility for unpacking the ways in which postcolonial sexual subjectivities are constructed and deployed and moves us away from a thesis based exclusively on sexual repression or sexual liberation. While sexual repression has been a primary mode of characterising the native subject and served as a justification for ostensibly liberating imperial interventions, the sexual liberation thesis based on a rights agenda does not examine how such moves reinforce the state's regulatory authority and freezes sexual subjectivities. The work of Gopinath and Puar are important interventions in how queer has been and can be deployed. These scholars trace the ways in which the techniques of gender and sexuality operate within the matrix of power arrangements and use a queer lens to understand the work being done by these techniques.

**Queering Naz**

The *Naz* decision has attracted considerable scholarly and public attention. Within moments of the decision being pronounced by the Delhi High Court, there was euphoria in the courtroom, which was packed with advocates, community activists, and lawyers. Over the days that followed the court's pronouncement, gays, lesbians, transgendered persons and others embraced the decision throughout the country. Couples declared that they now had the right to marry and publicly exchanged garlands and oaths in a bid to provide an expansive meaning to the decision. While the actual decision limited the scope of the sodomy provision to apply to non-consensual sexual contact, the
meaning that the decision acquired in public discourse transcended this narrow position.

In revisiting the implications of *Naz*, some scholars have declared it as an example of “queering the law.” Yet it is not at all clear what is meant by the phrase “queering the law.” Once the issue of same-sex desire and non-normative sexuality enters the courtroom, is it not the law that determines the level of complexity that will be permitted? The *Naz* decision in fact only serves to read down Section 377 so as to decriminalise consensual sexual acts in private. It is not a wholesale endorsement of the homosexual person as a legible subject eligible for juridical entitlements. Does this mean that the best that can be hoped for is a form of strategic engagement with law? But if strategic arguments produce nothing more than a de-sexualised, sanitised, liberal subject, what does such an outcome say about the impact of radical advocacy? Or is law simply one of many arenas with which to engage? How is advocacy around same-sex desire complicit in reproducing the very homosexual/heterosexual binary it sets out to challenge through legal engagements?

Posing these questions is not to suggest that there is no queering that takes place in law. When the sexual subject comes to law, her presence reveals not only the level of dexterity of legal norms, but also the elasticity of the legal subject. The sexual subject is not a fixed anatomical category. Her elasticity is revealed by the very fact that this subject has to be constantly reproduced and iterated in order to endure. At the same time, when she enters the court and the terrain of legal discourse, the extent of the queering is almost immediately limited. The conclusion is not then that the law cannot be queered, only that it is a more constrained, unreflective space.

Narrain locates the queering of law explicitly in terms of the idea of sex without conception which had been viewed historically as a perversion and abhorrent crime. Yet he then lapses into talking about gays and lesbians as an identity category and does not develop the more provocative and challenging call to queer the law. In Narrain and Gupta’s reading of the *Naz* decision, the victory is perceived purely in terms of formal rights and juridical entitlements rather than as a discursive space where the meanings associated with sexuality and sexual subjectivity are continuously contested and refashioned. They declare the *Naz* judgment as heralding a shift from the discourse of

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criminality to the discourse of dignity, privacy and inclusiveness. While the decision rescues the sexual subject from the postcolonial closet, it also operates to subjugate the sexual subject to the regulatory apparatus of the state. The end result is not necessarily a liberated sexual subject, but one who is regulated and sequestered in and through the liberal discourse of tolerance.\(^5\)

It is arguable that even an uncomplicated approach to sexual subjectivity based on identity and framed within the heterosexual/homosexual binary is to be welcomed given the prevailing hostility towards homosexuality and pockets of virulent homophobia that continue to circulate. Such a strategy was invoked in the Supreme Court hearing on the challenge to the *Naz Foundation* decision. Orthodox and conservative religious groups rushed to the Supreme Court crying that religion and 'Indian cultural values' were in danger and disavowed the existence of gays and lesbians in 'Indian culture'. During the course of the arguments in the Supreme Court, the judges expressed concern over, and sought evidence of, the extent to which homosexuality as well as non-procreative, non-normative sexual practices were validated in Indian culture and scriptures.

Naz Foundation as well as a host of interveners seeking the validation of the Delhi High Court decision relied on fixed categories of homosexuality and heterosexuality to counter the narrow view of Indian culture put forward by the appellants. They argued that India's sexual past, cast primarily in Hindu terms, was open, inclusive, diverse and non-judgemental. The near glorification of India's sexual past was contrasted against the colonial imposition of Section 377 of the Indian Penal Code of 1860 that criminalised same-sex as well non-procreative sexual activities and was driven by extremely conservative and puritanical Victorian cultural and sexual norms. The work of Vanita and Kidwai, as well as references from the *Manusmriti*, *Kāma Sūtra*, and *Arthashastra* were all submitted to the Court in a bid primarily to validate the existence of homosexuality as an identitarian category in some long-lost, ancient Indian (read Hindu) past.\(^6\) While the full implications of such a strategy remain to be seen only after the Court delivers it judgement,

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some of the interveners in the case, including gay and lesbian groups, argued that it was strategically essential to assert homosexuality as an identitarian category and prove its existence in India's cultural past to counter the disavowals and fiercely homophobic positions of orthodox groups. Confronted with a conservative judiciary and bench lacking a complicated understanding of sexuality, some intervenors argues that the aesthetic “politics of queering” would not be sufficient to counter deeply held beliefs based on a narrow and static understanding of 'Indian cultural values' and rigid binaries of homosexuality and heterosexuality.

The fact that homosexuality is out of the postcolonial closet is to be celebrated and the terms of its construction can now be debated. There still remains a need to interrogate whether the Naz Foundation decision incorporates the gay into a linear regulatory framework that cabins and confines or operates to liberate and emancipate? Is it better to breach the borders of heteronormativity or to remain content with a victory that produces tolerance of gay and lesbian sexual subjects, though not as rights-deserving citizens.\textsuperscript{57}

It may be that in the courtroom there is a need to invoke 'strategic essentialism', as argued by Gayatri Spivak. It is necessary to reflect on which arguments have more subversive potential as well as which arguments will resonate with the judges. Where there is space for creativity in legal argument, it should be pursued to ensure that the queer identity is somehow sustained and does not disappear into the shadows of the law. Perhaps one place where these arguments can be located is within the family. In response to the appeal against the Naz decision, parents of gays and lesbians requested the Supreme Court to direct the state to stop criminalising their children. The move reaffirms family values, that is, the love of one's children while, at the same time, it subverts the notion of family as confined to a heteronormative, procreative order. In some ways, the move may be totally assimilating, as the arguments presented remain within, albeit on the peripheries of, familial norms. After all, it's not as if gays and lesbians are asking to have kids. At the same time, such an argument may constitute precisely the kind of epistemological breach that creates the possibilities for more radical arguments to be made and heard.

Once the case moves out of the courtroom, the entire issue morphs into a project that is much bigger and more spectacular. In the public

\textsuperscript{57} Brooks & Leckey, supra note 55.
space, homosexuals continue to claim space and are visible in ways that are transgressing the borders of heteronomativity in academic scholarship and debate, in cinema, on the streets and in theatre.

II. HOMOSEXUAL DISSIDENCE

The discussion brings us back to Puar's analysis. Are gays and lesbians being included into the fabric of a nation-state on terms that reinforce its regulatory authority? The High Court decision rejects exclusion from the state, but directs inclusion on terms that are consistent with the nationalist agenda of the Indian state as well as with sexual normativity. It is precisely these moments that remind us of Foucault's interrogation of the revolutionary potential of homosexual sex. The law may not be a site where a breach in what is imaginable or possible can be inaugurated. It can, however, serve as a site where a queer politics can be partly forged and radical kinships formed.

The move towards radical kinship requires a move away from normative relationships such as marriage, monogamy, or homosexual exceptionalism. According to Foucault, what is required is a “queering” of community, kinship, and sociality. This queering can be produced by imagining homosexuality as a third position that takes us away from the binary categories of woman/man, male/female, masculine/feminine which sustain the heteronormative paradigm. This call holds within it the possibility of an open coalition with a range of fugitives, “an open assemblage that permits of multiple convergences and divergences.”

It is this opposition to binary thought that needs to be foregrounded rather than the focus on sexual acts and identities which is what the Naz decision does as it concerns the criminalisation of a specific sexual act – sodomy.

58. SHAKUNTALA DEVI, THE WORLD OF HOMOSEXUALS (1977); VANITA & KIOWAL, supra note 29; RUTH VANITA, LOVE’S RITE: SAME-SEX MARRIAGE IN INDIA AND THE WEST (2005); VANITA, supra note 27; GOPINATH, supra note 45; PUAR, supra note 53; Bhan & Narain, supra note 33.
59. Sonali Gulati, http://www.sonalifilm.com/I-AM.html (last visited July 15, 2012) (In the documentary film I Am (2011), gays and lesbians in India speak about their struggles and acceptance within the family, claiming their presence within the familial sphere in a very public way.).
61. Id. at 50.
Leela Gandhi provides an innovative argument as to how rupture can be produced as well as how affective communities can emerge. Drawing on the historical context of Empire which introduced a virulent strain of homosexual anxiety or homophobia within the domestic space as well as within the colonies, Gandhi reveals how such moves simultaneously produced dissidence and introduced the possibility for wide-ranging political and epistemological transformation.\(^ {64}\) Her discussion builds on the work of Monique Wittig who argues that heteronormativity is a closed, masculine economy where the feminine is banished, repressed or effaced from the modes of production and signification.\(^ {65}\) Wittig posits homosexuality as a third position operating outside of the binary of sex and securing a utopian space for the activity of homosexual identification.\(^ {66}\) Gandhi brings this analysis to the postcolonial context arguing that Empire and the anti-colonial nation were both profoundly heteronormative projects. While the Empire privileged masculinity, it simultaneously cast the native as 'effeminate'. The native struggled to recuperate his lost masculinity, heralding the onset of “postcolonial heteronormativity” and simultaneously producing an aggressive and internalised homophobia.\(^ {67}\) Gandhi makes the case that a homosexual dissidence emerged as a utopian space that refused the polarities of gender and withheld its consent from both the nationalist and imperial social contract.

This moment of dissidence is reflected in the career of Edward Carpenter, a nineteenth century social reformer in Britain. Gandhi maps the way in which his political and ethical stands against imperial exploitation and Empire, amongst many other issues, was informed by his homosexuality. She traces Carpenter’s call for the ruin of the “fatuous Empires” as emerging from his homosexual location and the accompanying sympathies with the repressed. His place on the margins produced an affinity for the fugitive or outcaste. Gandhi posits the idea that homosexuality operated within anti-colonial thought; that it was constitutively anti-colonial. The alliance of this outside position with fugitives and estranged sections of societies revealed a range of affectional possibilities.


\(^ {65}\) Monique Wittig, The Straight Mind and Other Essays 6 (1992) (Wittig argues that masculine should not be homologised with men.).

\(^ {66}\) Gandhi, supra note 64, at 92.

\(^ {67}\) Id.
Being excluded from the space of the civilised community and a privileged circle of certain kinds of human beings and human alliances, the homosexual is denied inclusion and legitimacy. This subject belongs to the crowd of outcasts, including the colonial subject. This location compels the homosexual to reject the elite and exclusive space of the civilised community and argue for a radical alternative kinship and alliances. Gandhi's arguments present homosexual politics as not based on sex acts or sexuality, but on a critique of Empire. While it may be argued that such a position represents a form of sexual evasiveness, Gandhi is not simply providing a justification for Carpenter's sexual equivocation. While homosexual sex acts may demand visibility and an aggressive strategy of “show and tell” in a homophobic world, such a focus obscures that which is queer about Gandhi's work— the productive possibilities of homosexuality in relation to anti-colonial nationalism.

Gandhi’s focus on Carpenter’s anti-colonial stand reads queer not in terms of a sex act nor sex as the repository of sexual insurrection. Queer politics is to be located in the unconventional alliances or radical relationships that may be regarded as intolerable or that are not normalising. Gandhi’s position provides a serious challenge to the “sex qua sex (or homosexuality-only-for-the-sake-of-homosexual-sex) as a viable or effective form of autonomy or resistance.” Sex no longer becomes the basis of a claim but rather we are encouraged to seek out homosexual exceptionalism that transforms not only the conditions under which sex takes places but also simultaneously all the attending relationships and alliances implicated in the process of normalisation.

The significance of Gandhi’s work for queer politics or queering the law lies in not restricting it to a particular sexual organ with a special

68. Id. (Gandhi seeks to counter the perception of Carpenter’s sexual evasiveness in light of arguments in favour of sexual specificity and identifying the corporeal practices of homosexuality as integral to developing the political dimension of erotic life.).

69. Sedgwick, supra note 19 (Questioning the position that regards the homosexual/heterosexual divide as of relevant only to a small homosexual minority as opposed to seeing it as an issue of importance in the lives of people across the spectrum of sexuality, Sedgwick argues that the binary of homo/heterosexual so overdetermined every aspect of life, even the least sexual aspects of personal existence.).

70. Gandhi, supra note 64, at 101 (Gandhi’s work can be aligned to an emerging theoretical position that articulates failure as a political position that dismantles the logic of success and its obsessive focus on how to be in the world in a very specific way. The measures of success which have been brought into question in light of the collapse of the financial market, bad mortgages, and spiralling divorce rates, compels a turn towards understanding the productive possibilities of failure.); Judith Halberstam, The Queer Art of Failure (2011) (Judith Halberstam examines how failure is something that queers have done and do exceptionally well and examines how this experience can be used to examine the gross inequalities of everyday life in the United States.).
status. Foucault argues that such an argument enables the state to legislate the particular part of the body or organ that is marked as sexual, such as the vagina or penis, differentiating it from the hand, hair or eyes.\(^{71}\) In the process, the regulatory power of the state is brought into direct contact with the sexual organ and imbues it with a specific meaning. In Foucauldian terms, sex is not simply something one has or a “static description of what one is.”\(^{72}\) It is the effect of the regulatory norm. And in terms of legal engagements, those who are not produced as fully formed subjects, who are abject beings, inhabit the zone outside of the circumscribed domain of the legitimate or legible subject.\(^{73}\) The legitimate subject comes into being partly through the repudiation of the abject subject. Queering lies in this repudiation and the subsequent emergence of the abject subject. The alliance between these abject subjects, the very possibilities of affectional kinship that Narrain and Gupta touch upon, but do not fully develop, become the recipe for a queer politics that is no longer limited by the physical, the form, or sex act.

III. CONCLUSION

The postcolonial theoretical arguments presented by Puar, Gopinath and Gandhi draw on the anti-resistant position of Foucault who refuses to credit power as an agency of sexual repression or refusal. The modern state has witnessed a discursive explosion of sexualities rather than sexual prohibitions and increased sexual repression.\(^{74}\) The emergence of Victorian prudery was an incitement to speak about sex in explicit detail and write about it voluminously.\(^{75}\) Foucault challenges the idea that the proliferation of sexuality is always resistive or antagonistic to power. It is a complex relationship in which sexuality is invariably implicated in the production of power. The proliferation of sexualities cannot be declared as revolutionary or autonomous. Instead, sexualities are constituted by the very apparatus of power that they seek to counter. Homosexuality itself has claimed legitimacy on the basis of the very natural disposition used to excoriate it. Similarly, as Gandhi argues, the anti-colonial nation-state could be regarded as being implicated in the “very imperial state from which it originally coveted its autonomy.”\(^{76}\)


\(^{72}\) JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 2 (1993).

\(^{73}\) Id. at 3.

\(^{74}\) FOUCAULT, supra note 62, at 49.

\(^{75}\) Id. at 18.
The *Naz* decision with its specific focus on the sex act, sodomy, becomes implicated in the production of power through its aggressive visibility and vocalisation and ultimately collaborates with the very power it sets out to challenge. It is not a viable form of resistance, but a means for assimilation and co-optation. Elsewhere, I have written about how the proliferation of sex speech and sex acts have come to be implicated in the neoliberal market and aligned with the regulatory power of the state rather than producing an emancipated sexual subject.77

The idea of homosexuality as a third position has many possible trajectories. It can be a utopian space that challenges the sex binary on which sexual relationships are conducted. To withdraw from this binary opens up possibilities of developing radical alternative associations and a convergence of those who are divergent.78

If homosexual dissidence is not about sex, then what is its potential? It opens up the possibility of a queering not confined to equating men with being gay and women with being lesbian. The homosexual disconnects from the male/ female, masculine/ feminine binary logic and holds out political possibilities not confined to the specifics of a sex act. The homosexual demonstrates a gender ambiguity. The space produced includes the *Ardhnareshwara*, the one who is two-sexed or even the possibility of asceticism as well as the spiritual as manifested in the music and poetry of the Sufi tradition and even the renunciate, who is celibate. Linking homosexuality to a tradition projected historically as backward and uncivilised brings it into close alliance with that which is different and indeterminate as well as a rejection of heteronormative masculinity. In the process, family, marriage, procreation, and monogamy are all challenged. The third space may become the space for fomenting a queer politics that does not become just another letter at the end of the LGBT acronym, but where radical alterity becomes possible through alliances not trapped within paralysing and essentialising binaries. It offers a trajectory for queering that enables many and more spaces for fugitives to flourish while also remaining attentive to the operations of power in which they flourish. When the postcolony finds freedom, the alliance is ruptured revealing its temporariness and the strategic value that lies at its core. Similarly radical kinships and the third space opened up by the homosexual disintegrate at the moment of their transition

into full, legible subjectivity, where the skin of alterity has been shed. Whether this experience is carried into the space of legitimate subjectivity, thereby questioning the terms on which legitimacy is acquired, remains uncertain. In other words, whether queer loses its queerness is never fully certain. And hence the insurrectional possibilities of queerness remain.  

79. _Id._ at xxxvi (The more radical reading of queer is initiated through a discussion of the campaign of the “Consortium of Loose Forward and Pub-Going Women” who countered protests by the Hindu Right to their celebration of Valentine’s Day by sending pink underwear to the local head of the right wing organisation); _See also Arvind Narrain, Queering Democracy, in Law Like Love: Queer Perspectives on Law_ (2011) (where Narrain develops this perspective with greater clarity.).
Contagion Politics: Queer Rights Claims, Biopower and the “Public Health” Rationale for the Repeal of Sodomy Laws

Neil Cobb*

This paper explores the increasing use of “public health” rationales in advocacy for the repeal of national sodomy laws, which justify decriminalisation in terms of managing the global AIDS pandemic and in particular reducing the onward sexual transmission of HIV. The paper frames these rationales as an illustration of the influence of biopower on human responses to the pandemic, or power directed towards the advancement of the health and welfare of bodies and populations. The paper acknowledges the strategic value of the public health rationales, especially in the face of resistance by many conservative nation states to traditional liberal human rights arguments for repeal. However, the paper then proceeds to highlight the potential dangers of over-reliance on the rationales by questioning whether they can offer a sufficiently inclusive, sustainable and progressive basis for contemporary queer rights claims.

In October 2011, the city of Perth, Australia, played host to the fortieth Commonwealth Heads of Government Meeting.¹ Two years earlier, in Trinidad and Tobago, the Heads of Government had agreed in an Affirmation of Commonwealth Values and Principles to establish an Eminent Persons Group made up of experts drawn from the member states with a mandate “to undertake an examination of options for reform in order to bring the Commonwealth's many institutions into a stronger and more effective framework of co-operation and partnership.”² The Eminent

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Persons Group submitted its final report in Perth, the Foreword to which summarised the main challenge faced by the organisation: “a growing perception that the Commonwealth has become indifferent because it fails to stand up for the values that it has declared as fundamental to its existence.” The report proposed primarily in response the need for a new Charter of the Commonwealth and for the appointment of a Commonwealth Commissioner for Human Rights, Democracy and the Rule of Law. However, several of its recommendations also offered advice on the joint approach the Commonwealth might take to tackle the high prevalence of HIV/AIDS across its member states.

In a section of the report entitled “Advocacy on HIV/AIDS: A Commonwealth Health and Economic Development Priority,” the authors drew attention, among other problems associated with the response to HIV/AIDS, to “criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex.” The report continued:

These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection.

In the section’s closing paragraphs, the authors proceeded to recommend that “Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of Commonwealth countries to the HIV/AIDS epidemic.”

The report received a frosty reception when it was submitted formally to the Heads of Government in Perth, especially its proposal to appoint a Human Rights Commissioner who would have been empowered to investigate human rights abuses by individual states. Consequently, some nations, including India, took steps to suppress the report's findings by preventing its publication. The report was eventually released but many
of the recommendations were nevertheless rejected outright or put on hold.\textsuperscript{10} While the specific recommendation to repeal national sodomy laws had been strongly supported by the Commonwealth Secretary-General, Kamalesh Sharma,\textsuperscript{11} and state representatives including the UK’s Foreign Secretary and Member of Parliament William Hague\textsuperscript{12} in earlier speeches to the Commonwealth People’s Forum, the recommendation was referred by the Heads of Government to a Task Force of Ministers for more detailed advice which will be presented to Commonwealth foreign ministers for further discussion at their next summit in September 2012.\textsuperscript{13}

The Eminent Persons Group report’s criticism of sodomy laws across the Commonwealth reflects the positioning of these laws increasingly as sites of contestation in local and global forums.\textsuperscript{14} Not only do many state penal codes still retain and enforce sodomy laws (most often laws introduced to postcolonial states by earlier imperial powers) but conservative backlash in several countries has led to the more recent imposition of new or strengthened criminal sanctions against homosexuality. Uganda is the most well-known (though certainly not the only) recent example. In 2009, the Ugandan Parliament debated an Anti-Homosexuality Bill which would have strengthened offences against homosexual sex, including the death penalty for “aggravated homosexuality.”\textsuperscript{15} The Bill was dropped after international condemnation but has been recently laid down again for debate.\textsuperscript{16}


\textsuperscript{13} Commonwealth Secretariat, supra note 10.

\textsuperscript{14} “Sodomy law” for the purpose of this paper is used as shorthand for all forms of criminal liability used to regulate consensual adult sexual activity between people of the same sex. Repeal of sodomy laws may not end discrimination against queer subjects under criminal law. Even when countries decriminalise private same-sex sexual acts they can continue to impose higher ages of consent for those acts. Also, the decriminalisation of consensual same-sex acts between adults in private often leaves in place other ancillary offences that can be used by the state to continue to police gay sex aggressively in public spaces.

\textsuperscript{15} Sonia Katyal, The Dissident Citizen, 57 UCLA L.REV. 1415, 1449-1454 (2010).

That the Commonwealth has been forced by the report to confront the problem of sodomy laws across its member states is both understandable and welcome. No less than 46 out of the 76 countries that presently impose outright bans on homosexuality (including Uganda) are Commonwealth member states and the vast majority of these offences were introduced to national penal codes under British colonial rule. The Commonwealth's muted response to the punitive treatment of queer subjects by member states has led previously to accusations that it remains “a bastion of homophobia.” The specific recommendation on sodomy laws in the Eminent Persons Group report suggests that, to an extent at least, criticisms of this kind are beginning to be taken seriously. Moreover, while the Heads of Government may have failed to reach agreement on the proposal in Perth, this has not stopped some member states from taking unilateral action in defence of its aims. Shortly after the 2011 Heads of Government Meeting, for instance, UK Prime Minister David Cameron threatened (controversially) to withdraw aid unilaterally from recalcitrant Commonwealth countries with poor gay rights records.

What remains most interesting about the Eminent Persons Group recommendation on sodomy laws, however, is the primary justification it proposes for decriminalisation across member states. Historically, struggles to repeal these laws have drawn on the liberal political and civil rights of privacy, equality and dignity for support. There exists now a canon of decisions by political and judicial bodies in which sodomy laws have been challenged successfully on these constitutional or human rights grounds. Conversely, the Eminent Persons Group report is

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significant because it develops a mode of reasoning – found increasingly in both international and national legal and political norms – that ties the justificatory basis for the repeal of sodomy laws to tackling HIV/AIDS and, in particular, the aim of reducing the onward transmission of HIV. Moreover, India is no stranger to this form of argument; perhaps the most striking and significant example of the “public health” rationale for decriminalisation is the litigation that led in July 2009 to the judgement of the Delhi High Court in *Naz Foundation*, in which Section 377 of the Indian Penal Code (another British colonial export) was read down to decriminalise consensual sexual activity between adults of the same sex in private after the High Court accepted that the offence infringed several fundamental rights guaranteed by the Indian Constitution. I return to the approach in *Naz Foundation* in more detail below.

More generally, this paper considers the wider implications of the public health rationale as a basis for advocacy, with particular focus on the repeal of national sodomy laws. While acknowledging the obvious strategic potential of the rationale in effecting material change, I admit to some ambivalence about its growing influence and I question whether recourse to the rationale can provide a suitably inclusive, sustainable and progressive basis for contemporary queer rights claims.

In the first part, the paper traces the public health rationale from its origins in the early human rights and health movement to its present position as official policy in the advocacy strategies of the UN Joint Programme on HIV and AIDS (UNAIDS) and its co-sponsors, and now as the basis for queer rights claims within the Commonwealth. Subsequently, it proposes that the public health rationale illustrates what Foucault described as biopower directed towards the advancement of the health and welfare of populations and the governmentalisation of the state that this advancement demands. It will be shown how biopower operates through global public health norms. These norms, legitimised by expert knowledge, now encourage nation-states to dismantle repressive

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22. *Naz Foundation v Delhi and Others*, 2009 4 L.R.C. 838 (Del.).

23. See generally 2 (3) NJLS L. Rev. (2009) (for useful explanations in this special edition of how the judgement in *Naz Foundation v Delhi and Others* has developed the scope of Indian constitutional law.).
sovereign systems of criminal justice in order to facilitate the more subtle, productive forms of disciplinary/governmental interventions by public health experts which under these conditions of biopower govern over and through bodies and populations judged to be at heightened risk of HIV infection.

In the second part, the paper raises three concerns with the public health rationale. First, it argues that the rationale depends for its political (bio)power on the exploitation of the state's fear of contagion by the queer subject and the exclusionary logic of securitisation, as opposed to citizenship, that this provokes. As such, even if the rationale persuades states to repeal their sodomy laws, it does so by (re)constituting queer subjects implicitly as anti-citizens or the enemy within, positioned in opposition to the heteronormative family and nation. In addition, by marking queer subjects as risks to be managed, the rationale may simply further reinforce the state's urge to criminalise, given that sodomy laws continue to be entrenched and indeed strengthened by states in part on public health grounds. Finally, by inducing the state's fear of contagion, the rationale works to silence those queer subjects, most notably lesbian women, who are unlikely to be understood as sufficiently threatening to require legal protection on public health grounds. In turn, the paper concludes that while the rationale may have short-term strategic potential, to avoid these pitfalls it must be framed as far as possible by representations of the queer subject conceived not simply as a threat to be securitised, but rather as a source of value or, in the words of Geeta Patel, as "a life lived differently; as a sustainable life."

II. THE PUBLIC HEALTH RATIONALE IN GLOBAL AND LOCAL FORUMS

Advocacy Around Sexual Orientation and Gender Identity before the UN

In June 2011, just a few months before the Commonwealth Heads of Government Meeting, the UN Human Rights Council passed a resolution, proposed by South Africa, which instructed the UN Commissioner for Human Rights to prepare a report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity in all regions of the world. This resolution, and

the report that followed in November 2011, are the culmination of a period of significant developments in advocacy relating to sexual orientation and gender identity within the political bodies of the UN since the early years of the twenty-first century.\(^{27}\) Beginning in 2005, a succession of joint statements have been read out on behalf of signatory states before the Human Rights Council and the General Assembly, condemning state discrimination on grounds of sexual orientation and gender identity.\(^{28}\) Support for these statements has grown over time; the last was delivered by Colombia to the Human Rights Council in March 2011, on behalf of 85 states;\(^{29}\) the first, delivered by New Zealand to the Commission on Human Rights, was signed by just 32.\(^{30}\)

Mobilisation at this supranational level has also influenced a shift in activism in (primarily Western) municipal settings towards global queer concerns, as the UK illustrates. Two new UK NGOs were founded with much fanfare in 2011 with remits to promote gay rights internationally.\(^{31}\) One NGO, the Human Dignity Trust, was set up specifically to challenge existing state sodomy laws in national and international courts.\(^{32}\) Since then, Stonewall, the most influential gay rights NGO in the UK at present, has announced it will be expanding its own remit for the first time to include lobbying for gay people abroad.\(^{33}\) This increasingly

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global approach to queer rights activism among Western NGOs is to be welcomed especially in light of recent research that has drawn attention to how activists and NGOs in the Global South often face chronic under funding, isolation and persecution.34

While the joint statements indicate the commitment of an increasing number of member states to global advocacy around issues of sexual orientation and gender identity, it is perhaps unsurprising that it has been more difficult to secure the formal agreement of the UN’s political bodies to address these issues. The Yogyakarta Principles provide a model for a future comprehensive international human rights framework for queer subjects.35 However, the moral and religious conservatism of many states means that, predictably, they have regarded with suspicion and resisted aggressively any attempt to challenge hegemonic sexual or gender norms through formal UN resolutions, usually asserting that cultural sensitivities around issues of sexual orientation and gender identity must be respected in an effort to challenge the universality of human rights in relation to queer subjects.36 There has been some progress in specific areas. For instance, since 2000 the biennial resolutions of the Commission on Human Rights condemning extra judicial, summary or arbitrary executions referred explicitly to sexual orientation (but not gender identity),37 although it was only after considerable wrangling that sexual orientation was included in the first such resolution passed by the General Assembly in 2010.38 At this point in time, however, no UN political body has resolved to challenge specifically the systematic state persecution of queer subjects legitimised by the existence of national sodomy laws.

It has been left instead to the joint statements to demand that states “take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may


under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.” In this respect (as is so often the case), the UN political bodies continue to lag some way behind the decisions of the UN’s expert treaty institutions. In fact, the basis for repeal of sodomy laws under international human rights law was established almost two decades ago by the Human Rights Committee in Toonen v Australia, in which the Committee found that sodomy laws then still in place in the Australian state of Tasmania breached the right to privacy and the right to non-discrimination guaranteed by the International Covenant on Civil and Political Rights.

Moreover, what also remains significant about the opinion of the Human Rights Committee in Toonen is the attention the Committee paid in its reasoning to the relationship between sodomy laws and global efforts to address HIV/AIDS. The Tasmanian government had argued that the retention of its sodomy laws “was partly motivated by a concern to protect Tasmania from HIV/AIDS.” The Committee roundly rejected this submission, noting the opposing view of the Australian government that criminalisation actually undermined the goals of public health “by driving underground many of the people at the risk of infection,” before concluding that sodomy laws ran “counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.”

Implicitly at least, the resolutions by the General Assembly relating specifically to the global response to HIV/AIDS lend further support to the public health rationale for the repeal of sodomy laws. The Millennium Development Goals in 2000 refocused the UN’s attention on tackling HIV/AIDS and the General Assembly went on to issue several declarations relating to the pandemic over the course of the following decade. Its first Political Declaration on HIV/AIDS in 2001 reaffirmed the health and human rights approach to HIV/AIDS, “that the full realisation of all human rights and fundamental freedoms for all is an essential element in the global response to the HIV/AIDS pandemic,” before acknowledging

41. Id. ¶ 6.5.
42. Id. ¶ 8.5.
the need “to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups.”

Similar statements were included in later resolutions by the General Assembly in 2006, and most recently in 2011. The 2011 Declaration also referred for the first time explicitly to men who have sex with men, or MSM, as a statistically vulnerable group, requiring particular surveillance and intervention by member states.

However, none of the Declarations have endorsed explicitly the public health rationale for the repeal of sodomy laws. It has been left instead to the UNAIDS and its co-sponsors to make the case for repeal. The International Guidelines on HIV/AIDS and Human Rights, issued jointly by Office for the High Commissioner on Human Rights and UNAIDS in 1998, and consolidated in 2006, reiterate that sodomy laws “not only interfere with the right to privacy but [...] also impede HIV/AIDS education and prevention work,” and include repeal as one of their recommendations to national governments. UNAIDS has also paid close attention to MSM as a specific risk population and has consistently noted that prevention work within this group is especially affected by these laws. More recently still, it has identified transgender people, specifically those who are male-to-female transgender (MtF), as a risk population, which does not necessarily identify with the population MSM but which is also at heightened risk of infection with HIV and in relation to which HIV prevention efforts are set back similarly by sodomy laws.

44. Id. ¶ 58.
47. Id. ¶ 29; See also Saiz, supra note 36, at 58 (Proposed references to MSM in the first Declaration on HIV/AIDS in 2001 were removed during debate, demonstrating the significance of inclusion of MSM in 2011.).
Importantly, the public health rationale promulgated by UNAIDS supports other queer rights claims in addition to the repeal of sodomy laws. The UN General Assembly’s *Political Declarations on HIV/AIDS* have reiterated the need “to eliminate all forms of discrimination against [...] vulnerable groups.” In turn, UNAIDS has focused not merely on the effect of the criminalisation of sexual activity on the global response to HIV/AIDS but also the wider role that municipal law reform can play in addressing the stigma and discrimination faced by these groups in all aspects of their lives. For instance, the *International Guidelines* recommend that states should enact anti-discrimination laws designed to protect not only those people living with HIV/AIDS, but “groups made more vulnerable to HIV/AIDS due to the discrimination they face.”51 The *Guidelines* also advocate specific measures to protect MSM using the public health rationale, including “penalties for vilification of people who engage in same-sex relationships,” granting “legal recognition to same-sex marriages and/or relationships,” ensuring that “[t]he age of consent to sex and marriage [is] consistent for heterosexual and homosexual relationships,” and reviewing “[l]aws and police practices relating to assaults against men who have sex with men [...] to ensure that adequate legal protection is given in these situations.”52 The Guidelines contend that without doing so the stigma and discrimination against MSM will continue to reduce their capacity to manage their greater risk of infection and onward transmission.

By 2010, in its *Strategy for 2011-15*, UNAIDS had identified the repeal of sodomy laws for the first time as a “priority area,” and committed itself to halving by 2015 the countries that criminalise consensual sexual activity between adults of the same sex.53 This commitment marks the high point in global advocacy by UNAIDS in support of decriminalisation. Such advocacy draws for support on successive agreements by the General Assembly reaffirming the need to address stigma and discrimination against vulnerable groups to tackle HIV/AIDS and illustrates the growing significance of the public health rationale in these global forums. The rationale was supported again most recently in the 2010 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health which made the public health case for the global repeal of sodomy laws but on the

52. *Id*. ¶ 22 (h).
additional ground that such laws infringe the right to health enshrined under Article 12 of the Covenant on Economic, Social and Cultural Rights.54

It was against this backdrop of UN advocacy deploying the public health rationale that the Commonwealth Eminent Persons Group was moved to use the rationale in its own arguments in favour of repealing sodomy laws across the Commonwealth, which it presented to the Perth Heads of Government Meeting in 2011. After explaining that national sodomy laws were undermining efforts to tackle HIV/AIDS, it added that “the importance of addressing this matter has received global attention through the United Nations.”55 Moreover, there is also evidence of the influence of the public health rationale developed within these UN institutions in more local settings. In particular, the rationale played a decisive role in the litigation that led the Delhi High Court in July 2009 to read down Section 377 of the Indian Penal Code, criminalising “unnatural offences,” to permit sexual activity between consenting adults of the same sex in private with apparent effect across India.56 It is the judgement in Naz Foundation, and the socio-political context that shaped it to which I now turn.

_Naz Foundation: India and the Public Health Rationale_

The reading down of India’s sodomy law by the Delhi High Court occurred at a significant moment in India’s own queer history.57 Despite Section 377’s British colonial origins,58 and the evidence


55. _Commonwealth Secretariat, supra_ note 2, at 100.

56. Jasmine Joseph, _Divided Laws in a Unified Nation: Territorial Application of High Court Decisions_ 2 (3) _Nus L. Rev._ 471 (2009) (explaining that while it has been assumed by most commentators that the judgement now has territorial effect across India this is not unequivocally clear.).


of greater acceptance in pre-colonial Indian society of a diversity of indigenous sexual and gender identities, meanings and practices.\(^{59}\) India today remains a site of entrenched homophobia and transphobia, compounded by a re-emergent right-wing nationalist Hindu politics, which presents non-heteronormative sexualities and genders as the products of imported Western decadence. However, since the last part of the twentieth century, as several authors have begun to trace, queer lives have become increasingly visible in India, although not without attracting controversy and sometimes violent reaction.\(^{60}\) As Narrain and Bhan suggest:

> there is a sense of freedom in the lives of many queer people in India today. It is a hesitant freedom for none of us can afford to forget how fragile the few accepting spaces we inhabit are, of how few of us have access to them.\(^{61}\)

More importantly, these authors also recognise that queer visibility has been primarily “mediated through globalisation” after the liberalisation of the Indian economy in the early 1990s.\(^{62}\) Globalisation also acted as a catalyst for the emergence of an incipient queer rights activism, although in a form different from that typically found in the West, grounded as it has been in the work of international AIDS-related NGOs.\(^{63}\)

At the time of the *Naz Foundation* litigation “there was as yet no community of people of alternative sexualities. Many of the activist groups were still at an embryonic stage of development having arrived on the scene after Naz initiated its work on the petition.”\(^{64}\) Instead, as Kole observes, queer activism was rather “intimately linked to HIV/AIDS funding,”\(^{65}\) which fuelled the rapid growth of AIDS-related NGOs following the liberalisation of the Indian economy. As an indication of their influence in India today, between the 1990s and 2005, international investment in AIDS-related NGOs grew from 19 million to an astonishing 608 million US dollars.\(^{66}\) Kotiswaran explains that:

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59. *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Ruth Vanita ed., 2002); *Same-Sex Love in India: Readings from Literature and History* (Ruth Vanita & Saleem Kidwai eds., 2000).


63. *Id.*

64. Ramasubban, *supra* note 57, at 102.

international efforts to prevent the spread of HIV/AIDS have led to the increased circulation of services and capital and to the establishment of a nation-state/foreign donor/civil society complex. This complex is remarkable for its innovation of public-private partnerships, so that there is a blurring of boundaries between the state and civil society.67

As such, queer rights activism in India in effect “came into existence piggy-backing on the AIDS crisis.”68 It is unsurprising therefore that both the litigant in the successful public interest challenge against Section 377, and the litigant that filed an earlier petition in 1994,69 were AIDS-related NGOs.

The successful litigant, Naz Foundation, was founded in London, but opened its first Indian office in Delhi in 1994, with a specific mandate to improve HIV prevention among MSM. As Narrain notes, while Section 377 “[had] been rarely used” to prosecute cases of sex between MSM it “[provided] the legitimacy for the police to arrest, blackmail, sexually abuse, and 'out' any individual they [considered] to be violating [the law].”70 The specific impetus for Naz Foundation’s challenge to Section 377 was the 2001 Lucknow incident, in which the offices of Naz Foundation and another NGO in Uttar Pradesh were raided by the police and safer sex material for prevention work with MSM and transgender people was confiscated on suspicion of facilitating offences under the provision.71 The incident highlighted dramatically the impact of India’s sodomy law on the HIV prevention work of Naz Foundation and other AIDS-related NGOs. This was not the only example of Section 377’s chilling effect on prevention work. An earlier unsuccessful petition against Section 377 by AIDS Bhedbhav Virodhi Andolan in 1994 had focused on the refusal of Delhi’s Tihar Jail to distribute condoms to prisoners to prevent the spread of HIV on the ground that it would amount to encouraging offences under Section 377.72

66. Id. at 6.
70. Id. at 151.
71. Id. at 152-154.
72. Id. at 155.
Following the Lucknow incident, Naz Foundation began proceedings before the Delhi High Court, with the support of the coalition “Voices against 377” and the HIV/AIDS Unit of the Delhi-based Lawyers' Collective. While the brief in *Naz Foundation* was couched in the language of fundamental rights guaranteed by the Indian Constitution, the litigation was shaped more broadly by the public health rationale for the repeal of sodomy laws, which proved to be a powerful strategic ground for challenge to Section 377. The Ministry for Home Affairs reiterated throughout the course of the litigation that its defence of Section 377 reflected Indian morality and sexual mores. However, in an affidavit submitted by the National AIDS Control Organisation (NACO), on behalf of the Ministry for the Family and Home Affairs, the Union of India supported the reading down of Section 377 on public health grounds.

NACO had faced criticism in the past for implementing repressive policies to address the HIV epidemic in India but in more recent years it had increasingly integrated itself into the global health and human rights framework applied to HIV/AIDS by UNAIDS. Indeed, in 2006, NACO agreed to host the UNAIDS *International Consultation on MSM and HIV*, at which the Director of UNAIDS openly criticised the criminalisation of same-sex sexual behaviour in India. Soon after, the Prime Minister of India in a public speech voiced his own support for reforming Section 377 to address the Indian epidemic.

In its 2009 judgement, handed down eight years after the litigation began, the Delhi High Court developed the fundamental rights to privacy, equality, and dignity to find that Section 377 was unconstitutional. It supported its decision with reference to the canon of national and supranational judicial and quasi-judicial decisions in other jurisdictions in which sodomy laws had been declared unlawful or otherwise contrary to human rights norms, including Europe, the United States, South Africa, Fiji, Nepal, and by the UN Human Rights Committee. However, the

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74. *Naz Foundation v Delhi and Others* 2009 4 L.R.C. 838 (Del.). ¶ 15
75. *Id.* ¶ 66.
77. *Naz Foundation v Delhi and Others* 2009 4 L.R.C. 838 (Del.). ¶ 66
public health rationale was also integrated into the Court's reasoning throughout the judgement. For instance, in response to the claim by the Ministry for Home Affairs that Section 377's interference with fundamental rights was justified by the compelling state aim of enforcing public morality, the High Court concluded that: “[t]he compelling state interest rather demands that public health measures are strengthened by decriminalisation of such activity, so that they can be identified and better focused upon.”\footnote{Naz Foundation v Delhi and Others 2009 4 L.R.C. 838 (Del.) ¶ 86.} In addition, by finding that Section 377 infringed not only the civil and political rights of privacy, equality and dignity guaranteed by the Constitution but also the Constitution's nascent right to health, the High Court located the public health rationale as the basis for its own independent rights claim.\footnote{Id. ¶ 61-74.}

The success of \textit{Naz Foundation} demonstrates the potential of the public health rationale for queer rights claims aimed at overturning remaining state sodomy laws. The rationale was well-suited to the cultural, political and legal landscape in India. It seems to have helped overcome the entrenched moral objections to queer subjects in some parts of Indian culture. It also built on the relative status and resources of Indian AIDS-related NGOs and their considerable influence in the incipient queer activism that has developed in India since the 1990s and exploited the growing responsiveness of the state to global public health norms relating to HIV/ AIDS. The rationale enjoyed particular legitimacy in light of the right to health derived from the right to life guaranteed by the Constitution. Immediately after the judgement was handed down by the Delhi High Court, an appeal was lodged before the Indian Supreme Court by petitioners from the Hindu Right.\footnote{Ratna Kapur, \textit{Out of the Colonial Closet, but still thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in De-radicalising the Rights Claims of Sexual Subalterns}, 2 (3) NUS L. REV. 381, 382 (2009).} Hearings took place in late February 2012, including submissions against the judgement on behalf of the Delhi Commission for Protection of Child Rights.\footnote{Krishnadas Rajagopal, \textit{No law says homosexuality is unnatural... society has changed: SC, Indian Express}, Feb. 17, 2012, available at: http://www.indianexpress.com/news/no-law-says-homosexuality-is-unnatural...-so/913180/ (last visited July 15, 2012).} Nevertheless, the public health rationale's initial success before the Delhi High Court has focused global attention on its potential as an advocacy tool. Indeed, the Commonwealth Eminent Persons Group's own support for the rationale was undoubtedly influenced, in part at least, by the rationale's success in the Commonwealth's most populous nation-state.
III. RETHINKING THE PUBLIC HEALTH RATIONALE

Public Health, Biopower and ‘Sovereign’ Criminal Law

The public health rationale for the repeal of sodomy laws advocated by UNAIDS has gained ever greater prominence in global and local forums, illustrated most clearly and recently by its application and success before the Delhi High Court and its reiteration subsequently by the Commonwealth Expert Persons Group in its report to the Heads of Government Meeting in Perth in October 2011.

This section sets out to rethink the wider implications of the rationale for contemporary queer rights advocacy and queer subjects themselves. Before that, however, it seems important to think more critically about the rationale and in particular the relations of power and knowledge that have shaped its development. In this respect, Foucault’s work on regimes of biopower as a form of political rule provides a useful framework for analysis. In his later work, Foucault drew attention to what he saw as a shift in forms of political rule in advanced liberal societies from control over territory to concern with the management of the health and welfare of populations. Foucault described this as a triangle of “sovereignty, discipline and governmental management, which has [the] population as its main target and apparatuses of security as its essential mechanism.”83 Moreover, Foucault recognised sexuality as a primary site through which relations of biopower now operate.84

Foucault explored how biopower typically entails a shift away from repressive sovereign forms of state power to more complex forms of productive power or relations of discipline and governmentality. Under conditions of biopower, this consists of a spectrum between the poles of anatomo-politics (discipline over individualised bodies) and biopolitics (governmentality over aggregated populations). These productive forms of political rule, increasingly subtle in their rationalities, techniques and effects, were compared and contrasted by Foucault to the comparatively archaic forms of sovereign power, “in the form of the state, public law, prohibitions and compulsion.”85 However, sovereign rule – the state, law – does not simply dissolve, but under conditions of biopower is directed increasingly to improving the population’s health and well-being.

Stefan Elbe, among others, has identified the human response to HIV/AIDS as an example *par excellence* of Foucauldian biopower, in which sovereign, disciplinary and governmental rationalities and techniques are employed in international mobilisations to address the effect of the global pandemic on public health. Public health expertise elevates the biological characteristics of populations to “high” politics; demands an institutional apparatus for the close statistical monitoring and surveillance of those populations; and shapes the interventions of formal and informal actors directed towards optimising health and well-being. This expertise has grown in influence as a direct consequence of HIV/AIDS. Elbe describes the epidemic as “an instance in which the medical professions are now beginning to assert the political primacy of their own public health ambitions.” Under these conditions of biopower, clinicians, epidemiologists and social workers, “authorized by the rhetoric and institutions of ‘public health’,” govern individual bodies (those deemed as being “at risk” of HIV infection or who are actually HIV positive) and through populations (using the techniques of surveillance and intervention across statistical HIV risk groups). Moreover, as Foucault forewarned, sexuality forms the focus of these developing rationalities and technologies of rule.

The rise of biopower in response to HIV/AIDS has had further important effects on state sovereignty, which has been co-opted to advance public health objectives. This is apparent especially in relation to state sexual regulation; increasingly, as Kaplan suggests, public health expertise and intervention “is deployed by state agencies to define and enforce public policy regarding intimate sexual behaviour.” Moreover, the public health rationale for the repeal of sodomy laws illustrates the influence of public health governance on the shape of sovereign law. In its attempt to persuade the state to withdraw its coercive power over sexuality where this interferes with the efforts of public health experts to manage risky queer subjects, the productive disciplinary/governmental techniques of HIV prevention and education are used. In the words of Ghosh, the “surveillance that marks their bodies as domains of sexual health and social discipline” comes into play. In the same way, use of

86. *Id.*


90. *Id.* at 236.
the rationale by UNAIDS to encourage states to enact anti-discrimination laws and other legal measures to address stigma and discrimination against vulnerable groups is designed, under conditions of biopower, to create a social environment in which queer subjects are better able to exercise care over themselves and ameliorate their own infection risk. In other words, biopower operates through the public health rationale by encouraging what Foucault termed the “governmentalized state,” which can govern HIV/AIDS more effectively by intervening less or at least in more subtle, less repressive ways.

There is considerable value in conceiving of the public health rationale as a product of Foucauldian biopower. Typically, liberal explanations of rights claims – including the repeal of sodomy laws – represent these claims as demands for absolute freedom for queer subjects from sexual regulation. The objectives of the public health rationale reveal the limitation of this liberal conception of freedom through rights because the underlying aim and effect of advocacy for the repeal of sodomy laws under the rationale is not freedom from regulation for queer subjects in the traditional liberal sense, but rather an effort to enable the state to “govern through freedom,” by improving the indirect control over queer subjects according to public health goals. Indeed, the state's aim in repealing sodomy laws in line with the rationale is to increase the power exercised over the queer subject with the aim of reducing the onward transmission of HIV. Put another way, conceptualising the public health rationale as a form of biopower draws our attention to how the freedom from state sodomy laws and other legal measures the rationale demands are designed to encourage the shift from one regime of power exercised over queer subjects (the coercion of sovereign law) to another (the knowledge production, surveillance and interventions demanded by public health expertise).

Contagion Politics and the Queer Subject as Anti-Citizen

There are four apparent strategic benefits for advocates in harnessing the public health rationale as the basis for queer rights claims and especially the repeal of sodomy laws. First, as Petchesky observes,

“[b]iomedical discourses and methods may be irresistible not only to
government and international agencies but also to advocacy groups,
for whom they create an aura of technical expertise rather than political
and social resistance.” 94 Unlike the globalised LGBT identity politics
that have developed typically in the West, it might be argued that public
health experts enjoy legitimacy, authority and a claim to neutrality that
can be useful in the face of the moral and religious conservatism that
exists across many of the states which have retained their sodomy laws.
Second, and relatedly, Katyal suggests that the public health rationale
allows queer rights advocates “to avoid some of the accusations of
Westernisation, and foreign influence, [which] often plague gay rights
strategies,”95 by avoiding the deployment of Western-inspired LGBT
identity categories in favour of behaviour-based labels like MSM. Third,
Katyal also contends that this behaviour-based approach ensures a more
inclusive model for queer rights advocacy that does not exclude so easily
those who do not self-identify with established sexual identity categories
(as one finds especially in India96):

The public health debates surrounding global efforts at AIDS
prevention have provided a fascinating and largely overlooked arena in
which dominant Western paradigms of gay identity have been soundly
rejected in favour of broader, more inclusive strategies of public health
intervention that focus on behaviour and conduct.97

Fourth, as Tellis explains, the rationale: “[articulates] itself necessarily
in the languages of crisis, violence and remedial action, not pleasure.”98
This seems to enable advocates, like those in India, to side-step the
difficult task of persuading states of the value in queer identities, meanings
and practices, in favour of a more instrumental rhetoric, grounded in
biopower, which foregrounds instead the practical role the repeal of
sodomy laws can play in ameliorating the destructive effects of HIV/
AIDS.

Nevertheless, the influence of the public health rationale on queer rights
advocacy should also give us pause for thought. From the earliest years

94. Rosalind Petchesky, Sexual Rights Policies across Countries and Culture: Conceptual
Frameworks and Minefields, in SEX/POLITICS: REPORTS FROM THE FRONT LINES, (Richard Parker,
98. Tellis, supra note 68, at 152.
of the emerging global HIV/AIDS pandemic, queer scholarship and activism has been keenly attuned to the potentially negative implications for queer subjects of the human response to HIV/AIDS: the possible “perverse effects” arising from “the intersection of [...] public health and sexuality”, and especially the “remedicalization of homosexuality, just when it seemed the battle against this had been won.” Roseman and Miller explain well the dilemma that has faced queer subjects, gay men in particular, as a consequence of the pandemic:

HIV/AIDS and the attention it both allowed and demanded to non-heteronormative sexuality (‘silence equals death’) has played a critical role in simultaneously enabling and constraining gay (male) ‘rights talk’, opening up space for queer sexuality (especially funding spaces), while marking them as disease-ridden.

In much the same way, the public health rationale for the repeal of sodomy laws depends for its strategic power on reproducing once again, in global and local forums, the discursive connection between queer subjects and HIV/AIDS. It is imperative therefore that any evaluation of the rationale and its implications considers carefully the consequences of marking queer subjects in this way.

In its 2009 Universal Access for MSM and Transgender strategic framework UNAIDS repeats its commitment to reduce by half the number of countries with sodomy laws by 2015, on the ground that such laws undermine prevention efforts aimed at the MSM and male to female (MtF) transgender risk populations. Significantly, the document opens with a quotation of the UN Secretary-General Ban Ki-Moon, in which he affirms the need for states to guarantee the human rights of vulnerable groups on the following basis: “Not only is it unethical not to protect these groups; it makes no sense from a health perspective. It hurts all of us.” Though Ki-Moon couches his defence in terms of ethics too, his deployment of the public health rationale is revealing. The “us” is important here. Implicitly, it indicates that the rationale depends on the exploitation of the heteronormative state's fear of contagion by the queer subject. At its core, as Kotiswaran recognises, the rationale legitimises queer rights claims not because they can reduce the vulnerability of

102. UNAIDS, supra note 50, at 1 (emphasis added).
queer subjects to HIV/AIDS but “only to the extent necessary to prevent the spread of HIV to the general population, really, ‘innocent’ wives and children in heterosexual marital families.” The message that underpins this rhetorical formulation is clear; queer rights will serve to strengthen the heteronormative order.

Exploiting the state’s fear of contagion by the queer subject seems to hold out the possibility of persuading recalcitrant nations, otherwise resistant to rights claims framed in normative terms, to meet the demands of rights advocates without them needing to acknowledge or accept that there might be value in queer lives. However, as Kotiswaran observes, this strategic approach to queer rights advocacy may yet prove to be a “slippery slope.” The problem with the politics of contagion it deploys is that, in the process of articulating rights claims on behalf of queer subjects, it repositions those subjects not simply as “disease-ridden” but as serious threats to the security of the heteronormative family and nation. As such, while the logic of securitisation may encourage some state institutions to afford new rights to queer subjects, it does so on highly unstable terms because it compounds simultaneously the construction of the queer subject as the enemy within; as an anti-citizen. In this respect, the location of the public health rationale within regimes of power is instructive. Biopower “operates as a technology of power that both privileges and marginalises, empowers and disciplines.” In its concern with governing a population’s life forces it relies on exclusions that divide and hierarchise the “normal” from the “abnormal” and the “risky” from those “at risk.”

