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## HEGEMONY, COERCION, AND THEIR TEETH-GRITTING HARMONY: A COMMENTARY ON POWER, CULTURE, AND SEXUALITY IN FRANCO'S SPAIN

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Tayyab Mahmud\*\*

Professor Gema Pérez-Sánchez's article, *Franco's Spain, Queer Nation?*<sup>1</sup> focuses on the last years of Francisco Franco's fascist dictatorship and the early years of the young Spanish democracy, roughly from the late 1960's to the early 1980's.<sup>2</sup> The centerpiece of her article looks at how, through law, Franco's regime sought to define and contain what it considered dangerous social behavior, particularly homosexuality. She traces how the state not only exercised hegemonic control over definitions of gender and sexuality, but also established well-defined roles for women and drew clear lines between what constituted legitimate and illegitimate sexualities, namely, the line between heterosexuality and homosexuality. She discusses how non-hegemonic sexual minorities subverted this line of control, especially during the 1970's, when they mobilized and resisted the law against socially dangerous behavior.<sup>3</sup> The period that followed this resistance witnessed the gradual transition to democracy in Spain and a heyday of gay cultural and literary activism.<sup>4</sup> Professor Pérez-Sánchez's bold and innovative legal scholarship, exploring the relationships between law, literature, and politics, is a good representation of the critical project in legal scholarship that aims to uncover the role of law in the intersections of power and resistance.

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1. Gema Pérez-Sánchez, *Franco's Spain, Queer Nation?*, 5 MICH. J. RACE & L. 943 (2000), 33 U. MICH. J.L. REFORM 359 (2000).

2. See generally *id.*

3. See *id.* at 5 MICH. J. RACE & L. at 956-59, 33 U. MICH. J.L. REFORM at 372-75.

4. See *id.* at 5 MICH. J. RACE & L. at 970-85, 330 U. MICH. J.L. REFORM at 386-401.

## I. THEORIES OF STATE AND LOCATIONS OF POWER

In the first part of her article, Professor Pérez-Sánchez examines the ways in which power is understood and used by a fascist state in contrast with one that has transitioned into democracy. She reviews Althusser's notion of the modern state, where a distinction is made between state power and apparatus, the apparatus behaving much as a catalyst and remaining unaffected even when state power is seized and altered.<sup>5</sup> A comparative example would be the post-colonial states of South Asia, where the apparatuses of the state, in particular its laws and bureaucracy, remained largely unaffected through the transition to self-rule.<sup>6</sup> As a result, colonial forms and practices remain alive in and through the state apparatuses even after formal independence.

In his analysis of the state, Althusser draws a distinction between the repressive state and the ideological state apparatuses.<sup>7</sup> The former includes the army, police, judiciary, and the penal system. The latter includes education, religion, family, political parties, communications, and cultural systems. This is a crucial distinction, which enables conservative, even fascistic forces, to continue to advance their agendas in formally liberal democratic settings. The Christian Coalition in the United States, the Hindu Right in India, and the Islamic reaction in Pakistan are different examples of the way in which ideological state apparatuses can and are being used and used effectively in pursuit of hegemonic and anti-minority agendas within the framework of liberal democracy.<sup>8</sup>

Professor Pérez-Sánchez critiques what she characterizes as the monolithic understanding of state power that informs Althusser's theory.<sup>9</sup> She adopts instead Foucault's position that relations of power "are not univocal; they define innumerable points of con-

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5. See *id.* at 5 MICH. J. RACE & L. at 945-47, 330 U. MICH. J.L. REFORM at 361-63.

6. See generally AYESHA JALAL, *DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE* (1995); Tayyab Mahmud, *Pretorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225.

7. See Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 121, 141 (Ben Brewster trans., Monthly Rev. Press, 1971).

8. See, e.g., BRENDA COSSMAN & RATNA KAPUR, *SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW* (1999); Tayyab Mahmud, *Freedom of Religion and Religious Minorities: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40 (1995).

9. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 946 n.7, 33 U. MICH. J.L. REFORM at 362 n.7.

frontation, focuses of instability, each of which has its own risks of conflict, of struggles, and of an at least temporary inversion of the power relations."<sup>10</sup> By way of example, Professor Pérez-Sánchez points out how the repressive mechanisms of Franco's rule, namely the police and the law, met the issue of homosexuality with cultural resistance. The repressive law dealing with socially dangerous behavior, directed primarily against homosexuals and enacted during Franco's rule, provoked a resistance that led to the ultimate demise of the law and witnessed a post-modern cultural explosion.<sup>11</sup> This cultural movement secured sexuality, more specifically, sexual difference, as an example of what could be regarded as a political issue.

The article aims to disengage from "an over-simplified view of state power as exclusively producing repressive effects."<sup>12</sup> Important theoretical interventions that enable innovative thinking about the state implicitly inform her article. Professor Pérez-Sánchez refers to Althusser's idea of a "teeth-gritting harmony"<sup>13</sup> between coercive and ideological apparatuses, between law and culture, between Gramsci's conception of hegemony and Foucault's notion of diffuse and unstable operations of power. Picking up her thread, we believe an exploration into the substance of repression, state power, and social orders, imagined as a "teeth-gritting harmony," is warranted. In this Commentary we focus on these interrelationships in order to obtain a sharper picture of how power functions in modern societies. We aim squarely at the question fundamental to Professor Pérez-Sánchez's project, namely the role of law in the incessant struggle between power and resistance.

Professor Pérez-Sánchez takes the position that Althusser's theory of the state "conceives power as monolithic," because even though ideological apparatuses are presumed to be diverse they have a shared role in "the reproduction of the relations of production."<sup>14</sup> While the term "relations of production" has a particular paradigmatic lineage currently out of academic favor, most social theorists would agree that the primary role of the dominant

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10. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 27 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978). See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 946 n.7, 33 U. MICH. J.L. REFORM at 362 n.7.

11. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 954–58, 970; 33 U. MICH. J.L. REFORM at 370–74, 386.

12. *Id.* at 5 MICH. J. RACE & L. at 945, 33 U. MICH. J.L. REFORM at 361.

13. Althusser, *supra* note 7, at 150. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 946 n.7, 33 U. MICH. J.L. REFORM at 362 n.7.

14. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 946 n.7, 33 U. MICH. J.L. REFORM at 362 n.7.

coercive and ideological practices in any social structure is to perpetuate that structure. This assertion does not, in and of itself, render Althusser's theory of power monolithic. His most important contribution to social theory was his refutation that institutions are autonomous from state and cultural practice.<sup>15</sup> By seeing coercion and ideology along the same continuum rather than as completely separate practices, Althusser opened the door for post-structuralist views about operations of power. Thus, Althusser and Foucault may not be so far apart as Professor Pérez-Sánchez's brief comments may suggest.

Nicos Poulantzas attempts to reconcile Althusser and Foucault, and his work aids greatly in appreciating how the two theorists complement one another.<sup>16</sup> In order to clarify the issue, we must first briefly sketch the theories of Gramsci, Althusser, and Foucault as they relate to Professor Pérez-Sánchez's project. We focus here on the relationship between coercion and ideology and the demarcation between the public and the private. Here the notion of hegemony, as used by Gramsci, furnishes the point of departure. Gramsci, rather than identify the state with government or with the repressive-coercive apparatus, forwards a broader notion of the state so that it includes "the state proper and civil society . . . the entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its domination, but manages to win the active consent of those over whom it rules."<sup>17</sup> The concept of the state here assumes a "wider and more organic sense, including elements which need to be referred back to the notion of civil society (in the sense that one might say that state = political + civil society, in other words hegemony protected by the armour of coercion.)"<sup>18</sup> The very notion of the state is modified by Gramsci to include the entire complex of institutions and practices through which power relations are mediated in a social formation to ensure the "political and cultural hegemony of a social group

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15. For a succinct assessment of Althusser's work, see Norman Geras, *Althusser's Marxism: An Assessment*, in *WESTERN MARXISM: A CRITICAL READER* 232 (New Left Review ed., 1978).

16. See NICOS POULANTZAS, *STATE, POWER, SOCIALISM* (Patrick Camiller trans., 1979). For the cordial personal relationship between Althusser and Foucault, see LOUIS ALTHUSSER, *THE FUTURE LASTS A LONG TIME* 271-73 (Richard Veasy trans., Olivier Corpet & Yann Moulier Boutang eds., 1993).

17. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 244 (Hoare and Nowell Smith eds., 1971).

18. *Id.* at 263.

over the entire society, as the ethical content of the state.”<sup>19</sup> The most striking aspect of Gramsci’s formulation is his abolition of a strict distinction between state and civil society. According to him, “by ‘State’ should be understood not only the apparatus of government, but also the ‘private’ apparatus of ‘hegemony’ or civil society.”<sup>20</sup> For Gramsci, ideas and values do not simply justify an existing power structure. Ideas and values are also formative forces capable of disrupting and redistributing power itself. In this sense, civil society is the quintessential ideological realm and thus is potentially the source of either hegemonic or counter-hegemonic ideas. The public/private contradiction dissolves and civil society is primarily defined by how it is structured.

As Professor Pérez-Sánchez’s project focuses on Spain between 1960 and 1980, it is very important to note that Gramsci recognized that his notion of civil society is limited to contexts where capitalism and a liberal legal order had opportunity to take root. In Czarist Russia, for example, he noted that “the State was everything, civil society was primordial and gelatinous; in the West, there was a proper relation between State and civil society, and when the state trembled a sturdy structure of civil society was at once revealed.”<sup>21</sup> Gramsci’s analysis of the relative underdevelopment of the southern region of Italy as compared to the state as a whole demonstrated that even within a single state, unequal development of productive forces and attendant relations might effect the viability of a civil society.<sup>22</sup>

Althusser carried Gramsci’s notions of hegemony and the fusion of state and civil society into an analysis of concrete practices of ideological institutions, yielding the concept of ideological state apparatuses. In defining such apparatuses as the church, the school, the family, and so forth, Althusser notes that whereas the *coercive* state apparatuses belong to the public domain, the *ideological* state apparatuses thrive in the private domain. The distinction between public and private is unimportant, as he contends that:

the State, which is the State *of* the ruling class, is neither public nor private; on the contrary, it is the precondition for any

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19. John Merrington, *Theory and Practice in Gramsci’s Marxism*, in *WESTERN MARXISM: A CRITICAL READER* 140, 151 (New Left Rev. ed., 1977) (quoting Antonio Gramsci, *Passato e Presente* 164–65 (1975)).

20. GRAMSCI, *supra* note 17, at 261.

21. *Id.* at 238.

22. See ANTONIO GRAMSCI, *THE SOUTHERN QUESTION* (Pasquale Vericchio trans., ed., 1995).

distinction between public and private . . . . It is unimportant whether the institutions in which they [ideological state apparatuses] are realized are 'public' or 'private.' What matters is how they function.<sup>23</sup>

The difference between coercive and ideological apparatuses, according to Althusser, is that every state apparatus functions both by repression and by ideology, the difference being that the repressive state apparatus functions predominantly by repression, whereas the ideological state apparatuses function predominantly by ideology.<sup>24</sup>

The important thing to note in the formulations of Gramsci and Althusser is that hegemony is not taken as something that comes about merely as a mechanical derivative of economic predominance of ruling classes. Rather, it is posited as work, resulting from permanent and pervasive efforts of the dominant classes, secured through their control of the state, to create solidarity among the powerful and supra-party consensus. Viewed in this light one can see important threads that run from Gramsci to Althusser to Foucault.

Foucault carries forward Gramsci's model of seeing the state as constituted by both the political and civil society, and argues that we can make no analytical distinction between the state and civil society. For him, "relations of power are not in a position of exteriority with respect to other types of relations (economic processes, knowledge relationships, sexual relations), but are immanent to the latter . . . [and] they have a directly productive role, whenever they come into play."<sup>25</sup> Institutions beyond the juridical state create the model for the disciplinary use of power in modern societies, which aim to and do yield normalized subjects and thus exert hegemony. In the modern disciplinary society the lines of power extend throughout social spaces in the channels created by institutions traditionally located in the civil society. The exertion of power is organized through deployments, which are simultaneously ideological, institutional, and corporeal. The argument is not that there is no state, but rather that it cannot effectively be isolated and contested at a level separate from society. The state is not properly understood as the transcendent source of power relations

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23. Althusser, *supra* note 7, at 149.

24. *See id.* at 138.

25. MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 94 (1978).

in society, but as the consolidation of forces of "statization" existing within social power relations.<sup>26</sup>

In the final analysis, however, for Foucault it is the nature of power, equally dispersed and localized, that is important in the study of everyday practices. Even when these different sites of power come together in a global strategy of domination, the links between these sites remain incoherent, disconnected, unstable, and discontinuous. Foucault therefore denied any general pattern of domination, coherence of macro-structures of power, presence of an ultimate cause of power, or any static binary encompassing opposition between the rulers and the ruled.<sup>27</sup> In his determination to shift the terms of discourse away from the state to micro sites of power, Foucault denied to the state blanket mastery of the discourse of power.<sup>28</sup>

Foucault extended the analysis of power equations that were traditionally thought of as belonging to the state and its institutions to cover all locations of social interaction.<sup>29</sup> Rejecting a top-down analysis of power beginning with the state, sovereignty, and law, he adopts an ascending analysis of power. The state emerges in his formulation as built on the power relations already present in society. The state is in a manner of speaking secondary to these sites of power. Directing attention away from visible and formalized codes of power, Foucault concentrates on the way in which individuals experience power at all sites of human relations. He focuses on the way in which the individual is constituted by these relations, the micro-physics of power, and the forms it acquires in specific contexts, the articulation of that power through discourses, and the fact that power is ubiquitous, immanent, and lacks both a beginning and an end. Foucault asserts that:

What we need, however, is a political philosophy that isn't erected around the problem of sovereignty, nor therefore the problems of law and prohibition. We need to cut off the kings' head, in political theory that still has to be done. . . . To pose the problem in terms of the state means to continue

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26. See GILLES DELUEZE, *FOUCAULT* 84 (1986).

27. See Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Graham Burchell et al. eds., 1991).

28. As Jessop puts it: "Foucault faced difficulties in moving from the amorphous dispersion of micro-powers to their class-relevant overdetermination in and through the central role of the state." B. JESSOP, *STATE THEORY: PUTTING CAPITALIST STATES IN THEIR PLACE* 238 (1990).

29. See generally Foucault, *supra* note 27.



posing it in terms of sovereignty and sovereignty, that is to say, in terms of law. If one describes all these phenomena of power as dependent on the state apart, this means grasping them as essentially repressive.<sup>30</sup>

Foucault, however, accepts that linkages between power relations are consolidated into a global strategy of bourgeois domination, and that this crystallizes in the state.<sup>31</sup>

It is essential for Professor Pérez-Sánchez's project that, in light of Gramsci, Althusser, and Foucault, any fundamental distinction between coercive and ideological apparatuses be rejected. This can be imagined as a rejection of any fundamental division between mind and body. If the state is inherently a relationship of domination and coercion, the notion of coercion implies violence exercised on living human beings. But as humans are not simply non-conscious biological entities, domination requires more than physical violence to the flesh. Domination must extend to a process of subjugation. The practice of rendering the normal goes beyond the mind/body and material/ideological distinctions because social order makes demands on human action, not simply on human act.<sup>32</sup> A graphic description by Foucault helps us appreciate this process:

[T]he body is also directly involved in a political field; power relations have immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs. The political investment of the body is

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30. Foucault explains his position:

I don't want to say that the state isn't important, what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extends beyond the limits of the state. In two senses: first of all because the state, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the state can only operate on the basis of other, already existing power relations. . . . This meta power with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and infinite power relations that supply the necessary basis for the great negative forms of power.

Michel Foucault, *Truth and Power*, in *THE FOUCAULT READER* 63 (P. Rabinow ed., 1987).

31. See *id.* at 64.

32. While "act" refers simply to observable behavior, "action" refers to the "act" nested in the meaning and purposefulness attached to it by the actor. For a discussion of the distinction between "act," "behavior," and "action," see RICHARD BERNSTEIN, *PRAXIS AND ACTION* (1971); Tayyab Mahmud, *Epistemology of Social Inquiry: A Contribution to the Critique of Logical Positivism / Empiricism*, 5 *SCRUTINY* 29 (1980).

bound up, in accordance with complex reciprocal relations, with its economic uses; it is largely as a force of production that the body is invested with relations of power and domination; but, on the other hand, its constitution as labor power is possible only if it is caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body.<sup>33</sup>

The interplay of coercion and ideology, and of force and persuasion, is the vital insight that the works of Gramsci, Althusser, and Foucault introduced into social theory. One could summarize this insight by saying that ideology is the velvet glove that encases the iron fist of coercion. This perspective opens a unique vantage point to the study of law, in particular, as law always combines coercion and ideology by its very structure and operation. And it is in this sense that Professor Pérez-Sánchez's article is a very welcome contribution—not only in advancing the project of multidisciplinary research about the law, but more specifically to see how far-flung structures form one another.

One other line of inquiry that links Althusser and Foucault may be fruitful to Professor Pérez-Sánchez's project. We refer here to Althusser's doctrine of interpellation and Foucault's concept of governmentality. Althusser's understanding of interpellation stages a social scene in which the subject is hailed by an officer of the law, the subject turns around, and in this turning the subject accepts the terms by which she is hailed. This turning around, as Judith Butler explains, "is an act that is, as it were, conditioned both by the 'voice' of the law and by the responsiveness of the one hailed by the law. The 'turning around' is a strange sort of middle ground . . . which is determined both by the law and the addressee, but by neither unilaterally or exhaustively."<sup>34</sup> This idea suggests a terrain beyond the coercion/ideology overlap, where determining whether subjection is complete requires accounting for the addressee's willingness to be subjected: while "there would be no turning around without first having been hailed, neither would there be a turning around without some readiness to turn."<sup>35</sup>

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33. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 25–26 (1979).

34. JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION* 107 (1997).

35. *Id.*

Foucault's notion of governmentality as a new method of power is concerned with the ordering and management of whole populations.<sup>36</sup> But the managing of a population does not apply only to the collective mass of phenomena and aggregate effects, but also the management of people in depth and detail. Foucault was troubled by the trend in modern governance toward impossible forms of political sovereignty whereby government is of all and of each, whereby the goal is both to conglomerate and to individualize. Foucault argues that for "modern political rationality" there is an integral relation between "the reinforcement of . . . [the political] totality" and "increasing individualization." Here the individual increasingly comes to be self-determining, but in a context that she is supposed to monitor and discipline herself.<sup>37</sup> The willingness of Althusser's subject to turn when hailed and the self-discipline of Foucault's subject both raise interesting lines of inquiry for projects like Professor Pérez-Sánchez's. To what extent is the homosexual or any other sexual subject itself an effect of power relations? To what extent is subjectification as a homosexual or any other sexual subject partly contingent on the subject's willingness to be part of the process? To what extent is she implicated in her own subjection to technologies of power?