It might still be argued that to secure repeal of sodomy laws from otherwise recalcitrant states is worth the wider constitution of queer subjects as threats to the heteronormative body politic. One should consider first though the practical limitations of the rationale for effecting such legal change. The success of this strategy depends on the state’s responsiveness to expert-led assertions that the most effective way to prevent the onward transmission of HIV is to protect queer rights. It is far from certain though that this responsiveness will follow from the utilitarian calculus by states that the politics of contagion encourages. As Nadasan notes, the exercise of biopower need not necessarily accord with the demands of progressive rights claims; indeed, where they conflict “individual notions of citizen rights tend to be outweighed by the epidemiological construction of public security risk.”

103. Halley et al., supra note 67, at 371.
104. Id. at 371.
Moreover, the assumption that criminal laws are counterproductive in relation to HIV prevention continues to be resisted by states on competing public health grounds. The recent proposal in Uganda to constitute same-sex sexual activity by people living with HIV or AIDS as an offence of “aggravated homosexuality,” attracting a capital punishment, illustrates not only the continuing dangers entailed by the discursive association between MSM and HIV but also the residual potency of the perception, asserted by the Tasmanian government in *Toonen v Australia*, that criminal sanctions against sexual activity between men can operate effectively as public health measures by using the state's own formal powers of coercion to control and contain risky sex. This form of resistance indicates that any expansion of regimes of biopower in this area can and does work both ways. It may legitimate the withdrawal of sovereign power to make way for the disciplinary-governmental rationalities and technologies of biomedical expertise, as India demonstrates. However, nothing intrinsic to this logic prevents states in which biomedical expertise may carry less influence from promoting atavistic forms of sovereign coercion as acceptable alternative techniques of biopower.108

There remains one further problem with the public health rationale. Queer rights advocacy using the rationale may also work to weaken or preclude entirely those rights claims made on behalf of queer subjects that are less easily understood through the lens of public health. In particular, as Rambassun notes, the focus of public health on statistical risk populations like MSM and MtF transgender people, “carries with it

106. *Id.* at 205.
108. Indeed, neither is this state investment under conditions of biopower in criminal liability as a public health technique restricted to struggles over sodomy laws. States in the Global North and South continue to justify the extension of sanctions to people living with HIV and AIDS who transmit or expose others to HIV using a modified public health rationale based on sovereign rather than disciplinary-governmental rationalities. *See for example*, the judgement of Cory J. (Major, Bastarache and Binnie JJ. concurring) in *R v Cuerrier* [1998] 2 S.C.R. 371, ¶ 140-142 (Supreme Court of Canada): “Interveners submitted that the criminal law is not the most effective tool for dealing with HIV transmission. They argued that public health initiatives are more appropriately employed to control the spread of HIV and AIDS […] However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. The respondent was advised that he was HIV-positive and on three occasions he was instructed to advise his partner of this and not to have unprotected sex. Nevertheless, he blithely ignored these instructions and endangered the lives of two partners […]Where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective.” (my emphasis; see also judgement of McLachlin J. (Gonthier J. concurring), para 74).
the potential loss of some aspects of women's sexual rights, most notably lesbian rights.” It is of course possible for rights claims articulated on behalf of MSM or MtF transgender people to benefit other queer subjects indirectly. For instance, the reading down of Section 377 in India guaranteed protection to all same-sex behaviour between consenting adults, and not simply the risk populations MSM and MtF transgender. Nevertheless, the politics of contagion and its irresistible logic of securitisation seems to create new hierarchies that favour some queer subjects over others with implications for the shape of rights claims articulated in public health terms. This may have exclusionary consequences for those subjects not classified by biomedical expertise as being at heightened risk of infection, such as lesbian women. Indeed, it may leave some queer subjects unprotected not only in relation to struggles over sodomy laws but where advocates deploy the public health rationale to support other right claims, such as legal relationship recognition, hate crime protection or anti-discrimination laws, by asserting the need for these rights only in order to reduce the stigma and discrimination that increases the vulnerability of “risky” queer bodies and populations.

_Beyond the Public Health Rationale: A Life Lived Differently; as a Sustainable Life?_ 

Geeta Patel, in her wide-ranging analysis of risk, insurance and sexuality in India, reflects in passing on the progress of the Naz Foundation litigation and notes that in their concern with the management of risk, the litigants worked to foreground the loss entailed by HIV/AIDS in order to justify the reading down of Section 377. Evaluating the apparent success of this strategy, she asks: “What seems so compelling about loss?” She concludes: “Loss seems to carry a valence that feels more powerful, more immediate than that of a life lived differently, as a sustainable life.” While the valence of loss may well have strategic potential as a basis from which to encourage action to grant rights to sexual subjects, it also shores up an image of that subject as an outsider and threat to the (human, national and international) heteronormative order that has wider implications for queer subjects. Conceiving of the public health rationale as a form of biopower reminds us that the rationale imposes its own regimes of knowledge/power over queer subjects which can have

110. Patel, _supra_ note 24, at 51.
negative consequences for queer rights claims. However, what Patel's observation also evokes is a glimpse of what the public health rationale displaces in its resort to contagion politics and the logic of securitisation: an understanding of the queer subject not merely as a source of riskiness to be managed, but as "a life lived differently, as a sustainable life." The concern expressed in this paper is that the logic of securitisation implicit in the public health rationale will be unable to support a sufficiently progressive rights agenda as it depends on manipulation of the state's fear of contagion by queer sexualities rather than a value-driven conception of different and sustainable queer lives.

It is because of these concerns that I remain especially cautious about the approach to the repeal of Commonwealth sodomy laws adopted by the Eminent Persons Group report which couches its own criticism almost entirely in public health terms. There may well be some potential in its strategy insofar as it helps to avoid the problems inherent in a value-driven justification for queer rights claims in the face of endemic heterosexism (although the refusal by the Commonwealth Heads of Government to accept the recommendation suggests the rationale will not inevitably overcome the resistance of some conservative states). Nevertheless, by presenting its case for repeal using the rationale the report encourages Heads of Government to engage with and satisfy queer rights claims solely in terms of contagion politics, and its securitising logic. In turn it seems to contribute to the wider production of queer subjects primarily as anti-citizens to be defended against to protect the health and welfare of the heteronormative family and nation (by protecting rights or otherwise). It is not my claim that the rationale should be rejected necessarily outright in this context. However, without also elaborating properly the value of queer lives, the report's approach may simply embed queer subjects further within the circuits of exclusion on which regimes of biopower rely.

Of course, this paper's apparently straightforward recommendation to rights advocates to ensure the parallel development of a value-driven conception of the queer subject raises its own dilemmas. Can more established forms of globalised LGBT identity politics provide the

111. **EMINENT PERSONS GROUP**, supra note 3, at 100 (I say almost entirely because while the report develops only the public health rationale in any detail, it does state once in passing that sodomy laws can "call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination." While this observation draws attention to the significance of a value-driven, inclusive approach to the issue, its relative brevity and obscurity compared to the prominence of the public health rationale indicates that it carries far less significance as an approach overall.)
basis for this value-driven approach? As critical queer and postcolonial scholars recognise, this politics creates its own difficulties because it assumes the universality of a global LGBT community. These claims have faced persuasive critique, which shows that purportedly global identity categories are fluid, incoherent, and exclusionary, especially when applied in local settings where they can work to obscure and even displace prior indigenous sexual and gender meanings and practices. Such criticisms levelled at the value-driven approach of identity politics need to be taken seriously not only to ensure a sufficiently inclusive conception of the value of queer lives but to counter allegations by moral and religious conservatives of Westernisation and foreign influence. Furthermore, demands by queer subjects for citizenship grounded in the value of queer lives can quickly reduce to a lurch towards assimilation which can encourage homonormativity in thrall to the logic of the market or even dangerous homonationalism, in which queer subjects are defined in opposition to perceived new threats to the state. For these reasons, care must be taken to ensure that any value-driven approach which might address the problematic implications of the politics of contagion, while avoiding the dangers of mainstream identity politics, must be both locally-grounded and transformative in its aims.

Identifying exactly what that approach might entail is more difficult, not least because it must be specific and sensitive to local contexts. However, an initial point of departure may be found in the judgement in *Naz Foundation*. After drawing on both the LGBT rights jurisprudence of comparative case law and the public health rationale, the judgement finally locates its reasoning in the history of the Indian Constitution, noting first that the notion of equality in the Constitution derived originally from the Objectives Resolution submitted by Nehru to the Constituent Assembly in 1946 before adding: “[i]f there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness.'” For me, it is when the Delhi High Court connects the repeal of sodomy laws and queer rights more generally to this aspect

113. Katyal, *supra* note 15; See also Katyal, *supra* note 95.
of “constitutional morality” that it meets most effectively the demands for a localised, value-driven jurisprudence of sustainability and difference. Perhaps the judgement could have done more: for instance, it might have drawn out explicitly the connection between the plight of queer subjects in India and the Constitution’s historic concern with addressing the inequalities faced by women, *dalits* and ethnic and religious minority groups. It might also have considered more clearly the concept of *swaraj* that Khaitan argues lies at the heart of the special attention given by the judgement to protection of personal autonomy. But in its return to Indian originalism, it does seem to begin to chart a more productive route between the unreflective assertion of homogenised global LGBT identity politics and the public health rationale.

### IV. Conclusions

In their recent overview of global advocacy around sexual rights claims, Roseman and Miller conclude that while there has been “an explosion in discourse and normative acts on sexual rights,” especially within global forums such as the UN, which together “represent a definable and historically specific project of consolidating and centralising sexual rights norms,” the articulation of these rights claims is “still evolving and fractured.” They add that “health continues to be the dominant site of norms evolution around sexuality in the United Nations, with both liberating and constraining effects.” In particular, Roseman and Miller draw attention to how, over time,

HIV/AIDS – hailed as a threat to global order and security, as well as to public health and development, particularly in the absence of accessible treatment – compelled a public and global discussion of sex as it actually happens, including homosexual sex, framed as ‘prevention’.

The public health rationale for the repeal of sodomy laws and other rights claims on behalf of queer subjects, both globally and locally

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118. Katyal, supra note 15, at 1464-1467 (for similar support for this creative deployment of Indian originalism); Compare Kapur, supra note 81, at 388 (who sees *Naz Foundation* as “a call to tolerate consensual sexual conduct between homosexuals, rather than to confer the right to full, substantive equality” which in turn amounts to “a device for social and political control, rather than empowering the groups being tolerated.”).

119. Roseman & Miller, supra note 101, at 317.

120. Id. at 318.

121. Id. at 317.

122. Id. at 322.

123. Id. at 326.
inspired and applied, is one as yet un-interrogated illustration of the evolving and fractured approach to queer rights claims. While globalised LGBT identity politics continues to face resistance before the UN, there are signs that the public health rationale for queer rights claims has had greater success as part of its international drive to combat HIV/AIDS. In India, the recent litigation before the Delhi High Court in *Naz Foundation* also indicates the strategic potential of the rationale in local settings, at least under certain cultural, political and legal conditions. The Commonwealth Eminent Persons Group report submitted to the Commonwealth Heads of Government Meeting in 2011 draws strength from these national and supranational developments and in doing so illustrates the increasing strategic investment in the rationale as part of the wider recent reinvigoration of global struggles over sodomy laws. This paper has begun to unravel the wider implications of these shifts in strategy in an effort to evaluate, in the words of Roseman and Miller, whether “rights speak” grounded in the rationale will be liberating, constraining, or indeed both.

There can be little doubt that the public health rationale, forming one rationality of the wider biopower that operates at the intersection of public health, sexuality and HIV/AIDS, has opened up new spaces for, and ways of knowing and speaking about, queer subjects and their rights claims. Strategically, the rationale offers an alternative to globalised LGBT identity politics, by drawing on the powerful knowledge claims of biomedical expertise around HIV/AIDS; by side-stepping the resistance of many states to perceived Westernisation and foreign influence associated with more traditional value-driven queer rights claims; by providing a model for rights claims grounded in behaviour rather than identity categorisation; and by replacing conceptions of queer lives couched in terms of pleasure with those that foreground queer rights claims as crisis management, to respond to the devastating effects of HIV/AIDS. It has not been this paper’s aim to demand that this strategic manoeuvre be abandoned entirely when it has been evidently successful in countries like India in achieving law reform goals. It seeks instead to highlight the possible negative consequences of over-reliance on this strategy for a progressive rights advocacy that might support a suitably inclusive, sustainable and comprehensive framework for contemporary queer struggles in politics and law.

The public health rationale depends for its discursive power on the exploitation of the heteronormative state's fear of contagion by the risky queer subject. While this fear may lead to meaningful change, the rights
granted to subjects under the rationale are not so much indications of their inclusion within circuits of citizenship but rather reproduce their status as anti-citizens who are seen to threaten the security of the nation and family. This supports in turn an underpinning to queer rights claims based on the logic of securitisation rather than acceptance and inclusion. Investing too much in advocacy of this kind may encourage states to decriminalise but it may also reinforce state justifications for sodomy laws as public health measures. Moreover, it imposes new hierarchies on queer lives that prioritise the rights claims of those perceived to pose the greatest threat to the heteronormative state. Roseman and Miller observe that “[m]any advocates of sexual rights seek cover under ‘health’ to avoid the politics of sex and sexuality; the cover, however, is impossible to sustain.”\textsuperscript{124} Efforts by advocates to overcome the continued resistance to queer rights claims articulated in terms of pleasure, life, agency and sustainability, by exploiting the biopower of contagion, loss, crisis and securitisation, cannot transform alone the response of states to queer subjects when transformation depends ultimately upon an acknowledgment of the value of queer life.

\textsuperscript{124} Id. at 333.
Section 377 and the Myth of Heterosexuality

Zaid Al Baset*

This essay intends to ‘read’ the 105 page text of the Naz foundation judgement as a site for the de-historicisation of ‘homosexual’ subject(s). Employing Roland Barthes’ explication of ‘myth’, an attempt is made to understand how the text of the judgement constructs the myth of heterosexuality which de-naturalises the ‘homosexual’ subject as a naturally occurring ‘unnatural’ phenomenon. This essay probes into the contradictory ways in which the ‘homosexual’ subject is produced by the text. While on one hand the ‘homosexual’ is understood as a ‘class’, on the other, a radical anti-essentialist stance is exhibited in the evocation of the discourse of AIDS and particularly the category of MSM (men who have sex with men). The simultaneous ‘minoritising’ and ‘universalising’ stances present in the judgement produce the queer subject in confounding ways which inadvertently evoke and reinforce the specter of the closet. The essay also provides a critique of the ‘right to privacy’ in so far as it threatens to erase the queer subject from the public, thereby, re-producing the closet. The metaphor of the closet is used to denote a space (or its lack) which functions to cohere heterosexuality and produce the ‘homosexual’ as its inevitable and often invisible other.

By attempting to analyse the relationship between the queer Indian subject and the closet as produced by the text of the judgement, a theory of the closet is envisaged as not simply a feature of queer lives but all lives in general in a heteronormative context.

For sake of convenient reference, they would hereinafter be referred to as 'homosexuals' or 'gay' persons or 'gay community'.

– Naz Foundation judgement

This apparently innocuous sentence rests self-assured on page 6 of the historic July 2009 Delhi High Court judgement of the Naz Foundation versus the Government of NCT of Delhi. But, of course, it is convenient: this collapsing of a constellation of terms that connote a multiplicity of sexual identifications and proclivities. I admit, nevertheless, putting homosexual and gay in quotations is smart; suggestive of how this convenience is rather inconvenient, that something is already lost; an insurmountable gap of difference has been mounted on a page.

It is also telling that gay when juxtaposed with community loses its decorative quotation marks. One wonders why. What does the word 'community' – such a 'social', 'harmonious' and 'stable' term – do to the

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word 'gay' that it becomes unproblematically gay? Or am I reading too close for comfort, for it may well be just an editorial slip? One cannot be certain, but since uncertainties demand questioning, I shall continue.

What the sentence manages to achieve, almost naively yet violently, is a collapse of history, a terrible error in conflation of identities, locations and desire and, most significantly, an attempt to naturalise the 'unnatural'. In absenting history, nature is reified: the homosexual/ gay\(^1\) becomes a naturally occurring 'unnatural' phenomenon. It is precisely this closeting of history, its camouflaging as nature, that produces the hegemonic heterosexual.\(^2\) In other words, the 'naturalness' and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, regulation and deployment of sexuality across time and space.

This essay will 'look' at such innocent sentences; will search for gaps and contradictions, will make silences on the pages of the judgement speak. This is not an effort to nullify the significance of the judgement, rather to ascertain the various ways in which it constitutes the becoming of queer\(^3\) selves and its articulation in contemporary queer politics in India. I will argue through the course of this paper, that the \textit{a priori} de-historicisation of the queer subject forces any expression of queer politics to evoke the spectre of a closet. And in so doing, every 'outing' is simply another act of closeting which reiterates the naturalness of the only natural sexual category – the heterosexual. The 'closet' is a site of the construction of a tautology – heterosexual is natural, or as it were, the myth of the heterosexual.

1. I use homosexual/ gay interchangeably to suggest that de-historicising these terms allows one to use them interchangeably as though they posit the same meanings when they necessarily do not.

2. By hegemonic heterosexual, I imply the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal. Heterosexuality is the site where the male sexed masculine man's desire for the female sexed feminine woman is privileged over all other forms of sexual desire and becomes a pervasive norm that structures all societal structures.

3. The term 'queer' is fraught with contradictions. It has had a chequered history from being a derogatory term for 'homosexual' males to a term that connotes, in theory, the impossibility of fixed essences and identity locations and a refusal to envisage a formulaic relationship between one's sex, gender and desire. The resistance to any closure of meaning is what makes the term polemical and allows for continuous revisions. 'Queer' is fashioned as an inclusive term while acknowledging, at the same time, that any act of inclusion will create its own set of exclusions. The term, arguably, is used in at least three senses: 1. As a noun, where it functions as an 'umbrella' term aiming to bring together diverse sexual proclivities, gender identifications and sexual practices within its fold as an opposition to heterosexuality. This meaning of queer is commonly employed in political practice; 2. As a verb which poses a theoretical critique to the crystallisation of sexual identities into fixed essences; 3. As an adjective, whereby it operates as an identity marker for those who do or choose not to fit into LGBT categories and claim a more fluid sexuality. I use queer in this essay, whether as noun, verb or adjective as a term of resistance against the discourse of sexuality that privileges the heterosexual as natural and constructs all 'others' as unnatural.
This condensation of queerness, this censure of terms on the pages of the judgement, where 'gay' or 'homosexual' is metonymically made to connote the entire spectrum of sexual and gender difference carries with it the charge of concealing an 'essentially' variegated experience. One cannot help but register the rare occurrences of terms such as lesbian, kothi, hijra and so forth in the text of the judgement. This 'erasure' has a two-fold consequence: firstly, sexual and gender differences which have historical and contextual import are effectively lost and this loss is conveniently forgotten. 'Homosexual' and 'gay' then begin to function as universal signifiers of homosexuality, which itself appears as a homogenous, general (natural) phenomenon, easily understood and uncomplicated. Secondly, the historicity of the terms 'homosexual' and 'gay' is undermined; these words are uprooted from their context of deployment and emptied out of their cultural content. The term 'gay' connotes a specific historical intersection of class, gender, region and even race. Likewise, the 'homosexual' has had an arduous history to traverse in the pages of medical, psychiatric journals and writings on sexology of the late nineteenth and twentieth centuries.

In the judgement, however, and arguably in the broader political context, these terms then simultaneously erase the histories of other terms as well as their own specific trajectories. Roland Barthes in his essay 'Myth Today' likens a myth to a second-order semiological system wherein "a sign in the first system becomes a mere signifier in the second." He notes:

[...] the signifier of myth presents itself in an ambiguous way: it is at the same time meaning and form, full on one side and empty on the other

[...] As a total of linguistic signs, the meaning of the myth has its own value, it belongs to a history [...] in the meaning, a signification is already built and could well be self sufficient if myth did not take hold of it and

4. Naz Foundation v. the Government of NCT of Delhi, 160 DLT 277, 382 (The term kothi features only once in the text of the judgement, in the section titled "Responses of Other Respondents." Respondent No. 8 is the coalition 'Voices against Section 377 IPC' which includes kothi persons who are then subsumed within the LGBT (lesbian, gay, bisexual and transgender) category. The term hijra is used five times in the text; firstly, as a part of 'Voices against Section 377 IPC' only to be subsumed within the LGBT category. The term is also evoked while citing the case of Jayalakshmi v. The State of Tamil Nadu in order to highlight police violence against hijras, where a hijra commits suicide due to custodial torture. Interestingly, this section begins with a sentence, "Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons." Again an attempt is made to erode the specificity of the hijra person by including her within the LGBT category.).

did not turn it suddenly into an empty parasitical form. The meaning is already complete; it postulates a kind of knowledge, a past, a memory, a comparative order of facts, ideas, decisions. When it becomes form, the meaning leaves its contingency behind, it empties itself, it becomes impoverished, history evaporates.6

For Barthes, myths have a specific schematic deployment. In a myth, “the sign7 in the first system becomes a signifier in the second system” such that the materials of mythical speech (the language itself, photography, painting, posters, rituals, objects etc.), however different at the start, are reduced to a pure signifying function as soon as they are caught by the myth.8 The signifier of the myth is at once meaning (the signified or the final term of the first system of sign) and form (the signifier of the myth). What is signified by the myth is the concept. Just as the correlation between signifier and signified in language is termed as sign, the relationship between form and concept is termed as signification.9 In simple terms, in the case of a myth, symbols by themselves may have specific meanings but myth erodes or distorts such specific meanings to posit itself thereby emptying out the specific content of the symbols it uses. Keeping in mind this schema, I intend to show how heterosexuality as a concept employs terms such as 'gay' and 'homosexual' (and many others) transforming their meaning into form to create a specific signification i.e. heterosexuality as natural (normal) and homosexuality as unnatural (abnormal) or, simply put, how the myth of heterosexuality is produced.

There is but an 'abnormal regression' of the words 'homosexual' and 'gay' as they are transformed from meaning to form. Both words as meanings contain a geography, a history, a morality (or its lack), a literature, a pathology and so forth. 'Gay' conjures up mental images of subcultures of the 1960s in the west, the Stonewall Inn riots, the birth of the gay movement in the US and its mimesis all over the world from the mid-twentieth century onwards, gay communities, gay individuals (most often white, male, and middle class), gay identifications the world over, gay rights, gay men of colour often westernised and middle class (again),

7. The elaboration of the nature of linguistic sign is detailed in: FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 65-67 (Wade Baskin trans., 1981) (Sassure writes “The linguistic sign unites not a thing and a name but a concept and a sound image.” A sign therefore is an amalgam of the signifier that which expresses and the signified (the concept). For instance the sign ‘tree’ is a two-sided entity composed of the word ‘tree’ (signifier) and the concept of tree (signified).).
8. BARTHES, supra note 6, at 137.
9. Id. at 140.
the 'plague' of AIDS, gay marriage, gay adoption, even gay promiscuity. The term 'gay' is rich, value-loaded, and pregnant with meanings. So, too, is the 'homosexual' born of the 'temporary' aberration that the sodomite was, and evolved into a pervert 'species'; a naturally occurring anomaly. Although this anomaly was so named only as late as 1869, the richness of meanings that 'gay' and 'homosexual' connote have to be depleted to sustain the myth of heterosexuality. Barthes points out:

That the form does not suppress the meaning, it only impoverishes it, puts it at a distance, holds it at one's disposal [...] It is this constant game of hide-and-seek between the meaning and the form which defines myth.

'Gay' and 'homosexual' when deployed as forms (as in the case of the judgement) have their meanings placed at a distance, have their richness tamed and are intentionally made the accomplices of a concept (what the form signifies). This concept is heterosexuality. The terms are used interchangeably and appear to connote sexual acts, sexual orientation, sexual behaviour and sexual identities (each, a different register of analysis) simultaneously. Barthes asserts that “the history that is drained out of the form is wholly absorbed by the concept.”

The concept, far from being an abstracted form, is suffused with history. It is history, a totality of our existence and our knowledge of reality. Heterosexuality intentionally employs 'gay' and 'homosexual' in tamed form in order to reinstate itself and assert its own ubiquity in history. In doing so, it robs these terms of their historicity. The word 'heterosexuality' appears only thrice in the judgement although the concept pervades each line of it as much as it pervades all societal structures. The concept intentionally deforms meanings to ensure that the signification “appears both like a notification and a statement of fact.” The fact that heterosexuality is natural imposes itself on us as a fact, uncontested, frozen in time and eternalised. For Barthes, mythical signification is made possible by a motivated analogy. Unlike the sign, in which the signifier and signified is but arbitrary, mythical signification is never arbitrary; the relation between concept and form is one of analogy, however partial. For instance, the image of a mother loving a child to be appropriated as form demands that an analogy be established between

11. See generally Bandyopadhyay, supra note 5.
12. BARTHES, supra note 6, at 141-142.
13. Id. at 142.
14. Id. at 148.
the mother and heterosexuality; the mother is heterosexual. A mother is naturally heterosexual. A mother is always heterosexual. What is interesting to note is that the signification of heterosexuality is made possible not simply by motivated analogy but through motivated opposition as well. 'Gay' and 'homosexual' and indeed all queer terms (including the term 'queer' itself) as forms are not simply devoid of their particularities, they are naturalised as opposition to the concept of heterosexuality. They operate as empty signifiers enabling the very constitution of heterosexuality as the norm. The effect of this naturalisation is that they become eternally frozen as 'naturally unnatural', and the means through which the eternal naturalness of heterosexuality is realised. The myth of heterosexuality does nothing more than depoliticise and dehistoricise sexuality thereby sustaining the natural image of heterosexuality. The 105-page judgement is a mere testimony to the successful career of the myth. Within the text, queer terms operate only as form veiling history wherein homosexuality and heterosexuality appear as naturally occurring phenomena, the former hitherto criminalised and the latter the foundation of society.

I. The (Unnaturally) Natural Homosexual

Probing into the myriad ways in which the judgement resurrects the heterosexual myth entails a summary of the judgement even when the dissolution of the myth is intended. The judgement which has been the cause of much celebration holds that “Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.”\(^{15}\) The concluding paragraphs endorsing the theme of inclusiveness of the Constitution of India assert that “those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized” and that misconceptions about who the LGBTs\(^{16}\) (lesbian, gay, bisexual and transgender) are, should not inform law. The rest of the document is of course how the court arrives at this 'historic' judgement. Section 377 was born out of a desire to sexually discipline the colonial subject imagined as erotically perverse in 1860. It criminalises “unnatural offences” which include voluntary “carnal intercourse” against the “order of nature” with any man, woman or animal. Section 377 further explicates that penetration is sufficient to

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15. 160 DLT 277, 382.
16. LGBT (Lesbian, gay, bisexual and transgender) as a acronym gained political currency in the 1990s. It refers to communities based on sexual orientation and gender-based identities.
cause 'carnal intercourse'. 'Carnal intercourse' in this instance, has been interpreted as anal sex, oral sex and other forms of non-procreative although penetrative sexual acts.17

Interestingly, the law does not discriminate between 'homosexuals' and 'heterosexuals'; both stand implicated and potentially culpable of going against nature. Please note that the words 'homosexual' and 'heterosexual' were yet to be invented when the law was drafted by Lord Macaulay and, since their invention, have not been incorporated in the law. Section 377, then, technically speaks to the image of the sodomite alone. The sodomite is a man with a wayward morality and aberrant sexual predilections; at least, by Christian standards (all salvation religions condemn sodomy, to be precise). Although the sodomite becomes a homosexual eventually, conflating a sodomite with a homosexual would be a discursive sin. A sodomite indulges in sexual acts that invite religious condemnation and legal proscription whereas a 'homosexual' is a person with an aberrant sexual identity. Sodomy connotes acts of transgression whereas the homosexual is constituted with a transgressive subjectivity.

The subjectivity of the sodomite, however, remains more elusive and interestingly generic; generic in the sense that it implies an immoral perverse 'satanic' disposition which can wreak havoc on any mind (the minds are yet to be heterosexualised/homosexualised). This anti-sodomy law puts into place certain stable equations. The natural is not criminal. It cannot be so for the natural also appears to be involuntary (an edict of the divine if you will). The unnatural is an act of volition hence the sodomite chooses to sin; sin is not yet his constituting essence. The sodomite is a mere rupture, a momentary rupture in the form of a sexually interdicted act in the otherwise natural world and naturalised being. Nature, in this case, can be restored. The sodomite can be converted to his naturally moral self (arguably through punitive measures). One must never forget that the natural is also always moral and one must also take cognisance of the fact that the moral is constituted as ahistorical. So the law puts into place the naturalness of coitus between a man and a woman.

Carnal intercourse between a man's penis and a woman's vagina is so natural that it did not even require an act of naming. Sodomy then functioned to name not simply a desire that dare not tell its name but also to speak of a desire so natural, moral and obvious that it

needn't have a name at all. Sodomy is appropriated to speak for the natural desire. While the former was an 'open secret', the latter was an objective, universal, religious fact. 1869 is the year when opposing twins are delivered to knowledge – 'homosexual' and 'heterosexual', with a view to underscore a specific shift that had been taking place in Europe regarding the understanding of sexuality.

Sexuality began to operate not through a calculus of prescribed and proscribed sexual acts but through a classification of persons and identities. Sexuality became a science. And science confirmed that the homosexuals are a separable species altogether; not a temporary aberration but a naturally occurring anomaly and until the late twentieth century, medical/psychiatric science was steadfast in its reparative stance of undoing this anomaly. The faith that nature could be restored remained intact. It had a new name: heterosexuality. Some more stable equations follow: Heterosexual = natural and Homosexual = unnatural (but simultaneously naturally occurring); Natural = normal and abnormal = unnatural.

I am not consciously or unconsciously bypassing the nature/nurture debate on sexuality, especially homosexuality, because I am interested not in the causation of the phenomena but in their deployment. Whether homosexuals are born or created, they are deployed as always already present across history and society. It is not the issue of causation that naturalises the homosexual subject. It is not that if homosexuals are born, they become natural entities and if they are created, they become historical subjects. Homosexuals remain 'unnatural' natural occurrences whether born or created. History is always arrested so as to make the category of the homosexual a natural universal.

Section 377 operates on the accomplishment of this arrest and so does the text of the judgement. Law itself in this case is a crime against history. Section 377 becomes the site at which heterosexuality is produced as natural, first simply through the evocation of the temporary sodomite and then through a construction of an essential homosexual. Section 377, in the way it is worded, accomplishes two other 'facts' as intended afterthoughts: 1. Men are the sexual subjects therefore sex is always phallocentric (this as we shall see will be reiterated in the text of the judgement) and 2. A lesbian slip (unlike a Freudian one) where a woman's 'right' to sexual subjecthood is playfully ignored/missed. Both these 'facts' have far-reaching consequences.

18. See Foucault, supra note 10, at 1; Bandyopadhyay, supra note 5.
II. THE HOMOSEXUAL ERASURE FROM THE PUBLIC AND THE PRIVATE

Section 377 has been seldom applied in court judgements but its very existence has thrust criminality on same-sex desiring individuals forcing them 'underground', burying them under the edifice of a nation that excludes them and stymies their ability to avail opportunities toward a dignified life. One must eschew suggesting an absolute causal link between Section 377 and homophobia in India, yet the law provides a fecund site for the articulation of homophobia and responses against it. It renders any form of queer identification always already deviant. Not surprisingly, then, the two decades old queer movement in India has largely been a struggle against Section 377. In 1994, ABVA (Aids Bhedbhav Virodhi Andolan) a left-wing, non-funded group filed a petition against Section 377 in the Delhi High Court questioning its constitutional validity. The petition was filed at the behest of a medical report which confirmed that Tihar Jail had become a sodomite's haven. WHO (World Health Organization) had recommended distribution of condoms to the inmates. Fearing that it would add fuel to fire (or desire) and promote what the law already prohibits, jail authorities refused. The case came up for hearing in 2001 and was dismissed without the knowledge of ABVA, which had failed to keep track of it.

In 2001, the Naz Foundation in collaboration with the Lawyer's Collective filed a public interest litigation (PIL) to 'read down' Section 377 'to the extent that the said provision criminalises consensual sexual acts between adults in private'. The petition was initially dismissed

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21. The Naz Foundation Trust is a New Delhi-based NGO (founded by its parent organisation in Britain) working on HIV/AIDS and sexual health since 1994. It endeavours to sensitise the public on sexual health and provide support to people living with HIV/AIDS. It has a rights-based approach to issues pertaining to sexual health.
22. Established in 1981, The Lawyers Collective is a 'public interest service provider' in the field of human rights advocacy, legal aid and litigation, especially issues relating to women’s rights, HIV/AIDS etc. Its members include professional lawyers, law students and human right activists.
23. The Naz petition was filed following the police raids of NGOs working with HIV/AIDS and the MSM community in Lucknow. In July 2001, the police arrested 10 people, one of whom was an activist from Bharosa (an NGO working with the MSM community) and raided the offices of Naz and Bharosa in Lucknow seizing safe sex materials. An FIR was registered under Section 377, Section 120B (conspiracy to commit an offence) Section 109 (abetment) and Section 292 (sale etc. of obscene material) of the Indian Penal Code, 1860. The incident was widely reported in the media and the NGOs were accused of running gay clubs and polluting young minds. For a detailed account of the Lucknow case, see Narrain, supra note 20.
on the ground that Naz Foundation had no *locus standi* on the case. However, following a review by the Supreme Court, the case was up for hearing before the Delhi High Court in 2009. The petition was fortified by a coalition of NGOs –Voices Against Section 377 – in 2006 which campaigned vociferously against the 'draconian' law. The culmination of this struggle is the 105-page text which details the responses against the provisions of Section 377, most notably by Naz Foundation, NACO (National Aids Control Organisation) and Voices against Section 377.

The petitioners argued that Section 377, insofar as it implicates consensual sex between adults in private, infringes upon the fundamental rights guaranteed under Articles 14 (right to equality), 15 (right against discrimination), 19 (freedom of speech and expression), and 21 (right to life) of the Constitution of India. The right to privacy, the petitioner noted, is implicit in the right to life and liberty and “since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie at the core of the 'private space', they are inalienable component of the right to life.”

The petitioner further submitted that the expression 'sex' used in Article 15 cannot be read restrictive to 'gender' but includes sexual orientation within its ambit and hence equality on the basis of sexual orientation is implied in the right against discrimination. Moreover, it was argued that the classification of sexual acts into procreative and non-procreative sexual acts as manifest in Section 377 is based on “stereotypes and misunderstanding that are outmoded and enjoys no historical and logical rationale.” Such classifications are necessarily 'arbitrary and unreasonable' and violate the provisions of Article 14 of the Constitution. The petitioner further surmised that Section 377 negates the freedoms guaranteed under Article 19 since “an individual's ability to make personal statement about one's sexual preferences, rights of assembly/ association and right to move freely so as to engage in homosexual conduct are restricted and curtailed.” The petitioner also makes a strong case against Section 377 to the extent that efforts towards HIV/ AIDS intervention and prevention is severely hampered because of the discriminatory attitudes towards the gay community which is particularly vulnerable to the disease. To support the above arguments, various court cases had been cited, provisions of international law has been quoted and snapshots of the nature of oppression that same sex desiring individuals face in India have been narrated. The verdict that

25. Id. at 286.
came in favour of the petitioner, in effect de-criminalised consensual adult sex in private.

The 'private' in this case, demands scrutiny. What does the right to privacy entail? In the text of the judgement, in the section titled “Section 377 as an infringement of the rights to dignity and privacy,”26 various definitions are available. Privacy has been understood as “a private space in which man may become and remain himself”27 or as the “right to be left alone.”28 The right to be left alone is not understood simply as a negative right against government intrusion but also as a right to “get on with your life, your personality and make fundamental decisions about your intimate relations without penalization.”29 It also entitles individuals “a sphere of private intimacy and autonomy which allows individuals to nurture relationships without interference from the outside community.”30

It is noteworthy that any reference to privacy is always juxtaposed with the family or home. For instance Article 12 of the Universal Declaration of Human rights (cited in the text) states “no one shall be subjected to arbitrary interferences with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”31 Article 17 of the International Covenant of Civil and Political Rights32 is also worded in a similar vein where privacy, family and home appear together. Likewise a reference is made to the case of R. Rajagopal v. State of T.N. (1994) where the court stated that “a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.”33

Privacy then is concurrently deployed as a spatial metaphor and a metaphor for personal autonomy. As a spatial metaphor, it is telling that

26. Id. at 311.
27. Id.
28. Id.
29. Id. at 310.
30. Id. at 311.
31. Id. at 104.
33. See Naz Foundation, supra note 15, at 309.
'privacy' is aligned with the family or home so that privacy connotes a physical space – the private sphere. The notion that 'privacy' implies the 'private sphere' is strengthened by proclamations such as the one provided by NACO that “enforcement of Section 377 IPC against homosexual groups render risky sexual practices to go unnoticed and unaddressed inasmuch as the fear of harassment by law leads to sex being hurried, particularly because these groups lack 'safe spaces', utilise public places for their indulgence and do not have the option to consider or negotiate safe sex practices.” Clearly, 'safe place' must mean the private sphere. The word 'risky' is worthy of note. Are same-sex acts 'risky' because they take place in the public sphere (in a hurried manner) and invite censure or are they 'risky' because of the very nature of such acts (apparently more prone to HIV infection)? Which same-sex sexual acts are particularly 'risky'? Is homosexuality 'risky' per se?

Moreover the notion of the 'public place' needs qualification. 'Public places' in this case could refer to public toilets, parks and even public transport. Undoubtedly, one needs to make a distinction between sex in public and exhibitionism. Gay sex in public is often veiled. There are rituals of practice which may well be invisible to anyone other than the practitioners themselves. This public space is at least partially closeted. Often queer readings of space begin with the insight that public spaces are “produced as ambiently heterosexual, heterosexist and heteronormative.” Although one can question this presumption, it cannot be altogether dismissed. If one were to accept that public places are heteronormative, and same-sex sexual acts at least partially closeted, if not completely, then the judgement by intending to relegate 'homosexual' acts into the private sphere or 'safe places' would effectively reiterate the ambient heterosexism of the public space.

The outcome is an erasure of the 'homosexual' from the public. Counter-intuitively speaking, when queer acts are 'caught' in public, the seamless heterosexuality of the space is ruptured; the judgement aims to suture the same by rendering invisible the potential of public spaces being tainted by markers of same-sex desire. Allowing queer sex in private is deeply problematic too. As the aforementioned articles show, there is an unconscious conflation of the private with the home and family, even marriage. The family as a space is always already heterosexual. In

34. *Id.* at 283-291.
35. I use public place to refer to specific geographical locations whereas 'public spaces' is used refer to space in the notional/ideological sense of the public-private.
most liberal discourses, it is also imagined as a natural/biological unit. Adding the two together, the family becomes a site for the reproduction of heterosexuality as natural. For most queer Indians (if not all), the family or home functions as public space too. The heteronormativity of the Indian family can force queer Indians inside the closet even within the private sphere. The judgement then rests on a utopic notion of a 'private' space which is erased from the public and does not exist in the private. The space then provided to the 'homosexuals' in India is in effect a non-space or simply an erased space.

Privacy also, as suggested earlier, implies personal autonomy. Relegating one's sexuality to the domain of the private also runs the risk of it being perceived as something innate, instinctive and outside the social, allowing it once again to slip into the abyss of the natural. Personal autonomy cannot but be exercised in a social context. The social context for queer Indians is overtly heterosexist. The argument against the 'reading down' of Section 377 forwarded by the Additional Solicitor General submits that "right to privacy is not absolute and can be restricted for compelling state interest." He contends that India has a higher standard of morality compared to western morality and likens homosexual sex to "gross male indecency." Moreover The Ministry of Home Affairs had stated that deletion of Section 377 could "open the flood gates of delinquent behaviour and can possibly be misconstrued as providing unfettered license for homosexuality."

That public morality is steeped in homophobia needs no reiteration. But the fact that the homosexual is always excluded from and stands outside the moral public is an issue that cannot be ignored. Personal autonomy will not make any sense unless 'homosexuals' become a part of the moral public. It is precisely at this point that the notion of privacy as space and privacy as autonomy intersect. The former presupposes the latter and vice versa. Queer Indians are spatially and structurally erased and morally excluded from the public. The right to privacy does not ensure inclusion into the moral public.

Not surprisingly, one of the strategies that NACO adopts for prevention of infection (HIV/AIDS) reads thus: "reinforcing the traditional moral values of abstinence, delayed sexual debut till marriage and fidelity among the youth and other impressionable groups of the population." 'Tradition', 'marriage' and 'fidelity' appear as words from a heterosexual script and 'impressionable groups' is an instance of just how cryptic

37. See Naz Foundation, supra note 15, at 300.
38. Id. at 287.
39. Id. at 291.
and vague language can get. An assertion of personal autonomy by queer individuals runs the risk of ensuring their exclusion from the public (morality), which they were never a part of at the first place. It's a Catch-22 situation: public morality does not include the 'homosexual' as part of the public while an assertion of personal autonomy invariably excludes the 'homosexual' from the public since the public is always already imagined as heterosexual.

Consensual same sex acts between adults 'in private' functions only as a form (as a historical and structural impossibility) usurped by the concept of heterosexuality. Homosexuality to the extent that it is framed as an opposition to heterosexuality signifies the heterosexual myth by erasing its own signification. The judgement is peculiar precisely because at the moment of the 'outing' of queer Indians, they are closeted by the very logic of the judgement. The judgement then evokes the spectre of a closet.

III. All the World's a Closet

What, then, is a closet? Or more specifically what does the closet hide? The closet seems to be a space whose boundaries, although continuously porous, are a defining feature of queer lives. Closets exist and they hide social information. They hide certain socially proscribed sexual desires, certain unnamable sexual acts deemed 'unnatural' by the cultural context and law, certain identities which dare not speak their name and certain forms of behaviour which can make an individual susceptible to stigma and oppression. The closet does not simply hide this susceptibility; it hides stigma and oppression itself. It marks the silencing of different voices, a silence which is achieved by a gross violation of lives that inhabit the closet, through both violence and pain inflicted by significant others both within and without the closet and instances of self-inflicted pain and violence. The closet also hides pleasure, myriad sexual expressions and furtive encounters that gratify the self. The closet also conceals the possibility of disease and death. Sedgwick asserting that the closet is “the defining structure of gay oppression” states that:

[the] gay closet is not a feature only of the lives of gay people. But for many gay people it is still the fundamental feature of social life and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.\footnote{40. \textit{Eve Kosofsky Sedgwick}, \textit{Epistemology of the Closet} 68 (2008).}
Taking this a step further, I wish to argue that the closet is not simply a feature of queer lives; rather all lives in a hetero-patriarchal context have a relationship with the closet. The closet is maintained both from within and outside; more prominently from the outside. The closet represents an unknowing, an ignorance, a forgotten secret which if tampered with can challenge the naturalness or the inevitability of compulsory heterosexuality. The closet then functions as a space to imprison the signs and signifiers that pose a threat to compulsory heterosexuality. The closet is that empty form in which a history of desire is locked and then forgotten. The relationship that heterosexuality shares with the closet is one of denial – a denial which ensures the systematic opposition between the 'normal' heterosexual who occupies the outside of the closet and the deviant 'homosexual' who occupies the space within. The boundary of the closet then circumscribes the homosexual as well as the heterosexual; one lives inside it, the other ignorant of it. But of course this ignorance is painstakingly maintained.

The tragedy of the homosexual resides in the fact that not only must he/she exist within the closet but he/she must deny the closet altogether and perpetuate the myth of heterosexual normalcy. The homosexual while occupying the closet also erases it by creating a non-space and pretending to be outside the closet. Interestingly, then, the closet acts as a double-bind in a homosexual's life: he/she is supposed to exist within it by feigning to exist outside it. The closet is a feature of all lives: both heterosexuality and homosexuality erase its epistemology through structural homophobia. The closet is a ubiquitous space which does not exist as a marker of homosexuality, rather as an erasure of it to ensure the pervasiveness of heterosexuality. In a subverted sense, the closet represents the site where heterosexuality is in effect made compulsory.

A movement steered at securing the rights of queer individuals must then confront the closet and by that logic compulsory heterosexuality. Confronting the closet would mean reclaiming markers of all desires, identities and acts which challenge it. A political dismantling of the closet has often been described as the process of 'coming out'. The phrase 'coming out' underscores a closed space but, as I have argued, the closet is a non-space and connotes an erasure of a space to exist or be. 'Coming out' in this sense would imply reclaiming a space which never existed in any real sense.

'Coming out' is never a finished process, it is always work in progress, a matter of degrees. An individual, who 'comes out' has to keep 'coming out' and offer social information about himself/herself. Hence, the metaphor of 'coming out' itself functions as a form always reifying the
concept of the closet, for outing oneself appears as an act of vacating the closet, which is always already an empty form. The relationship between the closet and 'coming out' is a relationship of opposition between two forms which serve the concept of heterosexuality. The heterosexual is always exempt from this terrible and perpetual state of repetitive coming out to which the homosexual is doomed. The heterosexual is always already outing, ever present, always known.

IV. MINORITISING MANOEUVRES

A section titled “Section 377 IPC targets homosexuals as a class” in the *Naz* judgement holds:

Sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity [...] The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalized and turned in on itself.41

The clubbing of homosexuals as a class of persons is a minortising exercise and an act of single vectored interpellation.42 It creates a picture of a concomitance between sexual acts and sexual identity. Locating a personhood is imperative for a liberal discourse on rights, for acts cannot have rights, individuals have rights. The acknowledgement of homosexuals as a specific class/species indulging in certain acts that follow from their essential being ensures the reification of its privileged other – the heterosexual.

41. See *Naz Foundation*, *supra* note 15, at 355.
42. *Sedgwick, supra* note 40, at 86 (Sedgwick notes “to be gay [...] is to come under the radically overlapping aegises of a universalizing discourse of acts and a minoritizing discourse of persons. Just at the moment, at least within the discourse of law, the former of these prohibits what the latter of them protects; but in the concurrent public-health constructions related to AIDS, for instance, it is far from clear that a minoritizing discourse of persons (“risk groups”) is not even more oppressive than the competing, universalizing discourse of acts (“safer sex”).” Sedgwick intends to highlight the simultaneous yet contradictory strands of separatist (essentialist discourse of persons) and integrative (constructionist discourse of acts) understanding of sexuality inform the public discourse of same-sex desire coupled (more often than not) with the discourse of HIV/AIDS. Her analysis is particularly germane to helping understand the contradictory arguments in favour of reading down Section 377 and the ways in which they speak to the metaphor of the closet.).
43. I use ‘single vectored interpellation’ to suggest a subject interpellated by only a single vector in this case, sexual desire. Such an interpellation is always a reductive exercise since subjects are interpellated through multiple vectors such as class, race, gender, region of birth and so forth which intersect in complex ways.
If the homosexual is a distinct person, then so must be the heterosexual. Whatever the terms and conditions of negotiation between the majority (heterosexual) and the minority (homosexual) may be, they always occupy mutually exclusive spaces. In such a situation, the closet as a non-space which reiterates compulsory heterosexuality is altered, no doubt. It no longer remains a non-space or an erasure but a space filled with variants of sexual identities. An easier way of putting it would be that the minoritising discourse propels the 'coming out' of identical homosexual selves as distinct from the heterosexual who exists outside, hitherto colonising the closet.

The closet stands colonised insofar as it continues to render coherence to the heterosexual who stands outside it. But this 'coming out' is also a 'filling in' of the closet to the extent that the closet is a non-space whose ontology is established only through the act of 'coming out' for the closet does not exist before this act. But this filling of homosexuals in the closet is what I call a form of 'heterosexual condescension'. The closet, in such an instance, does become a signifying economy for homosexual desire but only insofar as the already privileged heterosexual provides this space for such sexual variance. It is important to note that in a heteronormative context, the heterosexual is always already privileged; the minority homosexual, as he comes out, remains secondary, if not inferior, to the heterosexual. Yes, a space is created. The closet is marked and it posits homosexuality but at what cost? The closet reinforces what then appears as outside of itself – compulsory heterosexuality.

Ranjita Biswas notes in her essay *The Lesbian Standpoint*:

Heterosexuals are called upon to acknowledge homosexuals and understand their lives to give them space within the hegemonic. But never do we question the dominant order. It is important to note that against a backdrop of institutional primacy and legitimisation of the middle class monogamous reproductive heterosexual framework; in particular homosexuality would emerge as deviant and marginal, at best variant. The hegemony of the heterosexual order functions through a securing of its boundaries. And to do so it has to create it's 'other'. Without a certain precipitation of the deviant, heterosexuality cannot posit itself as normal; without the image of a copy gone bad, heterosexuality cannot be called original.44

With this as a focal point, I argue that a minoritising gesture (as ennobled it may be) is only a function of heterosexual condescension which is equivalent to saying: 'Look, you poor homosexual. I understand

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you are an anomaly (of nature/culture or whatever) but in my self-proclaimed privilege, I give you some space.' Such a space remains marginal, a million homosexual outings notwithstanding. A 25-year-old gay man who I interviewed\textsuperscript{45} told me, “I do feel I'm abnormal in a way and I wish I was straight.” A minoritising discourse sustains this wish rather than wipe it out and it is precisely at the site of this sustenance that compulsory heterosexuality reigns supreme.

Contrastingly, an argument in favour of reading down Section 377 holds:

According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them. The situation is aggravated by the strong tendencies created within the community who deny MSM behaviour itself. Since many MSM are married or have sex with women, their female sexual partners are consequently also at risk for HIV/infection. Clearly, the main impediment is that the sexual practices of the MSM and gay community are hidden because they are subject to criminal sanction.\textsuperscript{46}

Such an argument, possibly more effective, nevertheless poses two problems: a) A politics framed on the medicalisation of same-sex sexuality comes dangerously close to the nineteenth century medical construction of 'homosexuality' as a deviant or aberrant sexuality, even though medical science and psychiatry has absolved homosexuality of its alleged 'sickness',\textsuperscript{47} a politics linking same-sex practice to AIDS (as valid as the link maybe) retains the homosexuality and disease nexus which is counter-productive to a more positive view of same sex desire. In India, where the common sense perception of homosexuality remains one of sickness, even among medical practitioners\textsuperscript{48} such framings do more harm than good to queer persons.

The idea that gains currency is: if homosexuals are not sick enough in themselves, they still are carriers of grave sickness. Such framings

\textsuperscript{45} This interview was a part of my research for my M.Phil. dissertation titled 'Truth and Other Lies: Telling Queer Stories' based on accounts of gays and lesbians living in Kolkata and Delhi. The interview was taken after the Delhi High Court judgement of 2009. The M.Phil. was carried out under Prof. Sibaji Bandhopadhyay’s supervision at the Centre for Studies in Social Sciences Calcutta.

\textsuperscript{46} See Naz Foundation, supra note 15, at 326.

\textsuperscript{47} Arvind Narrain & Vinay Chandran, 'It's not my job to tell you that it's okay to be gay': Medicalization of Homosexuality: A Queer Critique, in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 55 (Arvind Narrain & Gautam Bhan eds., 2005).

\textsuperscript{48} Id. at 59-62.
retain the easy dichotomy between the healthy 'heterosexual' and the potentially sick and polluting homosexual. It affirms the notion that they are natural aberrations, mistakes made by nature. By highlighting the possibility that married men who have sex with men can transmit the disease to women and children, such a framing also appears to strengthen the heterosexual family and constitute 'homosexuals' as a threat to the health and vitality of the wayward heterosexual males and their families.

In a masterstroke, heteronormativity allows the normative male who does not identify his same-sex practice to put the entire onus of the act on the non-normative male for his masti/ discharge/ sex 49 just as it allows a normative male to put the onus of sexual assault of women on women themselves. The categorisation MSM – men who have sex with men – which marks a universalising attempt whereby sexual acts are privileged over sexual identities is itself problematic on various accounts. Shivananda Khan in his essay MSM, HIV/ AIDS and Human Rights in South Asia asserts that the term signifies “a range of masculinities and gendered behaviour(s) with differing contextualization of sexual practices, sex partner choices, perceived sexual needs, pleasures and desires.”50 He also problematises the 'male' in the term for the term straddles both normative males (who can easily pass off as 'heterosexual') as well as 'non-males' or effeminate men who, in a hetero-patriarchal context, would not qualify as men at all.

The inclusive nature of the term is made possible by a series of exclusions and omissions ignoring the specificity of gender, class and sexual orientation among men who engage in same-sex practice. Such a term then conflates identities with acts without doing adequate justice to either. For instance, how does one read a sex act between a kothi (feminised male who is penetrated) and parik/ panthi (manly male who penetrates), for what appears as a homosexual act has overtly

49. Shivananda Khan, Making Visible The Invisible: Sexuality and Sexual Health in South Asia: A Focus on Male to Male Sexual Behaviours 32 (1996) (Masti/discharge/sex refer to sexual 'play' which may not impinge upon the sexual identity of those involved. Khan notes: “The word [mastii] is not easily translated but in a sexual context it means sexual “playfulness,” and is usually used in the context of sexual play between males. It is not seen as a serious act, because it does not involve a woman. Nor is it really seen as sex. To some extent it is even socially permissible, ‘Young men letting off steam’. So long as it remains invisible. This does not differentiate this form of sexual playfulness from others, for all sexual behaviour, whether socially legitimate (sex between married partners) or otherwise must also remain invisible.”).

heterosexual connotations when gender identifications and role-taking are taken into account. The \textit{kothi} disturbs the alignment between sex and gender by coalescing a male body with a 'feminine' subjectivity whereas the \textit{panthi} iterates the alignment between male sex and masculinity. Precisely because the \textit{panthi} does not disturb the sex-gender alignment; that of masculinity with penetrative sex, he is able to 'pass' as normative whereas the \textit{kothi} fails to do so. Can the sexual act between the \textit{kothi} and \textit{panthi}, whose gender identifications reiterate heteronormative standards of desire, be reified as homosexual by simply divorcing it from the subjectivities of actors performing the act? Does it not simplify the question of what constitutes a homosexual act in the first place? Is this not a violently reductive exercise which underplays the possibility of interesting slippages in the way homosexuality and heterosexuality are employed as opposing categories?