A word of caution is warranted, however, when one deploys social theory born in Europe's northern heartland, i.e., Britain, France, and Germany, to study social formations located outside it. While claiming universal application, Eurocentric social theory is often conditioned by the specifics of its spatial and temporal origin. Social formations whose reception of modernity are not the same as that of the North European heartland may well be inappropriate sites for application of North European theory. When we

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36. The concept of governmentality, which he uses interchangeably with governmental rationality and the art of government, emerges from Foucault's interest in seeing government as an activity or practice, rather than as an institution having some essential purpose. For Foucault, government may be defined as "the conduct of conduct:" a form of activity aiming to shape, guide or affect the conduct of some person or persons. This activity operates through certain techniques of power, or power/knowledge, designed to observe, monitor, shape, and control the behavior of individuals situated within a range of social and economic institutions. For Foucault, this does not mean that power has an almost absolute capability to tame and subject individuals. In his model, power is only power, in distinction from physical force or violence, when addressed to individuals who retain some freedom of action. Power, for him, is "action on others' actions": it presupposes rather than annuls their capacity as agents. See Foucault, *supra* note 27; Colin Gordon, *Governmental Rationality: An Introduction*, in *THE FOUCAULT EFFECT*, *supra* note 27; Colin Gordon, *Afterword*, in MICHEL FOUCAULT, *POWER/KNOWLEDGE* 245 (1980).

37. See generally PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 118-41 (1992) (explaining Foucault's theories of disciplinary power and self-sufficient subjectivity).

do not heed this we wittingly or unwittingly adopt a unilinear evolutionist perspective whereby a historical process unfolding under concrete conditions—Seventeenth to Twentieth century Northern Europe—is presented as a universal path that all subsequent social developments are fated to tread. The outcome is history by analogy rather than history as process. This imperialism of categories born of “final vocabularies”<sup>38</sup> and grand narratives of modernity ensures that particular reality has meaning only to the extent that it can be seen to reflect a particular stage of development of the history of Northern Europe. Northern Europe’s experience of modernity is taken as universal history, and it is assumed that “it is only the concepts of European social philosophy that contain within them the possibility of universalization.”<sup>39</sup> Ignoring differences within Europe, Eurocentricism presents European historical experience in an idealized, mythologised, and non-contradictory form. European social theory is taken too literally, as a description of European history rather than as a prescription for its development. Just as it holds up modern North European history as a mirror in which to gauge the significance of *all* human development, Eurocentricism also has a tendency to view its objects as lacking in the capacity to comprehend their own history as a step toward the initiative to (re)making it.

Let us reconsider the three theorists we embraced above in this cautionary light. As previously mentioned, Gramsci himself limited existence of civil society to formations where capitalism and a liberal legal order were entrenched. He explicitly excluded Czarist Russia and Southern Italy from application of his theory. Althusser has been criticized for being too preoccupied with theoretical battles within Western Marxism and for taking the history of the Catholic Church in France as prototypical of all social formations.<sup>40</sup> Much of Foucault’s work is often faulted for being imprisoned in the history of modern France and for marginalizing the colonial

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38. HOMI BHABHA, *THE LOCATION OF CULTURE* 125 (1994) (discussing the imperialistic nature of colonial languages). This refers to the imprisonment of modern thought in ontological and epistemological conceptual categories born in post-Enlightenment Europe. Examples include the modern categories of universality, history, man, reason, nation, and rights. See DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

39. Partha Chatterjee, *A Response to Taylor’s “Modes of Civil Society,”* 3 *PUBLIC CULTURE* 119 (1990).

40. See, e.g., Mladen Dolar, *Beyond Interpellation*, 6 *QUI PARLE* 75 (1993); JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION* 106–31 (1997).

question.<sup>41</sup> Any uncritical adoption of the Gramscian concept of hegemony has been abundantly refuted by studies of colonialism, which find that while "the metropolitan state was hegemonic in character with its claim of dominance based on a power relation in which the moment of persuasion outweighed that of coercion . . . the colonial state was non-hegemonic with persuasion outweighed by coercion in its structure of domination."<sup>42</sup> This, in turn, has a direct bearing on the relationship between law and both the state and the social formation at large. In the colony "law was a department of the executive,"<sup>43</sup> never achieving the autonomy envisaged by liberal designs of governance. Given its relatively backward economy combined with a fascist political order, Spain may well have been closer to a colonized formation than a metropolitan one. The role of the Catholic Church in Franco's Spain further bolsters this argument. Althusser takes the position, for example, that whereas the dominant ideological state apparatus in the pre-capitalist period was the church, "the ideological State apparatus which has been installed in the *dominant* position in mature capitalist social formation . . . is the educational ideological apparatus."<sup>44</sup> Professor Pérez-Sánchez affirms the dominant ideological position of the Catholic Church in Franco's Spain and that it was used as an effective institutional means to "rectify the moral trajectory of the country."<sup>45</sup> All of this suggests that when we are analyzing social phenomena in settings other than Northern Europe it may be useful to seek theoretical guidance from Europe's Others; fortunately there is no dearth of such guidance now.<sup>46</sup> In the case of fascist rule in Spain, a focus of Professor Pérez-Sánchez, particularly useful are studies that recognize the particularity of this phenomenon,

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41. See, e.g., ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* (1995).

42. RANAJIT GUHA, *DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA* xii (1997).

43. David A. Washbrook, *Law, State and Agrarian Society in Colonial India*, 15 *MODERN ASIAN STUDIES* 649, 714 (1981).

44. Althusser, *supra* note 7, at 152.

45. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 953, 33 U. MICH. J.L. REFORM at 369 (internal quotation omitted).

46. See, e.g., GUHA, *supra* note 45; MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1997); MAHMOOD MAMDANI, *IMPERIALISM AND FASCISM IN UGANDA* (1984); SAMIR AMIN, *IMPERIALISM AND UNEQUAL DEVELOPMENT* (1978); ANDRE GUNDER FRANK, *DEPENDENT ACCUMULATION AND UNDERDEVELOPMENT* (1978); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970); *THE POST-DEVELOPMENT READER* (Majid Rahnema & Victoria Bawtree eds., 1997).

both with regard to its historical lineage and its disjunction from contemporaneous Europe.<sup>47</sup>

## II. A QUEER LAW IN FRANCO'S SPAIN

Armed with a nuanced theory of the state, Professor Pérez-Sánchez proceeds to examine the historical context in which laws regulating homosexuality were implemented. She argues that throughout the period of Franco's rule, Spain occupied a very marginalized position in relation to other European democracies, except during the brief period in the 1960's, and that this accounts for the adoption of an autarchic economic system.<sup>48</sup>