The term MSM, in emphasising the transience of same-sex acts and implicating it within the discourse of fun/\textit{masti} or casual encounters, plays upon another trenchant dichotomy between procreative sex and recreational sex, where the former is privileged. It functions to trivialise same-sex sexuality against the more 'responsible' heterosexual act of human reproduction. I do not wish to trivialise reproduction itself but only to assert that the easy equation 'heterosexuality = procreative = meaningful = responsible = natural against homosexuality = hedonistic = irresponsible = meaningless = naturally unnatural' is untenable and only reinforces a distaste for queer persons. Given the heteronormative context in which such 'deviant' acts are located, it reinforces the alleged direct correspondence of acts, identities and behaviours between heterosexual men and women, thereby justifying the heterosexual claim to normality and naturalness.

From the above discussions, it is amply clear that queer politics simultaneously employs the minoritising discourse of persons with the universalising discourse of acts. What are the consequences of such an exercise on the closet? The closet 'appears' as a hitherto hidden space emptied out of its assortment — secret typifications of identities and registers of acts, of contestations of the heterosexual matrix. This 'appearance' conjures an image of dismantling the closet itself. On the contrary, I argue that the closet is a space marked by the absence of homosexual signification; it is not emptied out of its content, rather content is attributed to it. Homosexuality conceived either as a compendium of identities or an assortment of acts is articulated in a
way that ends up supporting the heterosexual hegemony. The closet far from being dismantled through queer politics is reconfigured as a space of the 'other' simply as a 'form', devoid of content, emptied out of the complex social histories of 'othering', which by dint of its opposition to the concept of 'heterosexuality' crystallises it as a myth, eternal and foundational to sociality.
Claiming Citizenship, Contesting Civility: The Institutional LGBT Movement and the Regulation of Gender/Sexual Dissidence in West Bengal, India

Aniruddha Dutta*

This essay examines the ongoing construction of gender/sexual identities and minorities as claimants to legitimate citizenship and civic participation as a process that tends to exclude or discipline diverse practices and subject positions at the intersections of gender/sexual and class/caste marginality. Through a situated study of the interactions between the institutionalised LGBT (lesbian, gay, bisexual, transgender; particularly GBT) movement in West Bengal, India and lower class/caste individuals and communities that inhabit gendered positions of marginality, the article argues that while they are often positioned within the institutional movement either as subjects of welfare or inadequate citizens who need to be trained to become worthy of rights, they may contest such regulatory practices and attendant exclusionary definitions of civility and citizenship. The article explores how these contestations might provide the ground for imagining more radical practices of gender/sexual dissidence than those accommodated by liberal discourses of equality and rights.

I. INTRODUCTION

In July 2010, an article in a national English daily titled ‘Let's keep the Pride’, marking the first anniversary of the 2009 Delhi High Court judgment1 that decriminalised sexual activity between consenting adults of the same sex in private, approvingly described a commemorative event at Delhi2 that demanded equal rights for the “LGBT community.”3

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2. The event, a gathering at the national monument of Jantar Mantar, was organised by an informal coalition of activists and organisations on July 2, 2010, exactly a year after the Delhi High Court judgment on July 2, 2009.
However, while the article supported the political legitimacy of 'LGBT' persons as equal citizens and thus echoed an increasingly common stance in the Indian print media, it also singled out “a few transgenders” for “inappropriate behaviour” during the event that “threatened to mar the atmosphere.” Even as the report approvingly cited “cheerful slogan shouting by gay rights supporters” and “provocative images” such as two men kissing, it berated the aforementioned “transgenders” for dancing while “lifting up their skirts and shouting swear words,” which apparently embarrassed even “their own community.”

The author quoted leading gay activist Ashok Row Kavi in support: “We must use our rights responsibly [...] We have to go a very long way to convince society that we are equal citizens with equal rights.”

His words uncannily echoed those of Akash, a community leader and activist in the small town of Berhampore in the eastern Indian state of West Bengal. During a conversation in 2007, soon after the establishment of Madhya Banglar Sangram, the local community-based organisation for 'sexual minorities', Akash told me that the public behaviour of certain members of stigmatised gender/sexually variant communities like kothis and hijras provoked adverse social reactions and made working for their rights difficult. Speaking as a community member and leader, Akash said: “If one wants acceptance and respect from society, one will have to act in a respectable manner.” The stern caveat about 'respect' (shomman in Bangla) was not surprising. During my ethnographic fieldwork in the city of Kolkata and other small towns in West Bengal, I heard similar comments about the unruly

4. Id.
5. Id.
7. Afaque, supra note 3.
8. All personal names have been changed to maintain privacy and confidentiality, except when they are public figures (e.g. Ashok Row Kavi) cited in media reports or other public documents.
9. See Lawrence Cohen, The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification, in Sex in Development: Science, Sexuality and Morality in Global Perspective, 269-303 (V. Adams & S. L. Pig eds., 2005) (on the construction of the kothi category); See also Gayatri Reddy, With Respect to Sex: Negotiating Hijra Identity in South India (2005) (on hijra and kothi communities and subcultures. Kothis are commonly described as ‘feminine’ same-sex desiring males, some of whom might cross-dress, while hijras are organised groups of male-born transvestites often described as a ‘third gender’.).
10. I commenced my fieldwork in West Bengal, eastern India in 2007 as a volunteer in two community-based organisations, Madhya Banglar Sangram and Dum Dum Swikriti Society, while being a MA student at Jadavpur University. Subsequently from 2009 onward, I returned
and disreputable behaviour of some gender/sexually variant persons in both casual conversations with activists and more formal contexts such as meetings of non-governmental organisations (NGOs) that work with 'sexual minorities' (jounoshonkhaloghu in Bangla). Various actions collectively designated as bhel kora (acting flamboyantly) or bila kora (creating trouble) in the regional intra-community code or argot—including specific gestures used to solicit money (chhältla) or perform sex work in public (khajra), and more broadly, any overly assertive or aggressive public display of gender non-conformity—were critiqued for exacerbating 'mainstream' perceptions of such communities and even provoking abuse, thus hampering the struggle for equal rights and against societal discrimination. According to one activist who spoke against such public behaviour in a meeting preceding the 2007 Kolkata Rainbow Pride walk: “the action of some of the participants such as dressing up during [last year's] walk was indecent and lowered the dignity of the walk. It was also detrimental to the objective of the movement [...] establish(ing) the rights of community people.”

This led to an unwritten consensus among NGO representatives on the greater surveillance of such 'indecent' behaviour: for instance, the thikri, a loud clap used by hijras and some kothis for public assertion, came under censure during subsequent walks.

The systematic interconnections across the above instances suggest that at the very moment when 'sexual minorities', the 'LGBT community', and/or their constituent identities are constructed as intelligible and legitimate citizen-subjects deserving equal rights, a range of practices and subject positions at the intersections of class/caste and gender marginality—particularly manifested in gestures of public assertion and gendered flamboyance by lower class subjects—are sought to be excluded or disciplined by emergent modes of sexual/political subjecthood. Such practices may be condemned both as flouting cultural norms of respectability through their indecency or disreputability and as interrupting the process of gaining formal equality within civil society through their unruliness or incivility.

In this article, I locate and examine these regulatory tendencies as part of the contested processes through which institutions and activists in

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11. Quoted from the minutes circulated in English among the participants after the meeting (e-mail correspondence, May 25, 2007).
12. The 'consensus' I mention here was not officially recorded in the meeting minutes; however, it was evident in attempts by senior community members and activists to regulate behaviours such as thikri that I observed in the Kolkata Rainbow Pride walks of 2007, 2008 and 2009.
India in general, and West Bengal in particular, construct and assimilate 'sexual minority' groups into legitimate citizenship through claims upon both cultural nationhood and transnational discourses such as LGBT and human rights, corresponding to an aspirationally cosmopolitan middle class civil society. As I will argue, even as institutional LGBT activism in India contests restrictive narratives of national culture where gender/sexual variance is portrayed as alien and corrosive to the nation, it might reinscribe a normative relationality between socio-cultural hierarchies of respectability and exclusive forms of civility and citizenship, such that certain forms of queer resistance or dissidence are condemned both for social indecency and for violating civic equality through excessive provocation or aggression. While the process of claiming citizenship via liberal discourses of equal rights visibilises some LGBT subjects as deserving citizens, it might further entrench or reiterate extant social stigma against lower class/ caste groups and subject positions, such that associated forms of difference, resistance and subjectivity are rendered uncivil, illegitimate and/or politically unintelligible – 'subaltern' in the sense of speech and resistance that cannot be heard or recognised as such within dominant discourses of equality and rights. Moreover, hierarchies of civility and respectability fuel identitarian splits between categories such as gay and transgender, MSM (men who have sex with men) and transgender, and even good and badly-behaved transgender, though many 'community people' inhabit multiple and overlapping subject positions.

These arguments resonate with a growing literature in the west that maintains that LGBT recognition and visibility has included relatively elite queers into nationality, citizenship and socio-cultural respectability ('homonormativity') at the cost of continuing or increased marginalisation and deprivation of racial and socio-cultural others. While Indian institutional activism may parallel some trends of western LGBT politics,

14. See Ajay Skaria, Relinquishing Republican Democracy: Gandhi's Ramrajya, 14 (2) POSTCOLONIAL STUD. 203-229 (2011) (I refer to the modern liberal democratic tradition of juridical/ political equality through which the LGBT movement has often claimed constitutional and human rights; for a critique of this political tradition in the South Asian context.).
I argue that attempts to legitimise LGBT groups into cultural nationhood and civic equality become internally contested and contradictory in the postcolonial context of India and, moreover, come into friction with various forms of gender/ sexual and class/ caste agency associated with non-metropolitan subcultures and communities, which may not be easily recuperable into narratives of national culture and liberal discourses of citizenship. These frictions result in contested tendencies within the movement to regulate the domain of civic participation against encroachment by lower class subjects, particularly publicly visible male-born gender variant persons belonging to hijra and kothi communities or subcultures, through imputations of their indecent, disreputable or uncivil behaviour. I do not suggest that such regulatory tendencies are concerted institutional policies enforced by organisations or activists from above, nor do I assign blame to particular actors. Rather, the article analyses conglomerations or assemblages of societal, institutional and intra-community forms of hierarchy and stigma that do not have any singular agent, and indicate the structural limitations of liberal discourses of citizenship more than specific individual or organisational intentions. As I will attempt to demonstrate, regulatory modes of public and political visibility, organised around the liberal democratic ideal of formal equality and the modern interiorised and privatised conception of gender/ sexual identity, interact with and reinscribe social and intra-community hierarchies based on 'traditional' ideas of decency and respectability (shomman). These processes are not merely internal to the LGBT movement but evidence a broader structural dynamic of postcolonial citizenship where cultural ideologies of class, caste and gender intersect with the legacies of Enlightenment humanism and colonial governance, which promised the universalisation of equality and rights while withholding citizenship and political sovereignty from insufficiently civilised subjects. In its aspirational trajectory to equal

16. For an overview of narratives of national culture that the Indian LGBT movement contests or assimilates to, see Ratna Kapur, 'A Love Song to Our Mongrel Selves': Hybridity, Sexuality and the Law, 8 (3) Soc. & LEGAL STUD. 353 (1999); For a critical theorisation of liberal citizenship in postcolonial societies, see Partha Chatterjee, Lineages of Political Society: Studies in Postcolonial Democracy 1 & 12 (2010).

17. The regulatory tendencies described in this article primarily affect lower class/ caste male-born persons and communities. Lower class/ caste communities of same-sex desiring women and female-born transgender persons have been much less visible within institutional activism in eastern India for complex reasons, including the lack of HIV/AIDS control funding for women (except female sex workers) which often economically facilitates institutional queer/ LGBT activism: an exclusion that deserves separate treatment elsewhere, beyond this token mention.

citizenship, the movement displays prominent tendencies to seek to pedagogically assimilate lower class groups into norms of civility and respectability as inadequate subjects who need to be trained in order to become worthy of rights, evidencing the contemporary iterations of a long history of upper caste/class reformist endeavours to “recast” subordinate groups within hegemonic constructions of national identity or culture. As suggested in the equation between gaining social equality and acting respectably in Akash’s comment above, abstract political ideas of civic equality and exchange are expressed through particular cultural ideas of respectability, demonstrating convergences between regulatory ideals of political and cultural citizenship that restrict lower class participation in civil society.

II. CIVIL VS. POLITICAL SOCIETY?

As I will describe, these politico-cultural convergences create a structural rift between those relatively privileged subjects who may claim equal participation in both civic and cultural realms (usually middle class LGBT activists), and those who do not gain the position of full/proper citizens but rather become positioned as recipients of welfare and training provided by middle class-led NGOs, particularly as ‘target groups’ or low-tier staff in HIV/AIDS prevention interventions undertaken by many (though not all) NGOs. This rift may seem analogous to Partha Chatterjee’s distinction between civil society and ‘political society’, the first being the domain of equal citizenship entitled to a stable set of constitutional rights, the second the sphere of both welfare and regulation/surveillance of excluded sections through governmental technologies. According to Chatterjee, “civil society” in postcolonial nations is restricted to the urban middle classes, and aspires to be an “orderly zone” of law and rights in congruence with “normative models of bourgeois civil society.” It is both “sequestered” from and threatened by the messy practices of “political society,” where

20. Grants for HIV/AIDS prevention from the Indian state and foreign or multilateral donors is a major source of funding for both larger national NGOs like the HumSafar Trust or the Naz Foundation International and smaller community-based organisations (CBOs) working with ‘sexual minorities,’ see Akshay Khanna, Taming of the Shrewd ‘Meyeli Chhele’: A Political Economy of Development’s Sexual Subject, 52 (1) DEVELOPMENT 47 (2009) (for a critical analysis of this ‘HIV/AIDS industry.’).
different subaltern groups negotiate their demands through “temporary, contextual and unstable arrangements” with governmental power.23

However, I will deploy an ethnographic analysis24 of the movement for 'sexual minority' rights to suggest that both the 'real' spatial boundary and the conceptual distinction between civil and political society may be subject to contestation rather than marking the separation of neatly “sequestered” domains.25 NGOs advocating for 'sexual minorities' invoke constitutional rights to enter mainstream civil society and in turn seek to regulate the participation of lower class 'target groups' in this expanded civic space – a contradictory dynamic that cannot prevent further challenges from below. Such challenges often expose the lie of civic order and its disavowed moments of contingency, instability and excess. In the following sections, I elaborate this process with reference to my ethnographic fieldwork as a participant-observer in several organisations associated with 'sexual minorities' in West Bengal between 2007 and 2011.26 The location of the ethnography is prompted by my familiarity with the Bengal region as a native speaker of Bangla and by the access afforded by my gradual inclusion over the years as a friend and community member in both middle and lower class contexts. West Bengal also provides an appropriate site because of its early growth of an institutionalised LGBT movement (including India's first pride walk in Kolkata in 1999), its links with the broader national LGBT movement, and the expansion of NGOs across non-metropolitan and metropolitan areas, making for contact across socio-economic and geographic locations.27 While I approach mainstream discourses of citizenship operative at the national level through media analysis, I analyse forms of political expression and dissent in West Bengal such as pride walks and musical/ dance performances to provide a regionally situated example of how excluded sections negotiate or challenge the civil/ uncivil distinction that polices the boundaries of civil society. Although the ethnographic analysis is specific to West Bengal, I contend that there are parallels with broader national trends which I indicate at several points within the article in order to suggest the larger context and scope of the arguments.

23. Id.
25. See Partha Chatterjee, Lineages of Political Society: Studies in Postcolonial Democracy 90-93 (2010) (In response to criticisms of the civil/ political society binarism, Chatterjee's more recent work acknowledges overlaps between modes of political engagement in these two spheres, but does not provide any empirical analysis of how the distinction itself might be contested.).
27. For a chronological account of the institutional movement in West Bengal, see Sherry Joseph, Social Work Practice and Men Who Have Sex with Men 99-100 (2005).
In the third section, I demonstrate how contemporary Indian civil society within which the movement aspires for inclusion simultaneously negotiates cultural-nationalist formulations of the ethically responsible citizen and the transnational figure of the citizen-consumer, resulting in a complex (and at times conflicting) ethos of civility and citizenship. This challenges the conceptual abstraction of civil society as an ordered domain of civic interactions actualising ideals of liberal democracy and citizenship and shows how these norms are inevitably entangled in elite (and contestable) conceptions of proper civility and (trans) national culture. As feminist critiques and revisionist historiography have shown, the “distinctive culture of civil society” emerged in Europe with associated ethos and styles of public behaviour that drew from and furthered bourgeois and male dominance. Thus, rather than comprising an external disorderly domain such as ‘political society’, contingent political negotiations and claims by privileged subjects were internal to the constitution of normative forms of civility and citizenship from their moment of emergence. Further, the putatively rational discourse of civility is profoundly gendered and contingent upon a disavowal of feminine excess and irrationality.

In the fourth section, I examine how disparate tendencies within the dominant culture of civil society, while contradictory in themselves, unite to delegitimise certain subjects from citizenship – especially those identified with disreputability, irrationality, or aggression – exacerbating forms of stigma and fuelling identitarian divides within minoritised communities. On the other side of such exclusion, forms of middle class cultural expression, such as specific genres of music and dance, are used to assimilate and include unruly subjects through a pedagogical process of disciplining and containment.

The fifth section studies how subaltern encroachments and appropriations continually challenge the boundaries of civil society, interrupting the restricted spaces of civility and broadening its permitted ethos by mixing ‘high’ and ‘low’ culture. Again, musical and dance performances become a crucial site of these crossings and mediations. As Bourdieu argues through his influential sociology of culture, media of cultural expression such as music index class and social position and can play crucial roles in the struggle over cultural capital and social

29. Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, in Habermas and the Public Sphere (Craig Calhoun ed.,1992); Joan Landes, Women and the Public Sphere in the Age of the French Revolution 2-4 (1988).
mobility.\textsuperscript{30} I investigate how contestations and crossovers in the realm of 'culture' might reclaim models of equality and citizenship beyond middle class civil society spaces and permit situated demands far beyond the 'original' provenance of the liberal political tradition.

Before moving on, a note on categories of identification might be useful. The cross-cultural emergence and adaptations of modern identity-based conceptions of sexuality have inspired complex academic debates that are beyond the scope of this article.\textsuperscript{31} Given the transnational circulation of the term 'gay' in the media and the urban emergence of visible gay and lesbian-identified communities, the Indian movement commonly uses the 'LGBT' schema of identities for civic activism and media representation directed at middle class audiences.\textsuperscript{32} 'Queer' too is increasingly used in the sense of an umbrella term for LGBT identities\textsuperscript{33} – even though, academically, 'queer' may be deployed as a critiques of identity-based politics.\textsuperscript{34} However, many NGOs active in LGBT activism also undertake state and donor-funded interventions for sexual health and human rights which interact with and draw lower-level staff from lower class and non-metropolitan communities that, as I observed during fieldwork, may not identify as 'gay' and are usually even less familiar with 'queer'. NGOs draw upon transnational HIV/ AIDS prevention discourse and use 'sexual minorities', MSM (men who have sex with men) and TG (transgender), rather than LGBT, to denote 'target groups' and staff in HIV/ AIDS interventions.\textsuperscript{35} MSM and TG include and subordinate more 'vernacular' terms like kothi and hijra, with hijras being usually categorised as a 'third gender' TG group, organised into marginalised clans, while kothis are defined as feminine MSM who are more scattered within mainstream society.\textsuperscript{36} For the purposes of this

\textsuperscript{31} For an overview of these debates, see Peter Jackson, Capitalism and Global Queering: National Markets, Parallels among Sexual Cultures, and Multiple Queer Modernities, 15 (3) GLQ: A JOURNAL OF LESBIAN & GAY STUD. 357, 360 (2009).
\textsuperscript{32} See Abhay Deol Extends Support to LGBT Community, TIMES OF INDIA, 2 Mar 2012 (For example, the listserv lgbt-india@yahoogroups.com is the primary national online forum for activist discussion. The media too increasingly uses LGBT as an umbrella term.).
\textsuperscript{36} Id.
article, it would be useful to remember that cartographies of identity are unstable and there are institutional differences on whether terms like *kothi* should be classified as feminine males (MSM) or transgender women (TG), as described in the second section. Analytically, lower class gender/sexual difference may be understood as 'queer' in as much as they defy identitarian boundaries between categories like MSM and TG, even though the word 'queer' is largely absent in such contexts. All terms should be read as if in scare quotes, denoting unstable formations of identity rather than essentialised or historically unchanging subject positions.

III. **THE JUNCTURE OF LIBERALISATION: CONTESTED ETHOS OF CIVILITY AND CITIZENSHIP**

The story I tell here begins in the 1990s, a complex period in the history of independent India, marked simultaneously by socio-economic liberalisation/globalisation and the political rise of Hindu right-wing nationalism. As Arvind Rajagopal has argued, these are not simply contradictory tendencies but rather there is an “elective affinity” between consumerist liberalisation and Hindu nationalism, which utilised commoditised forms of mass culture for propaganda purposes and monetary support from diasporic Indians in the US and the UK.

However, one contested locus where this “elective affinity” is ruptured seems to be non-normative genders and sexualities. This decade was marked by visible representations of same-sex desiring and gender variant subjects in the media, even as dominant discourses of national identity attacked such representations as foreign to 'Indian culture' and even threatening to national sovereignty and security. The most publicised instance would be the 1998-99 controversy over *Fire*, a feature film depicting a sexual relationship between two

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housewives, when the Hindu right wing entered the fray with virulent proclamations of lesbianism as a western import, not only un-Indian but also corrupting Indian womanhood and family values. Such discourses show how patriarchal and upper-caste definitions of gendered familial order become constitutive of normative definitions of 'Indian culture' and national identity – thus forming, in Lauren Berlant's terms, an "intimate core" of national culture and citizenship. However, there has also been a wave of 'positive' media coverage in multiple languages, decrying these conservative trends and foregrounding, even celebrating, emergent gay and lesbian subjects and subcultures as signs of progress connected with the trajectory of economic liberalisation and cultural globalisation, here seen as desirable. For instance, a characteristic article in the Kolkata newspaper The Telegraph cites a LGBT pride walk in 2005 as evidence of changing social mores and states:

One doesn't have to look too far for the reasons for this change in attitudes. The City of Joy itself is changing. Shopping malls [...] have mushroomed [...] satellite television and multiplexes have added spice to life [...] Call centres have engaged a brigade of young workers – (who) are making money and willing to spend it.

In response to these contradictory currents, dominant LGBT activism has sought equal status within the national citizenry through a double move – both contesting and re-claiming the “intimate core” of national culture and identity on the one hand and evoking transnationally circulating models of liberal democracy and metropolitan culture on the other. For example, in response to the Fire controversy, lesbian activists highlighted the historical tolerance of same-sex desire within 'Indian culture', breaking down a monolithic and conservative view of Indian identity but also sometimes deploying essentialisms of their own – like a nostalgic idealisation of a libertarian Hindu antiquity or of the purported pre-colonial tolerance of different sexualities. Since then, a common strategy has been to cite revisionist readings of pre-colonial India and to depict homophobia as an alien imposition of Victorian legislators. While

\[widens protests, Agence France Presse, December 3, 1999, available at http://www.sawnet.org/news/fire.html (These press reports provide an overview of the controversy.).\]

42. Id.
44. Vishnupriya Sengupta, Oh! Calcutta!, The Telegraph, August 7, 2005.
45. Kapur, supra note 39, at 358.
46. See Human Rights Watch, This Alien Legacy: The Origin of “Sodomy” Laws in British
undeniably important in claiming silenced or marginalised histories, scholars have noted how such claims are often articulated with reference to high or 'classical' culture and can be Hindu-normative, sometimes even attributing the historical rise of homophobic attitudes to Muslim invasions and thus mirroring a classic trope of Hindu-right nationalism. For instance, an exhibition of photographs of temple art/ sculpture by Giti Thadani at the 2009 Annual Calcutta LGBT Film & Video Festival was advertised thus: “Homosexuality is very much part and parcel of Indic histories [...] these histories have been ignored, ravaged by different monotheistic invasions.” Contradictorily, homophobia is also depicted as an anachronistic and embarrassing reminder of conservative Indian tradition compared to 'advanced' societies and events of public activism such as pride marches and film festivals are indexed as ways to catch up with Western levels of equality and acceptance. Thus, contemporary LGBT activism can be placed within a simultaneously national and transnational moment, evidencing overlaps of cultural nationalism and aspirational cosmopolitanism symptomatic of the larger situation of the Indian middle classes.

This complex moment corresponds to an ideological juncture between 'old' and 'new' modes of middle class citizenship: the post-independence Nehruvian citizen who is oriented towards civil service, austerity and moral responsibility to the nation, and the rising citizen-figure who fulfils the social contract by virtue of being a consumer driving the economy and thus need not shy away from excess. As Leela Fernandes and William Mazzarella point out, these are less accurate descriptors of middle class reality, and more “idealized images” or “normative positions” that mark out the contested contours of civic discourse. Even as commentators

47. Akshay Khanna, Us 'Sexuality Types': A Critical Engagement with the Postcoloniality of Sexuality, in The Phobic and the Erotic: The Politics of Sexualities in Contemporary India 159, 177 (Brinda Bose & Subhabrata Bhattacharyya eds., 2007).
50. Phil Hazlewood, India gets its first mainstream gay film festival, AFP, Apr. 7, 2010 (“Organisers [are] hailing it as a sign of progress after years of prejudice and discrimination... Such events have been an established part of the cultural scene in Western countries for many years but in socially conservative India [...] it has been largely an underground activity.”).
52. On “idealized images” of the new middle class, see Leela Fernandes, Restructuring the Middle Class in Liberalizing India, 20 (1 -2) Comp. Stud. S. Asia Afr. & Middle E 88 (2000); Leela
like Praful Bidwai have lamented the alleged decline of the former moment of civic culture, the English-language media has increasingly celebrated the rise of the latter. These contrasting pulls are diffracted onto public forms of LGBT activism.

On one hand, there may be an ambitious rhetoric of humanism and moral struggle for a better society, including references to nationalist songs from the pre-independence period in the case of the Kolkata pride walk. This idea of an ethically engaged citizenship is cross-fertilised with discourses of universal human rights and transnational civil society shared through NGO and activist 'advocacy networks' across the world. In the Bengali context, this is manifested in the close association between the elevated rhetoric of monushotto and manobota (humanity/ human dignity) drawn from pre-independence humanism (including both cultural nationalist and anti-nationalist/ cosmopolitan strains within the literary/ cultural legacies of the 'Bengal Renaissance'), and manobadhikar, a more contemporary transnational formulation from the English 'human rights' framework, disseminated through NGO networks, UN agencies, and state discourses. The coalitional slogan for the pride walk through 2007-2010, Chai manusher adhikar niye banchte, or 'We want to live with the rights/dignity of the human', references both these spheres of influence. As a phrase, manusher adhikar – 'rights of the human'/ 'human rights' – has an exact precedent in the poetry of Rabindranath Tagore (1861-1941), arguably the central figure in Bengali literary/ cultural production in the first half of the twentieth century. Tagore's 1900 poem Apoman (Insult/ Disgrace) protests centuries of denial of 'manusher adhikar' to the oppressed and outcaste sections of Indian society and indicts dominant culture for this millennial disgrace against humanity, concluding with a “programmatic [...] call to all” for social transformation. As both cultural capital and political strategy, Tagore's poetry and music have been appropriated and frequently performed in pride marches and
associated cultural programs.\(^{58}\) But the phrase 'manusher adhikar' also marks the insertion of this Bengali humanist inheritance into NGO and state technologies of governmental power, directed at the welfare and uplift of excluded sections under the aegis of middle class leaders – as noted at the outset of this paper, the pride march is also a space where lower class/ caste sections are sought to be educated into civic norms both to maintain the “dignity of the walk” and to “establish the rights of community people,”\(^ {59}\) claimed within the transnational rubric of manobadhikar ('human rights'). Thus, the evocation of cultural-nationalist ideals might lead to pedagogical disciplining into being respectable, dignified and responsible citizens.

On the other hand, there is also the desire to keep up with transnational patterns of conspicuous consumption and display that have become a hallmark of metropolitan gay/ lesbian culture. These are evidenced through events such as the 'Pink Rupee Party' organised by the Delhi-based queer group \(\text{Nigah}\) in the summer of 2009\(^ {60}\) – a fundraising event preceding a week-long 'QueerFest' comprising film screenings, performances, workshops, etc. that asked members of the 'queer' community to attend a dance party at a prominent city pub for a donation of Rs. 400: “The pride of Nigah QueerFest is that it is funded by the Queer Community [...] The last 2 years have been a great success with your love and support [...] Yet again, we invite you to the fundraiser party to show your support and dance the night away with us.”\(^ {61}\) While the usage of the term 'queer' immediately indexes the class privilege and discursive access of \(\text{Nigah}\) and its constituency (as distinct from many organisations in West Bengal working with \(\text{kothi/hijra}\) subcultures and communities), similar events in pubs and dance clubs have been occasionally undertaken by NGOs in Kolkata with the agenda of fundraising and/ or creating 'safe spaces'.\(^ {62}\) Such events draw from and celebrate the rising economic presence and visibility of the big city gay/ lesbian consumer and their purported ability to contribute to social transformation (you can “show your support”) without necessitating further ethical or political commitment (just “dance the night away with

\(^{58}\) See Part V of this article.

\(^{59}\) \text{supra} note 11.


\(^{61}\) \text{Id.}

\(^{62}\) For example, there was a combined gala by \(\text{Pratay}\) and \(\text{Sappho}\) at the conclusion of their own film festival in 2009, similar to \(\text{Nigah}\)'s initiative in Delhi. Fund-raising parties were also organised prior to the Kolkata Rainbow Pride Week in July 2011.
us”). This fits in with a lot of media coverage that maps gay/lesbian visibility onto the cutting-edge of urban lifestyle and consumerism, which is celebrated both for rejuvenating the economy on the global stage and for being gender/sexually progressive.\(^63\) While spaces like parties do permit the flaunting of queer difference to an extent, only limited sections can have access to these spaces, which leads to another kind of containment and exclusion compared to the aforementioned national/cultural mode. Thus, as I argue in the subsequent section, despite their apparent contradiction, both of these normative modes of claiming citizenship – cultural and nationalist ideals of citizenship and a westward-looking consumerism and cosmopolitanism – might function jointly to stigmatise and/or discipline lower class public resistances.

These conflicting modes of citizenship demonstrate that while middle class LGBT activism does interrupt civil society, it can also get assimilated into the contradictory moments of its dominant ethos, based on the contingent nature of upper/middle class manoeuvres within structures of power: balancing the historical hegemonic aspirations of a nationalist avant-garde with a newer economic leadership related to changing labour patterns and occupations (such as the rise of information technology and service industries) and the concomitant rise in consuming ability for the upper/middle classes.\(^64\) Just as its 'originary' moment in Europe, the domain of proper citizenship hardly emerges as abstract or neutral laws of rational communication and arbitration of interests,\(^65\) but is established through changing upper/middle class strategies of establishing their dominance, as manifested in relatively elite forms and spaces of cultural expression.\(^66\)

IV. PEDAGOGY AND CONTAINMENT: CONFRONTING LOWER CLASS SUBJECTS

However fraught and conflicted in themselves, these various modalities of middle class citizenship might be consolidated through attempts to guard the putative “orderly zones of civil society”\(^67\) from encroachment by disruptive lower class caste sections. While this could take many

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64. Fernandes, supra note 54, at 92.
65. Fraser, supra note 28, at 59.
66. Fernandes, supra note 54, at 92.
67. Chatterjee, supra note 22, at 62.
forms, perhaps the most direct and visible manifestation is the spatial regulation of urban modernity. As William Mazzarella contends via Dipesh Chakrabarty and Sudipta Kaviraj:

Indeed, a zone in which the 'new' and the 'old' middle classes increasingly appear to find common cause is in an urban politics of 'livability' – a concern, above all, with neighbourhood order, cleanliness, and decency – a politics that loudly decries the lack of 'civility' that mars the modernity of the third world metropolis.68

The resultant criminalisation of groups such as squatters, slum-dwellers and street-hawkers is usually achieved through the invocation of property rights, which foregrounds their illegality as encroachers while conveniently eliding their structural necessity within informal urban economies69 - and as one might extend the argument, such strategies of positing disruptive 'others' to urban modernity permit a tentative consolidation of middle class civility through the externalisation of disorder onto disruptive 'others'.

Similar dynamics of exclusion are evident at the intersection of class/caste and gender/sexual marginality as well. In the media discourse, the more visible lower class sections such as the community of hijras (often inaccurately termed 'eunuchs' in the media) are often targeted for their occupations of begging and 'extortion' and seen as violators of civic space in marked contrast with the token celebration of middle class les-bi-gay subjects as markers of transforming urban culture. In typical reports, we read, “Eunuchs (sic) [...] have been causing great harassment to people, barging into homes and extorting money, reports our special correspondent from Agartala”70 or “They gatecrash weddings and childbirths, sing lewd songs and make extortion demands.”71 Here, it merits emphasis that the nominal inclusion of the hijras through an invocation of constitutional rights serves to simultaneously condemn them as disruptive of the same model of formal equality. That is to say, on one hand, they may be acknowledged as Indian citizens, deserving rights as such: “If eunuchs are participating members of a polity, there is no reason why they should need to 'adopt' either of the official genders [...] [there is a] need to rethink the boundaries of 'official' society, whether in the census figures or in electoral policy.”72 But by the same token of equal citizenship, hijra practices like chhalla or badhai (ritualised demands for money during events like childbirth or weddings, or in public spaces like trains, in return for blessings) are

likened to extortion or encroachment into private middle class spaces\textsuperscript{73} and condemned as disruptive, aggressive or (at best) comical.

What structural imperatives or motivations might prompt such widespread and anxious condemnation and/ or trivialisation of \textit{hijras}? As Gayatri Reddy argues in her ethnography of \textit{kothis} and \textit{hijras} in South India, \textit{hijras} are often pejoratively characterised by middle class society through ascriptions of lack – firstly, by the literalised lack of the procreative phallus as transvestites who may be castrated,\textsuperscript{74} (evident in pejorative constructions of \textit{hijras} as 'eunuchs' which ignore other aspects of \textit{hijra} identities), and, moreover, by a lack of shame (\textit{sharam}) and/ or respectability.\textsuperscript{75} Such ascriptions, of course, serve to naturalise and maintain gender/sexual and class/caste order and attendant hierarchies. Yet in recent years, \textit{hijras} have utilised such constructions of themselves (as outside of the gendered/sexualised familial order, and 'lacking' class/caste position and concomitant worldly attachments) to gain visibility in the public sphere, especially through contesting electoral politics.\textsuperscript{76}

While \textit{hijras} have proclaimed that such 'lacks' render them less susceptible to corruption and nepotism than more socially mainstream politicians,\textsuperscript{77} Reddy cautions that such a strategy may only serve to "remarginalise" them by reinscribing hegemonic frameworks of marginalisation.\textsuperscript{78} While the caveat is well taken, such a neat containment within a hegemonic framework would not serve to explain widespread anxieties about \textit{hijra} presence and visibility. Rather, there is also a different dynamic at play in \textit{hijra} assertions – \textit{hijras} may inversely ascribe their 'lack' to broader structures of politics and society. \textit{Hijras} may be seen as marking the failure of normative forms of citizenship and politics by ascribing their political ascent to the \textit{Kaliyug} of postcolonial modernity (in Hindu cosmic chronologies, \textit{Kaliyug} is the current era of decadence).\textsuperscript{79}

In re-ascribing their purported 'impotence' to corrupt politicians and failing political structures, Lawrence Cohen argues that "\textit{Hijra} leaders

\textsuperscript{73} See Gayatri Reddy, \textit{With respect to sex: Negotiating Hijra identity in South India} 2 (2005) (Many \textit{hijras} undertake the occupation of blessing newborn children in return for money and gifts, and are typically cross-dressed on such occasions.).

\textsuperscript{74} Gayatri Reddy, \textit{Geographies of Contagion: Hijras, Kothis and the Politics of Sexual Marginality in Hyderabad}, 12 (3) \textit{Anthropology & Medicine} 257 (2005).


\textsuperscript{76} Id. at 165.

\textsuperscript{77} Lawrence Cohen, \textit{The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification, in Sex in Development: Science, Sexuality and Morality in Global Perspective} 278 (V. Adams & S. L. Pig eds., 2005); Reddy, supra note 75, at 167.

\textsuperscript{78} Reddy, supra note 75, at 172.

\textsuperscript{79} Id. at 163.
entertain a reflexive practice of citizenship in which hijras uniquely address the problem of a political lack at the core of postcolonial nationalism.”80 We may extend Cohen's point to observe how this plays out beyond the arena of electoral politics and critiques civility itself. Instead of being bound by a formal definition of rights governing civic and economic exchange, hijras and some kothis may perform their 'lack' as an entitlement to special privileges – Cohen notes how hijras may describe their “wound” (of castration) as an “all-India pass” entitling them to ticketless travel on public transport.81 Through their claim of 'lack' as an entitlement to special concessions, hijras challenge both models of formal equality and governmental technologies that seek to conflate the subject of economic interest and productivity with that of juridical rights:82 even though their agency is severely circumscribed by their interstitial location and structural dependence within the same broader order.

Further, as I observed during my fieldwork, both hijras and kothis might employ provocative and flamboyant displays of gender/sexual difference as a response to situations of public harassment or abuse in ways that disrupt liberal models of equality and rights. In scattered conversations over the course of fieldwork, several community members have described to me how assertive non-verbal gestures such as the thikri (a loud clap associated with hijras and also used by some kothis), or the threat to reveal their genitalia (or their castrated 'lack') by lifting up their saris, function as 'weapons' (astro) to produce an affective response of fear and shock in mainstream audiences and permit escape from situations of public violence better than just a verbal defense would. Similar assertions of campy or flamboyant (bhel) behaviour have been recorded in Anirban Ghosh's *Diaries of Transformation*, a documentary film on lower class gender variant communities in Kolkata, where Bini, one of the protagonists, claims:

> Our clap is our weapon [...] without the clap even if we shake our hips [i.e. walk in a flamboyantly feminine manner] people don't care [...] when we clap people get intimidated and don't mess with us. The clap and the hair [...] the longer our hair, the more people respect and fear us.83

81. *Id.*
83. Anirban Ghosh, *Diaries of Transformation*, Directed & Produced by Anirban Ghosh,
In this strategically aggressive use of non-verbal affective 'weapons' that foreground gender/sexual difference, *kothis* and *hijras* may be read as challenging liberal models of equal citizenship that advocate the rational arbitration of conflict based on juridically defined rights to ensure a measured equality between citizens in civil society.  

Given that the movement is precisely about claiming space within civil society through the discourse of equal rights, this translates into a deep discomfort with *hijra* and *kothi* performances of gender/sexual difference and resistance. At the same time, the institutional movement in West Bengal (and India, more broadly) is heavily dependent on the low-tier involvement and support of such sections: especially for the crucial (and underpaid) labour of outreach work and peer education within state and donor-funded HIV/AIDS intervention programmes of non-governmental and community-based organisations (NGOs and CBOs).  

Besides acting as staff in HIV/AIDS interventions, lower class communities also serve to shore up requisite sexual minority populations to show as 'target groups' to the state and foreign donors and to provide mass participation in civic events like pride walks. Thus, rather than outright exclusion, there are tendencies within the institutional movement that seek to include them within civil society through pedagogical training into citizenship. The marginal *hijras* must be weaned away from traditional occupations such as begging and public soliciting for money (commonly described in terms of extortion/aggression, as we saw above) through IGPs or 'Income Generation Programmes' that aim to provide 'self-sufficiency' through training in specialised labour and skills. IGPs are a staple but often unfulfilled programme objective with many NGOs and CBOs – as Akash in Berhampore complained to me, *hijras* are often resistant to such well-intentioned activist efforts at mainstreaming: “M. [a...
well known transgender activist] had gone to hijra colonies to persuade them to take up occupations like making bidis [hand-made cigars], but they beat her up and sent her away.”

For sections like kothis who occupy more intermediate positions vis-à-vis the 'mainstream', there is a condemnation and desired containment of excessive or aggressively campy behaviours (collectively called bhel and bila). This is especially evident during pride meetings where there have been repeated complaints against disruptive practices such as thikri. By 2007, this led to a consensus on the ban of this particular gesture, accompanied by greater self-policing of excessive flamboyance, public cruising, etc. through appointed members of the 'community'. This extends the governmental technologies of 'behaviour change communication' (BCC) and 'information, education, communication' (IEC) used in targeted interventions for HIV/AIDS control – 'target groups' are to be educated not just on health issues such as safer sex (the standard functions of BCC and IEC), but also on civic behavior during public events. The complex hierarchical structure of peer educators, community advocates, shadow leaders, outreach workers, etc., established by NGOs within the 'community' in the process of administering BCC/IEC, is utilised for this extended purpose as well. In 2007, community members occupying relatively senior administrative ranks were designated to police the walk and control errant behavior. People who used thikri in response to perceived taunts from surrounding crowds or used 'vulgar' or foul language, were disciplined by senior community members. Such disciplining finds support in the attitudes of middle class community members and allies. As a local celebrity and LGBT icon, the singer Siddharta, put it in an interview to a community magazine:

It's great to express oneself, and there is nothing objectionable should someone choose to cross-dress, for that is their personal gender choice; however, one shouldn't do it so loudly that it trivialises the issues of the movement.

Thus, the activist demand for freedom of gender/sexual expression is simultaneously raised and contained in terms of the constitutional rights to privacy (“personal gender choice”) linked to the modern conception of an interiorised gender/sexual personhood that does not challenge the broader public ordering of intimacy and gender (“The state has no

business in the bedrooms of the nation”89). Through policing gender/sexual excess, prominent tendencies within the movement conform to the ‘intimate core’ of national culture and citizenship (i.e. sexual expression should be familial, private, and restrained if it is not to be too ‘loud’ and disruptive of civic exchange and serious communication – an injunction especially applied to women, and to feminised subject positions like *hijra* or *kothi*).

At the same time, in tension with the aforementioned tendency of assimilation to extant ideals of cultural citizenship, certain modes of difference, display and flamboyance might be valorised in terms of aspirational ideals of metropolitan (particularly ‘western’) gender/sexual progressivism. This is illustrated by the *Hindustan Times* article cited in the opening paragraph of this essay, which merits more detailed analysis:

> The LGBT community in Delhi got together at Jantar Mantar on Friday evening to mark the first anniversary of the landmark court judgment decriminalising consensual gay sex. The party that began […] with loads of cheerful slogan shouting by gay rights supporters, ended a tad bit sourly when […] some decided to indulge in inappropriate behaviour. Dancing in the middle of the road, a few transgenders started lifting their skirts and shouting swear words — enough to embarrass those of their own community. “They are spoiling the moment’s sanctity,” said a bystander. Looking visibly disturbed, one participant […] said, “This kind of behaviour at a place like Jantar Mantar is so unacceptable.” “The gay community […] has to show whether it can behave responsibly,” says Ashok Row Kavi, India’s leading gay rights activist […] Prior to the ruckus, the evening had its fair share of cheering, singing and dancing, in good fun. Men kissed men. Women hugged women […] Some participants were wearing t-shirts bearing provocative images (two London Bobbies kissing), or words (‘Unf**k the world’). “We have to go a very long way to convince the mainstream society that we are equal citizens with equal rights,” said Kavi. “[…] We must learn how to use our rights sensibly.”90

While the middle class visibilisation of queer difference with references to metropolitan LGBT culture (e.g. “London Bobbies kissing” and “unfuck the world”) is “provocative” and “in good fun,” acts typical to *hijra* and *kothi* modes of public visibility (“lifting up skirts” while dancing)

89. Pierre Elliott Trudeau, Canadian Minister of Justice, Remark to Newsmen, Ottawa, Canada, (December 21, 1967) reported in *The Globe*, Toronto, December 22, 1967 (He was commenting on the government’s proposal to overhaul Canadian criminal law, giving new recognition to individual rights in several areas, including sexual behaviour.).

serve to “embarrass” the “LGBT community” and the reporter as its ally, both “marring the sanctity” of a monument of national culture (the Jantar Mantar), and interrupting the process of civic equalisation (“convinc[ing]mainstream society that we are equal citizens with equal rights”). At the same time, the valorisation of middle class 'provocation' speaks to the contradictions of the dominant LGBT evocations of cultural-national and political-civic citizenship, which must disrupt nationality and civility (through “provocative images [...] or words”) but not too much – establishing a delicate balance between normative culture and LGBT difference by precluding acts too aggressive, excessive or crass for middle class 'provocation'.

These tricky negotiations between claiming and disavowing dissidence feed into the formation of identitarian divides that seek to exclude or guard against unruly forms of gender/sexual variance. For instance, a group such as GayBombay, intended to form a safe space for gay-identified men, has repeatedly policed the borders of 'gay' by banishing actions such as cross-dressing ('drag') from its events: “Drag is a strict no-no. For the simple reason that though GayBombay doesn't mind drag, the places that host us do. There are also may be many attendees who will prefer being discreet [...] This is a discreet event being held as a clean, safe & social get-together of a non-sexual nature.”91 This seeks to establish a clear distinction between this “clean” and “discreet” gay space and more overtly transgender spaces/communities, even as the very need to have an explicit injunction against drag points to the anxiety-inducing overlaps between 'gay' and 'transgender'. These anxieties recur within non-metropolitan kothi subcultures and communities that have been mapped as both MSM and as transgender by different state and foreign agencies. The National AIDS Control Organisation maps kothi as feminine MSM – “males who show varying degrees of femininity,”92 while a consultation supported by the United Nations Development Programme (UNDP) in 2009 maps them as “the most common local identity” for transgenders, defining a male-born transgender as “one who is biologically male but loves to feel and see herself as a female.”93

As observed during my ethnographic fieldwork, kothi subcultures and communities encompass people inhabiting a wide spectrum of gender variance who are often sought to be classified into rigid identitarian

divisions that are fuelled by anxieties around gender/sexual and class/caste difference.

For example, when Akash’s organisation in the Berhampore region was awarded an HIV/AIDS control project under the rubric of ‘MSM’ in 2011, a senior community member suggested that now that they were officially an MSM organisation, those community members who were too bheli (campy, unruly) should either control themselves or stay out. Furthermore, such divides might be extended even within the ‘transgender’ category. For instance, Kalki Subhramaniam, a prominent South Indian transgender activist, authored a protest petition in November 2011 against a railway police force action in western India that rounded up poor hijras, in which she included the lines: “I know how some of the transpeople who go for begging behave in public. Not all. When will people stop generalising about us?”

Thus, even at the moment of protesting against transphobia, a division emerges between the innocent and victimised transgender and unruly trans-people who behave badly in public. Such anxieties inform a double split in identity – firstly, between MSM-gay and transgender, involving the distancing of MSM-gay-identified groups from public effeminacy or gender variance, and further, between civil and unruly transpersons. But as signalled by the ambivalent positioning of the kothi between MSM and transgender and the dangerous association between gayness and drag, many individuals can and do cross these divides, prompting the policing of identitarian boundaries.

However, such processes of division and exclusion are accompanied by simultaneous processes of inclusion and assimilation: especially the education of unruly community members (whether understood as MSM, kothi or transgender) into more disciplined and civil forms of expression and dissent. In the aforementioned context of pride rallies in Kolkata, senior activists led participants through pre-set slogans and iconic songs in the 2008 and 2009 walks. At designated points within the rally, activists sang inspirational songs ranging from the Bengali version of ‘We Shall Overcome’ to iconic nationalist-era songs such as Tagore’s Ekla chalo re (“If no one comes in answer to your call, walk alone!”). Everyone was encouraged to join in if they knew the words; at other moments, slogans were raised in a call-and-response fashion, reminiscent of mainstream political rallies with their multi-tiered hierarchy among party leaders and cadres.

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Beyond the specific case of pride walks, forms of middle class culture such as classical or 'fusion' dance, art songs and theatre come into play as safe and contained valves for gender/sexual expression, where the display of non-conformity need not interrupt the ethos of civility but rather find space within it. This is strikingly evident in an open letter in the spring 2008 issue of *Swikriti Patrika*, the magazine of Dum Dum Swikriti Society. Addressed to the broad 'community,' the letter struck a cautionary note about the behaviour of certain community members which, it predictably argued, was coming in the way of the struggle for acceptance and rights. It especially targeted *kothis* who adopted aspects of *hijra* subcultures:

Please remember, all our problems will not disappear only if Section 377 is revoked. When people come to truly understand the problems of *kothis*, only then the real purpose of our movement would be fulfilled. And to accomplish that task we need reason, education, skill, self-respect and the sense of humanity. Remember, certain strange behaviours employed by [some] *kothis* – such as doing bila or giving thikri in public spaces – is not seen in good light by even other *kothis*, let alone the mainstream.

The letter thus highlights the need for becoming proper economic and rights-bearing subjects by acquiring “reason, education, skill.” But not stopping there, the letter goes on to state that there is a lot of talent within the community which needs to be foregrounded: “I have seen that a lot of *kothis* tend to be very talented. Through their talent they can become exemplary for the rest of society [...] then they will truly take part in the struggle for rights.” Given that the author, Anirban, signs off as a *shongeet-shilpi* (musician), and is in real life a singer of both Hindustani (North Indian) classical and Tagore songs, it cannot be in doubt what kind of “talent” is referenced here. Anirban belongs to a small town, middle class, yet upwardly mobile family living on the outskirts of Berhampore, and has been active in the local CBO, Sangram, since its inception in 2006. Soon after his 'open letter' was published in the Kolkata magazine, he sought my help in writing an abstract for a paper to be presented at an international AIDS conference.

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95. A community based organisation (CBO) in Kolkata.
97. Id. at 3.
98. I use male-gendered pronouns for most ‘community’ members born male and socially designated as male, except when they are explicitly transgender-identified, e.g. *hijras* and some *kothis*. However, gender identity and presentation might be contextual and variable for the same person.
on how 'cultural' activities like music and dance could help in bringing together the community across class and behavioural splits: “As you know, here is a huge fissure between bheli (flamboyant, campy) kothis and rest of the kothi community,” he told me while we drafted the abstract. “But cultural programmes with music and dance can bring them together and can also be a space for awareness-raising and expression,” he continued (italicised words originally in English). Thus, as he argued in the abstract, these forms of cultural advocacy needed more attention from funding agencies and current targeted intervention programmes on health issues like safer sex were not enough.

Another activist in the same organisation, Asaf, is a professional Bharatnatyam dancer who organised a 'dance drama' on the broad theme of 'marginalisation' in 2007, a year before Anirban’s open letter. One evening during rehearsals, he told me: “Our dance is not going to have any depiction of vulgar taunting on the streets.” “Nor any kothis giving thikri in response to the taunting,” interjected another prospective performer. “Yes,” replied Asaf, “we are going to show everything but in a much more abstract manner” (italicised word in English). He continued, “else, it looks distasteful, of low standard [nimno-maner in Bengali].” Artistic 'abstraction' here signals a safe distance from the actual on-street resistance undertaken by many kothis and hijras, which is seen as distasteful and vulgar, even though the theme was the marginalisation of these very subjects. Can one also sense here the necessary abstraction of intimate and embodied experience in order to ascend to the proper political culture of the liberal public sphere? Asaf's 'dance drama' aspired to use abstract art to convey serious socio-political meaning without the vulgarity of embodied resistances – “The paintings of M.F. Hussain might be difficult to understand, but don't they mean anything?” he asked. Here, different senses of abstraction that characterise civil society and high art become functionally conflated as modes of distinction from 'low standards.'

For the music, Asaf chose a lushly orchestrated track from the film Guru by the noted composer A R Rahman, Jaage Hain. He said: “It shows a process of awakening, of coming together” (of the marginalised). In


100. For the abstract rationality of civil society as a mode of distinction, see Fraser, supra note 99, at 60; For art as social distinction, see Bourdieu, supra note 30, at 2.
the film, the song is a rousing paean to the efforts of an industrialist to build an entrepreneurial empire; a much celebrated inspirational figure for the 'new' middle classes. As the music developed, the dancers – initially scattered and debilitated through unspecified traumatic experiences – recovered and gathered together, hand in hand. Into this veritable *bildungsroman* of the awakening political subject – set to the theme song of an icon of middle class aspiration – Asaf recruited some of the most *bheli* (flamboyant) *kothis* of the area. One of the most notorious is Makdul, who identifies as both transgender and *kothi*, and who has been frequently upbraided for her inclination towards provocative public cruising, cross-dressing, and aggressive response to harassment or abuse. During the rehearsal, she told me: “I don’t know why it is that *kothis* take to dancing so well [...] If I can dance, I don’t want anything else.” Even as she spoke and Asaf looked on, she illustrated the pleasures of dancing by performing *mudras* (ornamental gestures) through graceful hand movements, reminiscent not so much of actual 'classical' (*Bharatnatyam*) gestures as their popularised versions in Hindi film dances. Clearly, this was a permissible forum for 'feminine' gender expression and flamboyance. Thus, the containment of potentially provocative or disruptive embodiments becomes a part of the pedagogical reform of gender/sexual subalterns into cultural citizenship.

V. **Re-claiming Civility: Contestation and Reinvention**

However, *kothi*/*hijra* sections might resist both their confinement into a sequestered sphere of governmentality (Chatterjee's 'political society'\(^{103}\)) as 'target groups' of disease-control and their pedagogical assimilation into civil society by contesting and contributing to the very definitions of civility in their claims to citizenship. This is not to argue for a voluntarist or entirely self-conscious idea of their agency, but rather their potentially productive location within structural contradictions and possibilities. As discussed above, cultural and musical performances become important to these processes of contestation and reinvention.

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101. Mani Ratnam, *Guru*, 2007 (The song is used in the climactic scene of the film, with the industrialist celebrating national leadership and pledging international success to a stadium-full of staff, family and admirers.).

102. See *Santhi*, *supra* note 93, at 16 (*Kothi* has been mapped as a sub-category of both MSM and transgender, terms which have percolated into communities.).

103. See *Michel Foucault*, *Security, Territory, Population: Lectures at the College de France 1977-1978* 108 (Graham Burchell trans., 2007) (1997); Chatterjee, *supra* note 22, at 57 (While Foucault uses the term 'governmentality' to designate the entire complex of institutional apparatuses and knowledges that characterise the modern administrative state’s relation with the population, Chatterjee posits a separation between rights-bearing citizens in ‘civil society’ and subjects of governmental welfare/ control.).
In the first place, it doesn't take long to perceive the contradictions of the leadership of the 'new' middle class, which contradictorily balances the disciplining of lower class visibility, the performance of class distinction through consumption and display, and the provocative visibilisation of LGBT difference. The Berhampore activist Akash, while himself censorious of kothi bhel, was struck by what he perceived as the double standards of Kolkata leaders while attending NGO meetings in the city. Of one activist – who had been quite active in the censoring of thikri during the 2006 and 2007 prides – he said: “Sujit was so distracted with his make-up during the general meeting; about half an hour into it he took out his purse with a flourish, and started doing his face, showing off his fancy lipstick [...] what bhel!” Sujit's not-so-subtle marker of class distinction (expensive cosmetics) is thus reduced to merely another form of bhel – thus catching the hypocritical disavowal within middle class attempts to discipline kothi camp. (This gesture of re-ascribing bhel is also reminiscent of the re-ascription by hijras of their putative 'lack' onto broader structures of civil society and politics).

If this is a minute everyday event, this dynamic of re-ascription and reversal was played out on a much bigger scale during the recent rebellion of some lower-rung transgender-identified activists against the leaders of AlterNet Bengal (name changed), a nodal NGO within the organisational networks of West Bengal. Amidst broad allegations of monetary corruption, hierarchy, lack of transparency, etc., there was a telling attack on how one of the leaders had allegedly indulged in lavish “drink parties” on grant money. Even as the accused activist scoffed at the unidiomatic use of English – "I am unable to understand what 'drink party' means" – the imputation of profligate decadence and excess crystallised around “drink” is unmistakable.¹⁰⁴ In response, the accused activist made public a rigorous accounting of the expenditures undertaken as proof of his adherence to due procedure.

But beyond merely holding leaders to their ideals of discipline and subjecting them to the same kind of scrutiny as the lower rungs of the 'community', there may be the refiguration of the very norms of civic engagement. This becomes evident in the lower class utilisation of spaces like pride which epitomises some of the contradictions around civility – on the one hand it is a protest march claiming equality in terms of constitutional rights to privacy and personal freedom, and on

¹⁰⁴. Correspondence cited from the LGBT-India list, lgbt-india@yahoogroups.com. Given the unverifiable nature of and ongoing controversy around these accusations, I intentionally omit references to specific authors’ and e-mails.
the other it is a celebratory pageant of difference, flamboyance and excess. This double-edged nature is reflected in the media reception, which typically mixes issue-based reports with photo-features, and has prompted some organisations like the lesbian feminist front Sappho for Equality to stay away from participation, citing the media commoditisation and objectification of gender/sexual difference. As one of their senior functionaries told me during an interview: “We will go only once it is a walk about homosexuality, not homosexuals.”

While their discomfort with the display and potential objectification of 'homosexuals' is understandable from their ideological stance as feminists, many kothis and hijras use this space precisely to foreground their embodied difference that the dominant activist discourse seeks to control by relegating it to the realm of personal gender expression. Beyond the demand for equality, then, what is being contested is the fairness of extant gendered norms of civic participation. And just as in the project of disciplining, forms of cultural expression like music and dance become crucial to this contestation.

In the 2009 walk, I noticed a self-identified hijra, Sujata, walking among a cluster of people including some senior activists. One of them, Ashim, is a good singer of Rabindrasangeet and Adhunik ('modern', i.e. contemporary) Bangla songs, and has in the past led several performances of songs such as Tagore's Ekla cholo re ('Walk alone') during Pride. This time, however, Sujata said that she would sing something. She began innocuously enough, with a somewhat lofty Adhunik song about human dignity and respect. However, even as the others started humming to the song, she broke into dance to the lines: “Time itself is changing/ I have gotten my rights; You are changing yourself/ I have been given my rights” (my translation). This was sung almost satirically, while executing Bollywood-style dance gestures along with the hijra gesture of thikri – with swaying hips and seductive hand gestures punctuated by loud claps provocatively directed at fellow walkers and roadside onlookers, all characteristic of typical bheli behaviour.

However differently and ambivalently one may read this performance – seduction, flirtation, resistance, explicit gender performativity, etc. – what at least seemed clear was the provocative imputation on the word ‘you’, signalling the ‘mainstream’ audience of Pride, as well as senior activists, who are hailed to respond to these forms of performance and communication of difference, combining the discourse of equal rights with the affective, non-verbal ‘weapons’ of bhel. Sujata’s bold interpellation of her audience put the burden of change squarely on the mainstream and the elite sections of the movement – rather than as
gendered labour (Anirban’s injunction to acquire “reason, education, skill”) to be performed by feminised kothis and hijras, as demanded within projects of reform. In as much as such a performance may be read as a gendered and sexualised political gesture, it might also be understandable through Laurent Berlant’s concept of “diva citizenship,” which “does not change the world,” but is “a moment of emergence that marks unrealised potentials for subaltern political activity.”¹⁰⁵ In this case, it challenges and refigures modes of civility by foregrounding and performing – indeed making a spectacle of – the realm of the ‘intimate’ or the ‘private’ (Siddhartha’s “personal gender choice”) so as to challenge the elisions engendered through the normative constitution of these terms (family-oriented, hetero- and homonormative) within public discourse.

Sujata’s performance also points to the strategy of performing middle class culture subversively, using pedagogical modes of music and dance to break into civil society spaces and undermine the normative distinctions that guard access to it. Thus, rather than outright rejection, there may be a reclamation and re-articulation of such cultural forms through mélanges with inappropriate civic behaviour or ‘low’ culture.

Here let me describe a particular event to do with the literal and metaphoric displacement of an iconic Rabindrasangeet (Tagore song), Aguner Poroshmoni – roughly translatable as 'The Touchstone of Fire'. A rousing call for self-expansion through sacrifice to a higher cause, this popular song has become a staple of Bengali middle class, left-liberal circles, and is often interpreted as a revolutionary hymn and sung at public protest events (such as those in the wake of corporate land-grab and related abuses in Singur and Nandigram). It has also been performed at several Kolkata pride walks that I have attended, either during the walk itself or as a culminating gesture at the end of the walk and the speeches.¹⁰⁶

105. BERLANT, supra note 43, at 223.
106. The words to the song are as follows (my translation and transliteration):

Aguner Poroshmoni (The Touchstone of Fire),
Place the touchstone of fire on the spirit
Make this life blessed in its sacrifice to light.
Lift up and hold this body of mine
Make it the lamp of your divine house
Let the flame stay alight day and night in song.
Let your touch on the surface of darkness
Make stars bloom anew, all through the night
Darkness will melt from the sight of the eye
It will see light wherever it may fall
My suffering will rise as a flame upward.

Rabindranath Tagore (1861-1941)
Aguner poroshmoni chhowao praane
E jibon punyo karo dohon daane II
Amar ei deho khanti tule dharo
Tomar oî debaloyer prodip karo
Nishidin alok shikha jwoluk gaane II
Adharer gaye gaye porosh tabo
Shararat photak tara nabo nabo
Noyoner drishti hote ghuchbe kualo
Jekhanei porbe shethay dekhebe aalo
Byatha mor uthbe jwole urdhopaane II
But I was surprised when it turned up at a candlelight vigil in 2008 referencing the Transgender Day of Remembrance, organised by a CBO that mainly comprises kothis from lower class, migrant non-Bengali backgrounds, most of them Hindi or Bhojpuri-speaking. The location of the CBO is significant – based in a worker’s colony in North East Kolkata which is only slightly better than a slum in terms of living conditions and is yet juxtaposed with a new and glitzy multiplex complex. (The contradictions of 'new India' could not be more apparent). The vigil was held in a 'cruising' area around a lake called Subhash Sarovar across the street from the colony. The lake is a disreputable and dangerous area after dark where several kothis had been victims of sexual assaults and harassment over the years.

That summer evening, we arrived at the location – press, 'community' members, and senior NGO functionaries – only to be confronted with a power cut, routine in low-income areas of the city. As a result, the event got off to a slow start, everything being chaotic in the dark. With much shouting of directions and jostling around of people (irrespective of the rank of activists), somehow a semblance of a circle was formed and the candles were distributed. Subsequently, some order and hierarchy was re-established, and two senior NGO leaders led the vigil with speeches in English and Bengali against Section 377,107 the anti-sodomy provision of the Indian Penal Code, 1860 (IPC), and homo- and trans-phobic violence. After these mandatory addresses, there was a hesitant pause, and we wondered what would be coming up next. Ashutosh, the CBO leader, called out: “Hey, what is that song we sing usually on such occasions?” Someone piped up, “Do you mean Aguner Poroshmon?” “Yes, yes,” replied Ashutosh – “anyone who knows the song, please lead.” So people who knew the song started singing and the rest joined in to the tune which seemed to be familiar enough to permit collective singing, though many among the non-Bengali crowd scarcely followed the lyrics and would join in a beat or two after the ones who did. As is typical during such inspirational hymns, we linked hands during the performance – an uncomfortable procedure given that we were also holding on to the candles while standing the muddy ground, slippery after a recent shower. However precarious and tuneless the performance, all the senior functionaries stayed on until the end, awkwardly holding

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107. Text of the Section 377 is as follows: “Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”
hands with the motley group of slum-dwellers, junior activists and the press.

As a symbolic event, the vigil signalled the arrival of Ashutosh, himself a resident of the colony, though better-educated than most of his CBO members, as an important player within the NGO circle of Kolkata (and thus by extension, West Bengal. He later played an important role in the insurrection against AlterNet Bengal, mentioned above). In that context, how do we read his evocation of *Aguner Poroshmoni*? Given the demographics of the group that sang it that night – mostly non-Bengali lower class migrants from UP and Bihar merged with Bengali middle class activists – the choice was both odd and apposite. On one level, Ashutosh was merely indexing a culturally appropriate civic ritual and thus establishing the legitimacy of his CBO as a civil society organisation. At the same time, this was done without mentioning the author (the revered Tagore) or the song's name, thus subverting its aura of middle class respectability through the casualness of reference, which moreover made the ritualistic and formal nature of the activity clear. This would indicate a strategic use of a middle class cultural form, subverting its conventional use as a pedagogical device within the movement.

However, there could also be another and perhaps more radical reading. If Ashutosh contested modes of civility, there was also an injunction to middle class activists and leaders to truly realise the potential of equal citizenship. As activists joined hands over the slippery, muddy ground to sing this familiar song, they were momentarily interpellated into an equalised, revolutionary community, however fragile, illusory and temporary. Through that interpellation, middle class leaders were made to depart from their comfort zones – quite literally – as they negotiated their way through a familiar song in an entirely defamiliarised and physically uncomfortable setting. The broader implication of such defamiliarisation might well be that the putatively inclusive and universal ideals of civil society could be achieved only in as much as they are displaced from their normative forms and reinvented in new contexts, rather than being coerced onto recalcitrant subjects of disciplinary power under the guise of a pedagogical training for citizenship.

108. SAMIR AMIN, *Europcentrism* (1989); See also DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000) (While I agree with this argument in Samir Amin's *Europcentrism*, it need not necessarily go with an endorsement of his 'socialist universalism' in response to the seemingly universalising logic of capital; rather these concepts may need to be interrogated for their pre-emptive universalising move, which predicts what form such reinvention may take based on assumed universals such as 'capital').
VI. CONCLUSION

In the preceding sections, I have endeavoured to show that while there is widespread anxiety around and regulation of civic participation both within queer communities and in the wider domain of middle class society and the media, this cannot ensure the separation of 'sequestered' domains such as 'civil' and 'political' society. The contingency, instability and messiness associated with the latter constantly interrupt and threaten the apparent order and logic of the former. Moreover, modes of lower class/ caste activism may simultaneously utilise and displace ideals and norms of civility and citizenship. Chatterjee's schema remains immensely useful as a diagnostic tool to chart the desired separation between civic activism and governmental regulation and pedagogy of 'target groups', but more as a prescriptive/ normative division that seeks to contain contradictions than as a reality given in political praxis.

The crucial importance of the realm of 'culture' within such praxis demonstrates the messy entanglement of putatively universalisable and abstract norms and ideals of modern citizenship with particular histories and locations. Thus, cultural contestation becomes integral to the subversive re-fashioning of normative political forms to articulate the situated demands of marginalised sections. This process suggests how normative models of liberal democracy and bourgeois civil society need not remain in an external relation to the realm of popular politics and practice, to be used only strategically or instrumentally, but may be displaced, expanded and re-shaped in the encounter with subalternity, as Chatterjee himself suggests in his analysis of Dalit (lower-caste/ outcaste) constitutional politics.109

Analogously, subjects like the kothis and hijras of West Bengal may not be merely located as adversely affected by or external to trans-national articulations of LGBT equality and rights. Rather, in the very process of contesting their exclusion, they become integral to both the critique and the re-constitution of these discourses and political forms. Recognising this might help us, privileged subjects in the academia, to advance in the difficult and fraught path of engaging a politics more open to difference for the future.

Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India

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Using the frame of global governance, this article argues that the neoliberal economy and the consequent practice of global funding has turned “queers into entrepreneurial and consumptive citizens who play by the rules of the state-market nexus.” I contend that the ‘queer movement’ in India is classist, casteist, sexist and complicit with power structures of the most oppressive kind. There is a right-wing queer in India, and no other. Questioning the terms ‘queer’ and ‘movement’, the article shows how their coming together helps “old desires resurface – legalistic desires for equality and justice, the humanist desire for dignity and the orientalist desire of liberating the postcolonial queer from barbaric cultures,” and call for a more critical and radical engagement with the politics of the current conjuncture which produces the ‘queer’ imaginary in contemporary India.

Like many countries in the Global South, India opened its gates to the free market and the policies of liberalisation/globalisation/structural adjustment in the early 1990s, after decades of being a protectionist state.¹ This has led to countries like India being introduced to what Josephine Ho calls, in the context of East Asia, 'global governance'² in the neoliberal moment. This governance involves 'global civil society' holding out, Ho writes “further hope for democratic potentials that promote the spirit of responsible humanitarism as well...
as respect for diversity while weakening state power and domination in certain national contexts.” Speaking of East Asia, and she could well be speaking of India, she continues:

Optimistic LGBT advocates and marginal groups look to changing, and seemingly liberalizing, political regimes and expanding civil society as sites for possible leverage or gains, while pride marches, lesbian and gay cultural events, and booming queer Internet communities corroborate the impression that queer Asia may be much more than a concept.

All these phenomena mark the Indian postcolonial moment as well. A recent High Court judgment read down the colonial Section 377 from the Indian Penal Code and now consensual gay sex between adults is allowed, pride marches abound and so do lesbian and gay cultural events and booming queer Internet communities. But does this constitute a 'movement'? Before one addresses that question, one might follow the rest of Ho's argument. She speaks of the retrenchment of the deeply homophobic state being a simultaneous process with the one on global governance; of how using UN discourse, Christian fundamentalist NGOs are producing a new sense of civility inimical to queers and child protection is used to bash queers. While most NGOs in India are not overtly religious in any way, they are nationalist and deeply conservative on many issues, like those around child sexual abuse and certainly work to re-trench nationalist and anti-sexual minority ideas, even figures and NGOs working ostensibly around issues of sexuality and HIV/AIDS.

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3. Ho, supra note 2, at 457.
4. Id.
6. See Oishik Sircar, Homonationalism: Queer tales of queer prides, InfoChange India, June 25, 2012, available at: http://infochangeindia.org/human-rights/rights-and-resistance/homonationalism-queer-tales-of-queer-prides.html (last visited June 15, 2012) (Sircar writes: “A classic illustration of ‘the nationalist resolution of the homosexual question’ in India was a talk show on the news channel CNN-IBN discussing whether independent India is open to homosexuality, aired during the Independence Day week, just a few days after the Delhi High Court judgment in the Naz Foundation case in 2009. The ‘experts’ invited to speak were responding to a CNN-IBN-Hindustan Times survey in which almost 70% of the
Further, the class formation of these NGOs and its 'activists' means that the very framing of the question of sexuality is deeply problematic. But let us stay with Ho for the moment. She proceeds to show how the UN, via NGOs, is producing new global principles and values. Then, she baldly states:

There is, after all, nothing intrinsically progressive or democratic about international civil society. Internationally based NGOs have been known to set up branches in Third World nations not only as channels for needed funding and aid, but, more important, as a field where Western values and interests can exercise their influence and foster checks and balances to resist local state domination and control.7

Ho proceeds to show how building these universal international politics congeals around conservatism, especially around issues like “sex trafficking, child pornography, pedophiles and Internet content monitoring,“8 all of which are issues in the contemporary moment in India.9 She speaks of how nations are “strongly encouraged to bring their laws into alignment with UN decrees.”10

The rest of Ho’s essay deals with the specificities of various East Asian contexts but she ends on another important point. She refers to a protest at a WTO ministerial meeting in Hong Kong where “queer groups from quite a few East Asian states lined up with other social movement groups (laborers, farmers, women, and sex workers) in fierce protest against respondents felt that homosexuality should be ‘illegal’ in India. The ‘liberals’ were represented by the likes of Shyam Benegal, Mukul Kesavan and Gautam Bhan. The ‘conservative’ was a young Hindu religious leader and sitting on the fence was Jaya Jaitley. The discussion sparked many a fire, but was hackneyed – the same arguments and the same defences that are not worth repeating here. Yet the unprecedented openness with which the audience was engaging with the issue of sexuality, and alternative sexuality, on prime time television was an encouraging sign. The findings of the survey (even if statistics are graver than damned lies) did throw light on the societal prejudice that queers face in India, despite progressive judgments like Naz. The sharp divide in beliefs and perspectives among the panelists on issues of sexual morality finally reached a climax through a moment of nationalism-induced catharsis. Sagarika Ghose, the anchor, abruptly ended the show by asking everyone to stand up to the national anthem. And as per her instructions everyone did – the conservatives, the liberals, the fence-sitters, the homosexuals, the heterosexuals, the non-heterosexuals – everyone stood upright soaking in the buoyant verses of Jana Gana Mana and it seemed a perfect end to the crisis of India’s morals, culture, sexuality and religion where nationalist pride erased all differences and made us realise that, after all, we are all ‘Indians’ first – just like SRK’s Chak De India hockey team!”

7.  Ho, supra note 2 at, 460.
8.  Id. at 461.
10.  Ho, supra note 2 at, 462.
WTO policies.”\textsuperscript{11} It is difficult to think of one moment when the 'queer movement' in India has stood with labourors, farmers, women or sex workers in contemporary India or against WTO policies, though there are many struggles involving all these groups and the definite presence of the WTO as well.\textsuperscript{12}

While in the East Asian contexts, the Christian Right has taken over the NGOs (though Ho does not specify the class formation of the Christian Right in these contexts), in India NGOisation has largely been a voluntarist, bourgeois, entrepreneurial project. People who run and work in NGOs are largely middle class and upper class and are unlikely to even talk to, let alone stand by, labourors, farmers and sex workers despite making many noises about such intersectionalities and alliances. What they are good at is creating newer and newer identity categories to garner more and more funds, settle for piecemeal negotiations with the law by asking for a reading down of Section 377 in the Indian Penal Code that criminalises homosexuality so that it removes private, consensual sex from its purview (a blatantly classist and casteist demand) and courting the media to celebrate in parties and marches around such victories posing as 'Queer Liberation!'

In the text of the High Court judgment, all the precedents on sexuality quoted in it are international, all the language is global and in perfect consonance with global governance.\textsuperscript{13} While Ho does a good job of questioning global the governance discourse and that of the NGOs, she leaves both the question of the politics of funding and the nature of the 'queer movement' (the non-mainstream one she invokes approvingly in the end) in East Asia un-interrogated. In India, the politics of funding

\textsuperscript{11} Id.

\textsuperscript{12} See Janet R. Jakobsen, Working Alliances and the Politics of Difference (1998) (Jakobsen speaks of the difficulties of alliance politics which concentrates on the women's movement in the United States. Despite the repeated refrain of queerness being about intersectionality and queerness being about alliance politics and while the queer movement in India has sought the support of various other communities, like feminist groups, for its own cause (specifically the movement around the Naz judgement via Voices Against 377), it has seldom, if ever, come out with statements on all the important issues Ho raises and around which several movements in India do exist. This author is involved in several campaigns whether around the figure of imprisoned and tortured adivasi activist Soni Sori, rallies against sexual violence against women both nationally and in Delhi, day labourers and informal labour and farmers in Maharashtra and has never seen a single queer activist at any of these or any statement from queer NGOs or groups or individual activists on these issues. While there are doubtless exceptions (Sangama, for example, works with the female sex workers' movement in Bangalore and individual activists may make connections), no argument can be made that there is a concerted public effort to establish 'queer' alliances with any of these movements.).

\textsuperscript{13} See Ashley Tellis, LGBT Politics in India: Problems and Possibilities, in Class and Its Intersectionalities (Manoranjan Mohanty & Gilbert Rodrigues eds., forthcoming 2012) (My extended critique of the judgment.).
requires more investigation, something the 'queer movement' is unwilling
to do and again linked to this, in India (and indeed in the various contexts
of East Asia), how the term 'queer' circulates. This group which is the
main user of this term (and which poses as a 'movement') is in dire need
of interrogation.

I. The Politics of Funding

If global governance refers to the discourse around or through which
funding is granted, the specific discourse of global governance in
what have come to be called sexuality NGOs, or those that work with
sexual minorities and around HIV/AIDS, is one of a hegemonic global
identityspeak,14 once again from Euro-American contexts. If 'queer' is
not quite funderspeak, it is certainly used by Indian activists and NGOs,
alongside more 'indigenous' cultural categories, all of which seem to
have emerged only in the last few decades.15 That apart, the language
of sexual minorities comes from international mainstream organisations
(that groups like Queer Nation in the US were marking themselves
against) like Human Rights Watch, which has been readily adopted by
Indian NGOs and 'queer' activists. How is it that the Indian 'queer', for
all its radical claims, has not interrogated the hegemony of this language
and its appropriateness to the sociological contexts in South Asia? How
has it not questioned the institutional structures which produce this
discourse and the power relations between them (the donors) and the
receivers (the NGOs)?

Perhaps it has to do with the sheer power of money. There has been
a substantial body of work critiquing the non-profit complex, from the
volume produced by 'Incite! Women of Color Against Violence' entitled
The Revolution Will Not Be Funded to James Petras' classic essay NGOs:
In the Service of Imperialism.16 The Incite! anthology, apart from offering
a detailed history of non-profit funding in the US, brings together a
range of voices from across the world to offer a very nuanced critique

14. See Ashley Tellis, Ethics, Human Rights and LGBT Discourse in India, in APPLIED ETHICS AND
HUMAN RIGHTS: CONCEPTUAL ANALYSIS AND CONTEXTUAL APPLICATIONS 151-70 (Shashi Motilal ed.,
2010) (What I mean by this is the language of identity politics used in North America and
Western Europe. The above article is useful for a critique of this language.).
15. Ashley Tellis, Postcolonial Same-Sex Relations in India: A Theoretical Framework, in SPACE,
SEXUALITY AND POSTCOLONIAL CULTURES: ENRECA OCCASIONAL PAPERS 6, 221-231 (Manas Ray ed.,
2003) (An example of this is the identity ‘kothi’. This is a word (one of many) used to refer
to the passive role in anal sex. Suddenly in the late 90s and early 2000s this becomes an
‘identity’.).
16. The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex (Incite!
Women of Color Against Violence ed., 2007); James Petras, NGOs: In The Service of
and appraisal of what it calls the 'non-profit industrial complex' (NPIC). Raising several issues from the similarities between the prison industrial complex (PIC) and the NPIC in the context of the US and how the latter forms a 'shadow state' that allows “government to make war, expand punishment, and proliferate market economies under the veil of partnership between the public and private sectors”\textsuperscript{17}

to the protecting of elitism in social justice movements facilitated by the logics of funding/funders rather than the constituents of movements themselves; from the domestication of social justice to a career option to the creation of competition (around funding) between social movements; from the derailing of movements and the domestication of their radical potential to the exporting of conservatism in various less powerful contexts (for example, the squelching of revolutionary movements in Latin America by the US).

Petras makes similar arguments in his essay and is critical even of so-called progressive NGOs because he feels that they prohibit structural change in favouring individual initiative (microcredit schemes), replace movement leadership with NGO leadership, take no risks and are not accountable to the people with whom they claim to be working, among other things.

How is it that these critiques are never factored into the self-nominatedly super-critical 'queer movement' in India? Perhaps this has to do with the fact that the three pioneering NGOs in the area in India were individual figures who received international grants as individual fellows on the basis of which they started organisations? Perhaps this has to do with the fact that if one scratched the surface, one would find that HIV/AIDS is not a sexual minorities issue in India at all and so the garnering of large amounts of funding and the piggybacking on the HIV/AIDS pandemic are both rather dubious moves on the part of the 'queer movement'?

But even setting these unsavoury questions aside, what are some of the problems funding raises? First, given that funding agendas offer the language and determine the discourse of sexuality, there is a resultant flattening of the sociological landscape into the paradigms of identity and rights that often actually inhibit the processes of change that are desirable, if not actually prohibit them. Second, given that most of this funding comes to urban NGOs, no real attention is paid to rural contexts where many people and groups have great difficulties articulating sexual self-constructions. Third, given that upper class people run these

NGOs and there is free interplay (if not a set of networks that render them indistinguishable) between NGOs and 'queer activists', it is these people's agenda that are in the foreground while minority formations, some of which have to be considered given the question of funding and are appropriated and othered as 'high risk populations' or similar epidemiological categories and as indigenous cultural categories in need of modernisation into twenty-first century 'queerness' while others are ignored altogether. Which brings one to the use of the word 'queer' and why it is symbolically representative of the violences of the non-profit industrial complex and the logics of global governance.

II. 'Queer'? 'Movement'?

The word 'queer' emerges in the context of the US gay movement in the 1990s. It emerged as an activist term by groups like Queer Nation, a group of radical AIDS activists in New York. Queer Nation was a militant group with confrontational, Situationist-style modes of intervention. The group members were activists from ACT UP and were tired of the continuing discrimination against people with HIV/AIDS by the neoliberal, Reaganite dispensation and sickened by the continuing heteronormativity of mainstream culture in the US. This term quickly became popular and was appropriated not just by the popular media but also by academia, spawning the subfield of Queer Studies in US academia. At the time in the US, this was a liberating term for LGBT folk of colour and many disenfranchised along varying axes not acknowledged by the gay movement.18

How does this term travel from this specific context and reach the world over? How does the Indian 'queer movement' come into being? Isn't this use of queer, as Neville Hoad points out “innocent of its own colonising fantasies?”19 Michael Warner whom Hoad was critiquing in the quote above, had himself written: “In the New World Order, we should be more than usually cautious about global utopianisms that

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18. This is not to suggest that an ACT UP-style politics is what the 'queer movement' in India might replicate here which would be more useful. The contexts are so different that that would be impossible. However, the political impulse, passion and anger behind that moment in the US would be good to emulate and is missing from the 'queer movement' here altogether. How that might be articulated in the contexts of India is too heterogeneous and difficult (not to mention useless) to speculate about or draw a blueprint for, in this paper at any rate.

19. Neville Hoad, *Queer Theory Addiction, in After Sex?: On Writing Since Queer Theory* 35 (Janet Halley & Andrew Parker eds., 2011) (Hoad is citing his own pioneering essay on the racist and colonial genealogies of queer theory); See also Neville Hoad, *Arrested Development or the Queerness of Savages: The Imperial and Neo-Imperial Uses of Male Homosexuality*, 3 (2) *Postcolonial Stud.* 133-58 (2000).
require American slang.”

Have the proponents of the 'queer movement' in India shown this caution? Not really.

Consider the various definitions and uses of queer in the Introduction to *Because I Have a Voice: Queer Politics in India*, one of the first anthologies of the 'queer movement' in India. They remain ahistorical in their appropriation of the term and utopian in their impulse. “A multiplicity of desires and identities”; “defiant political perspective”; beyond “homosexual' and 'heterosexual”; “intrinsically and inevitably connected with the politics of class, gender, caste, religion and so on, thereby both acknowledging other movements and also demanding inclusion within them”; “questioning the fundamental assumptions of our society.”

How any of this is actualised in reality is not the priority here as long as the correct laundry list of identities is read out.

What do these proponents see as the aims of this 'movement'? “To name, visibilise and counter the violence faced by queer people”; “challenge the idea of a 'normal' and different' sexuality in itself”; “object to all hierarchies and power structures”; “intersections” with feminist and other “movements at the margins.”

Once again how exactly this is done, and any evidence of it being done, is conspicuous by its absence.

Among the modes of doing this are listed: challenging the law, protests and demonstrations, queering culture and creating queer culture and queer lives as political projects. No critique of the normatising impulses of the law and the state are offered, the AIDS Bhedbhav Virodhi Andolan is appropriated as 'queer', Voices Against 377, a loose coalition of different groups against Section 377, and its presence at the World Social Forum in 2004 and the first Pride march are offered as evidence of the queer movement's activities.

Among challenges facing the movement are enumerated: the tag of being Western, the fact that the movement is largely upper class and urban-based, the absence of women in it, the danger of strict identity categories. Apart from the fact that none of these issues are really addressed, there are no critiques of the politics of funding, the NGOisation of activist politics, the structural contexts within this 'queer movement' first emerged which would generate an awareness of class, caste and other forms of elitism inherent in the 'movement'.

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22. *Id.* at 6.
23. *Id.*
24. *Id.*
For the moment, it is important to point out that the word 'queer' in its travel from the streets of New York and its appropriation and transmution in the elite spaces of an upper class and upper caste set of people in India, many of whom run NGOs or are part of them designating themselves as a 'movement', needs to have its trajectory traced as the first step in the critical self-analysis needed to generate something like a critical movement.

While the editors of Because I Have a Voice, in their Introduction, do acknowledge that the word 'queer' does not have much truck in India, it is not simply a question of the word's semantic viability. What is crucial to stress is that the use of 'queer' is a symbolic representation of the elite nature of this 'new' form of 'social movement' that the 'queer movement' represents in India. The proponents of this 'movement' have never ever been even the activists of the kind on the streets of New York in the ACT UP days. Yet to borrow that street cred and make large claims about awareness of class, caste and other movements, to claim joint struggles with these movements and to claim a radicality that is only at the level of words, while offering not one self-reflexive critique of their own location and imbrication in the New World Order, let alone joining tribals in Orissa protesting against the taking over of their lands, is audacious and makes one re-assert that this is not a 'movement' at all.

III. Modes/Challenges

On the ground, what have been the self-proclaimed campaigns of and challenges to the 'queer movement' in relation to its self-proclaimed aims and what do these campaigns say about it? To concentrate on one mode and one challenge and ask some questions of them in the hope of re-thinking the 'queer movement' in India, one must turn to the law which has been the major campaign in the 'queer movement' in India.

The Delhi High Court Judgment on Section 377

The biggest campaign has been the legal one, involving the reading down of Section 377 of the Indian Penal Code. The first question to be asked here is why this privileging of the law? Why is the legal terrain the most important terrain for a movement which claims to concern itself with the most marginalised populations, with populations that defy all categories and identity formations? How can the self-professed radical 'queer movement' place as its first struggle recognition by the most conventional and normative institution, that of the law? How can it not
be aware of the normatising and surveilling manoeuvres of the law and how 'queerness' as defined by the 'movement' will be simply illegible to that law or damaged irreparably into domesticity by that law?

To be sure, this critique is not among those trendy postcolonialist ones that ask for a complete disregard of the law and no engagement with it. But why is law the primary site of struggle? And if it has to be the primary struggle, why in the specific form it took? It was the AIDS Bhedbhav Virodhi Andolan (ABVA), an early HIV/ AIDS advocacy group in Delhi which first challenged Section 377 in court arguing that it prevented work with HIV-affected persons but that petition was dismissed. The argument moved from repeal to reading down, proposed by an international NGO's Indian office and backed by the 'queer movement' and several other non-profits and groups. This move was, and is, inexplicable and, once again, only shows the lack of any real connection with even the populations that are affected by the Section and by the threat of HIV/ AIDS, the main reason offered again in the petition.

Elsewhere, I have argued against the elitist nature of this campaign and the judgment so widely celebrated by the media and 'the queer movement'. To briefly rehearse some of the arguments relevant to this enquiry: how many marginalised groups were consulted when the decision to settle with the reading down of Section 377 was taken? How many such groups were active parts of the almost decade-long campaign? Why is it that the queer petitioners' long case in the text of the judgment only invokes international precedent, a consistent colonial rhetoric of India's need to modernise and catch up, the sparse, almost non-existent invocation of women, the negligible and agency-less invocation of hijras? Why is it that the co-petitioners includes state organisations and none of the key organisations involved in the struggles not just of the groups that come under the Section but also marginalised groups that might be affected by similar discriminatory Sections?

Characteristically, the 'queer movement' has not addressed any of these questions. In a recent publication celebrating the judgment, the editors offer an inflated and contradictory account of the judgment's achievements and what it establishes but no real engagement with any

27 Id.
serious critique of it. The editors claimed the judgment marked queers becoming subjects of rights and citizens (when nowhere does the Section or judgment ever refer to the subjects they purportedly talk about); they argue that it proves that sexuality is integrally linked to identity (which completely contradicts their earlier anti-identitarian characterisation for queerness in Because I Have a Voice); they argue that sexuality requires a partner real or imagined (instituting monogamy implicitly as their model); claim a broader acceptance of queerness in pubic culture (both an unverified and undesirable claim); offer their old a historical and racist/communal history of homosexuality in the subcontinent (we were wonderfully pro-homosexual till the big, bad British came along); make the usual claims about the holy trinity of caste, class and gender (only as laundry list); anachronistically call several earlier groups and moments 'queer' (ABVA, Campaign for Lesbian Rights [CALERI], People's Union for Civil Liberties-Karnataka [PUCL-K]), none of which were/are queer or queer-identified); illustrate their investment in nationalism (they claim queers are now part of the 'Indian nation'); offer uncritical and unexamined accounts of love and how queer love is like inter-caste love (with no specific analysis of either or the conjunction of both); assimilate irreconcilable contradictions under the umbrella of diversity and announce that all of us are to partake in 'sexual freedom'.

Class/Caste/Gender Formation

If the 'queer movement' has acknowledged, however implicitly, the classist (disguised as 'urban' in the Introduction to Because I Have a Voice), casteist (though, tellingly, their articulation does not foreground caste at all and caste is only invoked as the displaced/othered concern of 'other movements' with which the queer movement must connect or rather 'demand inclusion' from) and sexist nature (at least it openly acknowledges its marginalisation of women, if not other disenfranchised and barely legible subjects of sexuality) of its own formation, what has it done about it?

Let us look at this through one of the documents of self-professed achievement in the definition of a 'queer' politics, the PUCL-K report along with queer activists and NGOs on the harassment of hijras in


Bangalore.30 Conducted firmly within the rubric of human rights, a framework they do not feel the need to question at all.31 Hijras, they incredulously inform us, have been demanding to be part of the 'sexual minority movement' which is reflective of a global shift in the discourse of queer politics from issues of sexual orientation to issues of gender identity. Apart from the absurdity of hijras being up on queer politics as the engine behind some hijra organising, the implicit acknowledgement that hijras have not been a part of the 'queer movement' is important.

What follows are the usual unhistorical endorsements of 'queer' which ends Chapter 1 and ahistorical accounts of the history of transgenderism in Chapter 2. Chapter 2 is entitled 'Social, Cultural and Political Context of Kothis and Hijras' and apart from absurd statements like "The hijra community in India has existed with a recorded history of more than 4000 years"32 and various accounts of their mythologies, no account is given of their castes, their religions, their beliefs, their positions in the social context.

Despite speaking of the 'Intersection of Class, Gender and Sexuality' (note the absence of caste), one of the subheadings of a section, none of these intersections are even mentioned, even developed, apart from the idea that they "have a sort of sanctioned and visible place in Hindu society"33 and that their marginalisation is at the level of class, the narrative moves into their role as sex workers. None of the testimonies that follow locate these subjects in any of the dense networks and contexts of caste, class, region, religion, language. We get no sense of the deep and abiding structures which allow for their violation but also the texture of their subjectivities. They are merely reproduced as hijras and as unilateral victims. These victim narratives flatten the sociological complexity of these hijras and also evacuate them of all agency in the interest of portraying them as human rights victims.

Even when in the next chapter, the authors claim to be dealing with 'Understanding the Institutional Basis for Violence', these institutions are

30. People’s Union for Civil Liberties, Karnataka (PUCL-K), Human Rights Violations against the Transgender Community (2003).
31. See Wendy Brown, “The Most We Can Hope For...” Human Rights and the Politics of Fatalism, 103 (2/3) South Atlantic Quarterly 459, 461 (2004) (Brown writes: “rights are not simply attached to Kantian subjects, but rather produce and regulate the subjects to whom they are assigned.” And again: “I have argued that we must take account of that which rights discourse does not avow about itself. It is a politics and it organises political space, often with the aim of monopolising it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well.”).
32. PUCL-K, supra note 30, at 17.
33. Id. at 21.
just invoked as family, law and that leads to an account of laws and the media. Even the invocation of the Criminal Tribes Act does not lead them to ask how many of these hijras are adivasi and how caste intersects their marginalisation. This radical othering and homogenising of the hijra community not only shows the 'queer' activists, the NGOs and the human rights community to be victims of their own class formation in their inability or unwillingness to read class, caste, religion, region, language into the lives of the hijras and the fabric of their violation, it also produces the community as homogenous in victimisation and in need of help from outside.

The mobilisation is mainly attributed to an NGO and while mention is made of how the NGO had to realise “that organising sexuality minority for their rights could not be achieved without bringing in issues of gender, caste, class and language backgrounds and other internal differences among them,”34 none of how this translated into the practice of the mobilisation at all. What follows are a list of the strategies adopted in terms of crisis management, legality and media by the NGO. What is quite clear is that while lip service is paid to the complicated axes of marginalisation that exist, none of these actually become part of the way in which cultures of resistance are built. Instead, the hegemonic narratives of law and media always come back in.

While there is no doubt that legal help has been important to Bangalore’s hijras, how does it substantively change the realities of their lives? How will the structural and systematic ways in which they are kept where they are change by only dealing with their harassment by the police through the law?35 The last section which holds the ‘future’ is imagined only in terms of legality and defined as “mobilising existing legal frameworks, challenging the existing legal frameworks and using progressive international legal developments.”36 Hijra voices die in this section. Don’t they have a say in what their future holds? Why are there

34. Id. at 60.
35. See Wendy Brown, Suffering the Paradoxes of Rights, in LEFT LEGALISIM/LEFT CRITIQUE 422 (Wendy Brown & Janet Halley eds., 2002) (Taking Gayatri Spivak’s critique of the subject’s position under liberal law as wanting ‘that which we cannot not want’ as her point of departure, Brown spells out the several paradoxes of using the law. These include the fact that the law re-inscribes the very designation that has violated us and because of which we came to it; it differentially empowers different social groups; it erases the compound production of subjects and it conflates acts with identities. None of these paradoxes are engaged with by this report, let alone the asking of Brown’s final question: “In other words, how might the paradoxical elements of the struggle for rights in an emancipatory context articulate a field of justice beyond that which we cannot not want? And what forms of right claims have the temerity to sacrifice an absolutist or naturalized status in order to carry this possibility?”).
36. PUCL-K, supra note 30, at 68.
no testimonies in this section? The righteousness of the 'queer'/ NGO and human rights activists appears completely successful in wiping out agency for the hijras and repeats the violent marginalisation of them under the aegis of their benign intervention.

The fact is that the 'queer movement' has been, and is, a bit of a slick Boy's Club, not old style and paternalistic, and making all the right noises to be sure but still participating in the Boy's Club rules of exclusion and marginalisation of the less privileged. What would a genuine interrogation, a 'queer' one, of this male, slick Boy's Club subject involve and what kind of politics would it produce? Would it be able to resist the homogenisation of subjectivity and politics that the global 'queer subject' produces? By shifting the onus onto the subject, one is not trying to argue either that this class/ caste/ gender-based subject is the only source/ hope of change in the field of sexuality (despite the disproportionately large amount of power in this subject's hands) nor that such self-reflexivity should not be the prime concern of this subject.

Rather, I want to make clear that it is impossible for this subject to afford that self-reflexivity without a truly radical questioning of the many levels of structural oppressiveness in which he is implicated. Without an interrogation of the discourse of global governance, the global circulation of the term 'queer', the politics of international funding, the politics of NGOisation, the power of colonialism, the poison of nationalism, the no-longer new economic order, the unquestioning faith in the law, the unstated inhabitation of Brahminism, the easy slide into patriarchalism and the heady jolt of utopian rhetoric that enables one to simply vault over all of this into a 'queer' paradise, there can be no 'queer movement' in India and the one that claims to exist is not asking any of these questions.

IV. Conclusion

The world of social movements must be one where the first thing to be interrogated is one's own formation and one's own limitations in terms of class, caste, gender, region, religion, language. None of these conditions are static yet they are not as easily surmounted/ overcome/ dismissed as we would like to think they are. Whether as individuals or collectives (and individuals are always collectives and vice versa) we need to be constantly vigilant of the axes of our own formation and the limits they impose on how we experience the world. Our strategies, campaigns and issues are as much in need of questioning as
the questions we ask, the people we are willing to work with, the people we are likely to beseech, the resources we draw upon are also caught up in layers and layers of hierarchy and power, institutional and otherwise. Engagements with otherness outside our class, caste, gender, region, language have to move out of the mode of patronising help and move into the zone of creative dissonance. This process is not easy or sexy and can be deeply destabilising but it is almost always productive. Engaging with another's marginalisation, seeing it in relation to one's own, indeed as one's own, is an educative experience. True education is never easy. If education does not disorient you and move you in your thinking, it is not education at all.

More importantly, a critique of the larger contexts within which the 'queer movement' unfolds in the contemporary moment in India is crucial. There is a sophisticated critique of this for some time now in the US and, more recently, in Europe. This is not a simple terrain in India and requires vigilance and rigorous and sustained critique if the sexual minority critique is to matter at all. We are situated lowest in the pecking order and have the least to lose. Instead of a place at the table, we need to pull the tablecloth to the floor and disrupt the bloody pleasures of the neoliberal dinner. We are best placed to do it even as the 'queer movement' seems the least inclined to.

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Unlearning Human Rights and False Grand Dichotomies: Indonesian Archipelagic Selves Beyond Sexual/ Gender Universality

Vanja Hamzic*

This study presents a critical genealogical analysis of the narratives and politics of representation of various human subjectivities in Indonesia who transgress dominant universalising sexual and gender norms. It traces various streams of regulation, including those reliant on liberal legalistic discourse of human rights, whose extremities produce the stringent ‘heteronormative’ versus ‘homonormative’ poles – the two mutually reinforcing otherworlds bereft of the intrinsic complexity of sexual/gender experience across the country’s archipelagic selves. This tacit othering, inapt to account for numerous local identitary frictions, transitions and re-appropriations owed, inter alia, to distinct non-sexual and non-gender communitarian dynamics, continues to usher in an alien dichotomy of personhood, whose referential, idealised ‘self’ and juxtaposed ‘other’ are both violently simplified and tainted with heightened ideological overtones. Against a backdrop of these impoverished binaries, this study confronts the multiple difficulties that a researcher of such phenomena inevitably encounters, ranging from the perils of internationalised taxonomies, such as ‘LGBT’, to the paradigmatic strategy of silent disidentification employed by the local subjectivities as a peculiar form of resistance. It is posited that these complexities are perhaps best captured and exposed if numerous globalised a priori binaries (‘hetero’/‘homo’, ‘male’/‘female’, ‘East’/‘West’, etc.) and legalistic ‘panaceas’ (eg liberal discourse on human rights) are gradually unlearnt and disestablished in favour of locale-specific inquiries into collective and individual selves and their counter-hegemonic social stratagems. The Indonesian narratives of archipelagic personhood offer one such opportunity.

1. Je suis l’espace où je suis
– Noël Arnaud, L’état d’ébauche, 1951

I. INTRODUCTION

Indonesia is today the world’s largest archipelagic state, where more than 237 million people inhabit around 6,000 of the total 17,508 islands.² Over 300 different ethnic groups, speaking some 742 languages

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1. I am the space where I am.
and dialects, hail from these islands. The turbulent tides of trading, migration and warfare have raged along their shores for centuries, moulding syncretic ethnoscapes, wherein an islandic self is dynamically negotiated between the allegiance to local narratives and the need to adjust to foreign winds, be they of Indic, Arab, colonial European or some other more or less distant origin. The archaeologies of cultural memory in Indonesia, typically fashioned as ethnographic studies, reveal a vast archipelago of locale-specific (and, in many instances, island-specific) cosmologies guiding the community’s ethos, hieropraxis, forms of kinship and an individual habitus. While nominally linked to Muslim, Christian or Hindu credos, these epi-narratives resiliently enshrine the islanders’ genius loci – the spirit of the place imbued with the distinct meta-histories and worldviews. Hence, the anthropologist Clifford Geertz has famously described the Indonesian, heterogeneous Muslim communities as, “remarkably malleable, tentative, syncretistic, and, most significantly of all, multivoiced.”

While Indonesian cultural and spiritual plurality is broadly acknowledged, it is less readily and carefully linked to an exceptional diversity of the Indonesians' gendered and sexual experiences. Instead, the sites of desire and gender/sexual relations are often fiercely contested and ideologically coloured, forcefully homogenised and expurgated of their inherent complexity. It is, in fact, the need for oversimplification that marks all such regulatory tendencies.

Starting with the first President Sukarno’s 'family principle' (azas kekeluargaan), later developed into an all-encompassing state familist ideology, the domestic, political elite have always been heavily engaged in encouraging and producing the model 'nuclear' hetero-patriarchal

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3. Arjun Appadurai, Modernity At Large: Cultural Dimensions Of Globalization (2006); Anthony D. Smith, Culture, Community and Territory: The Politics of Ethnicity and Nationalism, 72 (3) Royal Inst. Int’L Aff. 445 (1996); Conrad Schetter, Ethnoscapes, National Territorialisaton, and the Afghan War, 10 (1) Geo. Pol. 50 (2005) (The neologism ethnoscope was introduced by Arjun Appadurai, who describes it as the globalised spatial diffusion and mobility of correlated people. This study, however, does not follow this definition. Instead, it endorses Anthony Smith’s conceptualisation of ethnoscope, who understands it as ‘the territorialisation of ethnic memory’.).

4. Pierre Bourdieu, Outline Of A Theory Of Practice (1977); Pierre Bourdieu & Loic J.D. Wacquant, An Invitation to Reflexive Sociology (1992) (I am inclined to use Pierre Bourdieu’s elucidation of habitus which he understands as a system of acquired personal dispositions (e.g. judgments of sentiment and taste), dependent upon history and human memory.).


family, which would gradually throttle all other forms of kinship or
gender/sexual relations and expressions. The benevolent bapak (father)
and the dutiful, selfless ibu (mother) are central to this political imagery,
concomitantly signalling how both the public and the private spheres
should be managed. Bapak's wise leadership of the family and of the
state was to be complemented with ibu's sacrifice in a perpetual service
for these societal entities. The private, family life was to reflect the public
model of governance and vice versa.

Other forms of heteronormative regulation, particularly those
purported on behalf of the burgeoning theo-political opposition to the
central government, in the aftermath of the 1998 demise of the second
President Suharto's autocratic New Order regime and the beginning
of the so-called reformasi (reform) era, endeavoured to re-appropriate
the familist narrative with a characteristic, religious 'twist'. The woman's
sacrifice to the male-governed state and family was thus portrayed not
only as her patriotic but also a religious duty. The early years of the twenty-
first century saw the enactment of numerous gender-biased provincial
and local regulations, claiming their legitimacy from selective readings
of classical Islamic jurisprudence (fiqh).

The state elite responded with a competing yet in many ways similar vision of heightened public morality,
etitomised in the controversial 2008 Law on Pornography.

These regulatory interventions peculiarly resemble the early para-
geographies of the archipelago, such as a twelfth century map
charted by al-Idrisi, which shows the territory of today's Indonesia "as
a random assortment of blobs." A similar 'accuracy' is achieved in
the contemporary governmental and broader theo-political mapping
of the Indonesian gender, sexual and relational archipelago. The
need to homogenise and simplify, in order to control and politically
employ, produces here a kind of Althusserian effect of "[s]pace without
places, time without duration": a totalitarian tabula rasa beyond the
putative nation-building ethos. While tracing similar currents in what

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8. Vanja Hamzić & Zibamir-Hosseini, Control and Sexuality: The Revival of Zina Laws in Muslim
Contexts 63-67 (2010) (The new gender-biased regulations included the prohibition of khal-
wat (close proximity between persons of different gender, if they are at a secluded place and
not related to each other), various types of women's clothing and driving of motorcycle for
women.).
9. Id. at 61-63.
10. Bertram Schrieke, Ruler And Realm In Early Java, in Indonesian Sociological Studies:
Selected Writings Of B. Schrieke, Part Two 1, 267 (1957).
11. Michael F. Laffan, Islamic Nationhood And Colonial Indonesia: The Umma Below the Winds 11
(2003).
12. Louis P. Althusser, Politics and History: Montesquieu, Rousseau, Hegel and Marx (Ben Brew-
The terms *dissemiNation* – an evolving cultural difference 'from within' and liminality inscribed in an imagined nation-space, Homi Bhabha recounts “the incommensurability in the midst of the everyday” that a totalitarian nation-building or indeed sexuality-cum-gender-building cannot surpass. It is from such common interstices that one's self-perception and cultural memory are reinvigorated. In this scheme, the liminality of *Indonesianness* – its archipelagic quality *par excellence* – is juxtaposed against the imagined normative subjectivities of *bapak* and *ibu* as their alterity.

Parallel to the familist ideologies engaged in producing specific heteronormative selves, the past several decades have witnessed in Indonesia an ascendance of a liberal discourse, typically drawing on global, northern meta-narratives and taxonomies of sexual liberation, which attempts to explain away and indoctrinate Indonesian sexualities and gender variance so as to fit neatly into the presupposed universal moulds of human sexual/ gender experience and orientation. As a relatively new purchase within international liberal governance strategies across the globe, this *homonormative* discourse has triggered significant academic criticism albeit with sparse ramifications in non-governmental policy-making. In the context of Indonesia, although identified somewhat tacitly by the prominent ethnographers of sexuality and gender, *homonormative* identity politics remain skilfully under the

social radar.

This brief piece attempts to shed some light on this grey area of Indonesian sex/gender politics as a premise toward a broader theoretical framework for archipelagic (Indonesian) selfhood and its inherent complexities.

II. PERSONHOOD BEYOND RIGHTS

In Imagined Communities, Benedict Anderson underscores the difference between an old habit of the European colonisers to name their overseas settlements as “'new' versions of (thereby) 'old' toponyms in their lands of origin” (such as New York, Nueva Leon, Nouvelle Orléans, Nova Lisboa, Nieuw Amsterdam and Nieuw Zeeland) and the Southeast Asian custom to mark certain toponym with a term for novelty only when the old referential site has either vanished or been enlarged (hence, Chiangmai ('New City'), Kota Bahru ('New Town') or Pekanbaru ('New Market')).

Unlike the Southeast Asian diachronic or utilitarian relationship between the 'old' and 'new', European colonial imagery has allowed for the synchronic, parallel existence of the venerable original and its 'new-worldly' counterpart(s).

Precisely this kind of hierarchical parallelism and the zeal to superimpose one's own identity scripts characterise homonormative regulatory streams in Indonesia and elsewhere. The aetiological complexity of the encountered subjectivities, their sociality and spirituality, their communitarian non-sexual and non-gender needs and roles – all this is subsumed under an impoverished vision of a gendered and sexual being understood through the prism of international identity taxonomies and politics of 'emancipation'. Yet this stark vision is not always disseminated directly, partly because it is not readily welcomed by the communities it endeavours to infiltrate. Instead it often takes an intrinsically relational, biopoweristic shape: it is implicitly contained in donor policies and civil
society programmes, it permeates HIV/AIDS prevention strategies and lingo or it is propagated by a community member who endeavours to 'correct' others in their self-expression and self-identification.\textsuperscript{19}

The homonormative discourse is 'traditionally' fond of the messianic liberal parlance of human rights, as its legalistic phraseology appeals to the non-governmental sector even though it is usually devoid of any substantial locale-specific analysis. As a false heuristic device, liberal rights are conceived as a block to re-thinking workable solutions for problems at hand. By claiming tenaciously their \textit{sui generis} (conceptual) supremacy over all other normative or non-normative considerations, they effectively \textit{pre-empt} situations which might otherwise result in some novel substantial \textit{bargaining power}\textsuperscript{20} of the underprivileged constituencies concerned. For, if espoused in this peculiar fashion, the abstract humanism behind the idea of rights is reduced to yet another auxiliary normative system of the liberalist empire. It pompously confers upon the 'new' 'overseas' sexual/gender subjectivities, modelled in the image of the original, 'old' global northern selves, the freedom of personhood, the moral \textit{raison d’être}, thereby enlarging the cognitive map of liberal identitary scripts. Yet it fails to account for the asymmetries, frictions and anxieties of the 'new' subject positions; it falls short of disclosing the traumatic consequences of their forceful assimilation. After all, these subjectivities, like those 'new' overseas settlements of the European colonisers, are but an excuse for replicating the base – an egotistic and expansionist idea of the 'enlightened self' superior to all other forms of humanness.