Professor Pérez-Sánchez's claim that fascist Spain was "ostracized" by the West is well founded. The trajectory of this ostracization was incomplete, however. While Spain was excluded from the largess of the Marshall Plan, the onset of the Cold War led the United States to cement security relationships with Western European nations with varied political systems. Suddenly, the only criterion a state faced for inclusion was its willingness to play the containment of communism game. Turkey, Greece, Portugal, and Spain, along with "Western democracies," were quickly incorporated into the American strategic arrangements. As Professor Pérez-Sánchez acknowledges, even American economic aid started flowing by the early 1950's.<sup>49</sup> Besides, Europe's economic recovery also directly benefited Spain by furnishing it an expanding trading market. The better argument, one that Professor Pérez-Sánchez adopts, is that "more than an economic plan, 'autarky was a political choice.'"<sup>50</sup> A very productive inquiry would be the extent to which autarky was a building bloc to establish fascist corporatism, whereby the state, capital, and labor are institutionally and hierarchically integrated in the name of unity, stability, and order.<sup>51</sup>

Professor Pérez-Sánchez identifies foreign tourism, emigrant remittance, and foreign investment as the driving forces behind

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47. See, e.g., NICOS POULANTZAS, *FASCISM AND DICTATORSHIP* (1974); PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* (1974).

48. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 949-52, 33 U. MICH. J.L. REFORM at 365-68.

49. See *id.* at 5 MICH. J. RACE & L. at 950, 33 U. MICH. J.L. REFORM at 366.

50. *Id.* at 5 MICH. J. RACE & L. at 949, 33 U. MICH. J.L. REFORM at 365 (quoting RAYMOND CARR & JUAN P. AIZPURA, *SPAIN: DICTATORSHIP TO DEMOCRACY* 52 (1979)).

51. For a useful introduction to corporatism, see HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM"* (1997).

Spain's economic recovery in the 1960s.<sup>52</sup> This is undisputed. Professor Pérez-Sánchez adopts the position advanced by Edward Malefakis that the influx of tourism triggered changes in "sexual mores," "social attitudes," "life-styles," and "uncensored sources of information."<sup>53</sup> While this certainly was one of the impacts of tourism in Spain, when combined with other factors, one may identify less gleaming phenomena left in the wake of global tourism. The Caribbean, South Pacific, and Asian "tourist heavens," like Thailand, are cases where burgeoning tourist industries led not to political liberalization, but rather to distorted dependent economies and degradation of the "natives" who "service" the tourists.<sup>54</sup>

Professor Pérez-Sánchez argues that the economic marginality of Spain "in the sexist imaginary . . . must have been perceived as a passive, feminized position,"<sup>55</sup> and that it "must have weighed heavily in the imaginary of the Francoist regime."<sup>56</sup> Here she deploys the term "imaginary" in its psychoanalytic sense.<sup>57</sup> While incorporation of interdisciplinary constructs in analysis of the law is laudatory, some caution is warranted. When theoretical constructs travel between disciplines, mistranslations and displacements are common. This is even more likely when concepts designed to facilitate analysis of individual behavior are applied to collective behavior, or the other way around. Without going into the career of the Laconian construct of the imaginary, it appears that Professor Pérez-Sánchez deploys it in the sense of the collective imagination or self-conception of a political order. To put the concept to such use, without doing violence to its original place in psychoanalytic theory, one would have to reconceptualize it, as Cornelius Castoriadis has done.<sup>58</sup>

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52. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 950-51, 33 U. MICH. J.L. REFORM at 366-67.

53. *Id.* at 5 MICH. J. RACE & L. at 951, 33 U. MICH. J.L. REFORM at 367.

54. See, e.g., SEX, SUN AND GOLD: TOURISM AND SEX WORK IN THE CARIBBEAN (Kamala Kempadoo ed., 1999).

55. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 952, 33 U. MICH. J.L. REFORM at 368.

56. *Id.* at 5 MICH. J. RACE & L. at 951, 33 U. MICH. J.L. REFORM at 367.

57. *Id.* at 5 MICH. J. RACE & L. at 951 n.29, 33 U. MICH. J.L. REFORM at 367 n.29.

58. See CORNELIUS CASTORIADIS, THE IMAGINARY INSTITUTION OF SOCIETY (Kathleen Blamey trans., Polity Press 1987). Laconian concept of the imaginary may be summed up as sexual and culturally-specific images, symbols, metaphors, and representations that help constitute various forms of subjectivity. See Jacqueline Rose, *The Imaginary*, in THE TALKING CURE (Colin MacCabe ed., 1981); SUPPOSING THE SUBJECT (Joan Copjec ed., 1994). For very useful deployments of psychoanalytical approaches to examine race, see THE PSYCHOANALYSIS OF RACE (Christopher Lane ed., 1998).

Professor Pérez-Sánchez goes on to state, “[b]ecause the regime was not as normative and central as it wanted itself to be perceived as, the mere existence of non-heterosexual practices must have threatened Francoist legitimacy to its core.”<sup>59</sup> We would like to further complicate the immediate connection Professor Pérez-Sánchez draws between the representation of the Spanish state as feminine and the targeting of homosexuals. Further research is in order to explore the connection between feminization of a state and the targeting of homosexuality. Questions that should be addressed include, how does the feminization of a state get altered through the elimination of homosexuality? Also, why is homosexuality singled out for legal regulation in these contexts and not the whole spectrum of “non-normative sexual practices”? Sexually transgressive practices can be perceived as threatening to a highly regulated, fascist state. Yet even in contemporary liberal democracies the struggle for equal rights by sexual minorities has been met at times with opposition that takes the form of censorship, defense of marriage, and social and cultural exclusion.<sup>60</sup> It may not be fascist ideology per se that targets homosexuals. After all, this ideology operates in tandem with a dominant sexual ideology that remains fearful of practices that fall outside what is regarded as the sexual norm.

The idea of sex and sexuality as a dangerous and corrupting force, to be carefully contained at all costs within the family and marriage, is hoary and has been reinforced with renewed vigor since Victorian times.<sup>61</sup> Today there exists a naturalized and universalized set of ideas about sex. The features of this dominant understanding of sexuality have been explicated very well in the work of Gayle Rubin.<sup>62</sup> In her understanding, sex is a natural force and is also sinful and dangerous.<sup>63</sup> And sex is subjected to unduly harsh penalties, unless it happens to occur within the slender parameters of normative sexuality, which in its most pure form is heterosexual, marital, monogamous, reproductive, and non-commercial. Normative sexuality is accorded the maximum legal

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59. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 952, 33 U. MICH. J.L. REFORM at 368.

60. See, e.g., Lise Gottell, *The New Politics of Anti-Pornography*, in BRENDA COSSMAN, ET AL., *BAD ATTITUDES ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BULTER DECISION* 48 (1997).