Intriguingly, however, the liberals' reliance on their shallow vision of human rights in Indonesia has often proven to be in vain. One of the paradigmatic stories concerns a grassroots women's organisation, \textit{Suara Ibu Peduli} (SIP; Voice of Concerned Mothers), which has used one of New Order's most important ideological tools – that of 'motherism' – against the regime:

While state practices have intensified women's association with mothering [...], women's activism on the basis of motherhood has made a counter-hegemonic use of this trope, as a strategy of resistance to state policies which threatened a fundamental concern of poor women [...] – their ability to feed their families.\textsuperscript{21}

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\textsuperscript{19} Blackwood (2008), \textit{supra} note 16, at 481.


\textsuperscript{21} ROBINSON, \textit{supra} note 7, at 152.
The thrust of the SIP’s powerful programme has been in rebuilding community relationships, instead of relying “on abstract rights.”\textsuperscript{22} It has significantly contributed to the eventual downfall of the New Order regime\textsuperscript{23} through resistant acts of the everyday and ordinary. In a similar vein, Indonesian subjectivities outside the dominant heteronormative (and, arguably, homonormative) sexual/gender matrix have been building mutual relationships on the basis of their understanding that they share the ‘same spirit’ (\textit{sama jiwa}),\textsuperscript{24} day-to-day experience and, oftentimes, their \textit{Indonesianness},\textsuperscript{25} rather than on a common human rights framework. Furthermore, their often-invoked desire to be accepted (\textit{diterima}) by society at large is not seen as their inherent right but as a consequence of their sincere contributions to the broader community with their many good deeds and accomplishments (\textit{prestasi}). These subjectivities “almost never say they should be respected just because [of who] they are, but in terms of good deeds: ‘We’ve got prestasi too (\textit{kita punya prestasi juga}).’\textsuperscript{26} Clearly, liberal, rights-based, identity politics make little sense in these narratives. Instead, other successful bargaining strategies are being devised and deployed.

How then can the apparent resistance to both the hetero- and homonormativity of the Indonesian non-conforming subject positions be understood? Where does it stem from? What makes these communities so resilient even on the shifting sands of liberal rights discourse? A peculiar spatial occurrence – \textit{islandness} – of these selfhoods seems to account both for their astonishing variance and their ability to rebuff assimilatory schemata. It is, therefore, further analysed as a trait and as a strategy.

\textbf{III. Islandic ‘Sacral’ and ‘Common’ Selves}

Numerous subject positions across the archipelago transgress gender binarism and dominant sexual norms. Some of their ethnographers tend to divide them between those who are sexually and gender variant, primarily because of specific spiritual/ritualistic reasons – these are, then, said to embody a ‘sacred gender’\textsuperscript{27} – and others, whose sexual/gender

\textsuperscript{23} Robinson, supra note 7, at 68 (The regime fell due to a popular reformist (\textit{reformasi}) uprising; hence the subsequent period became known as the \textit{Reformasi} Era.).
\textsuperscript{24} Blackwood (2005a), supra note 16, at 236-237.
\textsuperscript{26} Id. at 178.
\textsuperscript{27} Blackwood (2005a), supra note 16, at 866; Wieringa, supra note 16, at 143; Leonard Y. Andaya, The Bissu: Study of a Third Gender in Indonesia, in Other Pasts: Women, Gender and
experience has no apparent causal connection with ritual. It seems that the category of 'sacred gender', signals a modality of social relationship that Victor Turner had termed “normative communitas”: a ritual-based “perduiring social system” outside an “area of common living.” It is, however, questionable to what extent a form of sociality (including an assumed gender identity) based on spirituality/ritual can be distinguished from 'common living' wherein supposedly other genders inhere. Firstly, the ritualistic practices in question form an inalienable part of the ethnoscapes in which 'sacred gender' in Indonesia occurs. Secondly, more often than not, members of 'sacred gender' tend to live it (including through sexual relations thought to be appropriate for it) well beyond their ritually prescribed realm i.e. commonly. These tendencies effectively blur the artificial borderline between 'sacred' and 'common,' thus further complicating some of non-normative selfhoods of the archipelago.

Perhaps the best-known 'sacred gender' are bissu amongst the Bugis of South Sulawesi, of which the earliest accounts date back to the sixteenth century. While it had been possible for the Bugis youth, of all sexes (male, female and intersex), to become bissu, it seems that, at least since the mid-1800s, there were no longer any female-born bissu. According to Bugis cosmology, bissu are an earthly manifestation of the primordial unity of all genders, hence their attire, behaviour, religious and social roles uniquely resemble that sacred oneness.

Similarly, among the Ngaju (an offshoot of Dayak people) in Kalimantan, two gender variant subject positions known as basir and balian have been known as ritual practitioners. Both male-born basir and female-born balian have had attire and mannerisms distinct from other genders. It could even be the case that basir and balian have shared a single, 'sacred gender' – much like bissu – irrespective of their

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30. Id. at 96.
34. Hans Schärer, Ngaju Religion: The Conception of God Among a South Borneo People (Rodney Needham trans., 1963); Anne Schiller, Small Sacrifices: Religious Change and Cultural Identity Among the Ngaju of Indonesia (1997); Andaya, supra note 27; Blackwood (2005a), supra note 16, at 854-855.
35. Schärer, supra note 34.
biological sex, and their imputed ‘gender ambiguity’\textsuperscript{36} simply attests to the global northern sex/gender lenses through which these subjectivities are usually viewed.\textsuperscript{37}

In the Ponorogo region of East Java, the actors in reog, an eighth-century old Javanese drama style, assume subjectivities known as \textit{warok} and \textit{gemblak}. They are traditionally age-stratified, with older \textit{warok} assuming a long-lasting guardianship over young \textit{gemblak}, which may lead to a sexual relationship.\textsuperscript{38} During this ritualistic apprenticeship, they are expected to live in close domestic partnerships. While the \textit{warok} are today exclusively male-born, there are strong indicators that suggest that female-born actors could have also assumed this subjectivity in the past,\textsuperscript{39} whereas the \textit{gemblak} subject position which were open only to young boys, has, due to shifting public mores, been dictated to gradually being replaced with female-born actresses.

No doubt these sex-based changes in \textit{warok}/ \textit{gemblak} subjectivities – comparable with the disappearance of female-born \textit{bissu} and the gradual ‘correction’ of ‘gender ambiguity’ amongst \textit{basir} and \textit{balian} – occur as a dire consequence of an imposed heteronormativisation of their society. Yet the relative malleability with which ‘sacred gender’ is constructed and performed – which is almost invariably mirrored in other, non-ritual gendered relationships – signals a deep-rooted cultural memory which resists and transforms major assimilatory schemata even when it strives to incorporate some of their aspects into a workable social and gender/sexual present and continuum. This catalyst ensures coexistence, even though never without a struggle, of social temporalities with varying cultural tropes, whereby gender variant Indic rites,\textsuperscript{40} integrative Sufi metaphysics\textsuperscript{41} and other peregrinating or locale-specific cosmologies merge into an array of islandic spiritual and social selfhoods. Moreover, whilst being socially validated and replicated in the sacral/ritual domain, such gender-constructive cultural transience invariably ‘spills over’ into ‘common’ relationships and existence.

\begin{itemize}
\item[36.] Andaya, supra note 27.
\item[37.] Blackwood (2005a), supra note 16, at 854-855.
\item[38.] Boellstroff, supra note 16, at 41.
\item[40.] Blackwood (2005a), supra note 16, at 849; Wieringa, supra note 16, at 152 (Gender variance in Bugis, Ngaju and Javanese tradition (\textit{inter alia}) is often linked to Hindu mythology, in which deities such as Ardhanārīśvara – usually depicted as a half-male and half-female – are thought to provide a convincing script for sacral dis-essentialisation of gender rigidity.).
\item[41.] Geertz, supra note 5, at 12; Ronald Lukens-Bull, \textit{A Peaceful Jihad: Negotiating Identity And Modernity in Muslim Java} (2005); Arskal Salim, \textit{Challenging the Secular State: The Islamization Of Law in Modern Indonesia} (2008) (Muslim Javanese mysticism is often accredited for preserving cultural memory – including that pertinent to the island’s rich Indic past – within an elaborate and delicate religio-social system.).
\end{itemize}
Paradigmatic for these phenomena are, again, the Bugis of South Sulawesi, famously branded as people of five genders: beside bissu, male and female, there are calabai' and calalai' – the latter two being gender-transgressive subject positions. Calabai' "are male-bodied persons who dress like women, perform women's roles, and often have male partners," while calalai' "are female-bodied persons who may live with their women partners and fulfil male roles." That these two subjectivities exist alongside bissu amongst the Bugis is often taken as evidence of social delineation between 'sacred' and 'common genders'. Yet at least calabai' are known to perform various functions in marriage ceremonies, much like the contemporary Indonesia-wide gender transgressive ('male-to-female') subject position waria. Whilst calabai' perhaps can no longer claim their aetiological connection with ritual, it is curious that they and some other 'common' gender variant subjectivities usually negotiate their place in society by reassuming roles directly engaged with key social ceremonies – such as that of marriage. Ritualistic mediation of one's gender variance apparently persists as a salient modus operandi, despite historical disconnections.

IV. NEGOTIATING ARCHIPELAGIC SELFHOODS

Whereas ethno-locality of specific gender variant and/or sexually diverse subjectivities – usually spanning the territory of a single island – had been more or less preserved in the earlier times, the ultimate stages of the Dutch colonial administration and especially the ascendance of pan-Indonesian political resistance, leading to the turbulent formation and independence of a new nation-state (1945), have challenged their ethno-cultural particularity. The term archipelago (nusantara) has thus been heavily politically re-styled as a synonym for the new national motto – 'unity in diversity' (Old Javanese: bhinneka tunggal ika, 'fragmented but one'), whereby "the notion of archipelagic culture (kebudayaan nusantara) has served as a central attribute of the unified nation, as one of the pivotal notions that has enabled the positing of the national subject's continuity across History." Archipelago has effectively become the state's unique 'personality', through which ethno-localised subjectivities can

42. Davies, supra note 31.
44. Id. at 143; Blackwood (2005a), supra note 16, at 849.
46. Boellstorff, supra note 25, at 159.
47. Greg Acciaioli, What’s in a Name? Appropriating Idioms in the South Sulawesi Rice Intensification Program, in IMAGINING INDONESIA: CULTURAL POLITICS AND POLITICAL CULTURE 12 (Jim Schiller & Barbara Martin-Schiller eds., 1997).
48. David Bourchier, Totalitarianism and the 'National Personality': Recent Controversy about
collectively envision their postcolonial future, including by re-imagining their precolonial pasts. In Indonesian everyday usage, nusantara has indeed become a byword for the state (negara) and its intricate nationalist ideology.

Yet the nusantara’s official sexual/gender politics soon have revealed their stringent heteronormative zest. Although enthusiastically ‘united in diversity’ under the ideological roof of their new state, the Indonesian gender variant and sexually diverse subjectivities have faced sustained efforts to remould themselves into the model normative men and women. As of the 1980s, these efforts were increasingly complemented with the emergent liberal homonormative discourse, thereby creating the rigid heteronormative versus homonormative poles – two mutually reinforcing otherworlds, bereft of the intrinsic complexity of Indonesian historical and present-day selfhoods. These hegemonic attempts, however, have not succeeded in depriving the archipelago of its cultural, sexual and gender diversity. Yet they have forced previously by-and-large islandic, non-normative subjectivities to rethink and rework their relationships with the rest of the archipelago as well as to re-imagine themselves from a multi-islandic, nusantara vantage point.

There are at least two major resistance strategies pursued by non-normative subjectivities – that of re-appropriation and that of disidentification. Seemingly at odds with each other, these approaches are, in fact, often simultaneously used so as to achieve the desired outcomes at two juxtaposed hegemonic ends. Re-appropriation is, for instance, employed by waria (banci, béncong, wandu, kedi, kawe-kawe), who often claim that their waria-ness (kewariaan) is a distinct nusantara-wide phenomenon. In doing so, they effectively make use of the nation-building ideology and celebrate the fact that various historical male-bodied gender variant subjectivities – such as calabai’ – have been reunited under a ‘single vision’ (pandangan satu) of the negara nusantara. Waria’s high mobility within the national borderlines, in fact, corroborates this narrative. Some calabai’ for example, live today in Kalimantan, amongst the broader waria communities.

Disidentification, on the other hand, is chiefly used to resist homonormative encroachments. For instance, toomboi in Padang, West Sumatra – a female-born masculine (‘men-like’) subjectivity is locally perceived as a part of so-called ‘lesbi world’ (dania lesbi). Importantly,
“[b]eing lesbi in Padang is generally understood as an expression of gender rather than a form of sexuality engaged in by two women.”\textsuperscript{53} Hence, although local terms such as tomboi or lesbi sound similar or even the same as their global northern cognates, their meaning is often crucially different.\textsuperscript{54} However, in their still relatively rare encounters with the Jakartan or international activists, tomboi from Padang are sometimes told that they cannot be part of dunia lesbi, because they are not 'lesbian' but 'transgender.'\textsuperscript{55} Some of the tomboi resist this dictum from the hegemonic 'centre' through disidentification: they return to their locale and retain their own concept of selfhood and of their 'peripheral' dunia lesbi as long, and as resiliently, as possible.\textsuperscript{56} Moreover, it is from their island experience and cultural viewpoint that they continue to see the rest of the archipelago. This strategic disjunction enables Padang's tomboi to contemplate an archipelagic self from their islandic, re-localised place.

The anti-racist, feminist activist Zillah Eisenstein terms multiple but connectable experiences as polyversal.\textsuperscript{57} The intricate elasticity of the Indonesian islandic and archipelagic selves signals their polyversal nature which enables them to dynamically shape their gender, sexual, cultural and spiritual geographies. In nusantara, cultural tropes are connectable, but not unconditionally: peripheries and centres can be reshuffled, locales and their subjectivities partially yet not inseparably merged. Even if the archipelago is united into 'a total organism'\textsuperscript{58} of some kind, its real and metaphorical islands will remain 'organs' in their own right.

V. UNLEARNING GRAND DICHOTOMIES

The perennial ambivalence and what Walter Benjamin has described as "the profound perplexity of the living"\textsuperscript{59} abound, amidst the human experience, including that related to sexuality and gender. Yet the societal organisation of one's place and the modalities of desire require clustering and crude categorisation. A distinct binary approach, fuelled

\textsuperscript{53} Blackwood (2008), supra note 16, at 486.
\textsuperscript{54} Boellstorff, supra note 16; Boellstorff, supra note 16, at 575; Blackwood (2008), supra note 16, at 481.
\textsuperscript{55} Blackwood (2008), supra note 16, at 498.
\textsuperscript{56} Id. at 499.
\textsuperscript{57} Bouventura de Sousa Santos, Cognitive Justice In A Global World: Prudent Knowledges For A Decent Life (2007); Vanja Hamžić, The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos, 11 (2) Hum. Rts. L. Rev. 237 (2011) (Tantamount expression – pluriversal – has been coined by the de-colonial semiotician Walter Mignolo.).
\textsuperscript{59} Benjamin, supra note 13, at 75.
by nineteenth century European worldviews had coalesced into a rigid set of mutually opposed pairs through which personhood is objectified and researched: 'hetero' versus 'homo', 'male' versus 'female', 'East' versus 'West', and so on. Ontically anchored and steadfastly reproduced, these dichotomies have been orbited into everyday as chief heuristic and mnemonic devices.

Some of the key common strands of liberal thought - such as egalitarianism, meliorism, and universalism\(^ {60}\) - not only fit well but, in fact, require rigid binary concepts of personhood in order to thrive: equality is best established amongst two; the very idea of progress seemingly necessitates an inferior entity contrasted with its superior alterity; the universal nature and span of human rights - which justifies foreign intervention, occupation, re-colonisation - is most easily achieved if the spectrum of human subjectivities is kept simple and, of course, globally applicable. Such heightened Manichean contrasts inform and produce the liberal urge to act and spread, against all odds and disparities. It is not there to negotiate its presence but to offer a total worldview into which the human experience and cultural memory are forcefully embedded.

Researching alternatives to the grand dichotomies requires a peculiar unlearning process. Otherwise, for example, one may still be benignly assured that "[t]he most promising discourse on the acceptance of gender variance is the rights discourse."\(^ {61}\) It is indeed exceptionally hard to see beyond the elaborate façade of liberal dichotomies and their localised decorations into a multitude of hidden social fabrics and construction techniques. One surely stands a better chance if the façade is dilapidated. Yet unlearning these deep-seated truisms is not an easy task. There are, for instance, some mechanisms of forgetting - such as lapsing or superficial rejection\(^ {62}\) - which may not suffice as the remnants of the façade will continue to inform one's analytical directions.\(^ {63}\) Other techniques - such as conversion, an epiphany or even an anarchist deconstruction - epitomised in Proudhon's *destruam ut aedificabo*\(^ {64}\) - might simply replace the façade with other totalised systems, without

\(^{60}\) John Gray, **Liberalism** 43 (1986) (Meliorism is a philosophical principle holding that progress is an all-useful concept leading to a betterment of the world.).


\(^{62}\) Sigmund Freud, *Negation*, in *On Metapsychology* 435-442 (Penguin Books, 1984) (1925) (This type of rejection has been identified by Sigmund Freud as 'negation' (*Verneinung*): a mental process in which an unconscious wish is negatively formulated; it is rejected 'on the surface', but it retains its uncanny existence.).

\(^{63}\) Id.

\(^{64}\) Pierre-Joseph Proudhon, *Système Des Contradictions Économiques Ou Philosophie De La Misère* (Chez Guillaumin et Cieet Cie libraries, 1846).
fully comprehending its constitutive elements.65 Unlearning, in this
context, not only involves a critical expulsive phase in which the grand
dichotomies are gradually analytically repudiated but also a relocatory
reparative phase in which one is accustomed to seeing from a non-binary
place.

VI. Conclusion

Beyond their obvious political appeal, geographies of desire and
belonging primarily and crucially intersect in an intimate space of human
lifeworlds. Hence, studies of affect66 or of peculiar “intermediate area[s],”
between internal and external – those “resting-place[s] for the individual
engaged in the perpetual human task of keeping inner and outer reality
separate yet inter-related”67 – offer invaluable insights into the formation
of spatially predicated selfhood. This piece attempted to illuminate how
human subjectivities and desire extend to a phenomenological site of
intimacy,68 located within (and throughout) an interiorised island, or even
archipelago, and how this place in turn provides them with the heuristic
and mnemonic tools to sustain their (thus attained) selfhood against
the hostile foreign/ exterior winds. That certain topographic extremes –
such as highlands – can dramatically influence the cultural and political
shape of the peoples that inhabit them is a rather well established idea.69
This study was concerned with exploring more intricate (and reflexive)
aspects of this phenomenon, imprinted in cultural memory, syncretistic
cosmologies and sexual/ gender performativity. Ultimately, however,
the Indonesian islandic and archipelagic selves are also reaffirmed as
political conduits toward less hegemonic identitary scripts. As such,
they provide an excellent incentive to unlearning the liberal worldview’s
pervasive and abysmal dichotomies.

69. See James C. Scott, The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia (2009) (This is a delightfully meticulous study, analysing the culture and politics of the inhabitants of Zomia.).
Asking for it: Erotic Asphyxiation and the Limitations of Sexual Consent

Ingrid Olson*

The contentious practices of the sadomasochism (S/m) community provide a template for investigating consensual sexual practices that are often deemed excessive. A recent Supreme Court of Canada (SCOC) decision convicted the defendant in an assault case regarding sexual activity performed during a sex partner’s brief loss of consciousness due to consensual erotic asphyxiation. The SCOC cited law that requires continual consciousness for sexual consent and rejected the defendant’s argument of prior consent. That is, despite prior consent for sexual activities the SCOC ruled on the legal parameters of sexual autonomy. Several contemporary court decisions regarding S/m practices in England and Canada have placed legal limitations on the permissible level of sexual consent, and subsequently, one’s sexual autonomy. Legal parameters on sexual practices often conflict with the contemporary community standards of sexuality. This article argues that the autonomy to consent to the sexual practices one desires should not be limited by consciousness. There is a new sexual movement underway, fuelled by the discourses of feminist, sexuality, and queer theorists that seek to shift anti-porn and sexual assault dialogues to a positive project of sexual empowerment and queer sexualities. It is a call for sexual agency, the autonomy to negotiate sexual boundaries and pursue one’s sexual desires. This sexual liberation movement desires a revaluation of sexual values, and the right to say ‘yes’. Sexual autonomy, borne from negotiation and enthusiastic consent, is a re-imagination of the term ‘asking for it’.

I. INTRODUCTION

There is a new sexual movement1 underway, a small but growing political action targeting conservative views of sexuality. This movement is fuelled by the discourses of feminist, sexuality, and queer theorists. It is a movement that follows in the wake of civil rights, women's rights, gay rights, and transgender rights movements. This is not a movement motivated by fear, seeking new laws; rather, it seeks to reinforce the separation of the state from consensual sexual practices.2

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1. I say more about the concept of a sexual movement in section VI of this essay titled ‘Sexual Emancipation’.
This movement confronts sexual assault, rape victim-blaming, and debates over sex education curricula. It is a call for sexual agency, the autonomy to negotiate sexual boundaries and pursue one's sexual desires: the contentious notion that sexual activities be engaged solely for pleasure. Sexual autonomy, borne from negotiation and enthusiastic consent, is a re-imagination of the term, 'asking for it'. This sexual liberation movement desires a revaluation of sexual values, the right to say 'yes', and negotiate an array of sexual practices that includes sadomasochism.

In a May 27, 2011 Supreme Court of Canada (SCOC) decision, the defendant in an assault case, R. v. J.A., was convicted regarding sexual activity performed during a sex partner's brief loss of physical consciousness. The brief loss of consciousness occurred during breath play, or erotic asphyxiation, which involved a tempered amount of manual choking during a consensual sadomasochism scenario. The SCOC cited law that requires continual consciousness for sexual consent and rejected the defendant's argument of prior consent. That is, despite consent prior to specific sexual activities, the SCOC ruled on the legal parameters of sexual autonomy.

The upheld conviction of the J.A. case in Canada comes almost two decades after a group of sadomasochism (S/m) practitioners in

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3. A specific tangible example of this movement is the 'Slut Walk' marches, see SlutWalk Toronto, Because We Had Enough, available at: http://www.slutwalktoronto.com (last visited May 30, 2012); See also CBC News, Toronto 'slut walk' takes to city streets, CBC News, Apr. 3, 2011, available at: http://www.cbc.ca/news/canada/toronto/story/2011/04/03/slut-walk-toronto.html (last visited May 16, 2012) (Originating April 3, 2011, in Toronto, Canada, following a January, 2011 comment by a Toronto Police officer that "women should avoid dressing like sluts in order not to be victimized" queer feminist activists organized Slut Walk Toronto, a collective demonstration that has grown to over 200 'Slut Walks' worldwide.).


9. The defendant placed his hand on the throat of his partner and applied pressure restricting the flow of oxygenated blood to the brain to enhance sexual stimulation.


11. See Donatien Alphonse François Sade, The 120 Days of Sodom and Other Writings (Grove Press ed., 1966) (Sadomasochism, or S/m, is the negotiated, consensual infliction of pain. The term Sadist is applied to persons who derive pleasure through the infliction of pain on others, while a masochist correspondingly experiences pleasure through physical pain. The etymology of the term Sadist is attributed to the life and writings of the Marquis de Sade.); See also Leopold Von Sacher-Masoch, Venus in Furs (1870) (The term masochist is equally
England had their convictions upheld on charges of assault causing bodily harm despite claims of consent. Both cases involved relationships of consensual S/m, that took place in private homes and did not require medical attention. Nor were the police summoned during or immediately following their S/m activities. Neither case received police attention until well after the events with which the defendants were charged.

Our sexual relationships are perhaps our most intimate ones. I suggest that sexual intimacy is an integral part of human life; most persons desire some form of sexual relationship, regardless of their placement in the plethora of diverse demographic classifications. Human sexuality denotes physically intimate activities that often involve touching other persons, caressing, kissing, and engaging in various sexual practices for the purpose of sexual pleasure. Furthermore, this level of intimacy has the capacity to create an emotional or spiritual bond between persons. Sexual consent is constitutive of sexual agency. It is the negotiation of intentional sexual activity and should not be limited by the loss of physical consciousness where prior consent exists.

This article addresses the most intimate level of safety: the negotiation, trust and consent between persons within the context of sexual relationships. Specifically, I address the linkage between consciousness and consent in the SCOC judgement in the R. v. J.A. decision and argue that sexual autonomy means that consent does not cease with loss of consciousness. Several contemporary court decisions regarding S/m practices in England and Canada have placed legal limitations on the permissible level of sexual consent and, subsequently, one's sexual autonomy. Legal parameters on sexual practices conflict with contemporary discourses of feminist and sexuality movements seeking to shift anti-pornography and sexual assault dialogues to a positive project of sexual empowerment. This article interrogates the restriction of sexual consent based on legal decisions of S/m practices and argues that the impact of these laws negatively effect sexual autonomy.

There are three legal cases regarding sadomasochism that I examine here. They are, in both chronological order and their order of appearance in this article, the 1993, England, House of Lords
R. v. Brown (sadomasochism) assault case. Second, the 2004 British Columbia (Canada) provincial court, R. v. Price (pornography) obscenity case. My explanation of the British Columbia R. v. Price case includes an abbreviated explanation of Canada's obscenity law, generally referred to in Canada as the 'Butler decision'. This explanation is included because it is a vital part of the contemporary community standard of sexuality for which I argue. Third, the 2011, SCOC, R. v. J.A. (sadomasochism) assault case that centred on the issue of sexual activity following loss of consciousness. I examine these three cases together because they represent significant legal decisions on S/m practices in the contemporary secular, industrialised West. These cases also work together in highlighting the distinction of the public/private divide and how legal decisions of S/m are influenced, or not, by contemporary S/m practices and the community standard of sexualities and tolerance. What I argue through these three separate legal decisions is that what the court understood and applied correctly in R. v. Price and what the courts failed to recognise in the Spanner and J.A. cases, is the contemporary community standard of tolerance regarding sexuality and the significance of autonomy and self-determination in adjudicating sexual consent.

I start with an overview of erotic asphyxiation, or asphyxiophilia, known to S/m practitioners as breath play. This will not constitute a complete analysis of the practice but will suffice as a working understanding for this article. The next three sections are descriptions of the legal cases listed above. These cases are followed by a comparison of two disparate narratives – one feminist theory, one queer theory – that serve to articulate the legal limitations of consent, sexual emancipation and agency in contemporary, secular Western democracies. I then provide an analysis of the legal cases in light of contemporary sexuality practices and discourses.

In this article, I take a liberal position with regard to sexual practices generally, and to S/m specifically. Following Athanassoulis' stance in The Role of Consent in Sado-Masochistic Practices, I endorse the significance of respecting individual “autonomy, self-determination and consent.”

This view of autonomy will be familiar to readers of John Stuart Mill. I do not pursue an interrogation on the requirements of consent here as that is beyond the scope of this article. I do however, wish to include Athanassoulis' summary of liberalism's view of the law as needing to “respect and uphold individual liberties in conformity with the principle

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13. Athanassoulis, supra note 6, at 142.
that each individual should be accorded the greatest possible liberty compatible with respecting that of others.”

I contend S/m practices are appropriate in a discussion of queer sexualities because they represent a non-normative sexual paradigm that invites multifarious possibilities for sexual pleasure via the modalities of bondage, pain, and submission. Certainly not all S/m practitioners would agree with labelling S/m as queer since many practitioners are hetero-identified and do not regard their sexuality or S/m practices as queer; in short, I respect this stance. Having said that, in Nikki Sullivan’s introduction to queer theory, she refers to the substantive number of theorists who adjudicate S/m as queer and cites Foucault’s discussion on S/m as a queer pleasure. For Foucault, S/m is “the eroticisation of power” and S/m practices represent “the real creation of new possibilities of pleasure.” Queer theorist Leo Bersani notes that Foucault wrote “at some length, and with enthusiasm” about S/m, and cites a 1984 Advocate article where Foucault “praised S/M practitioners as ‘inventing new possibilities of pleasure with strange parts of their bodies’ [...]” I suggest non-procreative sexual practices that eroticise power and pursue pleasure with strange parts of the body can be understood as queer.

Ken Plummer states that “queer” represents “the postmodernisation of sexual and gender studies” and “brings with it a radical deconstruction of all conventional categories of sexuality and gender.” This queer deconstruction of sexuality and gender categories is articulated in Jacob Hale’s and Robin Bauer’s work on the creation of alternative identifications in S/m scenarios. Alternative personae generated through (some) S/m relationships can be understood as disidentifications – queer and intersectional – traversing categories of ability, age, class, ethnicity, gender, religion, and sexual orientation. These definitions of the term queer suitably represent what I address here.

15. Athanassoulis, supra note 6, at 142.
18. Id. at 165.
23. José Esteban Muñoz, Disidentifications: Queers of Color and the Performance of Politics (1999); See also Judith Halberstam, In a Queer Time and Place: Transgender Bodies, Subcultural Lives (2005).
II. EROTIC ASPHYXIATION

The broad context of this article is the relationship between S/m and the law. More specifically, it is the requirement of consciousness for sexual consent in Canadian law. This limitation on consent subsequently requires an end to sexual activities, regardless of prior consent. In the R. v. J.A. case I examine later, a conviction of assault resulted from sexual activity that occurred following the loss of consciousness of a sexual partner. The unconscious state was precipitated by erotic asphyxiation, or asphyxiophilia, in psychological terminology.

Erotic asphyxiation is commonly referred to as breath play in S/m communities. Breath play is the limitation or restriction of a person’s ability to breathe and to receive oxygenated blood to the brain. In John Curra's work on deviance, he explains the physiological effects of erotic asphyxiation:

The carotid arteries (on either side of the neck) carry oxygen-rich blood from the heart to the brain. When these are compressed, as in strangulation or hanging, the sudden loss of oxygen to the brain and the accumulation of carbon dioxide can increase feelings of giddiness, lightheadness, and pleasure, all of which will heighten masturbatory sensations.24

Depriving oxygen to the brain can be achieved manually by gripping the throat by hand or by applying direct pressure with a cane, belt or rope. Alternatively, oxygen can be deprived through modes of suffocation such as a plastic bag placed over the head or limiting the flow of air entering a gas mask.25

Erotic asphyxiation is a relatively unknown and under-researched sexual practice.26 Combining an individual’s ordinary reluctance to disclose their sexual proclivities with the pathologisation of non-reproductive sexual practices as paraphilias27 results in a surreptitious sexual practice. When erotic asphyxiation does enter as a topic of conversation it might be initiated through a news story of death by auto-erotic strangulation: the bizarre investigatory issue in forensic science.28

26. Id. at 130.
27. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (1994); Hypoxophilia, meaning the love of oxygen deprivation, is listed in the DSM as a sub-heading of sexual masochism, see Downing, supra note 25, at 121.
28. Lisa Downing & Dany Nobus, The Iconography of Asphyxiophilia: From Fantasmatic Fetish to Forensic Fact, 27 PARAGRAPHE: J. MODERN CRITICAL THEORY 1, 9 (2004); See also JOHN
Asphyxiophilia is an extreme form of S/m, usually categorised in S/m jargon as 'edge play'. There is no easy guide to learning breath play; it is a practice that must be engaged gradually and with great caution.²⁹

Practitioners must be aware of the health status of anyone submitting to asphyxiation and realise that loss of consciousness is a real possibility and perhaps poses greater dangers to health. In examining the reasonable limitations of various S/m practices the techniques of erotic asphyxiation stand out as a “literal threat to the promise of 'safety', to the extent that its outcome may be accidental death.”³⁰ The potential for death is real because what creates breath control’s emotional and physical sensations is the restriction of oxygen generally and to the brain specifically. S/m practitioner and author Jay Wiseman, acknowledges that there is no absolute method of preventing possible death in breath play. This potent distinction leads Wiseman to categorise asphyxiophilia as a “qualitatively different” S/m practice.³¹

While the Diagnostic and Statistical Manual³² (DSM-IV), Curra and other authors³³ describe asphyxiation as a behaviour related to auto-erotic and masturbation practices performed alone it is also incorporated into sexual activities with partners.³⁴ The focus of breath play above has been on the psychical and physical experiences for submissive persons being choked or strangled. However, while the excitation is of a different kind, it is also true that dominant persons inducing breath control derive sexual pleasure from controlling a partner's ability to breathe.³⁵

The J.A. case is an example of asphyxiophilia as a sexual act between consenting adults. After learning of the potential for death through asphyxiophilia, some may wonder why anyone would engage in such a precarious sexual practice and why it would be referred to innocently as breath 'play'? I will not undertake a lengthy attempt at a satisfactory

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30. Downing, supra note 25, at 120.
32. The Diagnostic and Statistical Manual (DSM) is a professional reference for the spectrum of psychological disorders used to determine treatment options and prognoses, see American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV American Psychiatric Association (1994).
33. See Downing & Nobus, supra note 28, at 1, 9; See also Money, Wainwright & Hingsburger, supra note 28.
34. Downing, supra note 25, at 121.
35. Henkin & Holiday, supra note 29, at 61.
account of erotic asphyxiation here. Instead, I will refer to the S/m categorisation 'edge play' mentioned above. Edge play, as an unofficial category, consists of a number of S/m practices that vary depending on who you ask and how 'edgy' they consider various practices to be. What is largely accepted though is that the S/m activities in edge play are those that push the boundaries of one or more: safety, pain, humiliation, fear. An appreciation of these sexual desires should rather quickly indicate that these are persons who, for whatever reason, seek sexual adventure, sex on the edge.

III. R. v. BROWN: THE 'SPANNER' CASE

In 1987, in Manchester, England, a police investigation culminated in the arrest of a group of men involved in sadomasochism. The arrests were the result of a series of unforeseen circumstances: the men had videotaped their hard-core S/m activities for their private viewing pleasure and by still unknown means a videotape fell into the possession of the police. The police viewed the extreme S/m practices recorded on the tape and determined it was of a violent nature that required investigation. All the defendants were known to each other; they had engaged in S/m together over a substantial period of time, having freely negotiated and consented to the activities which took place in private homes. None of the men required medical care, and none reported unlawful confinement or assault to the police before or after the charges were brought.36 The defendants were tried on charges of 'assault occasioning bodily harm', contrary to Section 4737 of the Offences Against the Person Act 1861, and specifically, 'inflicting bodily injury, with or without weapon', contrary to Section 2038 of that Act.

The arrest of a group of gay men engaged in hard-core S/m, on trial for inflicting bodily harm caught significant media attention and subsequent


37. See Legislations.uk.gov, Offences Against the Person Act 1861 § 47, available at: http://www.legislation.gov.uk/ukpga/Vict/24-25/100/enacted (last visited May 15, 2012) (Section 47 reads: Whosoever shall be convicted upon an Indictment of any Assault occasioning actual bodily Harm shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and whosoever shall be convicted upon an Indictment for a common Assault shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding One Year, with or without Hard Labour.).

38. See Id. at § 20 (Section 20 reads: Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily Harm upon any other Person, either with or without any Weapon or Instrument, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.).
public discussion. The media called it the “Spanner Case,” named after the chief police officer of the investigation.39

The original conviction of the Spanner case was held on November 7, 1990. The conviction was appealed to the House of Lords and in a three-to-two decision the convictions were upheld in 1993. The opening lines from Lord Jauncey of Tullichettle in the March 11, 1993, R. v. Brown majority decision include:

The events giving rise to all the charges were sado-masochistic homosexual activities carried out consensually by the appellants with each other and with other persons. [...] It was common ground that the receivers40 had neither complained to the police nor suffered any permanent injury as a result of the activities of the appellants. [...] Your Lordships were further informed that the activities of the appellants [...] were conducted in secret and in a highly controlled manner, that code words41 were used by the receiver [...]42

This brief passage reveals the court was aware of several contentious issues in the assault conviction. First, the Lords knew that these individuals had been participating in their activities consensually. Second, the activities of the participants were deemed as assault causing bodily harm though no one complained to police or sought medical attention. Third, the scenarios were held in secret (a participant's home), not in a public venue. Lastly, the participants regulated their activities and took precautions to avoid harm. The defence was based on these points with the added clarification that there was no potential for injury to anyone beyond those involved. Further, the defence argued the case does not meet the criterion for the Offences Against the Person Act because there was an absence of hostility: no malice or aggressive intent.43

The Crown responded that the fallacy of this argument is that actual bodily harm is a crime and therefore one cannot legally consent to it. The submissive partners were seen as aiding and abetting in a crime by their consent, though consenting to S/m is not a defence because it is a crime. The activities of lawful bodily harm cited by Lord Templeman include “Surgery, [...] circumcision, tattooing, ear-piercing, and violent

39. Athanassoulis, supra note 6, at 141.
40. The term ‘receiver’ was used by some legal council to describe masochists, those receiving pain.
41. The Court here refers to the commonly used S/m term, safeword, a previously agreed word used as a code to cease activity, often because the masochist has reached or is near their pain threshold.
42. R v Brown [1993] 2 All ER 75, 86.
43. Id. at 108.
sports including boxing [...],”44 and “parental chastisement” added Lord Jauncey.45

Speaking for the minority opinion in the R. v. Brown appeal, Lord Mustill introduced the idea of a “continuous spectrum of the infliction of bodily harm, with killing at one end and a trifling touch at the other”46 so as to illuminate the simplicity of the majority’s argument that sought to clearly identify a point distinguishing sadomasochism from legal harmful practices. Lord Mustill stated that bodily harm or pain incurred during sexual activity that is momentary or slight is acceptable and not subject to charges of bodily harm. This attempt to distinguish bodily harm leaves the burden of analysing slight pain or harm with the courts. However, given the adamant objections to S/m in R. v. Brown as a permissible activity allowing physical harm, it is certain this was the court's method of allowing playful sexual activity while excluding S/m.

In the appeal, the blatant disregard for harm from consensual S/m versus permissible injury from surgery, rugby, body piercing and other lawful practices are summarised in Lord Templeman’s statement that,

> [e]ven when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating.47

In Lord Templeman’s comments for the majority, he acknowledged that the 1861 law cited was originally written in the early eighteenth century to prohibit maiming through duelling and fighting “because the King was deprived of the services of an able-bodied citizen for the defence of the realm. Violence which maimed was unlawful despite consent to the activity which produced the maiming.”48 Templeman also expressed concern that S/M participants could not accurately gauge the level of harm of their activities, and that the practice was “intentionally harmful to body and mind [...].”49 He went on to describe S/m as not being only about sex, but violence and “society must be protected from a cult of violence.”50

In Lord Jauncey’s comments for the majority, he acknowledged the participants used a safeword to cease activities when a pain threshold

44. Id. at 78.
45. Id. at 93.
46. Id. at 108.
47. Id. at 78.
48. Id. at 79.
49. Id. at 89.
50. Id.
was reached but then pointed out that unlike sporting events there was no “referee” present in S/m, and that none of the participants were medically trained for their activities.51 As with Templeman, Jauncey’s concerns extended to morality, claiming that in the case of the \textit{Spanner} defendants, the “corruption of young men is a real danger.”52 Similar to the other majority opinions, Lord Lowry voiced his moral concerns in stating S/m “cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.”53 And on the question of including S/m into the list of lawful activities for bodily harm, Lord Lowry claimed S/m is a “wish to satisfy a perverted and depraved sexual desire.”54

The dissenting opinions in \textit{R. v. Brown} came from Lords Mustill and Slynn. Mustill problematised the court’s limitations of lawful bodily harm by adding euthanasia and “religious mortification.”55 However, the main strategy for the defence was the argument that it was not a decision for the court at all. Lord Mustill stated S/m activities should be seen as a case of “private sexual relations.”56 Lord Slynn agreed that consensual S/m activities are private, stating, “It is a matter of policy in an area where social and moral factors are extremely important and where attitudes can change. In my opinion, it is a matter of policy for the legislature to decide.”57

The issue in the \textit{Spanner} case is that, in the opinion of the courts, there is a list of lawful activities that permit bodily harm but sadomasochism is not suitable for that list. A key point of contention for the courts in the \textit{Spanner} case is the idea of consenting to S/m, consenting to bodily harm of a particular kind. As Athanassoulis articulates, the critics of S/m find something objectionable with the idea of desiring and consenting to physical harm as a means to sexual fulfilment. She rightly points out that the legal opinion forwarded from the House of Lords decision is that it is rational to harm another person for the purposes of child character development or sport but not in pursuit of “sexual gratification.”58

51. Id. at 86.
52. Id. at 94.
53 Id. at 105.
54 Id.
55. Id. at 117.
56. Id. at 106.
57. Id. at 134.
58. Athanassoulis, \textit{supra} note 6, at 150; I want to add here that in addition to the issue of consent in the \textit{Spanner} case, there are other academic analyses that target what is reasonably perceived to be the court’s issues and motivations regarding gay men’s sexuality and the HIV status of some \textit{Spanner} defendants, see Annette Houlihan, \textit{When ‘No’ Means ‘Yes’ And ‘Yes’ Means Harm: HIV Risk, Consent And Sadomasochism Case Law}, 20 (31) \textit{TUL. J. L. & SEXUALITY} (2011).
The minority opinion from Lord Slynn recognises that society's attitudes regarding sexuality can change; this is a fundamental idea in this article. I now move to a 2004 British Columbia provincial case on S/m pornography, and the court's recognition that community standards change. What I seek to underline in the following *R. v. Price* decision is that, unlike Lord Slynn's contention in *Spanner*, the British Columbia provincial court hinged directly on the recognition of shifting societal views of morality and attitudes toward sexuality.

**IV. R. v. Price: The 'Sweet Productions' Case**

In response to the UK Court conviction on the *Spanner* appeal of 1993 and the SCOC ruling of assault in the *J.A.* case in 2011, I introduce the British Columbia (BC) provincial court case of *R. v. Price*. In 2004, the BC Courts dismissed the obscenity charges in *R. v. Price* based on a changing idea of obscenity, and evidence of how the community standard of tolerance on sexuality generally, and sadomasochism specifically, had shifted to accepting a higher level of violent depictions.

I will state immediately that I am aware of the difference in charges of assault, as in the *Spanner* and *J.A.* convictions, and an obscenity charge pertaining to sexual representations. I contend that while assault and obscenity are criminal charges of a different kind, the charges in all cases are related to acts of sadomasochism and the various courts' interpretation of the acceptability of these activities. As I mentioned in the introductory paragraphs, what I argue here is that what the court understood and applied correctly in *R. v. Price* and what the courts failed to recognise in the *Spanner* and *J.A.* cases is the contemporary community standard of tolerance and the significance of that community standard in adjudicating sexual consent.

In the summer of 2002, an adult video production company in Vancouver, Canada, called 'Sweet Productions Inc.' (SPI) operated by Mr. Price was raided by the police and charged with twenty counts of obscenity based on eleven pornography videos obtained in the raid. All of SPI's video work involved explicit depictions of bondage, sexual domination, and sadomasochism.

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60. All references to the 'Sweet Productions' case are from the BC Provincial Court decision through their website: Provincial Court of British Columbia, Regina v Randy Price, available at http://www.provincialcourt.bc.ca/judgments/pc/2004/01/p04_0103.htm (last visited Nov.7, 2011).
62. *Id.* at § 4.
To provide a clear explanation regarding the judgement of the obscenity charges against SPI, it is necessary to have a basic understanding of Section 163(8) of Canada's Criminal Code on Obscenity. 63 I will provide a summary of this law as it pertains directly to the outcome of the SPI ruling and to my argument.

Canada's current obscenity law is based on what is known as the “Butler Decision.” 64 In brief, Donald Butler owned an adult-only business that sold hard-core print pornography, and sold and rented video pornography. In 1987, Butler’s store was raided and charges were laid after police seized material deemed obscene because it depicted the “undue exploitation of sex,” containing one or more of the categories “crime, horror, cruelty and violence.” 65 The original provincial court conviction on numerous obscenity charges came in 1989. Butler appealed and was convicted by the Supreme Court of Canada in February, 1992, under Section 163 of Canada’s Criminal Code, which, at the time, set the standard for Canadian Courts; hence the dubious attachment of his name to Canada’s obscenity law.

I will not undertake a lengthy, detailed explanation of the Butler decision here. Rather, I want to highlight Section 163(8) of this legislation pertaining to a legal test that seeks to determine what constitutes “undue” in adjudicating an “undue exploitation of sex,” thereby identifying an “objective standard of obscenity.” 66 Under the heading of undue exploitation of sex, there are three test components; I will briefly explain these three legal considerations.

The first of these is titled the “Community Standard of Tolerance” Test. In R. v. Butler, the Court stated that this test must be based upon the current level of acceptability in matters of sexual representation, citing from R. v. Close 67 and R. v. Dominion News & Gifts (1962) Ltd. 68 These judgements recognise that a society’s conceptions of obscenity shift over time and that the courts must adjudicate in keeping with contemporary ideas and mores. The Butler decision also cites case law intended to

63. See R. v. Butler, [1992] 1 S.C.R. 452 available at: http://scc.lexum.org/en/1992/1992scr1-452/1992scr1-452.html (Section 163 of Canada’s Criminal Code addresses obscenity. Section (8) defines obscenity: “For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.”).
66. Id.
clarify the community standard test as one that applies to members of society as a whole, not only to a specific group or individuals, stating, “[t]he cases all emphasize that it is a standard of tolerance, not taste, that is relevant.”69 That is, the test is not to determine what a citizen is prepared to tolerate viewing themselves but rather what they will tolerate other citizens viewing. This test recognises that there is a context to the exposure based on the audience and the circumstances of the viewing. In R. v. Butler, the court states that the most important of the three tests in determining an undue exploitation of sex is the community standard of tolerance. The notion of a community standard in adjudicating undue sexual exploitation is an important point that I will say more about later.

The second test for the undue exploitation of sex is the “Degradation or Dehumanization” Test. The target of this test is relatively self-explanatory and concerned with sexual indignities. The Butler decision cited R. v. Doug Rankine Co.70 and its attention to “scenes which portray violence and cruelty in conjunction with sex”71 deemed to be degrading or dehumanising. Representations of this nature are of specific concern because they are thought to be linked to moral decay and harm to society. Having said that, if exposure to such material is that potent, it seems it would also fail the community standard of tolerance test. The level of public acceptance for degradation again hinges on what is deemed undue, where representations of sexual objectification achieve an interpretation as dehumanising.

The third test is the “Internal Necessities” Test, also referred to as the “Artistic Defence” Test. In R. v. Butler, counsel for the Crown stated that artistic defence is the last step in determining whether a material's content should be considered undue sexual exploitation. The Court recognised that there are artistic works that may offend many viewers but that this discomfort is weighed against the artistic and literary merit of the material and the creative freedom of the artist. The Court must arrive at a determination as to the intention of the author, whether sexual exploitation is an integral part of the theme or the story's development, or if it is an unnecessary and undue pursuit of obscenity.

What becomes immediately clear in reviewing the above tests is that the courts have the final word, although they are regarded as speaking for the community asarbiter in determining the nation's standard of tolerance and threshold of obscenity. It is because of the differing opinions involved that it is unusual for these court decisions to be unanimous.

While there is a majority decision, the dissenting justices give voice to an alternate interpretation of the law and show the unlikelihood of arriving at a united judgement. An example of judicial uncertainty from \textit{R. v. Butler} is the majority decision delivered by Justice Sopinka, and the stern condemnation of obscenity, which states:

Obscenity leads to many ills. Obscene materials convey a distorted image of human sexuality, by making public and open elements of human nature that are usually hidden behind a veil of modesty and privacy. These materials are often evidence of the commission of reprehensible actions in their making, and can induce attitudinal changes which may lead to abuse and harm.\textsuperscript{72}

However, in the initial 1989 provincial court conviction of Mr. Butler, Justice Wright considered whether the confiscated materials met the definition of obscene in Sec. 163(8) of the Criminal Code, and expressed serious difficulty in applying the community standards test. Wright stated that to render a definitive decision “on the basis of experience is contrary to the judicial role” and that applying his own views drawn from “experience” are unreliable.\textsuperscript{73}

I place these two contrasting legal opinions of obscenity together to disrupt any claim that resembles former American Supreme Court Justice Potter Stewart's famous 1954 quote on pornography, “I don't know what it is, but I know it when I see it.”\textsuperscript{74} Stewart helps elucidate that the demarcation of pornography is often, if not always, subjective; one person's erotica is another person's obscene pornography. What I want to garner from this description of the \textit{Butler} obscenity decision is the ambiguous nature of the concept 'community standard' at that time.

I return now to the first part of the undue exploitation of sex in the \textit{R. v. Butler} decision and draw attention to the court's statement that the most important of these tests is the “community standard of tolerance” test. As I mentioned above, the community standard test is a key element in my argument. I now summarise the outcome of the 2004, \textit{R. v. Price} (SPI) case and the importance of the community standard test in that decision. Mr. Price faced twenty charges of obscenity based on eleven videos obtained in a police raid. All eleven videos depicted graphic acts of bondage, discipline, sadism and masochism.\textsuperscript{75} The legal defence assembled a strategy targeting the measurement of the contemporary community standard based on four separate but supportive components.

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{75} \textit{R. v. Price} 2004 BCPC 0104 141079-3-C2, § 4.
The first defence strategy called on expert testimony from two medical doctors, Moser and Fisher, with expert knowledge in sadomasochism.\textsuperscript{76} The Crown argued against the supposed expert testimony but Judge Low permitted it, stating he would determine how much weight to attribute to this testimony.\textsuperscript{77} Dr. Moser's testimony stated that pleasure and pain are closely related in human sexuality and that “pain giving rise to sexual pleasure is a normal sexual experience and is the basis for practising BDSM.”\textsuperscript{78} He suggested that S/m is more common than might be thought and went on to describe various levels of S/m whereby people who might not consider themselves as S/m practitioners may indulge in mild bondage or similar lower level S/m.\textsuperscript{79} Dr. Moser clarified that while many S/m scenarios appear as acts of degradation both the dominant and submissive participants derive a “sense of accomplishment and feeling good and a whole variety of other emotions […].”\textsuperscript{80} Dr. Moser stated that consensual S/m “is normal and appropriate sexual behaviour” and that consent “is the overriding ingredient of normal and appropriate sexual behaviour.”\textsuperscript{81} Judge Low accepted that this definition was agreeable with Canada’s Criminal Code.

Dr. Fisher was accepted by the Court as an expert in sexuality and pornography. In this capacity, he stated that the proliferation of pornography, including S/m, has been proved statistically not to increase sexual violence and rape.\textsuperscript{82} Judge Low accepted the opinion of Dr. Fisher and the numerous studies he cited refuting a correlation between pornography and sexual violence.\textsuperscript{83} Ultimately, the Court concluded that while valuing Dr. Fisher's opinion, it cannot be given weight because it conflicts with the Butler decision and Parliament's concern of harm from pornography.\textsuperscript{84}

The second defence component introduced the status of the local Vancouver S/m community, and the police relationship with their activities. Mr. MacDonald, a retired thirty-year veteran with the Vancouver Police testified for the defence. Although he was not

\textsuperscript{76.} Id. at § 6.
\textsuperscript{77.} Id. at § 9.
\textsuperscript{78.} Id. at § 32 (BDSM is another acronym for sadomasochism, one that gives a fuller account of practices. The ‘B’ represents bondage, and ‘D’ represents discipline, for persons who engage in dominant-submissive power-exchange relationships but who may not necessarily engage in S/M pain activities.).
\textsuperscript{79.} Id. at § 33.
\textsuperscript{80.} Id. at § 41.
\textsuperscript{81.} Id. at § 34.
\textsuperscript{82.} Id. at § 46-51.
\textsuperscript{83.} Id. at § 56.
\textsuperscript{84.} Id. at § 86.
considered an expert in matters of S/m the Court gave weight to his testimony given his extensive police experience.85 The defence entered evidence that “most larger urban centres in Canada” have S/m and fetish clubs or organisations where adults interested in S/m practices can easily gather in a regulated public venue.86 Mr. MacDonald stated that local police are aware that S/m events take place on a regular basis and are routinely visited by police. He further stated that police do not interfere with the activities at these events and that in his experience the conduct of participants is “exemplary.”87 Mr. MacDonald stated that in his experience he had seen S/m activity move from being a marginalised practice to achieving what he regarded as “socially acceptable” status. Based on the testimony of Dr. Moser and the evidence of regular S/m events, Judge Low accepted that S/m is not an isolated sexual practice.88 MacDonald said the activities at these events is the same or very similar to that on the eleven evidence videos from SPI.

The third piece of defence evidence affecting the contemporary community standard is the prevalence of worldwide communication through internet access and its prolific usage by current Canadian society.90 SPI admitted that their S/m videos may be easily accessed via the internet through payment websites operated by SPI using a valid credit card.91 Dr. Fisher’s testimony stated “the Internet has provided anonymous, accessible, unfettered access to every variant of sexually explicit material from erotic to violent pornographic” images.92

The fourth and final major evidence introduced was a number of videos from mainstream movie rental outlets – American Psycho, I Spit on your Grave, and Rape Me, for example. The defence stated there is an abundance of sexually violent mainstream movies that are easily accessible through movie rental shops, theatres, cable television and libraries.93 These films were introduced as evidence of the current community standard.94 In his concluding discussion, Judge Low states “the level of violence in the Fictional Materials is higher than that portrayed in” the eleven videos from SPI.95 Judge Low accepted that the

85. Id. at § 38.
86. Id. at § 28.
87. Id. at § 29.
88. Id. at § 37.
89. Id. at § 36.
90. Id. at § 11-16.
91. Id. at § 17-20.
92. Id. at § 48.
93. Id. at § 25.
94. Id. at § 25-27.
95. Id. at § 95.
mainstream fictional videos are readily available thereby representing the current community standard and concluded that Canadians tolerate other Canadians viewing material “indistinguishable” from the SPI videos.96 This determination ended the Court's discussion with Judge Low acquitting Mr. Price of all obscenity charges.

In assessing the case, Judge Low considered *R. v. Butler* and its intent to prevent harm from obscene material,97 and recognised that *Butler* “criminalizes the exploitation of sex and sex and violence, when on the basis of the community test it is undue.”98 The ruling gave weight to the Community Standard of Tolerance test in stating that “Canadian community standards change,”99 and recognising that S/m “is not an obscure practice.”100

The acquittal was based on a community acceptance of S/m as a public practice given Dr. Moser's statement that S/m is a normal form of sexuality, Mr. MacDonald's thirty-year police career experience, the sample of sexually violent fictional films available at mainstream video stores and the proliferation of the internet and its burgeoning pornography sites that include hard-core sadomasochism.

Following the SPI judgement, there was an anxious assumption from pornography producers and members of the S/m communities in Canada that the Crown would appeal the decision but there was no appeal. While it is unknown to the public why an appeal was not filed, it was generally assumed that the evidence put forward by the defence sufficiently convinced the Court as to the contemporary community standard of tolerance.

I stated above that my argument recognises the difference in criminal law between assault charges in the *Spanner* and *J.A.* cases, and obscenity in the SPI trial. What I want to bring attention to is that the SPI defence is entirely built upon community standards from the disparate perspectives of medical, policing, communication technology, and mainstream entertainment sources. While the last two perspectives – internet and entertainment – address the more fictional aspects of S/m, the former sources – medical and policing – gave testimony regarding the actual practices of S/m practitioners. It is because the *R. v. Price* decision includes expert testimony, accepted by the court, on the permissibility of real

96. *Id.* at § 99.
97. *Id.* at § 85-86.
98. *Id.* at § 73.
99. *Id.* at § 89.
100. *Id.* at § 36.
S/m practitioners and their activities within the Canadian community standard of tolerance that I hold this ruling in high regard.

V. R. v. J.A.

One evening in May, 2007, a Canadian couple had consensual sex in their home. The couple had been involved sexually for approximately seven years and had a child together. Their sexual repertoire included engaging in S/m practices, including erotic asphyxiation and bondage, and on that night they did so. The man, known as JA, choked his partner and she lost consciousness, as had happened in the past. While the woman, known as KD, was unconscious JA inserted a dildo\textsuperscript{101} into her anus. After less than three minutes, KD regained consciousness and asked that the dildo be removed; JA complied. He then untied her hands and the couple had peno-vaginal intercourse.\textsuperscript{102}

Two months after this event, KD reported to the police that she had been the victim of an assault. KD stated that she had consented to being choked but had not consented to anal penetration, a sexual activity that occurred while she was unconscious. Her statement initiated an investigation and court case that would result in an original conviction for assault in Ontario provincial court, a successful appeal in Ontario, and culminate in an assault conviction in the SCOC. JA testified that there was no assault based on her prior consent.\textsuperscript{103}

This case is somewhat problematic as a legal example for this article because of the relationship between JA and KD. The court transcripts include testimony that their relationship was failing. The time lapse of two months between the assault and KD's report to police was later explained by her as a response to JA's threat to seek sole custody of their child. The SCOC also recognised that KD was less than forthcoming on the question of whether the couple had engaged in anal sex previously. The court acknowledged that KD later recanted her initial testimony.\textsuperscript{104} However, at that stage the legal process was underway.

Having said that, the J.A. case set a precedent in Canadian law. It upheld the legislation that states that sexual consent requires ongoing consciousness. Although the details of the case question whether there

\textsuperscript{101.} ROBERT M. GOLDENSON & KENNETH ANDERSON, THE WORDSWORTH DICTIONARY OF SEX 63 (1994) (A dildo is a phallic-shaped insertible sex toy available in various sizes and materials, usually silicone, rubber or plastic. These devices are used in auto-erotic and other sexual practices for orifice penetration. The term dildo is derived from ‘diletto’, the Italian word for delight.).


\textsuperscript{103.} Id.

\textsuperscript{104.} Id.
was consent to sexual activities occurring while unconscious, that was not a determining factor. First, the court recognised that KD recanted her testimony but made no reference to that in the decision. Second, and more significantly, the majority opinion focused on law that regards a loss of consciousness as the termination of consent; it is therefore moot whether KD consented.\footnote{Id.}

The SCOC convicted JA of assault in a 6-3 decision. Delivering for the majority, Chief Justice Beverley McLachlin stated that in her opinion, “the code makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent.”\footnote{Id.} In explaining the current consent law, McLachlin stated the requirement of consciousness is “to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.”\footnote{Id.} It is not sufficient that a person believes there is consent; consciousness is required to allow “revoking or withholding consent to each and every sexual act.”\footnote{Id.} In specific reference to the J.A. case, McLachlin said the defendant was required to take “reasonable steps” to confirm whether there was consent and that he must “believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious.”\footnote{Id.}

In his dissenting opinion, Justice Morris Fish suggested that the interpretation of the law by the majority in the J.A. case goes beyond what Parliament intended. Fish recognised that the problematic outcome of such an interpretation could criminalise otherwise harmless affection – like kissing or touching – with a partner or lover who is sleeping. Fish also called into question the prohibition of prior consent, stating, “Prior consent, or even an explicit request – 'kiss me before you leave for work' – would not spare the accused from conviction.”\footnote{Id.}

There are at least two questions that arise from this decision. The first is the definition of sexual exploitation or perhaps even 'sex' as an activity itself. As Justice Fish wrote in his dissenting opinion, the ruling prohibits sexual contact with a sleeping partner or a previously arranged kiss.\footnote{Id.} Opposing this is McLachlin's language that references “sexual

\footnotesize{105. Id. 106. Id. 107. Id. 108. Id. 109. Id. 110. Id. 111. This refers to Justice Fish's problematisation of prior consent and his example of agreeing in the evening to kiss before leaving for work the following morning.}
activity.” It follows that there is a burden on the Court to adjudicate what constitutes an intelligible and clearly demarcated definition of sexual activity. Is it a kiss? This seems unlikely given that people kiss their children, parents, and pets, for example, in a non-sexual context. Fish's reference to physical contact with a sleeping partner has more traction but again requires further clarification. Does touching breasts constitute sexual activity? Or touching genitals? Is merely touching a sleeping lover's genitals sexual activity or is some level of sexual stimulation required? I leave these questions for the courts to address. Clearly the courts deemed JA's anal penetration of his partner with a sex toy sexual activity. I do not dispute this and doubt many would.

The second question I want to address is the prohibition of prior consent. Justice Fish questions the legal considerations of touching a sleeping lover and the scenario of a prearranged kiss. In contrast with the first question of defining sexual activity, I think this question is more easily interrogated. In brief, if a couple discuss engaging in sexual activity and then mutually agree that they will have sex later in the day, is there a legal requirement to later confirm consent? What is the time limitation on consent? Immediate or within an hour? If the answer to these questions holds fast to Chief Justice McLachlin's account, consent would not be quashed over the course of the day because the lovers have not lost consciousness. Is consent then invalidated if the persons involved sleep between the time of consent and when they see each other again? Or is consent resumed once they wake up?

What is absolute about the J.A. decision is that the court held to an immediate termination of consent with consciousness. The final point I wish to raise on the prohibition of prior consent connects the recent J.A. case to the Spanner decision. As discussed above, in the R. v. Brown decision, the House of Lords defended consenting to numerous forms of bodily harm, excepting S/m. The Spanner decision's list of legal activities of consensual bodily harm includes surgery and medical procedures. Most types of surgery and many medical procedures require an individual to both consent to bodily harm and then undergo bodily harm while in an unconscious state. What I want to underline here is that a common denominator in both the Spanner and J.A. cases is that erotic asphyxiation is an impermissible practice. That is, in R. v. Brown S/m is a consensual activity involving bodily harm that is deemed illegal; in R. v. J.A. legal consent is terminated with consciousness but only in sexual practices, surgery is exempted. The question arising from this analysis is: what makes consent to surgery different from sexual
activities? It is arguable that if an individual is judged to be rational and capable of consenting to being rendered unconscious and undergo invasive surgery then a similar person should have the autonomy to consent and engage in contentious S/m practices. Presumably a response to this assertion is that surgical procedures are practices of a different kind, and are physically required or even life-saving in nature. While this may be medically accurate (and pragmatic), it does not respond to the endorsement of autonomy and self-determination mentioned above. There are cases where, for varying reasons, individuals refuse recommended medical or surgical procedures. I also want to add that, not unlike erotic asphyxiation, surgical procedures, even routine ones, hold the potential for danger or death and often have less predictable outcomes. I will leave this discussion here and along with the determination of what constitutes sexual activity leave it to the courts to respond to a distinction between prior consent for surgery versus prior consent for sexual activities.

Although the facts of the J.A. case are murky, it is clear that the only people who know what happened on that occasion are JA and KD. KD testified that the couple had engaged in breath play numerous times in the past and had enough experience with this activity that she had empirical knowledge that her length of unconsciousness averaged “less than three minutes.” The decision in the J.A. case showed the Court's unwillingness to waver on any lapse of time while unconscious. My objective here is to argue that the loss of consciousness should not terminate freely negotiated consent. I recognise the current Canadian law is aimed at stopping the sexual exploitation of persons who are unconscious. Cases of rape and sexual assault are adjudicated on their own merit and we hold trust in the judicial system that they will distinguish illegal and ignoble acts of violence involving non-consensual sex. Notwithstanding the very real concern for horrific outcomes from sexual assault, the courts in both Spanner and J.A. have positioned S/m practices as the limitation of sexual consent.

There have been other attempts at establishing an easily understood definition of consent to ensure sexual safety. A well-known version of sexual consent developed in 1991 at Antioch College, states that “each

112. These reasons may include but are not limited to religious convictions, quality of life options, or end-of-life decisions.
113. Id.
new level of sexual activity requires consent.” Students at Antioch generally supported the goal of ending sexual violence and fostering consent. The objections to the policy’s wording came from students whose concerns, similar to Justice Fish, interpreted “each new level of sexual activity” to mean that a person would have to stop and ask permission for each new touch, kiss, or advance. In Bussel’s article, Beyond Yes or No, she claims that “we do everyone a service when we recognize that consent is not simply a legal term.” As the title of the article implies, Bussel urges honest sexual negotiation. In a corresponding article on consent, Lee Jacobs Riggs promotes the negotiation and consent principles correlative with S/m practices. Riggs states that S/m “may be the most responsible form of sex because you have to talk about it. You have to articulate exactly what you do and do not want to happen before anything starts.” Concurring with Riggs, I contend it is this idea of a sexual discourse constituted of honest negotiation, articulated expectations, and consent that normative sexuality can benefit from S/m practices.

Philosopher Martha Nussbaum states that consensual S/m acts can be empowering because the “willingness to be vulnerable to the infliction of pain, in some respects a sharper stimulus than pleasure, manifests a more complete trust and receptivity than could be found in other sexual acts.” From the perspective of masochists, or persons submitting to S/m activities, there is an imperative to know one’s desires and to clearly state to partners what is sexually permissible. “The masochist's consent is specific and mapped out in detail prior to any activity.” The aim of this discourse is to avoid abuse or from providing an excess of permission, thereby allowing a level of submission beyond one’s true limitations. Athanassoulis writes that the responsibility for sexual action lies “with the consenting individual rather than the person actually executing the act.”

began creating this policy, which would alter the culture of an entire community. This policy is the embodiment of Antioch College’s commitment to ending sexual violence and fostering a culture of consensual sexuality. It governs the Antioch College Community by working with existing staff and faculty policies.”); See also Antioch College, Student Handbook 14-18, available at: http://antiochcollege.org/assets/files/ StudentHandbook-4.pdf.

115. Rachel Kramer Bussel, Beyond Yes or No: Consent as Sexual Process, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 44 (Jaclyn Friedman & Jessica Valenti eds., 2008); See also, Antioch College Student Handbook, supra note 114, at 15.

116. Id.


119. Athanassoulis, supra note 6, at 148.
For Athanassoulis, the consensual acts “originate with the consenting individual, and are merely carried out by another person.” However, my respectful response to Athanassoulis is that such a template for consent places a disproportionate attribution of sexual responsibility with submissive persons. The notions of sexual self-knowledge and personal cultivation are equally required from individuals wielding power; a good Dominant must “have control over her own pleasure,” she must recognise her limits, desires, and displeasures to maintain autonomy. I conclude this section by endorsing a shared responsibility for honest sexual negotiation, that engenders a substantive level of trust with our sexual interlocutors, and permits consent to sexual practices that moves beyond the binary of yes or no.

VI. SEXUAL EMANCIPATION

In the opening paragraphs I make reference to a sexual movement, rising from the discourses of feminist, sexuality, and queer theorists which calls for sexual agency and the re-imagination of sexual possibilities. This re-imagination is a consideration of the possibilities for individuals to create the sexual relationships and practices they desire, a sexual agency that negotiates freely, and charts a course of action with one's sexual interlocutors. This is what I refer to in the introduction, borrowing from Nietzsche, by a revaluation of sexual values; sexual agency unfettered by historic expectations of procreative sexual practices and monogamous relationship schema.

In this section, the struggle for sexual emancipation and agency starts from Joan Scott's paper, Sexularism. I posit Scott's concept of “sexularism” here because she questions the potential claim “that takes sexual emancipation to be the fruit of secularism.” That is, the issue of secularism producing autonomous individuals is problematised by recognising that the separation of religion from the state still leaves citizens influenced and regulated by cultural, judicial, religious and state ideologies. While recognising that Scott largely addresses the historical

120. Id. at 143.
121. A Dominant is a term for a person in the dominant position of a Dominant-submissive relationship or power-exchange relationship. A person who identifies as a Dominant may be a Sadist, or not, but it denotes a position of sexual authority.
123. Nietzsche's On the Genealogy of Morality can be regarded as a revaluation of values, it is a phrase he uses in that text. I borrow from the spirit of that writing in arguing for a revaluation of sexual values, see FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 3.27 (1887).
intersections of women's status by varied religious dogmas and political epochs, I want to navigate the concept of sexularism in support of my own argument and claim that a secular, feminist emancipatory discourse is appropriately placed for the legal limitations of sexual consent I address in this article.

In the section titled “Agency,” Scott cites Chowder et al. in highlighting the French enforcement of secularism through the example of a Muslim student ordered to remove her *hijab* by her teacher. When the student questions the demand, her teacher states it is required for normalcy. The young Muslim woman points out that some students wear their hair in dreadlocks, and asks how that is normal while her *hijab* is not.125

Scott states that in recent debates regarding headscarves there has been more attention given to the opinions of critics than to Muslim women who wear headscarves.126 The concern to hear the voices of a particular constituency is relevant to S/m practitioners and the claim that they have been unfairly criticised and misrepresented.127 I appreciate that the positioning of S/m practices alongside Muslim headscarves might appear intellectually ambitious or erroneous but the struggles for agency, consent, and sexual identity amid cultural, judicial, and religious apparatuses are, I think, quite similar. For the defendants in the *Spanner* case, various types of physical harm were lawful, but not for S/m. For the Muslim student, a variety of hairstyles are allowed while wearing a *hijab* is not; both face social and legal limitations on their identities. And while laws designed to protect bodily harm and non-consensual sex have not served S/m practitioners well, the promise of secularism has not brought sexual emancipation to Muslim women. The agency of the individual to knowingly consent to a practice must be respected “regardless of how unappealing or immoral such acts may appear to others.”128

Some persons, like the Muslim student's teacher, might have discomfort or a moral reaction to headscarves. Similarly, some S/m practitioners push society's moral limitations by usurping and manipulating what some hold sacred. S/m scenarios that engage issues of ethnicity, gender and religion, for example, can be visceral to outside viewers and call to question what the individual can consent to, in some cases going beyond consciousness or sexual practices some people find unappealing.

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125. Id. at 10.
126. Id.
128. Athanassoulis, *supra* note 6, at 147.
undesirable or immoral. With that in mind I examine Gary Fisher's short, non-fiction story *Arabesque*.129

Fisher recounts a consensual S/m scenario between himself and a gay lover. The *Arabesque* scene disrupts “socially encoded scripts of identity” on several axes, including ethnicity, religion and sexual orientation. Two gay men assume the roles and identities of an “Arab boy,” Fisher, and an “Israeli soldier,” his lover. Fisher is African-American; his lover is presumably (but not necessarily) White. The 'Arab boy' has been captured and is forced to be sexually submissive to the 'Jewish soldier'. Their scenario is intense, physical, sexual, driven by the potency of racism, nationalism and warfare. The Israeli soldier ties a red and white *keffiyah* tightly on the prisoner's head. He intimidates his captive, saying, “thousands of little Arab boys are being killed – blown to bits, shot, crushed in their bunkers.” The humiliation continues, “Aren't you glad that I captured you and made you my slave, my toy?”131 The soldier snidely asks the boy if he knows what his mouth is to be used for, then laughs. The Arab boy is threatened; his head slammed several times, he is assured that more violence will be used if necessary, in part, because it gives pleasure to his tormentor. The captive is threatened with death by forced fellatio: “I'm going to choke you to death, and you're going to love it.”132 The soldier continues to force his penis down Fisher's throat, eventually ejaculating, screaming that he's going to “blow [Fisher's] fucking head off!”133

The power of the scenario is executed through the captor's physical and sexual assault on the boy, yet one that Fisher, in the role as the boy, welcomes. Fisher describes his understanding of the encounter through “its strength, its unrelenting, its selfishness and selflessness.”134 Some might regard this type of S/m play reprehensible; others might think it is sexually charged. What I want to emphasise in this scenario is that, like the legal cases above, the participants entered into it freely, with an understanding of what action would occur. (I say this with recognition that there remains a question of consent regarding anal penetration in the *J.A.* case.)

131. FISHER, supra note 129.
132. Id. at 65.
133. Id. at 67.
134. Id. at 65.
The second consideration to underline here is that the brutality of consensual scenarios involving activities like punching or choking occur in a context of trust that is not aimed at real or lasting physical harm. Fisher recalls how his thoughts immediately shift from the contentious sexual fantasy play of Arab existentialism to briefly re-situate his life in contemporary California where in reality his 'captor' had taken him for dinner earlier that evening.¹³⁵

It is of course not accidental that I situate Fisher's Arabesque story immediately after Scott's sexularism. I wish to contrast legal limitations on the agency of Muslim women in consenting to wear a hijab as a symbol of religious identity, and the agency of Fisher in consenting to wear a keffiyah as part of a role in his sexual identity. The paper's main theme of S/m, consent and the law is disrupted and juxtaposed here through the practice of wearing a hijab, regulated by the state in some Western democracies that regard secularism as the harbinger of tolerance, liberalism and personal freedom.¹³⁶ Contrarily, S/m activities sometimes constitute bodily harm and are illegal in other secular Western democracies. Scott's notion of sexularism elucidates how the role of the state in secular democracies has not brought sexual emancipation and Fisher provides a story of sexual liberation representative of the community standard of tolerance.

VII. Final Analysis

To those inexperienced with S/m, unfamiliar with consensually aggressive, even violent sexuality, there can be a questioning of psychological contiguity. How does the non-S/m practitioner make sense of these activities? Erotic asphyxiation is a dangerous, marginalised form of sexual practice with the potential result of unconsciousness, and there are S/m participants who willingly consent to this practice.

In the SCOC's recent R. v. J.A. assault case, the Court held strictly to the law that requires continual consciousness during sexual activity so that one is "capable of granting, revoking or withholding consent to each and every sexual act." The court's jurisprudence denied the defendant's claim of prior consent and, I argue, sent a troubling message as to what rational sexual agents can freely negotiate and consent to. The SCOC decision is unfortunately reminiscent of the Antioch College attempt at establishing a robust definition of consent as the standard for

¹³⁵. Id. at 64.
sexual safety. The response for both Antioch College and the Canadian public following these decisions has included mockery and confusion: the snide questions as to whether every slight physical contact and movement must be prefaced with a “May I?”

A salient difference between the SCOC J.A. decision and the House of Lords ruling on the Spanner appeal is that while the Lords accepted seemingly every common form of bodily harm whilst forbidding S/m, the SCOC recognised potential situations where the consciousness legislation was not well thought out. My purpose in introducing the Sweet Productions case is obvious at this point; I remain hopeful that the courts will be reasonable in the face of existing legislation and give greater consideration to the contemporary community standard and the realities of people's sexual practices.

Admittedly, my reference to Canada's Butler obscenity law might be regarded as misplaced in a discussion of sexual consent and assault legislation. My reasoning here, to restate, is a concern with how the legal decisions discussed have been affected by the coupling of sexual acts with what the Butler ruling describes as crime, horror, cruelty and violence. Erotic asphyxiation is a practice at the intersection of sex and violence. It might be adjudicated as cruelty but when freely negotiated and engaged consensually between rational adults, it should not be legislated as a crime. The dismissal of charges in the SPI case signals a recognition of the change in the community standard of tolerance. In R. v. Butler the Crown states that the most important test in adjudicating the undue exploitation of sex is the Community Standard of Tolerance test. The Crown also acknowledges that this standard shifts over time and courts must remain mindful of contemporary attitudes and the level of acceptability in sexual practices, as Lord Slynn stated for the minority in the Spanner case. I take the Court's recognition of a community standard that varies with changes in a society’s ideas of sexuality to be a general agreement that a state prescription of morality would result in a sexual dystopia.

While acknowledging that the SCOC adhered to the most conservative interpretation of consent, I concur with the dissenting opinion in J.A. that consent was given prior to the loss of consciousness. The question of penetration post-consciousness being negotiated or consented to on that occasion is known only to the participants and I do not question the complainant's motivation for filing an assault charge. However, as I included in the section on the J.A. case, I contend that sexual activities
require mutual negotiation and consent, and that a disproportionate level of responsibility cannot be placed on one participant.

VIII. CONCLUSION

This article calls for a revaluation of sexual values in a context similar to Nietzsche in *On the Genealogy of Morality*.\(^{137}\) What I have tried to problematise, congruent with Nietzsche, is the unquestioned status quo of morality, the conditions and circumstances of our present set of values which render non-normative sexual practices such as S/m suspect, misunderstood and misrepresented. With regard to the ethics of consensual S/m practices, this article calls for a sexuality that allows a “glimpse of something perfect, completely finished, happy, powerful, triumphant, that still leaves something to fear!”\(^{138}\)

The Fantasy of Acceptable 'Non-Consent' is the title of an article by Stacy May Fowles. As a sexually submissive woman who pursues S/m relationships with dominant men and consents to being “violated via play,” Fowles describes the difficulty of reconciling sexual desire with the politically contentious.\(^{139}\) Fowles' conundrum is not about legal prohibitions on S/m but about the cultural stigmatisation. The proliferation of S/m pornography and psychopath killer movies was documented in the SPI case. Fowles points to these media misrepresentations of S/m practices as leading to the social inability to knowingly negotiate consensual ‘non-consent’.\(^{140}\) The outcome Fowles seeks from discourses of sexual empowerment is a reclamation of the phrase, “she was asking for it.”\(^{141}\) In navigating the precarious intersection between her concurrent identities as both a feminist and a masochist, Fowles reports sadly that “claims of sexual emancipation do not translate into acceptance for submissives.”\(^{142}\)

The lack of sexual emancipation is as true in Fowles' fantasy of non-consent as it is in Scott's sexularism. Fowles' struggle for unquestioned

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137. Nietzsche, supra note 123, at 3.27.
138. Id. at 1.12.
140. Non-consent is an S/m term for hardcore scenarios that resemble actual rape or assault but have been negotiated and consented to. This is often referred to as consensual non-consent. The term should not be interpreted as a lack of consent.
141. Id. at 125.
142. Id. at 119.
opportunities for consenting to non-consent confronts the legislation barring consent in *Spanner*, the limitation of consent in the *J.A.* case, and concurrently represents the community standard of tolerance adjudicated in the *SPI* decision. Like Fisher, Fowles provides a glimpse of that to which we aspire: negotiate and consent, something happy and powerful, a sexuality that we can create with our sexual interlocutors and a re-imagination of what it means to be asking for it.

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As popular media increasingly include representations of lesbian and gay parents, so comes with this what Gamson terms ‘paradoxes of visibility’. On the one hand, increased representation means both that lesbian- and gay-headed families are able to see themselves reflected in the mirror of the social realm, and that such representation potentially signifies increasing acceptance of lesbian- and gay-headed families. On the other hand, media representations of lesbian and gay parents, like all media representations, are prone toward sensationalism, normativity and potential misrepresentation. This article takes up this paradox by exploring a sample of articles from Australian popular magazines featuring lesbian and gay parents. The analysis presented suggests that normativities predominate across all representations examined, with this occurring specifically through: 1) the evocation of ‘loving families’ to account for lesbian- and gay-headed families in highly normative ways, 2) an emphasis upon biological relatedness to the exclusion of all other family forms, 3) a failure to recognise the racial and class privilege of white middle-class lesbian and gay parents, and 4) a primary focus upon coupled parents. As such, this article suggests that while the appearance of the articles analysed is positive for what it potentially signifies about public acceptance and the intelligibility of lesbian and gay parents, the articles function to exclude as much as they include.

I. INTRODUCTION

In Australia, attitudes towards lesbian and gay parents appear to be undergoing positive change. While research has suggested negative attitudes towards such parents within community samples, ongoing support for lesbian and gay parents as symbolised by legislative change would suggest otherwise. Such positive change is not limited to the legal system, however, and extends to the growing number of schools that provide actively inclusive environments for lesbian and gay families, along with increasingly positive representations of lesbian and gay

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parents within the media. It is the last form of potentially positive change upon which the present article is focused.

In his ground-breaking research on media representations of lesbian, gay, bisexual and transgender (LGBT) people, Gamson\(^2\) outlines how such representations produce 'paradoxes of visibility': at the same time as they provide a space for LGBT people within the media, they do so on particular terms that either normalise the experiences of LGBT people, or construct them as 'freaks'. In relation to the latter construction, Gamson suggests that heteronormativity is reasserted through the negative comparison of the lives of heterosexual people with those of LGBT people, with the latter frequently depicted in the media as abnormal or otherwise deviant.\(^3\) Conversely, and in relation to the normalisation of LGBT people in the media, Gamson suggests that positive representations rely upon the assumption that LGBT people are 'just like' heterosexual/ gender normative people.\(^4\) In so doing, Gamson suggests, norms of 'whiteness' and middle-classness are reinforced through the promotion of a normalised account of LGBT people that places them in comparison to white, middle class heterosexual people.\(^5\)

Importantly, Gamson also suggests that media representations of LGBT people such as those that appear in talk shows have much to tell us about the social contexts in which the shows are produced.\(^6\) For example, we can discern much about public attitudes toward LGBT people by surveying what is deemed palatable to a mainstream audience by the media. As Gamson suggests, the producer/viewer dynamic is constantly under negotiation with producers of media arguably placing their own spin on what is deemed acceptable, yet at the same time public opinion and viewer ratings will always determine a large proportion of what appears in the media.\(^7\)

Clarke and Kitzinger have also undertaken important work on representations of LGBT people in the media,\(^8\) in their research on representations of lesbian and gay parents in UK talk shows. In their analysis of such talk shows, Clarke and Kitzinger identified six discourses that were deployed by participants and talk show hosts to legitimate the rights and experiences of lesbian and gay parents. These were: 1) an emphasis on being 'just like all (heterosexual) parents': that lesbians and

\(^2\) Joshua Gamson, **Freaks Talk Back: Tabloid Talk Shows and Sexual Nonconformity** (1999).

\(^3\) Id. at 5.

\(^4\) Id. at 19, 46.

\(^5\) Id. at 127.

\(^6\) Id. at 4.

\(^7\) Id. at 19.

gay men who parent do so as 'just' women and men, not as lesbians or gay men, 2) the provision of examples of the mundaneness of the lives of lesbian- and gay-headed families, 3) an emphasis upon love as the only factor worthy of attention in families and the accompanying statement that lesbian- and gay-headed families are 'all about love', 4) the refutation of anti-gay attitudes towards lesbian and gay parents amongst the religious right via the claim that God created all people, lesbian and gay parents included, 5) the use of children's gender normative behaviours as 'proof' that lesbian and gay parents do not 'damage' their children and, 6) an emphasis on the benefits for children of growing up in lesbian- or gay-headed households.

Clarke suggests that whilst these accounts afford positive space for lesbian and gay parents, they do so by normalising their experiences. Furthermore, talk shows reinforce negative stereotypes about lesbian and gay parents (such as the presumption that they will 'damage' their children) simply by stating them. As Clarke suggests, when lesbian and gay parents are forced to engage with negative stereotypes, they are responding to agendas not of their own making: they are asked to represent their families on heterosexist terms that allow little opportunity for alternate representations of what it means to be a lesbian or gay parent. Similar to Gamson, Clarke suggests that the spaces accorded within the media to representations of lesbian and gay parents rely upon assumptions of whiteness and middle classness when promoting a particular form of normalisation. Clarke also suggests that families headed by two parents are reified within media representations of lesbian- and gay-headed families.9

Finally, specific attention to the whiteness and middle-classness of the rights claims and representations of lesbian and gay parents more broadly has been provided in the work of Boggis10 and my own work.11 Boggis pays specific attention to how disparities in socio-economic status function within LGBT communities in relation to parenting and suggests that issues of reproductive freedom must encompass not simply the right to have children but also the social and economic support required to access reproductive technologies currently limited to those who can afford them. I have suggested that media representations of lesbian and

gay parents in Australia not only conform to the norms of middle-class whiteness as Clarke, Kitzinger, Gamson and Boggis all suggest, but also the comparison of white middle-class lesbian and gay parents to white middle-class heterosexual parents relies upon the enactment of the race privilege that white lesbian and gay parents experience over and above their experiences of marginalisation in the context of white heteropatriarchy.

Taking the points raised above in relation to both the normalising function of media representations of lesbian and gay parents and the particular identity configurations of the parents who are accorded representation, the present article examines a sample of articles focusing on lesbian and gay parents from popular Australian magazines. Specifically, the analysis examines four dominant tropes that appeared across the magazines: 1) the deployment of a normative discourse of love to account for lesbian- and gay-headed households, 2) the reification of biological relations as central to parent-child relations, 3) normative constructions of race within the articles that recentred white middle-classness and which are reliant upon the construction of non-white groups/individuals as exotic others and, 4) an emphasis upon two-parent families. From the analysis, it is suggested that whilst these articles reflect the aforementioned increasingly positive stance towards lesbian and gay parents in Australia, they also serve to reify one particular form of family into which all LGBT parents are co-opted.

Further, it may also be suggested that Australian media representations of lesbian and gay parents don't only reflect what are deemed intelligible representations of lesbian and gay parents by the media, but also what are deemed acceptable representations by lesbian and gay lobbyist. It is arguably the case that contemporary LGBT politics in Australia adopt a relatively normative approach to politics in terms of primarily seeking equality with the heterosexual majority. Hence, whilst the moniker 'queer' might otherwise be used in a discussion of non-heterosexual and or non-gender normative people, in this article the acronym LGBT (or more specifically lesbian and gay parents as applicable) is used to denote the distance between the politics represented by the articles, and a queer politics that would typically adopt a more radical relationship to what might constitute state recognition. Having said this, it must of course be recognised that there are many reasons why what has been termed a 'homonormative' approach to politics is adopted by the majority of

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Australian activists, yet at the same time we must be wary of how new norms are imposed through a homonormative politics as the analysis provided below clearly demonstrates.\textsuperscript{14}

\section*{II. The Articles}

The articles analysed in this paper were collected over a one year period between mid-2007 and mid-2008 from popular magazines published in Australia that included reports on the lives of Australian lesbian and gay parents. While other articles were identified during this time period that reported on the experiences of lesbian, gay and transgender parents from outside Australia, a decision was made to focus on the Australian-specific articles so as to provide empirical findings that highlight the Australian context. No articles were identified in the time period that focused on bisexual parents, a point that itself is noteworthy.

Six articles comprise the corpus examined here (see Table 1). These appeared in popular women's magazines ({\it Who}, {\it New Idea} and {\it Take 5}), lifestyle magazines ({\it Notebook} and {\it Time Out}), and one parenting magazine available freely from a large national supermarket chain ({\it Coles Baby}). Several of the articles focus on one particular set of gay parents and their narrative of family creation ({\it Notebook}, {\it Time Out} and {\it Take 5}).

\begin{table}[h]
\centering
\caption{Articles Analysed} \label{table:articles}
\begin{tabular}{|l|l|l|l|l|}
\hline
Author & Title & Source & Cover Text & Publication Date & Coverage \\
\hline
Michael Crooks & Not Your Average Family & {\it Who} & No & 17 Dec. 2007 & pp. 44-45 \\
\hline
Andrew Georgiou & Doting Dads & {\it Time Out} & No & 21 May 2007 & pp. 58-59 \\
\hline
Kate Nash & Pride and Joy & {\it Coles Baby} & Yes & Autumn 2008 & pp. 36-37 \\
\hline
n/a & Devoted Dads & {\it Notebook} & Yes & Jan. 2008 & pp. 190-191 \\
\hline
\hline
n/a & Two Men and a Baby & {\it Take 5} & Yes & 20 Jun. 2007 & pp. 10-11 \\
\hline
\end{tabular}
\end{table}

Articles were read repeatedly by the author with a focus on the article text, the images included, the title of the article, and any coverage of the article on the cover of the magazine. Importantly, and in relation to Gamson's suggestion that media representations of LGBT people can tell us a lot about the social context in which the representations occur, none of the articles emphasised negative stereotypes about lesbian or gay parents and instead focused primarily on the reproductive desires of lesbians and gay men and their attempts and successes in achieving them. Also of note, and in contrast to Clarke's findings, space was given in some of the articles to examining how negative social contexts impact upon the reproductive desires of lesbians and gay men (such as legal prohibitions on access to some reproductive technologies in Australia including surrogacy and access to donor sperm in clinics in some Australian states). The provision of information about this would appear important as it locates lesbian and gay parents within a social context and does not explain away issues of discrimination.

The majority of the articles primarily read as reports of the experiences of lesbian and gay parents, and as such may be seen as orientating to a heterosexual audience in the form of providing stories about 'diverse families'. Two of the articles (from *Coles Baby* and *Time Out*), however, went beyond this form of 'exhibiting the other', and instead would appear to be directed towards lesbian and gay parents, in addition to potential heterosexual readers. This claim is made on the basis of the way the two articles provide extensive information about avenues to reproduction for lesbians and gay men, and explore the multiple factors involved in family creation for lesbians and gay men rather than simply reporting the narratives of family of lesbians and gay men. As suggested in the introduction, the following analysis focuses upon four dominant tropes identified through a close reading of the articles. These build upon the previous findings of Gamson, Clarke and Kitzinger, and extend these to examine some of the particular configurations of family that are reified within the articles.

### III. Analysis

*Love Makes a Family*

Reiterating the findings of Clarke and Kitzinger, the repeated use of claims to 'love' as the central aspect of lesbian- and gay-headed families was found in the Australian sample reported in this article. Such claims appeared within the text of articles, on the covers of magazines, and in
the captions accompanying images. A clear example of this appears in *Time Out*,\textsuperscript{15} where a gay father is quoted as saying “we believe a family is about love.” While such a claim may be taken as reflecting the speaker’s belief about his family, the simplicity of the statement belies the complex ways in which discourses of love circulate in both positive and negative ways in relation to families. One of the primary ways in which claims to love can be misused is inherent in the statement itself: it is an injunction to understand love as the centrepiece of families. This begs the question of what it means to be in a family that does not necessarily display or speak of love in ways that are typically seen as intelligible, or in families where claims to love are used to warrant abusive behaviours. The statement not only enforces a normative idea about what a family should be, but also presumes that 'love' is an inherent capacity of families that will be uniformly experienced.

A second example of this type of claim about love appeared in *New Idea*, which stated that “Jaason, John and Odin are a loving family unit.”\textsuperscript{16} While this example does not provide such a clear injunction to love as the previous example, it nonetheless constructs a 'family unit' as something formed through love – that the very structure of the 'family unit' is something that is made possible as a result of love. For many families, it might be the case that it was formed through loving relations between adult members, but the presumption of love as a key aspect of 'family units' holds the potential to overwrite the claims to legitimacy of families who experience themselves as a coherent 'unit', but who do not organise around the primary principle of love or at least love as it is conventionally understood in a family where all members live together.

Claims to love were also deployed to legitimate the parenting of lesbians and gay men. The lead into the *Time Out* article,\textsuperscript{17} for example, included the statement “gay men make incredibly loving, nurturing and open-minded parents.” Whilst this positive statement is indeed an important reflection of the overall tone of the article itself, it nonetheless centres a particular image of fatherhood in which it is “incredibly loving, nurturing and open-minded” men that are being spoken of in the article. We must ask what it means for gay fathers reading the article who at that moment do not feel nurturing or loving. How might the injunction to love and nurture overwrite the everyday challenges of being a parent, and a gay parent in particular? The conflation of 'loving' with 'open-

\textsuperscript{17} Georgiou, supra note 15.
minded' is also problematic not only for its assertion that all gay men are open-minded parents, but also its implicit contrast between 'loving, nurturing and open-minded' gay parents and those constructed as not open-minded (and thus potentially neither loving nor nurturing).

In her excellent examination of accounts of lesbian and gay parenting, Lehr suggests that whilst there is some merit in speaking of research findings or lay opinion that lesbian and gay parents in couple relationships engage in more equitable parenting practices than heterosexual couples or foster greater acceptance of diversity amongst their children, this can also be problematic in that such families are constructed as better than those families who do not engage in equitable parenting practices or acceptance of diversity. Lehr asks the question of what it means to compare two-parent lesbian and gay families with single mother families (for example): how does the injunction to be 'nurturing and open-minded' pit differing family forms against one another and perpetuate hierarchies of 'good' versus 'bad' families? We can see an example of this construction of love as the capacity of 'good' parents in the cover description of the article in Notebook, which refers to “Devoted dads: Loving stories of modern fatherhood.” Not only is this reference to 'modern fatherhood' an interesting allusion to gay parenting (the topic of the article), but it also serves to construct 'modern' (read: gay) fatherhood as enacted by 'devoted' and 'loving' dads. Again, this assumption of devotion and love creates a hierarchy whereby the 'best' dads are those that display these traits, the implicit contrast being with dads who do not.

The final way in which love was deployed in the articles to legitimate lesbian and gay parenting was in relation to a particular representation of love as possession. Drawing on the work of Irigaray, I suggest that claims of loving another person in familial contexts often result in proprietal claims over the other person and, furthermore, that such enactments of propriety re-centre love as a form of consumption or ownership. In her work on lesbian mothers' accounts of desire and love for their children, Gabb similarly examines how lesbian parents' statements about their children where children come to stand in for the desire to have something in the context of a society where having things means something. One

example of this from the present study appears in the *Coles Baby* article,\(^{22}\) where a lesbian mother is quoted as saying “We love [our daughter] to bits and we'll make sure she's happy and has everything she needs.” Here the claim to love is extended beyond the emotion of love, and encompasses the claims of the parents to ensure the child's happiness and give her 'everything she needs'. While it is fair to say that many parents wish to ensure their child's happiness, this quote exceeds the 'simple' happiness of love (however problematic that term may be), and encompasses the requirement of consumption that is presumed to be the right of all people: that children need 'everything' and that it is parents who can make this happen.

Another though perhaps less obvious example of this conflation of love with consumption appears in the *Notebook* article,\(^{23}\) which states that two gay parents “enjoy being a family, and like most proud parents, they're wide eyed with pride and love.” While, as with all of the statements quoted thus far, this is a positive image of gay parenting, it nonetheless evokes an image of love that involves 'pride'. As the parents being referred to have an infant, it is hard to imagine where the source of pride lies: while it is standard to refer to 'proud parents', it is important to ask to what such pride refers. One suggestion would be that it refers to the pride of reproduction or demonstrating one's capacity to have children, rather than pride in the child's achievements in their own right.

While it is important to recognise that positive references to love in relation to lesbian and gay parents in the article are a welcome move away from past constructions of lesbians and gay men as engaged in 'pathological love' or as not eligible to be parents, it is nonetheless important to consider how discourses of love, even when deployed positively, can reinforce particular normative understandings of family.

Furthermore, and as Clarke suggests, discourses of love in media representations of lesbian and gay parents may largely be seen as responding to the heterosexist injunction to prove the validity of lesbian and gay parents. Thus, while some of the articles quoted above were directly citing interviewees, others were the words of the reporter, who understandably place their own slant on what they think will be an intelligible representation of lesbian and gay parents. To cite 'love' as the centrepiece of lesbian and gay families may be thought by many as the best way to counter negative stereotypes. For lesbian and gay parents themselves, such as those quoted here, the injunction to claim love, or

\(^{23}\) *Devoted Dads, Notebook*, Jan. 2, 2008 at 190-191.
pride, or to give a child 'everything they need', may be experienced as a pressure upon them to conform to a model of family shaped by heterosexist assumptions about lesbian- and gay-headed families. Examining how love functions in media representations of lesbian and gay parents must thus move beyond simple dichotomies of good and bad, and instead examine the subtleties and complexities of how claims to love function to warrant particular images of what it means to be a lesbian or gay parent.

Claims to Biology

In many cultural contexts, claims to the centrality of biological relations to kinship continue to be deployed to prioritise particular family forms over others. While in many cultures it is indeed the case that claims to biological descent are a cornerstone for ensuring the recognition of rights (for example in Australia, where claims to kinship relations are required within indigenous communities to ensure access to land and the passing on of cultural practices), in other cultures, claims to biology are often less about rights \textit{per se} and more about the hegemony of biological discourse that privileges the nuclear, biological family.

The deployment of biology as an organising discourse appeared in the articles examined here in a number of ways. First, there was considerable attention paid in all of the articles to the relationships between the parents and the children. This may, at least in part, be explained by the heteronormative assumption that families are formed as a result of the reproductive capacities of an opposite-sex couple. This type of assumption may thus lead to an injunction upon same-sex couples to account for their ability to reproduce. So, for example, the descriptors attached to the parents in most of the articles served to position the parents in a relationship to biology, such as: “Kirk’s biological child” and “Kendi, a Sydney communications officer who gave birth to both the couple's children.” Both of these examples, reported in \textit{Who},\textsuperscript{24} clearly make the assumption that it will be of interest to readers who carried the child or whose sperm was used. Whilst some of the interviewees actively resist this by stating that they were unwilling to name the biological father, the articles nonetheless clearly orientate to a norm of biological relations.

The second way in which biology is reified in the articles is by some of the parents themselves. This is particularly the case when comparisons

are drawn between children conceived through surrogacy for gay men and the possibility of such men becoming parents through fostering arrangements. In Australia, in comparison to the US (and increasingly the UK), children placed in long-term foster care (where parenting rights are removed from birth parents) are likely to remain with foster parents until they come of age. In this sense, long-term foster placements in Australia provide a family context for children. Yet a binary of biology versus foster care is constructed whereby two interviewees are reported as considering and then dismissing foster care as they wanted to be “full time dads” (Take 5)\textsuperscript{25} and in another article stating that they “felt fostering was too temporary” (Notebook)\textsuperscript{26}. Obviously these are the beliefs of individual people, but they nonetheless reflect an assumption that a 'full time dad' is one who has a biological relation to a child. This was reiterated in a list provided about the 'types' of gay parents known to one interviewee quoted in Time Out: “We have dads who have become fathers through known donor arrangements, co-parenting agreements, surrogacy and those with children through previous relationships with women.”\textsuperscript{27} Again, the relationships described here only appear to encompass biological relations, further dismissing gay parents who provide care for children not biologically related to them.

This emphasis upon biology as the primary way of creating family is stated more plainly in the Coles Baby article,\textsuperscript{28} where an interviewee is reported as saying that despite the challenges of being a gay parent, it was important for him to go ahead with plans for surrogacy as “if I don't go ahead they just won't be created.” Here the 'creation' of a child is depicted as the only option for this interviewee to start a family and that it is therefore incumbent upon him to 'go ahead' and do it. Finally, and in reference again to surrogacy, some interviewees emphasised how gestational surrogacy ensures the perpetuation of biology as a property managed by the parents: “The surrogate is in no way biologically linked to the child, leaving the biological father and his partner as the legal parents” (Time Out)\textsuperscript{29}. Not only does this quote emphasise the legal possession of biology by the parents, but it also re-centres the distinction of biological/ non-biological relations by drawing a line between the 'biological father and his partner'. In this quote, a father is biologically related to a child, a non-biologically related father is just a 'partner'.

\textsuperscript{25.} Two Men and a Baby, TAKE 5, 2007, at 10-11.  
\textsuperscript{26.} Devoted Dads, NOTEBOOK, Jan. 2, 2008 at 190-191.  
\textsuperscript{27.} Georgiou, supra note 15.  
\textsuperscript{28.} Nash, supra note 22.  
\textsuperscript{29.} Georgiou, supra note 15.
It is of course important to recognise that discourses of biology are central to how the law in Australia defines family and that 'proof' of biology can often be necessary for ensuring the rights of lesbian and gay families. However, it is also the case that many lesbians and gay men negotiate the creation of families with children to whom they are not biologically related and that they manage to do so with varying degrees of support and success. In relation to the articles examined here, it is important to consider how both the reporters and the interviewees themselves reify biology as central to familial relations. While the above points about the legal status of biological relations are salient, most of the instances of reference to biology in the articles were not in relation to the law but rather were a more general reference to the presumption of biology and the construction of a binary between biological and non-biological relations. In this sense, the articles may be seen to clearly orientate to notions of biology as they shape lesbian- and gay-headed families, and in so doing present a particularly narrow image of what it means to become a parent as a lesbian or gay man. Furthermore, and with particular reference to practices such as surrogacy, all of the articles report the considerable expense involved in the process. Factors such as the cost of reproduction draw attention to issues of class as they shape access to family formation, and it is important to recognise that the priority accorded to biological relations may in many instances be a luxury only afforded to relatively affluent lesbians and gay men.

Constructions of Race

Within the articles, discourses of race were deployed in ways that typically marginalised or exoticised non-white people or communities. This occurred in two distinct ways. One appeared in relation to the discussion of a white gay father's understanding of his Taiwanese partner's family: “Jeff's extended family is made up of people who have descended from his parent's village who are often not biologically related. When you think about it these were the first alternative families, and Jeff and I continue that tradition” (Time Out). In this example, the white interviewee not only constructs an exoticised image of his partner's family which is marked as differing from the norm of biological relations outlined above, but he also locates himself within a linear trajectory of 'alternate families' in which a mixed-race gay family living in Australia are seen as a natural progression to the extended family practices of

30. Id.
the Taiwanese. This is problematic in the sense that it positions the Taiwanese families described as 'alternative families', rather than as potentially the norm in their own cultural context and it also constructs a parallel between the speaker's own family and those of his partner's family, in ways that potentially ignore the incommensurable differences between the two. While it may be possible for us to consider some sort of 'continuation' of family practice if this were elaborated by the interviewee's partner based on their perception of the similarities or differences between the two cultures, it is hard not to see the interviewee's assertion of 'continuity' as an enactment of racial privilege in which non-white cultures are compared to, and assimilated into, the norms of whiteness.

The second way in which non-white people are depicted in the articles appears in the *New Idea* article, which focuses upon Australian actor Jaason Simmons and his plans to marry his male partner and parent his adopted son. From the onset of the article, we are provided with stereotyped images of the adopted child, his birth family and culture, such as in the statement that Simmons “plans to wed his lover [...] and together raise the boy John rescued from an African orphanage.” Here a discourse of 'rescue' is used to construct the two white men as benevolent and as saviours of the young boy. Claims such as these serve to render invisible the global economic disparities between countries involved in transnational adoption and the race privilege evoked by white adoptive parents. This failure to examine racialised inequities and their role in the production of global economies of adoption (where children from Africa and Asia are produced as commodities for sale) continues throughout the article, where one image caption states that “Odin left a life of poverty for a new beginning in America.” Here the child's life prior to adoption is constructed as inherently negative, with America being represented as an unquestioned opportunity for betterment. Accounts of adoption such as these not only fail to examine the racial privilege of adoptive parents; they also perpetuate the binary of pathological non-white/ benevolent white that have long shaped adoption discourse.

Further in the article, we are provided with a direct quote from Simmons' partner who states that “People say: 'who's his real father?' I am. Birth parents are a little overrated. The father lived alone in a mud hut; drank a lot of alcohol, he could barely look after himself.”

Whilst this quote directly counters the emphasis on biology provided in the previous section, it does so in the context of adoption, where the role of the birth parents is constructed as 'overrated'. Not only does this potentially undermine the relationship between children placed for adoption and their birth parents, it also perpetuates the discourse of 'real' parents by emphasising the contrast between 'good' parents who do all the things described in the previous section on 'love,' and the things that 'bad parents' do, such as drink a 'lot of alcohol' and 'barely look after' themselves. Yet despite this acknowledgement of the child's birth father (however negative that representation may be), the article includes reference to the fact that “When the two men wed later this year, Tasmanian-born Jaason will officially become Odin's second father.” In this statement of Simmons' status as the 'second father', the child's birth father is rendered invisible as is their relationship to one another.

As is typically the case in media articles, the racial identities of white people are rarely if ever mentioned in the articles examined here. The majority of interviewees in the articles appeared in the images accompanying the articles to be white lesbians and gay men and yet these parents are never marked as racialised. The only instance where the race of the parents is mentioned is in the instance outlined above where the couple were mixed-race. Yet, in all bar one instance when this couple were referred to across three separate articles, only the racial identity of the non-white parent was mentioned with no explicit reference to the racial identity of his white partner. In the one instance where his identity as white was explicitly named, it was by the interviewee himself, where he stated in Take 5 that “with Jeff being Taiwanese and myself being Caucasian, we decided we could use two egg donors – a Caucasian egg donor for Jeff and an Asian egg donor for me. That way whichever egg was fertilised, our baby would reflect each of our racial backgrounds.”

In this instance we can see the problematic deployment of race as referencing biological categories despite the fact that the mapping of the human genome project found no 'race gene', and despite the fact that elsewhere the same parent claims that he and his partner are 'continuing the tradition' of biology not mattering. In contrast to this, his emphasis on gamete matching would very much suggest an investment in race as biologically determined, and that the creation of a child reflecting both of its parent's racial identities is made to matter.

33. Two Men and a Baby, TAKE 5 2007, at 10-11.
Statements such as these about gamete-matching echo Mamo's findings that lesbian couples looking to conceive through donor sperm will often negotiate racial matching when selecting a donor. Whilst, as Mamo suggests, this is often warranted through claims to the need to create family coherency, it nonetheless privileges a notion of coherency that centres upon biological and visual similarities. Finally, in regard to this last quote, the interviewee problematically collapses a Taiwanese identity into an Asian identity, thus rendering visible the tenuous foundations on which claims to racial matching often lie, in addition to valorising the ways in which racial categories function through assumptions of visible appearance in ways that privilege white, Western accounts of relationality and intergroup differences.

While the examples examined in this section focus on the voices of particular reporters and gay parents, they nonetheless may be said to reflect broader social discourses about transnational adoption and the practice of racial matching. That these articles were deemed intelligible by the publishers tells us much about how discourses of race are understood within the Australian context and how accounts of race and reproduction continue to be shaped by the norms of whiteness. While these accounts are not limited to lesbian and gay parents, they do display how discourses of race and sexuality intersect with one another to make possible particular accounts of parenting that are reliant upon stereotyped, marginalising and exoticising images of non-white people and communities.

Privileging Parent Couples

As Clarke suggested in her analysis of UK talk show representations of lesbian and gay parents, there is a normative presumption that lesbians and gay men parent in couple relationships and that this is the best context in which to raise children. This type of assumption was explicitly articulated in some of the articles examined for this article. One interviewee in Who was quoted as saying “Sophie has the love of two dads, two loving parents, which is all you can really ask for.” Here the fact of having ‘two loving parents’ is constructed as ‘all you can really hope for’, the implication of this being possibly that this is the least you can ask for. This type of logic also appears in Notebook, where a gay

parent is quoted as saying “we both want to be involved; we both want to be the best parents we can be. Ethan doesn’t have a mum – he has two dads, but most of all he has two parents.” While the emphasis here on dual involvement is a fair claim for this couple to make, the concluding statement that the fact the child has two parents and that, 'most of all', this is important evokes the presumption that having two parents is the most important thing. As Lehr and Clarke suggest, this presumption of a two-parent model as the 'ideal' context in which to raise children is constructed through implicit comparison with other models of family depicted as less ideal: for example, single parent families and possibly also multi-parent families.

In addition to these explicit statements valorising two-parent couples, all of the articles reified couples in mundane ways. This included the fact that all of the images depicted coupled parents, in addition to statements such as “two same-sex couples share the joy and challenges of parenthood” (Who)\(^{37}\). While some articles did refer to the fact that single gay men or lesbians can create families, this typically defaulted back to reference to couples, such as in the following example from *Time Out*: “Surrogacy sees a gay man or gay male couple firstly choosing an egg donor [...] With the assistance of a surrogacy agency, the male couple are introduced to a surrogate.”\(^{38}\) In this example, the article begins by recognising that single gay men can engage in surrogacy, but in the same sentence goes on to refer solely to the 'gay male couple'. Examples such as this highlight how the norm of coupled parents plays out in representations of lesbian and gay parents in the media.

**III. Conclusions**

Through the identification of four tropes evident within a sample of Australian popular media articles on lesbian and gay parents, the findings presented in this article both support previous research on this topic and extend it in important ways. The findings replicate UK research by Clarke and Kitzinger which found that discourses of love are often deployed to legitimate lesbian- and gay- headed families. The analysis presented here extended this by examining how claims to love not only normalise particular family forms, but also produce forms of ownership within families that reify consumerist notions of relationality. Also replicating previous findings, the analysis found that


\(^{38}\) Georgiou, *supra* note 15.
coupled parents are exclusively represented within Australian media articles and that this is often constructed as the best environment in which to raise children. The findings also outlined two tropes previously given little attention in research on media representations of lesbian and gay parents: those of representations of race and the privilege given to biology. In relation to the former, significant proportions of two of the articles evoked problematic accounts of race that either marginalised or exoticised non-white people and communities or reified race as a biological category. Furthermore, neither were the racial identities of the predominantly white interviewees remarked upon by reporters nor were their identities as apparently middle-class lesbians and gay men. With regard to the privileging of biology, not only were biological relations routinely reported on in the articles, biology was often constructed as the most appropriate (or indeed in some cases only) means through which to form a family.