61. Some argue that the very foundation of “civilization” is rooted in the control of sexuality. See, e.g., SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1929).

62. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carol Vance, ed., 1992).

63. See generally *id.*



and social benefits, while practices that fall outside of this dominant sexual ideology, such as sodomy or commercial sex work, bear the greatest social and legal stigma.<sup>64</sup> Border crossings between what is described as good sex and bad sex take place from time to time; but the crossing of really 'bad' erotic practices into moral and legal acceptability is feared and resisted.<sup>65</sup>

Professor Pérez-Sánchez focuses her arguments on the targeting of homosexuals in Francoist Spain. We locate this argument within a broader understanding of the relationship between sexual normativity and nation-state identity, which becomes particularly intense at moments of political and social rupture. The criminalization of homosexuality was not the work only of fascist states. We believe that the elimination, incarceration, and/or rehabilitation of the "deviant" sexual subject has been and continues to be integral to the operation of sexual normativity in the broader project of the nation-state. Re-education, rehabilitation, and reintegration are directed at reform into the mainstreams into dominant sexual normativity more specifically, heteronormativity.<sup>66</sup> It is a strategy that has been used frequently to deal with sexual difference. This response has been and continues to be the dominant way in which many contemporary states deal with sex workers and prostitution.<sup>67</sup> In the case of sex work, re-education involves learning the skills of domesticity, rehabilitation involves stripping the worker (generally female) of her whore identity, and re-integration involves the process of converting her into a "good," socially acceptable woman.<sup>68</sup>

Sexual normativity is integral to a nation-state's identity. Re-integration or containment of 'deviant' sexual actors remains particularly acute at moments of profound social change and political disorientation. As Jeffrey Weeks states,

[m]oral panic occurs in complex societies when deep rooted and difficult to resolve issues become focused on symbolic

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64. See INDIAN PEN. CODE 377 (1987); PAKISTAN PEN. CODE 377 (1985) (providing a minimum penalty of ten years imprisonment for sodomy).

65. See Rubin, *supra* note 62, at 283.

66. See, e.g., Usha Ramanathan, *Women, Law and Institutionalisation: A Manifestation of State Power*, 3 INDIAN J. OF GENDER STUDIES, 199 (1996).

67. See, e.g., GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION (Kamala Kempadoo & Jo Doezema eds., 1998); GAIL PHETERSON, *THE PROSTITUTION PRISM* (1996); Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Context*, 11 HARV. HUM. RTS. J. 65 (1998); Carol Smart, *Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives*, in CAROL SMART, *LAW, CRIME AND SEXUALITY* 88 (1995).

68. See Rubin, *supra* note 62.

agents which can be easily targeted. Over the past century sexuality has become a potent focus of such moral panics . . . Whilst the concept of moral panic does not explain why transfers of anxiety like these occur—this has to be a matter of historical analysis—it nevertheless offers a valuable framework for describing the course of events.<sup>69</sup>

The rise of right-wing politics, the decline in nuclear family forms, and the globalization of national economies are all examples of disruptions that have triggered social-purity movements and fears that the sexual order will crumble and lead to social chaos. At such moments of instability or transition, social anxieties focus on persons or groups of people who are identified as threats to accepted social norms and values.

### III. CONTAINING THE HOMOSEXUAL 'CONTAGION'

Professor Pérez-Sánchez focuses on the specific relationship between the new "queer law" and the containment of the homosexual "contagion." As she points out, the 1970 Spanish law against "dangerous social behavior" replicated in most ways an older law enacted in 1954, which dealt with "thugs and vagrants," and permitted incarcerating the deviant subject.<sup>70</sup> Professor Pérez-Sánchez states that an important addition in the new law was the inclusion of provisions also directed towards "rehabilitating" and "curing" the homosexual subject.<sup>71</sup> She discusses the various provisions of the law that related to homosexuals. It contained security and incarceration measures as well as rehabilitative measures for dealing with the homosexual. The security measures included confinement for four months to three years in a reeducation institution and a provision prohibiting homosexuals from residing in certain designated areas.<sup>72</sup> In addition they were subjected to State surveillance.<sup>73</sup> It also established an entire institutional

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69. JEFFREY WEEKS, *AGAINST NATURE* 118 (1991).

70. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 964, 33 U. MICH. J.L. REFORM at 380.

71. *Id.* at 5 MICH. J. RACE & L. at 970, 33 U. MICH. J.L. REFORM at 386.

72. *See id.* at 5 MICH. J. RACE & L. at 959, 33 U. MICH. J.L. REFORM at 375.

73. *See id.*

apparatus directed at the social reform and rehabilitation of the dangerous subject.<sup>74</sup>

Analyzing the Spanish legislation, which mandated that homosexuals "be confined to special institutions and, at all costs, with absolute separation from the rest,"<sup>75</sup> Professor Pérez-Sánchez observes that homosexuals were treated "[a]s if infected with a contagious disease . . . . perceived as carrying a particularly infectious brand of dangerousness."<sup>76</sup> She also quotes the 1970 law that provided for "rehabilitation of the dangerous subject through the most purified technique"<sup>77</sup> and notes its "blood-chilling connotations."<sup>78</sup> We believe this ensemble of notions of disease, infection, contagiousness, danger, and purification furnishes an opening to locate sexual repression and racism at the very heart of modernity in general and nation-building in particular.

Modernity posits as universal ideas reason, autonomy, equality, citizenship, representation, and the rule of law.<sup>79</sup> Colonialism and the age of empire, coterminous with modernity, however, brought into sharp relief the exclusions built into these supposedly universal concepts. While Europe was developing ideas of political freedom, particularly in France, Britain, and Holland, it simultaneously pursued and held vast empires where such freedoms were either absent or severely attenuated for the majority of native inhabitants.<sup>80</sup> Liberalism, and the rights and freedoms that it nurtured, co-existed with the Empire.<sup>81</sup> There were at least two ways in which to reconcile the freedoms associated with liberalism with notions of the Empire. This reconciliation included linking the capacity to reason with adherence to some notion of a universal natural law, applicable to all.<sup>82</sup> These universally applicable

74. See *id.* at 5 MICH. J. RACE & L. at 966, 33 U. MICH. J.L. REFORM at 382.

75. *Id.* at 5 MICH. J. RACE & L. at 964 n.85, 33 U. MICH. J.L. REFORM at 380 n.85.

76. *Id.* at 5 MICH. J. RACE & L. at 965, 33 U. MICH. J.L. REFORM at 381.