These findings have important implications both in relation to what they tell us about the broader social context in Australia and what they tell us about the claims of lesbians and gay men as parents. In relation to the social context, the analyses presented here would suggest that while there are an increasing number of positive representations of lesbian and gay parents in the media and in society more generally, and while this may reflect more positive attitudes towards such parents, there are still many limits imposed upon the representations deemed intelligible. Primary amongst these are the push for lesbian and gay parents to explain themselves in terms of a heteronormative agenda that, while not centring upon negative stereotypes of lesbian and gay parents per se, nonetheless reinforces a set of white, middle-class, couple parent norms for families that are formed through biology. The fact that this image mirrors the image of most families who receive positive attention in the Australian media is no accident and suggests that representation may still require conformity amongst lesbian and gay parents.

In relation to lesbian and gay parents themselves, this requirement for conformity produces a set of problematic choices: is it enough to simply be included or represented on any terms or should representation actually reflect the diversity of lesbian and gay (and bisexual and transgender) parenting communities? As Gamson suggests, the ability of certain lesbian- and gay-headed families to conform to a particular dominant image is the privilege that comes with white middle-classness and this fact cannot be overlooked when we are examining media representations. In other words, while the media does reflect the opinions of the wider
society (in addition to its own agendas), it is also shaped by those willing to be represented and their own complicity in practices of exclusion. While we must acknowledge that some lesbian and gay parents may perceive representation in any form as a positive thing, this perception must be located in a relationship to a range of practices of inclusion and exclusion that deem only certain people intelligible.

To conclude: what is needed in relation to future representation of LGBT parents in the media are truly diverse samples of participants: parents in all forms of relationships, from a wide range of cultural backgrounds and with a diverse range of accounts of family formation. Engaging with what Gamson terms 'paradoxes of visibility' requires acknowledging how these paradoxes are formed through exclusion and how certain members of LGBT communities currently experience inclusion at the expense of others.
Resisting, Demanding, Negotiating and Being:
The Role of Scandals in the Everyday Lives of Argentinean Travestis

Soledad Cutuli*

The aim of this article is to explore the different uses and meanings of the category 'scandal' among Argentinean travestis. It is argued that this insight could be fruitful to understand the logic according to which local travestis resist, negotiate, demand and manage access to rights, opportunities, and/or goods, from which they have been historically excluded due to their non-hegemonic gender identities. In line with the performative logic employed to construct their gender identities, the idea of 'scandal' is fruitful for them to think, to make themselves visible and to act politically. This article proposes a political and anthropological approach to study the relation between structures of inequality and resistance through collective action. It takes into account a perspective developed by political anthropologists, centered in the power relationships analysis and an understanding of politics as a dimension of daily life.

I. INTRODUCTION

Social studies on sexualities have flourished in Argentina in the last fifteen years. Knowledge about so-called 'homosexuals' was almost exclusively generated by psychiatrists, psychologists and doctors, exploring homosexual conduct and tagging them as 'risk groups'. However, a multiplicity of other voices has recently been developed in the field of social sciences as well as in the field of activism. In this growth of perspectives and debates, one of the privileged issues of inquiry has been the movement of Lesbian, Gay, Bisexual and Transgender (LGBT) persons. Frequently, the movement has been defined, a priori, as a sort of 'imagined community' shared by a wide range of members whose diverse sexual practices and/or their gender identities

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destabilised heteronormativity. With this perspective, the movement has been thought as homogeneous in spite of being a particularly dynamic and controversial field. Those possessing the intention to consider the movement as a unified or closed object of study could hardly find a better instance of analysis than the LGBT Pride demonstration, one of the few events of the year in which the movement operates in an articulate way.

*Travesti* associations (a part of the LGBT movement) have received little attention from social researchers, although in the last two decades Argentinean *travestis* associations have been working collectively to address stigmatisation and oppression. During the 1990s, these pioneer groups focused their objectives on denouncing the violence of the security forces and fighting to abolish the legal provisions that criminalised their identities; as well as carrying out HIV/AIDS prevention activities. Now their purposes have diversified, expanding the horizon of demands to issues such as access to education, dwelling, health and 'dignified' work.

With the purpose of inquiring into the organisational, social and political actions of *travestis* in the metropolitan area of Buenos Aires, I started ethnographic research for my PhD in mid-2008. In this paper, I present partial results of the data collected during the first two stages of fieldwork (June-December, 2008 and May-September, 2009), in which I had the chance to follow the formation and the daily routines of a labour cooperative specially created by and for *travestis*. I participated in the daily life of the venture, attending training courses, collaborating in the moments of production and sharing instances of leisure, social gatherings and public events, amongst others. Being there enabled me to observe diverse dimensions of their experiences, which in turn cannot be simplified by just categorising them under the usual topics in existing literature about transgender issues, such as sexuality, body or gender identity.

At any time that trans people have been thought of as political subjects, it has been argued that this is solely due to the notion that their identities disturbed the gender binary or because their sexualities challenged the heterosexual matrix. Focusing only on these aspects, a com-

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2. L. Berkins, *Un itinerario político del travestismo (A political itinerary of transvestism)*, in *Sexualidades migrantes. Género y transgénero* (D. Maffia ed., 2003) (Travesti is the term used by the local male to female transgenders to refer to themselves. The first travesti association of the country was *Travestis Unidas* (United Travestis), founded in 1991. Then appeared *ATA* (Argentinean Travesti Association) in 1993, and *ALITT* (Association for the Struggle for Travesti and Transsexuals Identities) and *OTTRA* (Travesti and Transsexual Organization of Argentinean Republic), in 1995.).

3. Buenos Aires is Argentina’s capital, in which most of the political life of the country takes place.

plex organisational and political dimension has been underestimated, losing sight of the suffering, resistance and claims of the real subjects. The pioneering book of the anthropologist Josefina Fernández has influenced the construction of my research. In her broader work about gender practices and representations assumed by travestis, she deals with the formation of political organisations and their resistance to police edicts in Buenos Aires city. In the Brazilian case, a paradigmatic text about this issue is Charles Klein and Don Kulick's *Scandalous Acts: The Politics of Shame among Brazilian Travesti Prostitutes*, in which travesti scandals are presented as political and performative acts. These scandalous acts consist of shaming homosexual clients in order to get additional money for their sexual services and denouncing their 'passive homosexuality' in public. The authors understood such initiatives as micro-politics: when provocating a scandal, travestis would be temporarily subverting a situation of inequality; reinforcing travesti abjection, however, with the same argument that justified it.

For the travestis that I met during my fieldwork, the category of 'scandal' is recurrent and centrally political too. However, as I aim to demonstrate in this paper, it has different nuances and follows other motivations. I argue that an insight into the different uses and meanings of the category 'scandal' may be fruitful to understand the logic according to which travestis in the metropolitan area of Buenos Aires resist, negotiate, claim and manage access to certain rights, opportunities, and/ or goods which they have been historically denied due to their non-hegemonic gender identities. This paper proposes a political and anthropological approach to study the relation between processes of inequality and the modalities of resistance and collective action. It takes into account a perspective developed by political anthropologists, centred in the analysis of power relationships and the understanding of politics as a dimension of daily life.

This paper is divided into three sections. The first one is dedicated to reviewing the emergence and the evolution of the pioneering travesti associations in Argentina. In the other two, the potential of the category

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of 'scandal' is explored as an expression of social relations and as a producer of bonds and identities in the context of struggle and conflict.

II. TWO DECADES OF TRAVESTI ORGANISING

Due to their non-normative sexualities and gender identities, Argentinean travestis have been historically deprived of access to many citizenship rights and have been exposed to violence and exclusion. Like many other Latin American travestis, they have found their main source of income in sex work/prostitution. Although there are no official statistics about this population, several studies carried out by local travesti organisations have shown that almost 79 per cent of them work as prostitutes and over 91.1 per cent have suffered violence, including police harassment and sexual abuse, mostly while working on the streets. Already, most would have been expelled from home and school at an early age, having little access to the health care system and lack of vital opportunities other than what is available on the streets. Significantly, the life expectancy for these individuals has been seen to not be more than thirty five years.

The recurrent context of police harassment was a crucial reason behind the political organising of travestis in the early 1990s. Kenny de Michelli was the first travesti to publicly denounce police harassment and founded one of the pioneering associations, United Travestis, with the objective of bringing visibility to the terrible life conditions of her community. In June 1993, another group was created with the support of the Argentinean Homosexual Community (CHA). Named Argentinean Travesti Association (ATA), it made its first public appearance at the Pride March the same year.

9. There is a major debate in Argentina about the relationship between prostitution and work involving not only travestis but mainly women. In this sense, the original association which grouped women sex workers suffered a division and two new organisations were created. The first one argued that their activity should be considered as work adopting a ‘reglamentarist perspective’, with the goal to have the sex-trade spaces controlled by the state (establishing brothels and ‘red zones’, registering sex workers and controlling them with health certificates). They joined the Argentinean Trade Union (CTA), claiming to have the same labour rights as any other worker. In contrast, the second group was against considering prostitution as work because they understood that it was a situation generated by a sinister articulation between capitalism and patriarchy and not a dignified job. This position can be considered ‘abolitionist’, as it considers prostitution as humiliating condition that must be eradicated. Without criminalising those confined to that situation, the supporters of this stance demanded the creation of employment alternatives and the struggle against the procurer’s networks. Officially, Argentina holds the latter position on the level of international treaties on the subject. As I explain above, this debate has also divided travesti organisations.


11. Id.
While the narratives about the emergence of travesti groups in this period are scarce, the text titled *A Political Itinerary of Travestism*\(^{12}\) is an attempt to systematise these early experiences and is one of the sources consulted for this work. Its author, Lohana Berkins, is currently one of the most recognised travesti activists in the country.\(^{13}\) In the above-mentioned text, she argues that the First National Meeting of Gays, Lesbians, Travestis, Transsexuals and Bisexuals\(^ {14}\) was a milestone for the travesti organising process. She suggests that before that crucial meeting, gay and lesbian groups discriminated against travestis and were reluctant to accept them as part of the movement. With the objective of exposing the humiliating and violent situations they faced in police stations, five travesti activists wrote and performed the play *A Night at the Police Station*. Lohana asserts that after watching this play, the gay and lesbian groups who doubted them finally became convinced about embracing their cause.\(^ {15}\) As we will see in the last part of this paper, performing with the purpose of instructing those who do not understand the travesti cause has been one of the primary strategies of activism. Beyond the performativity of their gender identities, the repertoire of their political actions has had a distinct theatrical nature since the beginning of the organisation.

In her story about the incorporation of travestis to the pre-existing gay and lesbian movement and to their annual Pride March, Lohana Berkins noted the following:

That was our first struggle for visibility. When collecting money to make the poster that identifies the diverse groups of the demonstration, we had to put money but we could not include our name. We were excluded from the flyers and the place designated to our name in the main poster was insignificant. However, the travesti participation in the demonstration was not only numerically greater than the other groups, but also our colourful clothing highlighted us from the rest.\(^ {16/17}\)

The problem of 'visibility' turned out to be central in shaping the relations between the pioneer travesti groups and groups of gays and lesbians and even today remains a cause of conflict among the various

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\(^{13}\) In 2003, she was honoured by the International Gay and Lesbian Human Rights Commission (IGLHRC) with the “Felipa de Souza” Prize. She was also awarded local prizes because of her activism in Human Rights.

\(^{14}\) Berkins, supra note 12 (This meeting was held in 1996 in Rosario, one of the most important cities of the country. It was organised by a local LTGB organization, *Colectivo Arcoiris*).  

\(^{15}\) *Id.*

\(^{16}\) *Id.*

\(^{17}\) The translation has been done by the author.
organisations in the movement. Among them, 'visibility' is a social category which implies a process of disputes to install specific demands as priorities as well as to represent the movement in public events. Since the emergence of the first *travesti* associations, visibility has been constructed on the basis of a paradox. On one hand, to be a *travesti* meant that one's presence was qualified as striking and disruptive; one was the most visible part of the movement: without a closet in which to hide. On the other hand however, *travestis* believed that their demands were given lower priority than those of gays and lesbians, making them invisible behind the general slogans of the movement.

The main activities of the first organisations focused on resisting police abuse and claiming abolition of Edictos Policiales (Police Edicts).\(^{18}\) With establishment of autonomy of Buenos Aires\(^ {19}\) in 1997, the derogation of these regulations began to be discussed. In this context, the *travestis* multiplied their public appearances, exposing their dramatic living conditions and the police violence that they faced. They argued that those edicts which regulated the use of public space criminalised their identities, as they had no alternative option for work, apart from occupying the streets. They also claimed the existence of a lack of other opportunities for living. While the struggle against these codes was collective, in 1995 some members of Argentinean Travesti Association (ATA), one of the first *travesti* organisations, left this group and created two others: namely, the Association for the Struggle for Travesti and Transsexual Identities (ALITT) and Travesti and Transsexual Organisation of the Argentinean Republic (OTTRA).\(^ {20}\)

These groups have conflicting positions on various issues such as defining the scope of representation of each group. While ATA includes people identified with the categories transsexual and transgender (becoming ATTTA, Argentinean Travesti, Transsexual and Transgender Association), and nationalised the 'Trans movement' over a network with several offices around the country,\(^ {21}\) ALITT was reluctant to accept these categories, understanding them as 'definitions

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18. Asylumlaw.org, Helping win asylum cases world-wide, available at: http://www.asylumlaw.org (While no law in Argentina specifically criminalises homosexuality, the police have resorted to a number of other legal instruments to harass individuals they consider 'dangerous.' For example, police edicts, which are not laws as such, but regulations applied at the discretion of the Argentine police, have been used extensively to harass sexual minorities.).

19. This political event was significant, because Buenos Aires was given the same status as the other provinces of the country, having the right to draw up its own Codes.

20. Berkins, *supra* note 12 (This group no longer exists, since its President died in 2004. Currently, ATTTA and ALITT are the two predominant associations in Argentina.).

imposed by central countries', having nothing to do with the specificity of the Latin American *travesti* experience.22 In this search for recognition and affirmation of the *travesti* identity, ALITT also discussed the terminology of HIV/ AIDS international prevention policies, according to which *travestis* were considered as part of 'high risk' groups, together with 'men who have sex with men' (MSM). So, while the Global Fund to Fight AIDS, Tuberculosis and Malaria23 granted resources to finance projects of prevention for this group, ALITT rejected them, objecting that defining them as men was “violent for their identities,” which they deeply felt were feminine. On the contrary, ATTTA decided to accept them, mostly because HIV/ AIDS is still the principal cause of death in this group24 and as a source to finance their activities. The implementation of these prevention projects focused on distributing condoms and safe-sex leaflets for trans people dedicated to the sex trade, organising workshops to train new activists, and promoting testing and monitoring in the treatment of the HIV-positive.

Following the recommendations of the UNAIDS regarding the scarce access of trans people to the health care system, in 2007 the Ministry of Health of the city of Buenos Aires signed a resolution to ensure respect for all gender identities at every hospital and health centre for summons, registration, call or other requirements.25 Recognising that some of their main reasons for disliking the health system included being called by the name assigned to them in their official document (National Identity Document, DNI) and being hospitalised in male wards, a special programme26 was established at one of the main hospitals of the city, in order to facilitate their access to the system and monitor the implementation of the above-mentioned resolution. This programme was funded by the Global Fund. ATTTA participated along with other HIV/ AIDS NGOs carrying out awareness-raising activities with hospital staff and trans people who attend the institution. They provided guidance and assistance and promoted testing and distribution of condoms in the neighbourhoods where they live and work.

24. BERKINS, supra note 10.
The ATTTA’s focus on health coincided with that of other HIV/AIDS NGOs as well as LGBT groups, founding the Argentinean Federation for Lesbian, Gay, Bisexual and Trans in 2007. Thus, whereas ATTTA integrates the Latin American sex workers network (RedTraSex), ALITT argues that prostitution is not a form of work but a situation in which most *travestis* are confined due to the lack of other employment opportunities. This distinctive political stance is a result of alliances with different feminist groups that have fought police edicts and contravention codes. Therefore, within the process of demand for dignified work encouraged by ALITT, in June, 2008 the first labour cooperative for *travestis* of Argentina was inaugurated.

III. MODES OF RESISTING AND MODES OF DEMANDING: SCANDAL, EDICTS, AND POLICE FORCES

The first *travestis* started organising themselves by the end of the 1980s and the beginning of the 1990s and shared a common experience of persecution, harassment and police violence. As Stephen Brown affirms:

> The police often raid bars and clubs and use various legal provisions to harass and detain lesbians and gays without necessarily charging them with any crime. Thousands of transgendered people were arrested every year. While in custody, were often verbally and physically abused with impunity. Some disappeared and are later founded murdered, and the cases go uninvestigated.28

Contemporary police edicts in the city of Buenos Aires (as well as in some provinces) operated as a mechanism according to which federal or provincial police forces were allowed to suppress any practice not expressly foreseen in Argentina's Penal Code. These regulations, written in 1923 and established by decree in 1956 during Pedro Eugenio Aramburu's military dictatorship, controlled a number of behaviours that were not considered criminal, yet punished through fines or arrests. In reality, federal police operated in Argentina without any form of judicial intervention. Once democracy returned in 1983, these regulations were considered unconstitutional and received widespread criticism from human rights organisations, especially LGBT groups.30

27. Fieldwork notes, June 2008.
Amongst the regulations on the police edicts, 'public exhibit of cross dressing' and 'the offering of the carnal act' specifically concerned travestis. Both regulations, which were part of the Misdemeanours Codes of several provinces of the country, led to the idea of 'scandal in public'. For example, Article 68 of the Misdemeanours Code of the Province of Buenos Aires stated that:

The prostitute or homosexual offering [her]self, provoking scandal or disturbing, or arousing scandal in residential zones, will be punished with a fine equivalent to a 15-40% of the Buenos Aires police officer's salary, along with a 5 to 30 days arrest.

Similar sanctions were established in the Misdemeanours Codes of the provinces of La Rioja, Neuquén, Catamarca, Mendoza, San Juan, Santa Cruz, Formosa and Santiago del Estero. The category of 'scandal', commonly found in many codes and edicts, became a key argument mobilised by various security forces in defining, repressing and incarcerating travestis, whether or not they were working as prostitutes.

The testimonies on the conditions of travesti life during the dictatorship (1976-1983) established more continuities than disruptions between that period and the democratic one. Valeria Ramírez, a current member of the Fundación Buenos Aires SIDA (Buenos Aires AIDS Foundation), was once kidnapped and kept at the Pozo de Banfield – a clandestine detention centre – thus becoming an emblematic case. Together with her, seven other travestis who worked with her in the Lavallol 'red zone' were arrested and only two survived. Valeria points out that at the time, the so-called 'Morality Brigades' were after travestis accusing them of the same 'crime' that would be used in the following decades: 'scandal in public'. The stories of the 1980s and 1990s emphasise how often they spent twenty-one to thirty days in jail under the 'scandal in public' allegation. In addition to illegal arrests, travestis point out other forms of police abuse such as sexual abuse, hitting, insults, torture and the regular demand of bribes so that they could work in particular areas of the city.
These stories appear fragmentary and scarce probably because there are very few survivors of police violence, HIV/AIDS and other health problems. Others travelled as undocumented migrants to Europe to try their luck at prostitution and never returned.

As mentioned above, the initial demands established by travestis were related to ending police abuse and police bribery and revoking various Misdemeanours Codes that allowed for these situations. Once the city of Buenos Aires became an autonomous district in 1997, the debate on the abolishment of police edicts began. In that context, public appearances of travestis increased, along with exposure of their material conditions, especially police abuse. Outside of the City Council, travestis protested against the banning of public circulation in the clothes of the opposite sex; some chained themselves to the doors of the Parliament in order to put pressure on the government of the City of Buenos Aires. They defined themselves as 'the identity group still unreached by democracy', arguing that the regulations that organise public spaces still criminalise travesti identity, in the sense that they fail to recognise that those who practice prostitution can only work on the streets. Also, they protested against the lack of other life opportunities available to them.

Finally, in March 1998, the Urban Co-habiting Code came into existence, establishing that a district attorney had to intervene before any police could issue an offence statement or initiate an arrest. However, some neighbours' associations, and specially the one of Palermo, protested against this Code and demanded the designation of a 'red zone' in isolated areas of the city. During this period, the disputes between neighbours' associations and travestis became more frequent. In July of that year, conservative lobbyists promoted a set of changes in the Urban Co-habiting Code through the modification of Article 71 which states that while the offer of sex on the streets is not forbidden, noise nuisance and public disturbance is. In March 1999, through a presidential decree, police edicts were re-established, with severe measures that allowed for the arresting of people without any judicial mediation for the alleged 'provocation or offering of the sexual act' when it involved 'the disturbance of public peace'. After this, the City Council completely
forbade sexual commerce, imposing fines of AR$50 to AR$200 and/or community work. These measures were condemned by travestis because, once again, it enabled police forces to chase them and to demand bribes. Given the scarcity of other job opportunities, travestis continued to work on the streets at night, resisting arrests with shouts, hits and struggles, both individually and in pairs. In March 1999, they collectively protested, demanding annulment of the ban on sex offers on the streets.47 When the Prince of Great Britain visited the country, travestis protested at the British Embassy, demanding that political asylum be given to seventy seven of them.48 However, before they could submit their written demand, the police repressed the protest. “Scandal once again” was the phrase used by the media reporting the event.49

The year 2004 inaugurated a new period of conflicts relating to the Misdemeanours Code. On July 16, when reforms on the use of public space was under discussion, the protest, which involved many other groups, resulted in serious incidents where fifteen people were arrested and released only a year later (in September 2005). These reforms were relevant not only for travestis but also for women who practised prostitution, street vendors etc. Finally, in that year, a new code was created and established, authorising prostitution in public spaces, 200 meters away from residential buildings, schools and churches. As a result, the 'Godoy Cruz travestis50 moved to the city Rose Gardens,51 turning that area from then on into the 'red zone' of the city.

Three years later, in July 2007, the Sub-secretary of Protected Areas at the Ministry of Environment of the City of Buenos Aires signed a decree which declared the Rose Gardens and their surroundings as an 'unauthorised space for the offering or demand of sexual services'.52 A year earlier, when the same officer was the Rose Garden's Director, he had agreed on cohabiting zones with the travestis and promised to develop social inclusion activities such as trade learning workshops. In his new position nonetheless, he decided to make use of the Ombudsman Office resolution which, in response to a group of neighbours upset about travesti presence, ordered the city to “arrange the necessary...
[measurements] in administrative and, if necessary, judicial matters” to ‘preserve’ the Rose Gardens. This resolution argued that *travestis* had occupied the Rose Gardens, and that the 'neighbours' and their 'families' no longer could visit the Gardens because of the *travestis* and their clients' pervasive presence, aside from the environmental damage caused by used condoms on the grass.

As a result of this resolution, *travestis* organisations protested at the Plaza de Mayo, located right across the offices of the government for the City of Buenos Aires, under the banner: “If they kick us out of the Rose Gardens, we will come to the Plaza [de Mayo].” A letter was read during the protest and some activists met the Minister of Environment and the Chief of Staff of the city. During the meeting, the Minister apologised on behalf of the government of the city, annulling the resolution signed by the Sub-secretary and inviting the organisations to meet with various ministries and work on social inclusion policies for *travestis*. A few days later, a 'dialogue table' was organised mediated by an international NGO and comprised of *travesti* organisations and other sex workers as well as grassroots organisations. Finally, they resolved to move the 'red zone' to one of the peripheries of the Florencio Sánchez square of the Tres de Febrero park, next to the Lago de Regatas (Yacht Club) and the Lawn Tennis Club. This new zone, their current work space, is further away from residential areas and has been equipped with portable toilets, hazardous material waste baskets, lights and cambered roads. It was also agreed to shorten their work schedule from 10 pm to 6 am and a daily cleaning of the premises was promised, as well as weekly workshops on sexual health and environmental care for *travestis*.

Initiated at the end of the 1990s, the disputes about the regulation of public spaces in the case of Palermo were resolved with greater governmental intervention over the management of space and regulation of work hours and conditions for *travesti* prostitution. In justification of regulation, the government used the scandal in public argument along with the arguments about the environmental – and moral – preservation of the park for the residents of Palermo. In this way, the first Argentinean formal 'red zone' was established despite the abolitionist position on prostitution. According to Sabsay, the creation of this 'red zone' is not only a spatial reorganisation but a metaphor about a long and complex

54. An emblematic square of the city, where most political demonstrations take place.
process of reconfiguration of political identities. The establishment of the first official 'red zone' focused, in fact, on *travesti* sex workers as a symbolic gesture to grant the 'purity' of the public space.

However, in the other neighbourhoods and suburbs of the city of Buenos Aires, the situation remains the same: the *travestis* offer themselves on public roads in residential areas. This brings constant complaints from neighbours and the need to bribe police officers. In September 2008, during my fieldwork, two *travestis* I knew invited me to join them for a demonstration in front of the police station of Flores, one of the neighbourhoods of the city. The conflict originated when in the context of a complaint by a resident of the neighbourhood a police officer beat a *travesti* who worked in the area. When we arrived there, we saw part of the Gaona Avenue blocked by a patrol and a group of about thirty *travestis* and women who were demonstrating, holding a large flag of one of the local *travesti* associations. The President of the association was holding a megaphone and was standing next to the Secretary and the Coordinator of the neighbourhood. Some girls held up banners with the words “For an Independent Sex Work” and “Stop Bribes and Police Violence,” while chanting “Federal Police, the National Shame.” Two policemen approached the crowd. They wanted to know who was responsible for the demonstration in order to take that person to the police station to talk to the commissioner. The President of the group and their lawyer left the crowd and went with the policemen.

As we were waiting outside, the girls exhibited their bodies with their tight clothes and showed their banners to the cars that passed by. While some drivers shouted compliments, some shouted insults, provoking laughs and cries of the more exposed. Some others had their faces covered with scarves, hoods or large sunglasses to avoid being recognised by the police officers. A while later, the President and the lawyer of the association appeared and told the others that the Commissioner would call them the first Tuesday of every month at 8 pm for a 'dialogue' with the police officers and neighbours. As they were satisfied with this agreement, everyone applauded and celebrated singing “*Travestis* united, will never be defeated.” The governmental repression of the scandal in public was contested with more scandal; from being alone, working at a dark corner at night, they ended up all together in the afternoon, drawing the attention of the entire neighbourhood, denouncing the police abuses.

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IV. MODES OF NEGOTIATING AND MODES OF BEING: 
SCANDAL AND RECENT INITIATIVES

Within the struggle for dignified work for the travesti community, in 2005 ALITT received a donation of five sewing machines from the National Ministry for Social Development. They proposed to use these to create a labour cooperative and got financial assistance to buy a house to install the workshop from the National Institute for Associativism and Social Economy (INAES). The National Ministry of Labour also gave them funds to finance some training courses.

The formation of this labour cooperative can be thought in the context of the different state policies developed in the last few years. In December 2001, Argentina faced one of the most serious crises of its history. The 1990s was a decade of neoliberal policies which almost destroyed the national industrial infrastructure, raising unemployment to unprecedented levels and plunging most of the population into poverty. The result was a memorable social revolt. A state of emergency was declared. Four presidents were overthrown between December 20, 2001 and the beginning of 2002. After that, a provisional government was installed which devalued the local currency and called for democratic elections. Néstor Kirchner assumed the Argentinean presidency in May 2003. He governed the country for four years and was followed by Cristina Fernández, his wife, who was elected President both in 2007 and 2011. They both took several steps to overcome the critical situation Argentina was in.59

From 2003, the state took a 'productivist turn'. It began to discourage neoliberal social grants and to emphasise the creation and proliferation of labour cooperatives. These measures were intended not only to help recover a large number of companies from bankruptcy (in order to reduce the unemployment rate) but also included people considered unemployable in the social network. Under this category were grouped people in extreme poverty, those with limited access to education and those without labour experience. Even though these policies did not include travestis among their beneficiaries, the travesti associations were able to be included within them.60

The labour cooperative mentioned above is composed of almost forty people, most of them *travestis*, attending three afternoons per week. During its first three years of existence, they conducted training courses of dress-making, design, printing, data processing and marketing, as well as producing t-shirts, sheets and bags on a small scale. By attending classes, the members of the cooperative receive a monthly financial grant from the National Ministry of Labour, Employment and Social Security. They also get boxes of non-perishable food delivered by the Ministry of Social Development and those most in need have access to housing subsidies from the local government of Buenos Aires as well as tickets for supplies at supermarkets.61

These training lessons created the space for the encounter between different generations of *travestis* who share different types of knowledge beyond their trajectories in prostitution. The oldest ones related to the youngest their experiences of parading at carnivals and as cabaret stars or actresses in variety theatres in which they had participated. They exchanged photos, videos and instructions on making costumes for those events, such as corsets or feather headdresses, on embroidering sequins and on mending dresses.

Towards the end of 2008, the cooperative was invited to participate in the LGBT Pride March. This invitation was received with much enthusiasm and perceived as an opportunity to publicise their incipient production. All the members attended the event each year but this was the first time they went collectively, representing the cooperative. This new form of participation generated great discussion among the members about how they should be dressed and behave in this first public appearance for the cooperative. For some of them, the Pride March was the opportunity of the year to show off and celebrate, so they wanted to be ‘very scandalous’, with showy clothes, wigs and makeup. Others wanted to wear the discreet cotton-shirts of the cooperative, avoid drinking alcohol and employ all their efforts to promote the cooperative. ‘To be or not to be scandalous’ during the Pride March: this turned out to be the focus of a political and moral debate which lasted days. For the former category of persons, to dress discreetly would be counterproductive because they would pass unnoticed “among all those fags” and they would not achieve their publicity objectives. They also considered that they would become the object of mockery of other organisations: “They’re going to label us the repentant prostitutes,” they

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affirmed humorously. For the latter, behaving scandalously was clearly contradictory to their objectives of managing dignified work, different from prostitution as well as their new role as cooperative workers. Finally, they agreed to wear purple cotton shirts made by the cooperative and combine that with wigs, hats and other flashy accessories, and carry a large banner with the name of the venture embroidered in sequins.

Every achievement for the venture or the association was considered a festive situation and deserved a celebration in the organisation, with a great display of travesti glamour. Thus, during the fieldwork period I witnessed and was told about several significant episodes of exhibitionism. For example, the event in which they announced that the Supreme Court of Justice had granted legal status to ALITT was organised at the Empire Theatre and consisted of a revista, a theatrical genre where the characters wear glossy and eye-catching clothes and crowns of feathers while they sing and dance. The actors were members of the association, led by a choreographer and accompanied by other dancers; they even had an assistant for the costume design, which they made by themselves. Later, on the occasion of the presentation of a book compiled by the President of ALITT, a similar event was held at another theatre. After a few brief words about the book (which described the situation of the travestis in the country), two members of the group performed a show, wearing minimal dresses with sequins and crystals of fantasy, dancing and singing on the stage, encouraging the applause of the audience.

In June 2009, they were invited to participate in a fashion show, organised by the INAES for the textile cooperatives which depend on this institution to advertise their production. While other ventures asked famous actors and fashion models to show their products, the members of the travesti cooperative chose to parade themselves, wearing 'haute couture' dresses specially made by them for the occasion. Preparations for this event required considerable time and effort: they managed the money to buy materials, searched for the most convenient prices and even contacted a fashion designer to draw the designs. The designer was promptly dismissed by them because he proposed very simple costumes, “a few insignificant satin petticoats.” Instead, they chose a travesti expert to advise them 'properly' in the design and the cutting of the fabrics. Then they finished sewing the dresses and embroidering and completing the outfit with wigs, shoes and accessories.

62. BERKINS, supra note 10.
63. Fieldwork note, June 2009.
The day of the fashion show, four travestis and the teenaged daughter of another one, represented the cooperative at the event wearing long and pompous evening dresses with what they described to be a “very travesti” style. This time, being scandalous had a highly positive connotation as the event had great importance in the media; they appeared in most of the photos and videos that covered the show. The following year, they were given funds to organise another fashion show exclusively for the cooperative.

When they worked as prostitutes, they learnt that being scandalous would bring them advantages by attracting more clients but also greater police cruelty. Participation in the cooperative brought them a new dilemma: how to articulate this new discreet, cooperative worker, the 'repentant prostitute' who claimed dignified work, with their way of life, their knowledge and previous experiences. Dealing with the expectations that they suppose 'the others' have of them, they discovered that it could be strategic to highlight some 'very travesti' aspects, to achieve their political objectives.

In addition to being, 'making a scandal' was also considered one of the privileged strategies to negotiate with government officials. "If you don't give me an answer, in an hour you'll have fifty travestis making a scandal in your office," said the President of the cooperative, threatening an official from the government of the city, angered by a cut in the supply of food for the members of the organisation. Even knowing the impossibility of convening such number of travestis so quickly, she knew that the threat would be as effective as the scandal itself. 'Making a scandal' can involve incidents like leaving a governmental office while throwing any object and/or screaming and/or aggressively closing the door when they could not get any of the expected benefits or it can include actions such as publicly scolding and reporting a state employee who hindered their proceedings or made fun of them, for travesti-phobia. These scandals are almost always followed by reconciliation once the 'travesti fury' has ended where an 'educational' intention again prevails: they must teach these officials, as well as the society as a whole, what a travesti is and how she should be treated. The scandals are later recalled and recited to other people in a humorous manner with the 'victim', as milestones in the histories of their relationships.

64. Fieldwork note, November 2008.
V. Conclusion

The objective of this paper has been to show how 'scandal' is a privileged strategy that Argentinean travestis have used to denounce, demand and negotiate. My argument is that this is the result of an experience of suffering and resistance to repressive acts of the state, in articulation of recent relationships with bureaucratic and administrative agencies. Scandal appears to be not only a way of 'making' but also a way of 'being' that is associated with street prostitution. It is stressed and repeated, politically and morally, in new experiences such as cooperative work, which claims to have dignified work and other rights for the travesti community.

As advanced in the introduction, the scandals of Brazilian travestis have been understood, as in our case, as performative and political acts. However, I cannot agree with those perspectives which assert that such scandalous acts reinforce the abjection of being travesti. Asking if scandals disrupt or strengthen the abjection do not allow us to take account of the logic according to which travestis experience different contexts: being constructed as a threat to public order or a moral (and environmental) danger; as health promoters and managers of international funds, or as dignified workers.

Problematising this recurrent category of 'scandal' has led us to enquire into the social relations that are configured both on the repression and the production of these subjects. We propose then to set aside the assumption that classifies travestis as abject beings, to begin to think of them as active actresses who are part of the broader social life. With their particular logic, they are integrated with the whole set of dimensions that make up every day of their lives.

This paper has been inspired by the understanding of sexualities as results of different social practices which give meaning or sense to human activities, social definitions and self definitions and struggles among those who have the power to regulate, against those who resist.65 Through complex power relations within the realm of sexualities there are various domination and subordination structures.66 Avoiding the stereotype that categorises travestis as 'essentially' scandalous, my aim was to consider how a category used to stigmatise and suppress them has been re-appropriated and re-signified for them to represent

themselves and to set up social relationships with other actors. With educational, advertising or management purposes, these performances are the privileged ones within a repertoire in permanent construction.

In line with the performative logic employed to construct their gender identities, the idea of *scandal* is fruitful for them to think, to make themselves visible and for them to act politically. In the introduction I affirmed that, in the few times where *travestis* had been thought of as political subjects, they had been shown as secondary actresses within the dynamics of the LGBT movement. Contrary to this, I have tried to recover their life experiences, in constant tension with dominant discourses, to explore their most creative aspects and to present them as the protagonists of their own stories.

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Queer Politics in Spain: 
There is Life after Same-Sex Marriage Legislation

Susana López Penedo*

This article analyses the evolution of the gay and lesbian movement in Spain during the past forty years, from the final years of Franco’s dictatorship and the transition to democracy to the achievement of same-sex marriage rights in 2005. The article focuses on the influence of Queer Theory and queer activism in the gay and lesbian movement and, more widely, in the politics of other Spanish social movements. The article analyses the debate between the gay and lesbian movement and queer activists about the implications of focusing on same-sex marriage instead of developing a radical critique of heteronormativity. The author explores the effects that achieving same-sex marriage has had in the dynamics of the LGBT movement. As reclaiming the right to marry for gay and lesbian people was the main political objective of the LGBT movement, once the right was achieved it left the movement with a lack of political direction and a need to readdress its priorities. The author argues that the Spanish case is a good example of the limited effectiveness of strategies that focus on the discourse of rights and laws and their inability to stop social and cultural homophobia. She explores the contribution of queer activism in the politics of current Spanish social movements, beyond LGBT activism, especially in the discourse of the new M-15 movement which emerged as a result of the social discontent created by the current international economic crisis and that has inspired the Occupy Movement beyond the Spanish borders.

In 2005 the Spanish Government passed a law that granted same-sex couples the right to marry. It was the end of decades of civil rights struggle for Spanish gay and lesbian people. With the beginning of democracy in 1978, gay and lesbian people who had been living clandestinely began to organise and slowly form an identity-based social movement that reached its pinnacle in the nineties. It was also in the nineties when activists influenced by the discourse of Queer Theory developed in the United Kingdom and the United States entered the movement and began to question the heavily identity based movement and political practice.

In this article, I will analyse the evolution of the gay and lesbian movement in Spain in the past forty years and trace the influence of

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Queer Theory and queer activism in its politics over the past twenty years. I will analyse the effects that the passing of the same-sex marriage law has had in Spain on the gay and lesbian movement. I will show the difficulties that the movement is now facing in keeping up the fight and the pressure on the government and society in order to defend the rights and interests of lesbian, gays and also transsexual and bisexual people. Trans and bisexual people have been included within the movement in the past ten years to conform to what is known as LGBT movement, (Lesbian, Gay, Bisexual and Transsexual).

Finally, I will argue that the Spanish case is a good example of the limited effectiveness of strategies that focus on the discourse of rights and laws and are unable to combat the subtle homophobic discrimination in the day-to-day lives of people, especially those who refuse to comply with hetero or homonormativity.

Spain has had a fractured political past since the beginning of the twentieth century. The country went through a civil war between 1936 and 1939 and the result was the beginning of a fascist dictatorship led by General Francisco Franco. The dictatorship lasted for forty years and it only ended with the death of the dictator in 1975 which allowed the beginning of a political transition towards democracy that ended with the approval of a Constitution that guaranteed equal rights of all Spaniards in 1978. The transition to democracy allowed for the legalisation of political parties and trade unions and it set the ground for a very intense civil participation and the creation of social movements.1 It is in this context that gay and lesbian people started to fight for their rights.

I. THE BEGINNING OF A GAY AND LESBIAN MOVEMENT IN SPAIN

Social change is linked to the rise and the organisation of a social subject with particular political claims underpinned by a particular discourse. This is the case of the Spanish gay and lesbian subject who, within a space of twenty years, went from living secretly during Franco’s fascist dictatorship to forming a strong LGBT movement with the capacity to lobby the government through the FELGT (Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales) – State Federation of Lesbian, Gays, Transsexuals and Bisexuals.2


2. This federation was first founded in 1992 under the name of FEGL (State Federation of Gays and Lesbians) by Colectivo Gay de Madrid, Agrupación Gay de Madrid and Comité
In this article, I wish to make a clear distinction between the LGBT movement and queer activism. Although the word queer has often been used as a synonym for gay and lesbian in many scholarly articles, Spanish-speaking countries have bypassed all the negative connotations originally associated with the word queer and use it to denote a particular way of approaching activism. Therefore, I use the concept of queer here just to refer specifically to those activists who are critical of the identity politics of the movement for the equal rights of gay and lesbian people, known as the Gay and Lesbian Movement that has lately included bisexuals and transsexuals.

Queer as a political and analytical concept came into being in the 1990s when Teresa de Lauretis used it in the introduction of the special issue on Queer Theory published in the journal *Differences* in 1991. The publication of this issue coincided with the publication of the book *Inside/Out*, edited by Diana Fuss, with a collection of essays that served as a template for the future of Queer Theory arguments.

Queer activism in Spain has a critical approach to the essentialism of the LGBT movement when focused on the fight for equality and civil rights for gay and lesbian people. The LGBT movement followed an ethnic model of social grouping. Members of the gay and lesbian community identify themselves as an ethnic community and gay culture is treated as a new form of ethnicism. Their sexual identities transcend any other identity categories of the subject such as race, class or nationality. This "shared culture" is based on a common inheritance of oppression that serves to bring those who have suffered from it together.

The antecedents of the LGBT movement started with clandestine gay activism in Spain during the last part of the dictatorship in the late sixties and early seventies. This was in response to a law passed in 1970, the Law on Danger and Social Rehabilitation (Ley de Peligrosidad y Rehabilitación Social). This law stated explicitly that homosexuals (meaning gay men and not lesbians), were a social and moral threat to society just by virtue of being homosexuals and the law was enforced

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rigorously. Gay men caught or even suspected of being gay were either imprisoned or sent to psychiatric hospitals.7

It was then, and partly as a reaction to the approval of this law, that activists Armand de Fluviá, Mill Bellgai and Roger de Gaimon started the first clandestine group MELH, Spanish Movement for Homosexual Liberation (Movimiento Español de Liberación Homosexual) in Spain. This group published the monthly bulletin AGHOIS, the Homosexual Group for Sexual Equality (Agrupación Homosexual para la Igualdad Sexual) that was distributed from France to subscribers mainly in the region of Cataluña. Unfortunately, police persecution eventually ended the group's activities.8

In 1973 members of MELH founded FAGC, the Catalan Front for Gay Liberation (Front d'Alliberament Gai de Catalunya), which was the first gay and lesbian rights group to work openly in Spain. It was a very influential group and its ideology, based on the celebration of gay and lesbian identities and the fight against gay and lesbian discrimination in Spanish society, inspired the future of the Spanish lesbian and gay movement. FAGC is still a very active organisation in Cataluña.

In 1977 EGHAM, the Basque Country Gay and Lesbian Liberation Movement (Euskal Herriko Gay Askapen Mugimendua), was founded in Bilbao. Like its Catalan counterpart, it focused its activity on the fight for rights and recognition rather than providing services to the gay community.

Madrid, the Spanish capital on the other hand, didn't begin the Spanish lesbian and gay movement until the mid-1980s with the creation of COGAM (Colectivo Gay de Madrid), Madrid Gay Group, later called Madrid Gay and Lesbian Group, in 1985.

Prior to COGAM, the Madrid Lesbian Feminist Collective (Colectivo de Feministas Lesbianas de Madrid), began its work in 1981 and it was led by Empar Pineda who, as part of the feminist movement, was the visible face of Spanish lesbians for more than a decade, until the LGBT movement became stronger in the mid-nineties and could provide more lesbian public faces.9 The strength and public profile of the LGBT movement also overshadowed the work of feminist lesbian groups.

that disappeared as such by the end of the nineties. The invisibility of lesbians in the LGBT movement is a long-term issue. The reasons for this invisibility is due to several factors, mainly related to the invisibility of lesbians in society and the fact that women have more difficulties in general to get involved in political activities due to their duties as carers in the family structure.

In 1996, as COGAM abandoned its initial anti-identity and anti-gay community ideology and moved into defending lesbian and gay existence and actively constructing a gay and lesbian community in Madrid, the founders of the group abandoned it and founded Triangle Foundation (Fundación Triangulo) that would work together with COGAM and the rest of gay and lesbian groups in Spain to achieve same-sex marriage rights but never agreed with the essentialist take on gay and lesbian identity. Instead they argued that gay and lesbian people were no different from heterosexuals and therefore shouldn't be part of a differentiated social group.

II. THE BEGINNINGS OF QUEER ACTIVISM

At the beginning of the 1990s, Spanish gay and lesbian activists became familiar with queer theories and political activism being developed in Anglo-Saxon countries. They felt attracted by the queer critique of identity discourses and their tendency to bring into the unifying gay and lesbian labels any non-heteronormative sexual practice and gender identities. A lot of gay and lesbian activists who took up the queer arguments were involved with COGAM and left this organisation to form new groups where they could put queer theory into practice. These two groups were The Gay Radical (La Radical Gai) and LSD Lesbians Without Any Doubt (Lesbianas sin Duda). Although these groups were very active, their discourse didn't resonate within the LGBT movement or within other social movements in Spain until after the approval of same-sex marriages in 2005. It is only in the last seven years that queer activism has gained visibility and influence within the social movements in Spain.

Queer activists reject the category of identity as they understand that it is excluding and it only takes into account one variable of the subject: sexual orientation. They believe that the individual is defined

by different identity components that can intersect or combine with each other. Queer theory understands that opting for one “identity” or another involves silencing or excluding important experiences for the individual. Queer activists propose the interrelation between the categories of race, ethnicity and social class with gender and sexuality and, in doing so, they open the possibility of putting into practice the analysis on subjectivity developed by Michel Foucault whose concepts of “games of truth”\(^{12}\) is reinterpreted by queer theorists.

Queer theory not only focuses on the socially constructed nature of sexuality and of sexual categories but also in the variety of great and multiple spaces of power that operate within the sexual category, including the normative category of heterosexuality. Therefore, queer theorists like Michael Warner are interested in analysing how “regimes of the normal,” work.\(^{13}\) Queer analysis looks into the construction of the normal and in doing so it maps deviation. Queer analysis turns into a tool that can help us to re-read personal experiences and cultural prescriptions with a focus on how the normal is constructed and maintained.\(^{14}\)

For queer activists identities are always multiple. Any specific identity construction is arbitrary, unstable and exclusive. Identity construction, therefore, involves silencing or excluding some experiences or ways of living. For example, when highlighting the black, US and middle class lesbian identity of an individual, other differences related to religion, subcultural self-identification, age or education are being silenced. Nevertheless, queer theory has mainly focused on sexuality rather than on other categories. Queer activists try to deconstruct gay and lesbian identity, which they consider monolithic, to demonstrate that these identities are determined by factors such as heterosexuality, race, gender and desire.

Queer theory opens up a space where sexuality becomes the primary way of expressing a fluent desire that has no borders. Queer sexualities don’t imply an identity structure but a set of sexual behaviours that are linked to codes of conduct, aesthetics and relationships that are not restrictive but changeable and fluid depending on the individuals involved. Queer theorists believe that sexualities take over fixed identities and free the subject from the chains that tie the individual


to very structured identity groups, where any deviation from the norm would mean a betrayal of the group.\textsuperscript{15}

While the movement for gay and lesbian rights focus their work on the achievement of equal rights for gay and lesbian people, queer activists aspire to a sexual revolution that will free both heterosexual and homosexual people. The queer project focuses its fight on the subversion of sexphobic cultures and, in doing so, fights against erotic repression of both homosexuals and heterosexuals. Therefore, queer culture can't be based on the concept of "equality" as this would involve the acceptance of a "normal" sexuality and the identities that might be related to it.\textsuperscript{16}

Therefore, and in line with queer discourse, the beginning of queer activity in the Spanish context, from an organisational point of view, is marked by fundamental disagreements about the political priorities that the movement should have. A good example of this is the negotiations that took place in 1995 with the Spanish Red Cross over the questionnaire that was given to blood donors. The meetings with the Red Cross were attended by the then main gay and lesbian group in Madrid, COGAM and two queer groups also based in Madrid, Radical Gai and the lesbian group LSD. While COGAM's pragmatic approach was concerned just with the removal of a direct question to potential donors about their homosexuality, the queer groups wanted a radical change of the questionnaire to include precise questions on specific sexual activities that were considered an HIV risk, such the use of infected needles in drug use, or the use of condoms in sexual relations by not only heterosexuals and gay people but also lesbians.

The final objective was not only to separate homosexuality from AIDS, but also to make people aware of the fact that it is not a particular sexuality but sexual practices that are the real risk. This particular action demonstrates the work that queer groups did around AIDS prevention for lesbians, an area that was totally ignored by everybody else, including gay groups as lesbian sexuality was, and still is, at many levels, not considered sexual at all as it doesn't involve penile intercourse. LSD did an important job in making lesbians aware of the risk of certain sexual practices that could involve the contact of bodily fluids through the bloodstream.

LSD came from a feminist left wing political activism linked with the squatter movement and other social causes such as immigrants'.


and prostitutes' rights. Its scope of action went beyond lesbian rights to focus on the intersections between many axes of oppression that affect women. In the same way as the Radical Gai, LSD was not interested in creating a gay and lesbian community with its own commercial and party ghetto to help them find a niche in mainstream society. On the contrary, they sought to destabilise the very basics of that mainstream society, challenging conceptions around sexuality, desire and gender by promoting sexual ambiguity. They were the first ones in Spain to talk about transgender sexuality at a time when the LGBT movement's concept of drag didn't go beyond the idea of gay men dressing up as women to perform as 'drag queens'.

LSD's choice to practice queer feminism was motivated by their interest in understanding how different kinds of oppressions are linked. “Racism, classism and heterosexism re(produce) themselves by violently imposing in our daily life.”17 Taking this into account, they insisted on the need to avoid identifying a priori a primary form of exclusion:

Even if homophobia is a violent form of oppression in our heterosexist culture and, even more, transphobia, they are adopted and lived subjectively in many different ways depending on the gender, social class, rural or urban condition, in having papers or not, in having a certain level of education or in being more or less vulnerable to racist interpellations.18

This transactional analysis of homophobia clashed with the LGBT tendency to create a strong, unified community.

LSD's refusal to rejoice in the newly created gay and lesbian community was even reflected in their choice of geographical space for their meetings and activities in Madrid. While LGBT groups gravitate towards the increasingly popular gay village in Chueca, LSD and Radical Gai chose the multicultural and more alternative area of Lavapies.

Queers were very active during the 1990s but, entering the 2000s, the already small groups, more like activist cells, were dwarfed by the strong LGBT movement which was able to gather a million people in the streets of Madrid during the 2005 Gay Pride celebration. Queer discourse was too abstract to be understood by the majority of gay and lesbian people who were focused by now on the possibilities opened up by the pragmatic claims for marriage rights. Thus, queer activists didn't find an audience even within the more politically aware leaders of the LGBT movement.

18. Id.
III. THE PATH TOWARDS THE ACHIEVEMENT OF SAME-SEX MARriage RIGHTS

From 1996 onwards, some major fundamental changes in the Spanish social and political landscape started which led to the achievement of same-sex marriage rights in 2005. In the 1990s the then conservative Government led by the PP (Partido Popular) President, José María Aznar, tried to obstruct the activity of many progressive groups within different social movements by withdrawing public funding. These measures initially weakened the gay and lesbian movement. The financial situation for the LGBT groups changed when they started to approach gay businesses to seek financial support and in exchange promoted the gay scene. This alliance helped to articulate an open and very public LGBT community, first in Madrid and then in many other Spanish cities. The repertoire of gay business until then was mainly limited to gay saunas, sex shops and a few bars but under the new deal, business rapidly expanded to meet the needs of a growing, self-aware, confident and out-of-the-closet groups of gay and lesbian consumers. Soon gay and lesbian-friendly travel agencies, restaurants, cafes, hotels, bookshops and even fashion shops could be seen around the gay and lesbian villages in Madrid and Barcelona.

These new businesses could now advertise their services in the new and glossy gay media, with two magazines leading the way, Shangay and Zero. Zero in particular became the platform for many famous Spanish politicians and actors to come out of the closet. Also some members of anti-gay organisations, such as the church and the police, chose Zero to announce their once secret sexualities. These actions very quickly improved gay and lesbian visibility in Spanish society since Zero’s reports became news in the mainstream media.19

The expansion and increase in visibility coincided (or maybe was the result of) a more positive presence of lesbian and gay characters on mainstream Spanish television, which made the Spanish public familiar with the lives of gay and lesbian people and, therefore, increased social tolerance. As two surveys carried out by CIS (Centre for Sociological Research) showed in 2004, 70% of the Spanish population supported legal and social equality for homosexuals and heterosexuals.20

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Parallel to these events, during the nineties and especially in the five years before the approval of the same sex marriage law, there was an evolution in the discourse of gay and lesbian organisations. During the nineties, lesbian and gay organisations focused their efforts on trying to achieve individual rights for gay and lesbian couples such as pension or inheritance rights. Adoption was a right that was not even considered by the movement as it was seen as impossible to achieve in the climate of the day. By the year 2000, the arguments started to move from a pragmatic approach to a more conceptual one and focused on the fight for marriage rights which would include the right to adopt and the use of the very term marriage. Heterosexuality was taken as the norm, the cornerstone of civil rights.

This change of political direction within the movement was supported by a move of the European Parliament towards the recognition of gay and lesbian equal rights by passing the Resolution A-0028/94 on February 8, 1994 for gay and lesbian equality in the European Union. This political decision backed gay and lesbian people's claims in Spain. At the same time, many town halls all over Spain started to open civil partnership registries in recognition of same-sex couples rights.

Ximo Cadiz, a Valencian activist who was involved in the negotiations towards a civil partnership regional law in Valencia believes that the socialist party's (Partido Socialista Obrero Español - PSOE) lack of interest in passing a civil partnership national law during the early nineties and the stubbornness of the conservative Partido Popular that voted up to 30 times against parliament proposals for a law during its eight years in power, blocked the possibility of a gradualism in the achievements of gay and lesbian rights that might have divided and demobilised part of the LGBT movement once some basic rights were achieved.21

Contrary to this, the brick wall of a government determined to thwart the movement and a parallel social pressure in favour of gay and lesbian rights, based on the internalisation of the public opinion of an argument focused on the rights for equality and dignity of all people, helped the LGBT movement to scale up their claims from just the right to have access to civil partnerships to the demand for full reform of the Civil Code on marriage. The President of the Spanish Lesbian Gay Transsexual and Bisexual Federation (FELGTB) from 2003 to 2007, Beatriz Gimeno, has explained this change in the dialogue as a way to move forward from claiming special rights for a sexual minority to a universalistic

discourse based on the more general principles of modernity, equality and citizenship already acknowledged by the Spanish Constitution:

This discourse was very effective politically speaking, as it allowed us, on the one hand to connect with other groups that were denied the right to marry precisely to block their access to citizenship, such as black people in the US or Jewish people in Europe. It also allowed us to seek protection in all the constitutional texts that have Equality as one of their basic principles and that are the foundation of democratic States. And we started to talk about democratic Dignity, about ourselves as subjects of the same democratic Dignity as the rest of the citizens.22

LGBT organisations capitalised on the increasingly tolerant atmosphere in Spanish society by establishing links with other social organisations, trade unions and political parties both left wing and right wing. Many LGBT activists became members of other organisations and political parties in order to defend their discourse and gain wider support from mainstream sectors of society and the political class. These efforts created the right atmosphere that facilitated acceptance by society for the right-to-marry argument. On the legal level, courts passed judgments that recognised that there was a contradiction between the principle of equality, dignity and protection of a plurality of families and the legislative reality on issues such as adoption, inheritance, health insurance or pensions that failed in the interest of gay and lesbian people. Every judgment was used by LGBT organisations as another element to support their cause and gave them widespread publicity in order to help shift the general public opinion views on the need for a change in law on same-sex marriages.