77. *Id.* at 5 MICH. J. RACE & L. at 966, 33 U. MICH. J.L. REFORM at 382.

78. *Id.*

79. See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (1990).

80. See generally UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999).

81. See generally *id.*

82. Francisco De Vitoria, a Sixteenth Century Spanish jurist, used this postulation of reason and the existence of a universal natural law to argue that the Indian was entitled to the same rights as other men. Any interference with the exercise of such rights, whether by the Spanish or the Indian, could justify retaliation. Moreover, as Indians were endowed with reason, they were also capable of changing their peculiar practices and adhering to universal norms. If they refused to change, this could also justify sanctions and intervention. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

norms were premised on European practices, to which the colonial subjects had to conform if they were to avoid sanctions and achieve full membership.

A second way in which to reconcile colonial domination with ideals of freedom and equality was through the discourse of difference, whereby the eligibility and capacity for freedom and progress were deemed biologically determined, and colonial subjugation was legitimized as the natural subordination of lesser races to higher ones.<sup>83</sup> The purportedly universal rights of man could be denied to those not considered to be men or human. Liberal discourses of rights, inclusion, and equality could be reconciled with colonial policies of exclusion and discrimination only by presuming differences between different types of individuals. To lay a claim to modernity a discourse must include capacities it identifies with human nature—inherent freedom, equality and rationality. This anthropological premise anchors the concept of consent, which in turn is the foundation of institutions of contract, rule of law, and representation.<sup>84</sup> Those designated as being unable to exercise reason are deemed incapable of consent, and thus can be excluded from political constituency and governed without consent. The capacity to reason, far from being universal, was posited to be a matter of education and “breeding,” whereby one is initiated into a time, place, and social norm, with the White, male, heterosexual, propertied adult furnishing the standard.<sup>85</sup> Simultaneously, the emphasis on difference, by constructing the Other as unfathomable, and inscrutable, as distant and removed, was partly achieved by demonstrating that the “other” was civilizationally backward or infantile.<sup>86</sup> Colonial subjugation was one way in which to rectify the deficiencies of the past—what has frequently been described as the civilizing mission of empire, in societies that purportedly were stagnant and mired in the chokehold of custom. Colonialism was posited as “an engine that tows societies stalled in their past into contemporary time and history.”<sup>87</sup> Achievement of

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83. See Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 *MIAMI L. REV.* 1219 (1999).

84. See JOHN GRAY, *LIBERALISM* (2nd ed. 1995).

85. See, e.g., JOHN LOCKE, *THOUGHTS CONCERNING EDUCATION* (1880); MEHTA, *supra* note 80; Tayyab Mahmud, *Race, Reason & Representation*, 33 *U.C. DAVIS L. REV.* 1581 (2000).

86. For nuanced expositions of a foundational project of modernity, namely the construction of non-Europeans as the “others” of Europe, and how this construction anchors the identity of modern Europe, see PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1993); JOHANNES FABIAN, *TIME AND ITS OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECTS* (1983); ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (1990).

87. MEHTA, *supra* note 80, at 82.

this version of civilization was regarded as a necessary precondition for progress, and the stage of civilization was the marker to determine whether progressive possibilities were in reach of a given community at any point of time.

The universal claims of liberalism were able to justify political exclusions, and this logic continues to operate in the post-colonial moment. It serves as a basis for distinguishing Others, whether they be women, gays and lesbians, or ethnic and religious minorities. When confronted with difference, liberalism spawns strategies of exclusion based on class, gender, sexuality, ethnicity, religion, and race.

Universality is always accompanied by, and indeed rests on, what Denise da Silva evocatively terms "the other side of universality."<sup>88</sup> This "moral and legal *no man's land*, where universality finds its physical limit,"<sup>89</sup> is built upon the foundation of difference. The Enlightenment project, which claims universality, could relate to those excluded from the project by positing them as qualitatively different and not quite human. The very identity of modern Europe was then constituted by differentiating it from this not-quite-human Other. It is this identity rooted in a posited essential difference, particularly with the figure of the dark-skinned savage, that furnished the grounds to constitute the White, civilized, disciplined European; in other words, the universal subject. In this sense, then, we can say with Peter Fitzpatrick that race produces universality.<sup>90</sup>

When the Spanish law considers homosexuals as diseased, contagious, dangerous, and warranting purification, it situates them in this dark side of universality. By this gesture the Spanish law *raced* the homosexual. By *racing* we mean the technology of power whereby domination is exercised and legitimated on grounds of the professed biological, natural, and immutable deficiencies of the subordinated. Conventional understanding posits race as a pre-conceptual, pre-political signifier. This understanding ignores the fact that race as we know it today is a modern category, which shares in the distinctive features of modern power: that as a strategy of power/knowledge, race produces modern subjects available for appropriation into modern narratives of being. As Da Silva has

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88. Denise Ferreira da Silva, *Interrogating the Socio-Logos of Justice: Considerations of Race Beyond the Logic of Exclusion*, 1 (paper presented at 2000 Summer Institute of the Law and Society Association) (manuscript on file with authors).

89. *Id.* at 2.

90. See Peter Fitzpatrick, *Racism and the Innocence of Law*, in *CRITICAL LEGAL STUDIES* 119 (Peter Fitzpatrick & Alan Hunt eds., 1990).

demonstrated, by furnishing the connection between history and science, the temporal and spatial, nation and the modern subject, race emerges as a global category to define the territory of modernity and thus to configure the modern global space.<sup>91</sup> Modern power and knowledge constituted race as a category that connects body, place of origin, and consciousness. We designate *racing* as the modern power and knowledge maneuver to connect the body with consciousness in order to create a subject available for subjection and marginalizing. It is not essential that *racing* anchor the connection between the body and the mind in the color of the skin. Any production of a subjected being that rests on any attribute of the body, then, can be seen as *racing*.

To appreciate the concept of *racing*, it may be helpful to refer to Foucault's concept of "bio-power" as a link between microphysics and macrophysics of power.<sup>92</sup> Bio-power, for Foucault, designates forms of power exercised over persons specifically to the extent that they are thought of as living beings: a politics concerned with subjects as members of a population, in which issues of individual sexual and reproductive conduct interconnect with issues of national policy. This is in line with Foucault's position that modernity renders life a discrete object of perception and regulation, both protected and eliminated by operations of power.<sup>93</sup> Examination and designation of the body is indispensable for its regulation by and subjection to power. It is to bring into sharper relief this interdependency between designation and subjection, that Foucault, instead of speaking about the law, speaks of a "scientific-legal complex" or of a "epistemologoco-juridical formation."<sup>94</sup> In a similar vein Giorgio Agamben holds that "the production of a biopolitical body is the original activity of sovereign power."<sup>95</sup>

*Racing* shares with bio-politics the feature of making the body available as the site of inscription of modern power. *Racing*, however, is a maneuver whereby as the body is made available to power it is already placed outside the zone of normalcy on grounds of some posited biological feature. The *raced* body comes to have a particular location in the population: a part that is yet apart.