When the socialist party (PSOE) party came to power in March 2004, President Jose Luis Zapatero promised in his opening speech to give gay and lesbian people the right to get married as part of a very social political agenda. It was a revolutionary move after eight years of conservatism and his speech received widespread social support. He said:

The time has come to end, at once, the unacceptable discrimination that many Spaniards still suffer exclusively because of their sexual preference. I will say it clearly: homosexuals and transsexuals deserve the same public consideration than heterosexuals and they have the right to freely live the life that they have chosen for themselves.23

22. Brasas, supra note 19 at 36.
IV. THE DEBATE BETWEEN THE LGBT MOVEMENT AND QUEER ACTIVISTS ON THE POLITICAL USEFULNESS OF SAME-SEX MARRIAGE

It is now part of the LGBT movement's mythology: the foundational moment when, in June 2005, the Spanish Parliament passed the Same-Sex Marriage Law, which for the first time in Spanish history, gave the same legal rights to same-sex marriages as heterosexual marriages. Spain became, together with Belgium and the Netherlands, the third country in the world to allow full civil rights to gay and lesbian people. For the Spanish public and the rest of the world, this achievement was seen as a joint achievement of the whole LGBT movement, the peak of a two-decade-long fight to become first class citizens, the end of all their claims.

To Spanish queer activists, the outcome was perceived very differently: it meant a surrender to heteronormativity, the end of the fight, but for very different reasons. For queer activists the Same-Sex Marriage Law only meant the assimilation of certain accepted forms of previously non-normative sexualities into the heterosexual norm. As academic Beatriz Suarez puts it:

[T]hose who perform well considered sexual practices are rewarded with respectability, legality, visibility and freedom of expression and action, social and physical mobility, the acknowledgement of their mental health and institutional support. Sexual dissidence is penalised with the presumption of mental illness, the absence of respectability, invisibility, criminality and the loss of institutional support and with economic sanctions.

It was a debate around the issue of what it meant, from an ideological and political point of view, to accept state interference in the private lives of gay and lesbian people. Queer voices totally opposed this route arguing that letting the state into their private lives meant the acceptance of heteronormativity and its institutions of power and control. Queer activists believe that the gay and lesbian movement's strategies have relied on the assumption of conceptual dualisms such as man/woman or homosexual/heterosexual that reinforce the idea of the “other” and it creates binary oppositions that leave the core of the system untouched.

This core is heteronormativity. Heteronormative assumptions organise mainstream knowledge and practices. For instance, many surveys in

24. Law 13/05 that modifies the Civil Code on marriage rights.
social sciences request the marital status and offer the following options: married, divorced, separated, widowed and single. All these categories are offered as the only options for people to organise their social identity which gives marriage an essential status. Heteronormativity, therefore, works as a way of naturalising institutions, practices and relationships within society.26

For queer activists having the right to get married hasn't been considered an achievement but a surrender, the definite signal that the LGBT movement has been swallowed up by the spiral of capitalism and its heterosexual norms. As queer activists see it, being allowed into the heterosexual privilege of marriage is the best way for capitalism to keep social control, appearing to make changes but, in reality, everything stays the same. The heteronormative family is one of the main pillars of capitalism; it is a basic social unit that keeps society in control by, on the one hand, providing individuals with an emotional refuge and, on the other, facilitating a labour division in order to guarantee both production and reproduction. Although from a traditional and conservative perspective, the heterosexual unit of husband and wife (with children if possible) is the ideal, it is always better to create new types of families than to totally lose the concept of family.

From a queer perspective, same-sex marriages reinforce capitalism and the heterosexual norm by assimilating gay and lesbian lives to the rules and regulations of a society that still doesn't respect alternative forms of sexuality, desire or gender identity. And that includes homosexuality. Thus, same-sex marriages become a tool to normalise deviants by creating couples of good married citizens that obey the law rather than challenge the whole system.

As a defence from the FELGBT, Beatriz Gimeno argues that those who believe that reclaiming the right to marriage is a conservative claim should look at the resistance that real conservatives from the right and the Catholic Church have shown to understand that something very important has been taken from them. She says:

[I]t is evident to anybody, that heterosexuality and its main tool, marriage, have been used by capitalism as ways to legitimise and naturalise the sexual division of labour by establishing it as a “natural” equation between sex and gender and politics of desire. It is true that marriage has historically been the most important heterosexist institution, the ideological tool of heterosexism. Hence, their resistance to let go of

such a privileged tool. Homosexual marriage breaks the paradigm that legitimises heterosexuality and [...] it breaks other paradigms that are still current such as the identification of the man as the active subject and the woman as the passive subject and the object of the sexual relationship. It breaks also with the two gender system and, finally, it makes visible the priority of civil institutions over the religious ones. Homosexual marriage shows that the Church has no say on civil law, that it is the State that decides who can get married and to whom. It is therefore not a conservative fight, but deeply transformative.27

Queer voices, though, were hardly just a whisper during the years that led to the passage of the law. Gay and lesbian organisations focused on achieving marriage rights in the understanding that it would bring equality for gay and lesbian people as citizens, without going into a further debate on what this meant for those whose desires didn't fit with normative (hetero or homo) monogamous sexuality.

One of the main characteristics of the LGBT movement in Spain has been its lack of space and interest in intellectual debates such as an in-depth analysis of heteronormativity and its role in oppressing and excluding gay and lesbian sexualities. The Spanish LGBT movement has ignored the possibility of developing a critical approach to heteronormativity and considering the need to change social structure rather than just looking for ways to fit into it.

One could argue that the Spanish gay and lesbian movement has tended to be a very practical movement because it has always been fighting battles and therefore couldn't really focus on big philosophical debates. First, it was the law on Danger and Social Rehabilitation under the fascist dictatorship in the 1970s; then it was the battle against AIDS that engaged activist energies for most of the 1980s and part of the 1990s, and then it was the pressing need to become first class citizens by achieving the same legal rights as heterosexuals, as initially acknowledged in the Spanish Constitution. Little space was left for theoretical debates on whether the movement should be critical of capitalism and heteronormativity considering that LGBT people weren't even part of the system.

The queer debate therefore is seen by the mainstream gay and lesbian community, at best, as a very complicated, highly theoretical and not very pragmatic perspective. At worse, it is considered as a hindrance to the achievement of rights for gay and lesbian people as the queer approach refuses to identify a gay and lesbian subject that should be

27. Brasas, supra note 19 at 40.
protected and, even more, believes that finding the protection in the legal system is a way of legitimising heteronormativity. Spanish academic Alberto Mira explains that:

[I]n Spain even gay people believe that it is not necessary (it could even be harmful) to construct an identity based on history or to establish groups with other social discourses. From the start, the gay movement has been centred on the notion that the homosexual question was just a matter of achieving rights. I don’t know if the lack of an intellectual space in the movement has been due to the inability to understand or to a will to exclude, but the truth is that the spaces created by the movement haven’t favoured debate or reflection but action. There is even the belief that intellectual voices could obstruct the process and divide the movement.28

V. WHAT IS LEFT TO BE DONE AFTER SAME-SEX MARRIAGE: THE FIGHT AGAINST HOMOPHOBIA

When Zapatero’s promises became a reality in June 2005, the LGBT movement achieved something that, as veteran lesbian activist Empar Pineda says, “very few movements have achieved: the 100% fulfilment of their claims.” This might be an overstatement as though the LGBT movement has indeed achieved 100% legal equality social equality is yet to be fulfilled.

Seven years have passed now since the approval of same-sex marriages and the dust has settled. The early euphoria led to a different stage in the LGBT movement. The level of political activity since 2005 has been greatly reduced. The main reason for this is that the LGBT movement was so focused on the legal achievement of same-sex marriage that the fight against other forms of homophobia had been put aside. After a period of frantic activity, the movement has moved into a phase of self-indulgence, there is a feeling that 100% of the movement’s claims have been achieved and many activists who fought for them have reached the end of their activist lives or have moved to the backseat. Younger generations don’t feel marginalised in the same way as the older ones did, unless they suffer from homophobia in school (which is still a deep-seated problem). The movement is, therefore, in a phase of reorganisation of its priorities and is facing a more subtle fight against different kinds of homophobia that are not as obvious as a denial of citizenship rights.

In order to achieve social equality, visibility might be the first requirement to carry on the LGBT fight. Marriage can be a two-sided coin: on the one hand, it makes gay and lesbian people invisible as they fit into heteronormativity and on the other hand, it renders them even more visible because marriage is a very clear definition of the nature of a relationship and there is no space to pretend people are just flatmates.

In any case, the achievement of legal rights doesn't automatically imply the normalisation of the LGBT reality. Homophobia still exists particularly in schools and professional environments. The LGBT movement faces at the moment a similar situation to the feminist movement. Total legal equality was achieved by women but that hasn't eradicated machismo, gender and sexual violence or the discrimination of women especially in the labour market. There is still a need to educate people in equality and diversity not only in schools but also in the working environment. Education at both levels, within the education system, from early years until university, but also education in a more general sense, in relation to norms and social behaviour is necessary.

A recent campaign by a group of LGBT organisations in the Valencian region went to the regional court in order to forbid a popular song titled “Who Doesn't Jump is a Puff,” played by music bands in street festivals. The title of the song reflects a common Spanish language expression that is normally said in mass celebrations such as electoral wins or in street demonstrations. The groups claimed that the repeated use of this expression is a clear sign of homophobia and can hurt some people's feelings.29

Activist Jordi Petit identifies several areas where the LGBT movement still needs to focus its attention:

More groups will focus on leisure and daily needs, such as sport, because affinity is a need that doesn’t exclude social normalization and visibility. It is necessary to show more specific problems of this social group, such as those related to the elderly, teenagers and criminals that take advantage of some homosexuals who live a double life. When will the police be trained on LGBT issues? In order to make these issues visible more testimonies are needed and, especially, in depth reports, it is not enough now with banner activism, it is necessary to study the problems, to show data and numbers in order to find solutions.30

29. The campaign is led by Col·lectiu de Lesbianes, Gais, Transexuals I Bisexuals de La Safor (La Safor Gay, Lesbians, Transexuals and Bisexuals Colective), more information about the campaign can be found on the organisation website: CLGS - Col·lectiu de Lesbianes, Gais, Transexuals I Bisexuals de La Safor,http://www.clgs.es (last visited May 30, 2012).
There is work to be done not only outside the movement but also within the LGBT community. Writer and journalist, Jose Infante, denounces classist, racist and ageist attitudes within the LGBT movement that he believes are due to a lack of awareness about the different levels of marginalisation within the community that has led this collective to lose a sense of self-criticism.

The best way to achieve real equality (it is too optimistic to expect a law to end latent and ancestral homophobia) is that homosexuals themselves give away those discriminations that still exist within their collective: poor gays, rich gays, camp gays and straight-looking gays, young gays and older gays, handsome gays and ugly gays. Unfortunately, tolerance can’t be imposed by law and it is in tolerance that we find real equality.31

Representatives of the LGBT movement also realise that once legal equality has been achieved in Spain, their work is still not finished as discrimination is still a painfully common feature in most parts of the world, lethal even, in some countries where homosexuality is a crime. In a globalised world, LGBT and queer activists in Spain equally feel that they have a responsibility to stop this situation. Therefore, they have established strong links with other LGBT groups particularly in South American countries, thanks to the language affinity, a good example is their work with the Argentinian LGBT Federation for the achievement of civil rights for transsexuals.32 They often cooperate with Amnesty International. The Spanish LGBT Federation has a permanent link to the Spanish website of Amnesty International and supports this organisation in its fight against homophobia in other countries where homosexuality is still a crime.33

Once the LGBT movement achieved legal equality for gay and lesbian people, it turned its attention towards fighting another form of legal discrimination, the one suffered by transsexuals in their process of sex change. Gay and lesbian groups have joined forces with transsexual organisations to support them in their fight towards an integral law to


protect the civil rights of transsexual people, to have access to a sex change operation in the public health service, to remove transsexualism from the World Health Organisation's list of pathologies and to fight against transphobia in society by promoting the inclusion of information about transsexualism in the curriculum from early years to university.34

All these lines of work appear on the websites and in the manifestos of most LGBT groups all over Spain but their activity has been low-key. It has been more focused on support work and the organisation of socialisation activities rather than on street demonstrations and intense political lobbying that characterised the fight for same sex marriage.

VI. FROM IDENTITY BASED POLITICAL ACTIVISM TO QUEER ACTIVISM

The dormant state of the LGBT movement contrasts sharply with the renewed energy of queer groups that have appeared on the Spanish social activism scene in the past four years. A myriad groups that identify themselves as queer have emerged all over Spain, not only in the main cities, Madrid and Barcelona, but even in small towns. As in the case of LSD and Radical Gai in the nineties, the feminist, anti-globalisation and squatter movements have been the three spaces where activists influenced by queer perspectives have chosen to develop their political activities.

Queer activism was renewed in 2004 by a large number of young women and transgender35 people in their twenties who, while working on these movements, felt they needed to incorporate in the different struggles a critique of heteronormativity and gender in order to address their standpoint as women and as transfeminists. As the group Maribolheras Precarias' manifesto states:

We believe that survival is the first revolution. We reclaim difference, plurality and diversity. We celebrate free will. We are suspicious of the “equality” that we are offered because it isn't real, as it is confined and silenced by the limits of an omnipresent heterosexuality. Our activism is not about sexuality. We come from a queer perspective: we want to

35. Transgender is an umbrella category that brings together anybody whose gender identity doesn’t coincide with their sex assigned at birth and that goes beyond the social stereotypes of normative gender roles that society establishes for the gender that was assigned when they were born.
live in a different way and make it explicit. Fights are multiple and they are all ours. We come from our own creativity and our passions in order to build a better world. We think that the word LGBT is leaving out many sexual dissidents and it is forcing our identities to just be a market niche. We believe in a global antagonism that promotes a multiplicity of irreducible and unruly sexual subjectivities, out of the current binarism, where none is above the other.36

Their membership is small but they are very visible in the social movement scenario and are very well connected with each other through the internet and with a wider group of sympathisers via social networks such as Twitter and, especially, Facebook.37

The main groups are Precarious Dykes (Maribolheras Precárias) based in Galicia; Medeak and Baske Country Gay and Lesbian Liberation Movement (EHGAM); Queer Working Group (Grupo de Trabajo Queer-GTQ) in Madrid; Stonewall Aragón; Travolaka Guerrilla (Guerrilla Travolaka), in Cataluña; Dykes on Bikes (Ciclobollos) and Eskalera Karakola, both based in Madrid. There are many more groups most of whom are feminist groups who practice DIY (Do It Yourself) feminism and feel closer to the transfeminist discourse.38

Although queer groups have names and usually meet on a regular basis, that is as far as the formality goes. They don't have a formal structure; there is no President or Secretary. The organisation of the groups is horizontal and their membership is very fluid which makes it difficult to know who belongs to the group. Whoever has an idea can take it forward without having to consult with the rest.

Their strength is not so much in the numbers but in their capacity to join other groups, even organised ones, on an ad-hoc basis, to carry out specific projects, activities or demonstrations. Eskalera Karakola’s own words demonstrate this will to work as part of the wider community. Their aims, they say, are the:

37. This information has emerged from the author’s own fieldwork.
38. Emi Koyama, The Transfeminist Manifesto, in Catching a Wave: Reclaiming Feminism for the Twenty-First Century (Rory Dicker & Alison Pipmeier eds., 2003) (Transfeminism is primarily a movement by and for transwomen who view their liberation to be intrinsically linked to the liberation of all women and beyond. It is also open to other queers, intersex people, trans men, non-trans women, non-trans men, and others who are sympathetic to the needs of trans women and consider their alliance with trans women to be essential for their own liberation. Transfeminism is not about taking over existing feminist institutions. Instead, it extends and advances feminism as a whole throughout won liberation and coalition work with all others.).
Promotion of citizenship participation of women through self-organization and by getting involved in different educational, political, social, cultural and artistic activities. We work at the local level within the context of a wider neighbourhood movement but also with women's groups networks and social movements in Madrid, the rest of Spain and abroad. All of them are formed by performers and different sort of artists – craftspeople, painters, photographers, designers or sculptors who, as Maribolheras Precárias state in their manifesto, “want to expose in a direct, festive and radical way homophobia, heterosexism and precariousness.” Medeak defines itself as a group formed by: “dykes, transsexuals and travesties.”

We want to promote alternative lifestyles and autonomous spaces. We are not a formal collective, nor are we a lobby group in the line of the LGBT Movement, but an artistic and social action group similar to the first ACT UP. We are “political” in so far as we denounce homophobia or heterosexism, precarious economy and the lack of affection [...] in a direct way, but we don't do “politics” and we don't access the State networks that manage social and equality “policies”. We don't want to waste energy on the fatal and grey political agenda of the current gay movement.

All of these groups have a special interest in the organisation of DragKing workshops and in the production of post-porn practices, following the work of international artists such as Del La Grace Volcano, Annie Sprinkle or Virgine Despentes. Post-porn is seen as a tool to explore sexual liberation and to develop a critique of gender construction and, more widely, of heteronormativity itself. As a political tool, queer transfeminist groups are giving priority to train as many activists as possible on the characteristics and possibilities of post-porn practices. A good example of these efforts are the workshops organised

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42. Stefan Offermann, Dildos and Cyborgs: Feminist Body-Politics in Porn from the 1970’s to Posthumanism, (37) Gender Forum 3 (2012) (Post-porn discourse is produced by sex-positive feminism and instead of rejecting pornography altogether, chooses to subvert its phallocentric and patriarchal capitalist structures from within. It is a critical and self-reflexive approach to pornographic image-production. Post-porn no longer perceives sexual and gender identities as given and natural but it exhibits, comments on and parodies its reiterated attributions.).
45. Virgine Despentes, King Kong Theory (2009).
by 'Do Not Walk Over Where I've Just Mopped' (Nomepisesofreghao) with the objective of “learning how to use our bodies and minds as tools for freedom.”

Queer group tactics of protest are mainly based on using street performances as a way of demonstrating, rather than marching in the streets, which is characteristic of more traditional political activism. An example of this is a recent performance carried out by a small group of lesbian feminists who pretended to be a religious parade. They marched in the streets and sang religious psalms on the way to the Catholic chapel of the Faculty of Politics and Sociology at the Complutense University in Madrid. Once inside, the women read a manifesto in front of the priest and three people who were praying at the time. They then removed their clothes to show their breasts which were covered in slogans that denounced the submissive role that the Catholic Church demands of women. In their manifesto, they stated that the Catholic Church promotes sexist and hetero-patriarchal values. They exposed themselves naked to reclaim their own bodies and sexual identities against a Catholic Church that actively campaigns against lesbian rights, abortion laws and same-sex marriages. The action was carried out by a small number of people – fewer than ten people participated – but the effect was huge after they uploaded the video of their action on their website. They enjoyed enormous public success as well as the support of the academic community in Madrid – who could see the action even if they never participated in it or saw it live. They ignited a debate about the role of the church in Spanish society and, more specifically, the right of the Catholic Church to occupy public spaces such as the University, on the basis that Spain is officially a secular State.

This strategy has the advantage of not needing large numbers of people to carry it out. The greatest inconvenience of this form of protest is that its effect on the wider public is limited. Today's public opinion is still more impressed and influenced by large numbers than by clever demonstrations. On the other hand, they compensate for the lack of power in numbers by gaining a lot of visibility on the internet, where all their actions can be found via YouTube and other social networks. Also, in Spanish current social reality, with marriage rights achieved, LGBTQ groups don't need so much to enter into negotiation processes but to change cultural and social perceptions about homosexuality and


gender identity. It is about changing minds, not laws and that requires education, not negotiation.

The queer approach gives space to the individual by promoting diversity. Following “the personal is political” principle, the main objective of queer politics is focused on sexuality. By bringing this category into the public space, they transform it through performance and art events that give visibility to different types of oppression and non-normative sexualities. In that way, queer groups might be better equipped to do this than other LGBT groups since they focus all their energy in trying to change the social discourse on these issues, rather than offering specific support services to a gay and lesbian community which tends to be the main activity of more mainstream gay and lesbian organisations.

Queer activists are opening new doors in the LGBT movement by offering a discourse of difference that marks, not only the difference between social groups but between individuals who are part of those groups, highlighting multiple identities. This approach also informs their concept of citizenship. Citizenship as an idea that goes beyond the concept of an individual who accepts the laws and needs of the state, who has rights only as far as he/she fulfils his/her duties. Queer theory enriches this concept by claiming the right to be different and claiming the rights for those who have different values, needs and interests, and who often live on the margins of society. This approach also questions the existence of nation-states and their repressive laws. Queer theory claims the rights of individuals to cross borders, not only geographical but those placed by restrictive laws. This point of view resembles queer groups' actions and manifestos in defence of the freedom of illegal immigrants, transsexuals and intersexual people to enjoy their lives and bodies without the control of the state in its different forms and institutions.

Eskalera Karakola, for example, in one of its manifestos against the violence used by the Spanish government on illegal immigrants and the existence of detention centres for foreigners, has developed a more complex analysis that shifts the focus from the existence of the detention centres and police violence against immigrants to the very meaning of the broader discursive concept of border. Border is a concept that involves anybody placed on the margins of society, immigrants, legal

or illegal, women and LGTBQ people. Thus, their analysis covers the gap left by the liberal feminist and the LGBT movements in addressing the discrimination faced by illegal immigrants and, particularly, the underlying political and cultural discourse that justifies the discrimination of anybody who doesn't fulfil the standards of heteronormative and patriarchal capitalism.\textsuperscript{50}

This understanding of the citizenship concept has led queer groups to get involved in the M-15 movement,\textsuperscript{51} a grassroots social movement, also known as the Indignants, that erupted in Spain in the Spring of 2011. They denounce the greediness of the banks and financial institutions which they accuse of creating the current global economic crisis and they also attacked the lack of action of Spanish political institutions to redress it. The movement is formed by an amalgam of individuals, some of whom were already members of different groups and organisations and from all sorts of social movements but many who have not been previously involved in political activity but reached a point of frustration with the current social, political and economic situation in the country. Individuals, most of them young people, who feel that their present and future are being held hostage by external forces out of the control of the state and who, therefore, lost their faith in the current democratic system were part of it.

The movement has its seed in the Democracia Real YA! (Real Democracy NOW!) initiative, a forum that came together through the internet social networks in the months previous to the Spanish general elections of 22 May, 2011. The platform, with no leaders or any formal structure, organised its events through internet networks that served to bring together hundreds of citizens who participated in spontaneous street camps as a way of protest against the corruption of politicians and to reclaim more participation of citizens in Spanish political decisions. This initiative was the catalyst of the M-15 Movement. It is a civic movement as Guillem Martinez\textsuperscript{52} puts it “there are no flags, but many

\textsuperscript{50} Precarias a la Deriva, A LA DERIVA POR LOS CIRCUITOS DE LA PRECARIEDAD FEMENINA (2004).

\textsuperscript{51} The M-15 movement is a citizens’ movement that started off on the 15\textsuperscript{th} May, 2011, with a series of protests all over Spain to call for a more participative democracy, away from the PSOE-PP two-party system and the control of banks and financial corporations. The protests took the form of public space occupations that were turned into spaces for public debate. Their actions were inspired by the Arab Spring, especially Cairo’s Tahrir Square protests and were later replicated across 82 countries under the name Occupy Movement. The ones that are taking place in the United Kingdom and the United States are getting the most global coverage but in late November 2011, the website “Occupy Together” listed 2,668 Occupy communities worldwide.

hand-made banners”; “Violence is to earn 600 euros”; “Behind every corrupt politician there are six media commentators”; “Error 404. Democracy not found.”

As defined on the M-15 movement's website:

[I]t is the awakening of citizens, who so far have been asleep while politicians are increasingly more corrupt, the political system limits the participation and representation of citizens and financial and economic powers control politics. Indignation is now socialised and shared and it is, in this way, a state of collective conscience that becomes aware of itself and its possibilities. We are working on the democratisation of the system.\(^{53}\)

The movement is apolitical in that it is not affiliated to any trade union, is horizontal and transparent. It is organised through public assemblies that usually take place in public squares or parks and that are open to any individual who wants to participate and is not monopolised by any particular social organization.

This fluid participation fits in well with queer activism as does the squatter philosophy behind the M-15 movement that has already taken over several abandoned buildings in Madrid and Barcelona as a way to protest high housing prices that has meant that the majority of young Spaniards over twenty-five are still living in the family home and hundreds of families who can't afford to pay their mortgages are seeing their houses repossessed by the banks.

Other ways of protesting range from camping in public places to more conventional demonstrations or to street performances full of creativity and irony, such as the protests organised through the social networks that brought hundreds of people to the Madrid underground to protest against the sudden high increase in transport fees. Under the slogan “This high increase of tariffs is a luxury” (“El tarifazo es un lujazo”), hundreds of people took the underground trains dressed as if they were in the middle of an upper class party and they literally celebrated a cocktail party in one of the main hallways of the underground network.

There is an affinity between queer activism and the M-15 movement in the nature of their claims. From the 1960s up until the 1990s, the main characteristic of social movements, such as the environmental, the women's and the LGBT movements, was that their demands were based on non-materialistic values (and this was also the main trend of queer activism during the nineties\(^{54}\)). In a step backward, by the beginning of


\(^{54}\) Penedo, supra note 14.
this century, social movements have been forced to focus on material claims, as we can see with the rise of the anti-globalisation movement. The international economic crisis, the rise of unemployment, the precariousness of many jobs, especially jobs done by women, and the vulnerable position of illegal immigrants are now issues being analysed by queer discourse and they are very high on its political agenda.

The social class category is back and high on the civic agenda and queer discourse is contributing to its analysis. Precariousness is especially high on the queer feminists groups' agenda because poverty more often than not affects women more often than men. We can see this in the street action taken by the transfeminist queer group 'Don't Walk Over Where I've Just Mopped' (Nomepisesofreghao), to raise public awareness and to protest against the discrimination that female domestic employees suffer in Spain as they have very few employment rights. In this action, several women dressed as cleaners carrying cleaning equipment, went to a market and cleaned the place while giving out leaflets at the same time informing the general public about the lack of rights of cleaners.55

Queer groups have enriched the M-15 movement protests by raising awareness around the constraints of heteronormativity and the physical and moral violence that many individuals suffer either because of their sexuality, gender or transgender status. An example of this is the participation of prostitute collectives in the M-15 protests supporting general messages while carrying banners that said “Politicians are not our children.” This was in response to a general and very popular slogan shouted at many demonstrations that called individual politicians “son of a whore,” one of the worst insults in Spanish culture. Queer sex workers called attention to the fact that M-15 demonstrators were using heteronormative stereotypes that were offensive to many groups.

VII. CONCLUSION

The ability of queer activists to embed their actions in other social movements and initiatives that share similar objectives and ideals is creating a space to continue the fight against homophobia that the LGBT movement started forty years ago in Spain. This fight is not over with the legalisation of same-sex marriages as is shown by the current low key work of LGBT organisations on issues such as discrimination within LGBT people on the grounds of age or looks, homophobia in schools and in popular culture or transphobia.

While queer activism found a great deal of resistance within the LGBT movement in the nineties, it has found it a lot easier to collaborate with other social movements, possibly because those activists don’t feel directly affected by the queer critique in the same way as lesbian and gay people who took part in the LGBT movement did. Therefore, the presence and participation of queer activists in the camps of the main Spanish cities, contributing to the M-15 movement discourse with their critique of heteronormativity have been more productive. It has given a new insight into the limits of the concept of democracy that enriches the idea of citizenship participation defended by other strands of the M-15 movement. In this way, the queer movement has shown a greater flexibility and capacity of political action in the new scenario of social movements in Spain, a scenario that calls for a democratic renovation that goes far beyond the limits of a particular political or legal structure to permeate the very grounds of society and its citizens as individuals and subjects of social change.
REVIEW ESSAY

**SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM**

By Janet Halley


Saptarshi Mandal*

In January 2012, an Indian newspaper reported a court case where a man and his male lover had been booked by the police under the provision of the Indian Penal Code (IPC) that criminalises sodomy (Section 377) at the behest of the man's wife of 18 years.¹ The man was also booked under Section 498A of the IPC that makes infliction of mental or physical 'cruelty' upon the wife an offence. How do we tell who is the person who is harmed in this case? Is feminism bound to be a natural choice while choosing an analytical lens with which to look at this case? And who is more likely to emerge as the harmed person in this case when we look at it through the analytical/political position of feminism? Is the harm suffered by the man and his lover, of being held guilty of an offence for having consensual sex, necessarily occluded if we look at the case as feminists? Does feminism have within its political aspirations and commitments, the space from which it can take up the cause of the man and his lover as harmed persons? And if we choose some other lens that throws into focus the harm suffered by the men in this case, does it mean that we have to kill feminism in order to proceed with such an enquiry? Situations and questions such as these animate Janet Halley's book, *Split Decisions: How and Why to Take a Break from Feminism*. Halley argues – passionately and provocatively – that we must be willing to 'take a break from feminism' while theorising sexuality, in order to critically evaluate such cases and our responses to them.

While the immediate focus of the book are theories of sexuality and power produced by Left-oriented academics in the US over the last twenty-five years, Halley's larger project is to develop a 'politics of

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theoretic incommensurability.\textsuperscript{2} That is, Halley wishes to persuade her readers to value many theories about a problem and their refusal to fit neatly with each other, instead of one all-encompassing theory that does not leave any loose ends. Halley finds such 'total' theories dogmatic, insipid and the perfect place for experiencing paranoia and paralysis when one confronts real-life experiences that do not fit the preferred grand theory. The particular attitude to theory that Halley desires for herself and others in the Left, is one that reveals the world:

\[\text{[a]s a normatively fraught, contradictory, conflictual place, a place where interests differ, change over time, and come into zero-sum conflicts, a place where all our decisions – even our decisions to abstain from deciding – shift social goods among highly contingent but pressing, urgent, vital interests.}\textsuperscript{3}\]

Secondly, Halley prefers to deploy theory to form hypotheses about the world instead of deploying it prescriptively. That is, Halley prefers to use 'theory fragments'\textsuperscript{4} that are lying about, 'instrumentally, pragmatically and disloyally'\textsuperscript{5} to deal with the problems that she is working on instead of demanding that theory describe the reality for her, illuminate the good and bad aspects of that reality and also direct her towards normative emancipatory goals.

In rest of the brief first part of the book, Halley sets out, why she feels feminism, as it is encountered in the contemporary US, stands in the way of developing such a posture to theory in general and theorising sexuality in particular. Halley contends that three commitments characterise feminism in its various avatars in the US They are, one, that feminism is the theory of the subordination of women/ femininity/ female-gender/ associated ideas, by men/ masculinity/ male-gender/ associated ideas, and its task is to work against such subordination; two, that sexuality is the fundamental location where this subordination takes place and feminism is an indispensable part of any theory of sexuality or gender; and three, that one overarching theory is better than many parallel or conflicting ones and the goal of our work is to integrate or converge alternative theories about sexuality, gender and power.

In the second part of the book, through a close reading of key texts on the politics of sexuality as it developed in the US, Halley tells the story of the struggle between those wanting to retain feminism as a

\begin{itemize}
\item \textsuperscript{2} Janet Halley, \textit{Split Decisions: How and Why to Take a Break From Feminism} 3 (2006).
\item \textsuperscript{3} \textit{Id.} at 3.
\item \textsuperscript{4} \textit{Id.} at 7.
\item \textsuperscript{5} \textit{Id.}
\end{itemize}
preferred analytical/political framework for theorising about sexuality and those wanting to 'take a break' from it. Along with the 'power feminism' exemplified by Catherine MacKinnon's work and the 'cultural feminism' exemplified by the work of Robin West, the early characters in this story are the 'hybrid feminisms' that, in addition to the sexual welfare of women, have parallel commitments to socialism, anti-racism or anti-imperialism. The occasional divergence of these feminisms from treating sexuality as the fundamental contradiction in society is a source of continuous tension and discomfiture. Gayle Rubin bursts onto this stage with her pioneering essay, *Thinking Sex*, written in the midst of the sex wars among the US feminists in the eighties where she questions the privileged status of feminism in theoretical/political work on sexuality.6

Without denying the relevance of feminism, Rubin calls for developing an autonomous politics and theory for thinking about sexuality. So if MacKinnon is the chief antagonist in Halley's story, Rubin is clearly her protagonist and Halley comes back to Rubin from time to time throughout the book to substantiate her arguments and to display the historical roots of her project. The influence of Michel Foucault's work on power, departing fundamentally from feminism's conception of power as top down oppression, intensifies the desire for 'taking a break'. Eve Sedgwick's and Judith Butler's work problematising the essentialism and even heterosexism of the categories of sex and sexual identity and Leo Bersani's and Duncan Kennedy's work on sexuality from the vantage point of men's erotic interests, leads to the realisation of the 'break'.

As the story progresses, the debate turns towards the territorialisation of sexuality within queer theory and Lesbian and Gay Studies while gender is assigned to feminism and Women's Studies. Somewhere along the way, postmodernism comes in and disrupts the very category of 'woman,' the very constituency that feminism claims to represent.

Throughout the nineties, while some feminists are engaged in negotiating a better deal for feminism by resisting any division of 'proper objects' of study and advocating an integrated analysis of gender and sexuality, others worry about the debilitating effect of postmodernism on feminist foundations, politics and emancipatory ideals. This feeling of a crisis or an impasse in feminist academic work is characterised by Halley, as 'feminist paralysis'.7 Halley attributes this to feminism's own investment in 'paranoid structuralism' – the belief that although,

on the face of it, things in the world do not appear to be structured by
the subordination of all things feminine by all things masculine, deeper
investigation would reveal, that it is actually so – and the 'moralized
mandate to converge' – the moral demand to integrate accounts of
sexism with other forms subordination into a seamless, synergistic system,
where any failure to do so amounts to reinstating the un-integrated,
un-incorporated axis of subordination.

Halley argues that such anxiety is misplaced and can be totally
dispensed with if one thought of theory as a resource for developing
hypotheses about a complex, contradictory world and not expect
theory to produce normative aspirational insights for us. Such an
attitude to theory makes it more critical and less hostile to dissimilar,
even inconsistent, theories. Such an attitude to theory would enable us
to accept that while feminism might be better equipped to illuminate
particular stakes in a given problem, it may not be the best tool for
getting a grip over other aspects of that situation or some other problem.
So if those in the Left choose to bracket feminism for some time and
turn to other hypothesis-producing analytical tools to get a grip over the
dynamics of sexuality, it need not be experienced either as an elision/
denial/ repudiation of feminism or hurting/ silencing/ disempowering
'real' women.

Armed with these insights, in the third part of the book, Halley gets
down to the actual business of 'taking a break from feminism'. Halley's
first example is the case of workplace accommodation of pregnant
women and feminist advocacy insisting that the employer must be made
to do so as a legal duty. Against the grain of received feminist wisdom
that such accommodation must be made 'costless', Halley argues that
the costs do not disappear, they just shift to some other location. The
costs might just be borne by the Blacks, third world workers or even
women in the informal economy. Halley argues that unless we 'take a
break from feminism' we would not be able to see who eventually ends
up bearing these costs and what constituencies are hurt by the same.

Halley's second example is the US Supreme Court decision in Oncale
v. Sundowner Offshore Services, Inc. [523 US 75 (1998)] recognising same-
sex sexual harassment at the workplace as actionable cases of sex
discrimination. Halley shows that the reasoning of the Supreme Court
in this case tracks the line of reasoning and assumptions in cross-sex
sexual harassment cases, which is deeply informed by MacKinnon's
power feminism: sexual harassment as an instance of male dominance
and female submission, producing male and female genders. Against
the feminism-inspired reading of the case in Oncale that was adopted by
the Supreme Court, Halley offers a gay identity-affirmative reading and a queer theory reading of the details of the case, to show possibilities very different from the sexual-dominance-of-a-feminised-man kind of scenario. When 'facts' are unpredictable and unknowable, as Halley's reading of the case shows, we must know that 'we will always do violence when we decide.' And so how can we think responsibly about the violence of our decision in such situations? For Halley, to arrive at the answer to this question, one must be willing to 'take a break from feminism' and allegiance to any single theory about sex and power.

Halley's final example is the 1993 Texas Supreme Court decision in *Twyman v. Twyman* [855 S.W. 2d 619 (Sup Ct. Texas 1993)]. The case concerned a divorcing couple where the wife brought a tort claim against the husband arguing that his insistence on sex involving bondage had caused her emotional distress. The questions that the judges had to answer in order to decide the claim was what particular act of the husband constituted the cause of action and in what sense did it cause distress to the wife. To the judges, those encounters where the couple engaged in bondage at the insistence of the husband constituted the outrageous bit but not those instances of vanilla sex which had left the wife with gynecological injuries. Additionally, though the facts maintained that the wife had willingly, though reluctantly, engaged in sadomasochistic sex, the judges were keen to discount the wife's agency because she had agreed to do so in order to save her marriage. Halley argues that the judicial opinions in this case are shot through with elements of power and cultural feminism: male power and female submission; lack of female agency even when she is engaged in a bargain; male insistence on deviant sex backed by threat of divorce and female silent sufferance to save the marriage; the necessarily deviant nature of BDSM, which eroticises that very thing that causes women's subordinated status in society, i.e. domination in sex.

The Texas Supreme Court decision allowing infliction of emotional distress as an actionable claim between spouses is, in this reading, nothing but a justified reparation of the harm suffered by the wife. Halley's counter question is: 'Can feminism acknowledge that women emerge from the court's decision with new bargaining power in marriage and a new role as enforcers of marital propriety?' Once again, Halley shows the upsides of 'taking a break' by reading the facts of this case with the lens of 'slave revolt in morals' from Friedrich Nietzsche's *Genealogy* 

8. *Id*. at 301.
9. *Id*. at 356.
of Morals and Michel Foucault's idea of power without dominance/subordination elaborated in The History of Sexuality, Vol. I.

In her re-readings of all the cases mentioned above, Halley explicitly acknowledges her preference for queer theory despite her own detection of strains of structuralism in some versions of the same.\(^{10}\) If the structuralism of 'some' versions of queer theory does not dissuade Halley from completely turning away from it for hypothesising, one wonders why the same diagnosis in feminism leads her to 'take a break' from the whole of 'feminism.' If the objective is to avoid pre-determined outcomes issuing from particular versions of feminism, then one can do so and yet be a feminist and produce feminist work on sexuality. Even Rubin in Thinking Sex made a distinction between the anti-porn feminists who saw all forms of erotic pleasure and sexual expression as saturated with male domination and the sex radical feminists, who she thought (but did not discuss in detail), could contribute to a radical theory of sex. Halley's conception of feminism throughout the book appears to be as rigid as MacKinnon's and West's conception of sexuality that Halley is committed to oppose.

Turning to Indian feminist debates on sexuality for a moment, we can see how interventions over the last two decades have loosened the grip of the notion that sexuality is the domain where women are invariably harmed by men's sexual domination over them. The ones to challenge and dislodge such notions have been feminists themselves. Shohini Ghosh for instance has criticised feminist efforts to regulate sexual images and speech from a feminist position that seeks to create 'space for greater sexual expression on the part of women.'\(^{11}\) Ratna Kapur has a sex-affirmative, feminist critique of the current Indian anti-sexual harassment legal regime, which was a product of feminist demands.\(^{12}\) Similarly, Prabha Kotiswaran's recent work on the legal regulation of sex work is a feminist critique of feminist initiatives on sex work and trafficking.\(^{13}\) Thus, looking at the current Indian feminist engagement with sexuality, it cannot be maintained that feminism is always a theory of sexual subordination of women. Further, the work of feminist scholars such as Nivedita Menon shows that instead of being subsumed

\(^{10}\) Id. at 202, 206.


\(^{13}\) Prabha Kotiswaran, Dangerous Sex, Invisible Labour: Sex Work and the Law in India (2012).
within familiar feminist categories of pleasure/danger, non-normative sexualities and gender identities open up newer questions relating to identity, citizenship and nation, for feminism to confront and engage with. Thus Indian feminism at this juncture not only acknowledges sexuality minus subordination, it also acknowledges male sexuality by recognising the harm suffered by homosexual men due to the criminalisation of sodomy. However, despite the 'official' position of the Indian women's movement regarding homosexuality, it remains to be seen how individual feminists may respond to cases such as the one that I began this review with.

In proposing that we 'take a break from feminism' in matters relating to power and sexuality, Halley is aware of the costs that we might incur. She nevertheless believes that the costs are worth paying when compared to the possible advantages of 'taking a break'. Chief among them is that it would enable feminism to acknowledge its own rising influence and power as a mode of governance with considerable local and international purchase. Further, it would enable feminists to break out of the 'politics of injury' accompanying so much feminist work on sexual violence. Giving a Foucauldian spin to the issue of women's sexual sufferance, Halley asks what if the experience of sexual subordination of women that feminism claims to speak from were produced by, were an 'effect' of feminism itself?

Could feminism be like adults on the playground? Imagine: the little girl stumbles, falls, scrapes her knee. She is silent, still composed, waiting for the kaleidoscope of dizziness, and surprise to subside. Up rush the adults, ululating in sympathy, urgently concerned – has she broken her leg? Is she bleeding? How did it happen? We must not let it happen again! Poor thing. The little girl's silence breaks – for the first time afraid, she cries.

The privileging of sexual harm above everything else and the assumption of women's sexual victimhood in international and domestic feminist justice projects has increasingly come under critical scrutiny in recent times. But all these interventions, while recognising the problematic nature of contemporary dominant feminism's engagement

with sexuality, maintain some redemptive scope for feminism. Halley's project appears provocative as it denies any such redemptive chance to feminism in the politics of sexuality. But it may be pointed out that Halley's project is distinct from these critical projects as it is pitched at a more fundamental level; her focal concerns being the politics of theory-making and its distributive consequences. Looking at sexuality through inconsistent theories with divergent political commitments is of immense value in illuminating the stakes in situations such as the one mentioned at the beginning of this piece. Thus even if one thinks that Halley overstates the power of feminism in the contemporary world and in the legal system, one just cannot deny the methodological insights that she produces. As one of the reviewer's comments printed on the book's blurb states, “Split Decisions is more than a critique; it initiates a paradigm shift.” Even if one decides eventually to not 'take a break from feminism' or any other social theory that one is committed to at the moment, the reader of this book cannot be unaffected with respect to how he/she thinks of theory, method, critique and the role of law.

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REVIEW ESSAY

FOR THE RECORD: ON SEXUALITY AND THE COLONIAL ARCHIVE IN INDIA
by Anjali Arondekar

Lakshmi Arya*

Anjali Arondekar’s *For the Record: On Sexuality and the Colonial Archive in India* is pithy with insights on colonialism and sexuality in the subcontinent. Her work disturbs in many fundamental ways the historiographical script on colonial heterosexual masculinity. The story of colonial, heterosexual masculinity has been told in standard ways: the reordering of normative models of masculinity, femininity and androgyny in both the colonising and the colonised cultures, the metaphor of the rape of the colony, cultural nationalism and its production of a particular native masculinity.

Arondekar excavates instead the archive on homosexual practices: the male nautch, governmental brothels in Karachi where men lay for a price, cross-dressing hijras and the trope of homosociality between English and native men in Kipling’s telling of Empire. Yet it may be questioned how far Arondekar’s recuperation of the queerness of the archive destabilises the phallus as its signifier. We discover that natives deploy homosexual penetration to rape and punish the colonial intruder. “‘Strangers’ entering the ‘harems’ of Persian women are stripped and thrown to the mercy of the harem’s grooms and ‘negro-slaves.’” Another archival anecdote tells of a missionary whose “conversion-mania” so infuriated a Persian prince-governor that he was insulted and punished in similar ways. The metaphor of the India rubber dildo also figures in colonial pornography, as the female/lesbian phallus. Conceptually, Arondekar does not distinguish a theory of gender from a theory of sexuality or illuminate the in/adequacy of one in explaining the other.

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4. *Id.* at 42.
Arondekar traces the shifts in the colonial discourse on homosexual practices between 1830 and 1860. These years, Arondekar demonstrates, are co-terminus with a turn in colonial discourse from a study of texts to an investigation of practices. Historians have remarked on this shift. Neeladri Bhattacharya, for instance, traces the shift from text to custom as a source of the law, in the latter half of the nineteenth century. The heavy reliance on the pundits and their interpretation of texts (the Dharmasastras) during the abolition of sati in Bengal in the 1820s is starkly different from the exercise of cataloguing oral traditions and practices so as to ascertain the customary law of Punjab in the mid-nineteenth century.

The enterprise of textualising India seems to give way to an inquiry into the lived customs and practices of the native peoples. Arondekar reads this as a turn from the British search for the origination of societies to a more practical understanding of how societies function. Or, in my view, from a normative conceptualisation of “what ought to be” to an empirical inquiry into “what is.” Historiography has shown us that the truth of texts always eluded the British and, furthermore, its pursuit necessitated a dependence on the Brahmins. Moreover, the British saw the discrepancy between “Hindu” texts (read as “what ought to be”) and actual “Hindu” practices (“what is”) as further proof of the cussedness of the wily Brahmins, who had hidden the original religion from the people, reducing them to their current state of degeneracy.

With the epistemic move to “knowing” practices, competing discourses of ethnography, ethnology and anthropology emerge during this time (1830-60) and produce truth-claims about race, customs, climate, geography, sexuality and colonialism. What is curious is the intersection of these truth-claims. The wheat diet of the “martial inhabitants of India,” who fill up the lower ranks of the British army, is contrasted with the rice diet of the “effeminate and intellectual Bengalis.”

The taxonomy of races and peoples collapses between geography and climate. This poses a challenge to the racial separation of the Britishers and natives: do Englishmen give in to sexual excesses in the hot, damp tropics? Such a question reflects the anxiety surrounding British pederasty and their relations with native wo/men: phenomena that Richard’s Burton’s Karachi report amply unearthed in the valley of


the Sindh, phenomena that disrupt the “heteronormative teleologies of colonialism.” Or, do bodies not matter, as cultural practices (such as a diet of wheat/ rice) determine physiology and constitution even within the same tropical zone?

The enactment of the Indian Penal Code (IPC) in 1860 follows upon this systematic production of colonial anthropology. Section 377 of the IPC is thus born in 1860. Arondekar mentions that it is unclear whether “the jurisdiction of Section 377 extended to European subjects.” She discusses a few notable cases of unnatural vices among the Indian populace, most remarkably Queen Empress v. Khairati. Arondekar's reading of this case brilliantly illustrates how Khairati becomes knowable through the discourses of ethnography, legal medicine and sexuality. There is scarce evidence to prove when, where and with whom Khairati's unnatural offence was committed, which makes a conviction unsustainable. Evidence only shows that Khairati habitually wore women's clothes, sang and danced and that he had a subtended anus. The forensic evidence established that he was a habitual sodomite. Khairati was, according to colonial anthropology, a hijra.

Arondekar talks of the increasing reliance on medical evidence in the colonial legal system, in the face of the irregularity of witnesses, codification, etc. This is, after all, the time of Chevers' Indian medical jurisprudence. The truth-claims of medical jurisprudence are, interestingly, buttressed by the disciplinary force of colonial anthropology. The state of Khairati's subtended anus, mucous membranes and anal lesions, are discursively corroborated by ethnographic descriptions of the appearance, dress and behaviour of hijras.

What is noteworthy here is that Khairati is not an individual criminal. He is part of a collective, a community of habitual sodomites, a criminal group. Ethnography meets legal medicine to produce the habitual offender or rather a class of such offenders. Much historiographical ink has been spilt on the subject of colonial governmentality and its discursive delineation of criminal tribes. Criminal tribes are located where the disciplines of ethnography and criminology intersect: where native practices meet the criminal offences of dacoity and theft. The hijras are one such group that collectively represents native perversion or crimes against nature.

In my reading, the category of criminal tribes disrupts the neatness of the division of colonial law into “public” and “private.” The “British public law,” Arondekar suggests, was embodied in the Indian Penal

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8. Id. at 41.
9. Id. at 82.
Code. The “universality” of its principles stemmed from the implicit notion that all nations would agree on questions of “what acts constituted crimes against the community.” The “private” law, on the other hand, included the difficult, incomprehensible terrain of communities, of Hindu and Islamic Law. Arondekar invokes Kunal Parker’s argument that the premise of the criminal law was a “legal solicitude for the subject firmly located within a knowable British ‘public law,’” whereas that of the private law was the “legal recognition of the community firmly located within a fundamentally unknowable Indian ‘private law.’”

The distinction between a culturally-neutral public law and a culture-specific private law seems to reiterate the idiom of the universalism and reasonableness of Western epistemes as against the coloured-cultural peculiarities of the colony.

It is also a distinction between the individual subject and the community. I would like to posit that the universalistic lexicon of the public or criminal law and the individual subject it presupposes meets its limit in the criminal tribe or the hijra. In these collective figures, the “community,” hitherto relegated to the confines of the private law, resurfaces as the criminal community within the public law. Furthermore, the individual modern criminal—the psychologised, pathologised subject, the “I”—of Western criminology finds an antithesis in this collective “We.”

How do we understand this collective criminality? Arondekar raises an interesting question: Who is the “hijra”? Do hijras have no referentiality other than their sexuality? How do we recover the hijra as subject if the only idiom in which the subject is recoverable is through the North American or European category of gender/sexual difference? Arondekar reflects on this sexual hypervisibility of the hijra as third gender which elides the material histories of capital and colonialism. Hijras, Arondekar tells us, “were often powerful figures in Sultanate and Mughal courts and had the prerogative to collect taxes and duties in particular areas.” These other histories and practices become erased or invisible when the subject is mediated solely through the category of gender/sex.

And herein lies my dissatisfaction with Arondekar’s analysis. The poststructuralist frame is limiting. It cannot adequately address the questions that Arondekar encounters in recovering the hijra as subject.

10. Id. at 78.
11. Id. at 79.
12. Id. at 78.
13. Id. at 91.
The only answers that emerge are those of archival loss, displacement and irretrievability.

I would suggest that we perhaps need to ask why the discursive lenses of European/North American academia are unable to retrieve. And what is it that they seek to retrieve? Sexuality? Foucault's path-breaking work on the history of this entity tells us that no such thing existed until the nineteenth century. The *scientia sexualis* produced sexuality as a domain that bespoke a truth about an inward-looking, introspecting subject.

It is this deployment of "sexuality" that provides us with a truth about the *hijra*, which makes the subject knowable. It establishes a certain relation between subjectivity and truth that enables us to understand practices (homosexual, practices, in this case) as a manifestation of this subjectivity.

Therefore, it does not matter if we replace the individual subject with the collective subject/community, the "I" with the "We," the individual homosexual/pathological criminal with the *hijra* or "criminal tribe" as community. The "We" continues to be the "I" writ large. It presumes the same relation between subjectivity, truth and practices. The practice could be cross-dressing, dacoity or thuggee. Our only way of understanding the *hijra*, who collect taxes, have power in the court and cross-dress, is with recourse to the explanation of (homo) "sexuality."

Can we perhaps develop a paradigm to comprehend practices which is not mediated through a recourse to the subject, sourced either through the interiority of the recesses of the individualised mind or the exteriority of the body? In Foucault's later work, there are the beginnings of a theorisation of an alternative configuration of the fields of practices/action and the self. In his revisiting of pagan Greek culture and its comparison with Christianity, Foucault develops the concept of *askesis* which he explains as a 'practice of the self.' *Askesis* is a process of self-transformation, whereby one adopts a practice in order to become a self. This configuration reverses the known relation between acting and being, wherein there is a self that acts. S.N. Balagangadhara takes this forward in this theorisation of action-knowledge and of culture as a configuration of learning.  

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analyst's couch. It is the discourses of the analyst's couch that produce the *scientia sexualis*. Arondekar adds an intriguing new perspective to Foucault's work on the history of sexuality by suggesting that the *scientia sexualis*—the sciences of sexuality (such as psychoanalysis)—actually emerge from what lies beyond Europe, in the colony.

Drawing upon the work of Ann Laura Stoler, Robert Young, and Anne McClintock, Arondekar posits that the histories of empire, “rather than being peripheral to the cultivation of the nineteenth century bourgeois self, were in fact constitutive of it.”\(^\text{15}\) She takes the instance of the emergence of sexuality and the *scientia sexualis* in nineteenth century Europe. In her formulation, the foreign landscape of the colony is a space of otherness. It becomes the space of discourse, perversion and incitement, as opposed to the silence, prohibition and regulation of the metropole. Pornography, sexology and, I may add, anthropology are the sites of this discursivity.

She substantiates her argument with an engagement with Victorian pornography. It is to the elsewhere-place of the colony that Victorian pornography is relegated: the imagination of the sexually perverse flourishes in this elsewhere, which is spatially, discursively, or economically, not England. This justifies discursively the evangelical civilising mission. Arondekar adds to this existing discursive analysis demonstrating how the material histories of production—of the India rubber dildo, produced in India, for example—are inseparable from the histories of sexuality and race. She further outlines the dents that Victorian pornography makes in colonial ideology — the consumption of white women as pornographic vignettes by native brown men, or the spectre of interracial sexual relations.

This engagement, interesting in itself, does not adequately tell us how the material history of empire disturbs the genealogical excavation of Foucault's *History of Sexuality*. The reader is left wondering how the genealogy of sexuality that Foucault so masterfully unearths is destabilised by the imperial histories of Europe and otherness of the colony. This perhaps would be a question worth exploring.

\(^\text{15}\) *Id.* at 104.
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