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91. See Denise Ferreira da Silva, *Race & Nation in the Mapping of the Modern Global Space: A Critique of Sociology of Race Relations* (1995) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with authors).

92. MICHEL FOUCAULT, *HISTORY OF SEXUALITY* 1 (1981).

93. See *id.* at 143.

94. Michel Foucault, *Governmentality*, 6 I & C 5, 23 (1979).

95. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 6 (Daniel Heller-Roazen trans., 1998).

*Racing*, then, is a power and knowledge technology of the insertion of a body into the population in a subordinate position with the subordination attributed to essential and pre-conceptual deficiencies.

The Spanish anti-homosexual legal regime, with its attendant material and discursive structures, teaches us that if we want to see racism, we should look for *racing*, not race. Those engaged in the critical project of anti-essentialism and anti-subordination would do well to remember this.

Modernity has also seen the consolidation of History—the unilinear, progressive Eurocentric, teleological history—as the dominant mode of experiencing time and being.<sup>96</sup> In History, time overcomes space—a process whereby the distant Other is supposed to, in time, become like oneself; Europe's present becomes the future for all Others. Embodying the agenda of modernity, History constitutes a closure that destroys or domesticates the Other. History, as a mode of being, becomes the condition that makes modernity possible, with the nation-state posited as the subject of History that will realize modernity.

The very birth of nationalism was “coeval with the birth of universal history.”<sup>97</sup> But the nation, an anomaly in the age of universality, is Janus-faced: it claims to be universal, unbound, and uncontained, but in order to exist and be stable, that same nation must situate itself in particular spaces. The ground of the nation is homogeneity of population within a bounded territory. It is not surprising, then, that the process of nation-building is a process of exclusion; coherence is sought in a nation through the exclusion of what is “Other” to it. In the final analysis, production of the Other is *raced*: purportedly biological, immutable differences, anchored in blood, are posited as the natural markers of lines of exclusion.<sup>98</sup> Membership in the nation—citizenship—entitles one to representation and protections of the law. A quick route to denial of representation and protection, then, is denial or revocation of citizenship—excision from the body of the nation. The Spanish law constituted homosexuals as diseased and dangerous, warranting

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96. See generally ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (1990).

97. PARTHA CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE?* 2 (1986).

98. See generally ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* (1991); PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992); Peter Fitzpatrick, ‘We Know What it is When You Do Not Ask Us’: *Nationalism as Racism*, in *NATIONALISM, RACISM AND THE RULE OF LAW* (Peter Fitzpatrick ed., 1995).

purification. Through this construction, it rehearsed the classical nation-building gesture. Spain constituted the Other in a discourse of blood and body, facilitating exclusion from the politically franchised body of the nation. The modern Spanish nation was inaugurated by the expulsion of the Moors and the Jews in 1492; the *raced* homosexual becomes the Moor or the Jew of Franco's Spain. Again, it is *racing*, not race, that constitutes racism.

It is intriguing to note that there is no direct reference to lesbianism in the legal and cultural complex examined by Professor Pérez-Sánchez, although she does state that lesbians were assumed to be included in the 1970 law.<sup>99</sup> The absence of any reference to lesbianism, according to Professor Pérez-Sánchez was due to the fact that in "a highly *machista* society, where only men and heterosexuality are valorized and where women are trained to be passive, compliant, subservient mothers, women's independent sexuality was difficult to conceptualize."<sup>100</sup> This position warrants further exploration. Purportedly, in a "highly *machista*," heterosexual context, the feminized, submissive, gay man would also be difficult to conceptualize. Yet he was precisely the one targeted by the state as a security risk. In fact, it is quite likely that there were also laws that targeted prostitution, which would provide evidence that in fact the state and legislators were aware of and fully comprehended the existence of female sexual autonomy. Could the absence of lesbianism have more to do with the absence of women from the public and political arena, whether as resisters or even as perpetrators?

Professor Pérez-Sánchez's comments also raise a second issue that is perhaps more relevant to the contemporary moment. If lesbianism or female sexual autonomy was incomprehensible to the legislators, and presumably to both gay and straight men, it leads us to question political strategies that suture gay and lesbian sexuality together. The comparison between gay and straight men along the spectrum of "*machista*" culture has little relevance to either the straight woman or lesbian woman. There are also a whole range of sexual practices that are illicit and stigmatize women that may be permissible for men, or at least, not invite stigma, depending, of course, on the class and race of the male. These include extramarital sex, oral and anal sex with women, sex before marriage, sex outside of marriage, sex as a divorced or widowed man, and sex for money. The legal, cultural, and moral

99. See Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 969–70, 33 U. MICH. J.L. REFORM at 385–86.

100. *Id.* at 5 MICH. J. RACE & L. at 969, 33 U. MICH. J.L. REFORM at 385.



stigma against women who participate in these practices is far heavier than that placed on men. Professor Pérez-Sánchez's article in many ways illustrates what happens to lesbian sexuality when it is considered in tandem with gay sexuality—it remains largely unaddressed and invisible. The broader political battles continue to operate predominantly along the gay and straight male dichotomy, which leaves female sexuality unexplored and uninterrogated.

#### IV. LIBERATION, POPULAR CULTURE AND THE SUBVERSIVE SEXUAL SUBJECT

In the final section of her article, Professor Pérez-Sánchez examines the flurry of writing and activism on the subject of homosexuality that was triggered by the 1970 law, which continued until its derogation in 1978.<sup>101</sup> She then discusses the cultural and sexual changes that took place with the stabilization of democracy in the 1980's. She looks specifically at how sexual identity came to be foregrounded in popular culture. Professor Pérez-Sánchez focuses on the short story of Eduardo Mendicutti entitled *Una mala noche la tiene cualquiera* [Anyone Can Have a Bad Night].<sup>102</sup> The story is told from the perspective of *la Madelon*, the main protagonist, a hormone taking transgender. *La Madelon* reflects on what might have happened had Antonio Tejero's failed coup attempt in February 1983 been successful, and reversed the delicate process of democracy that had begun after the death of Franco in 1975. The story is a fictionalized account of the consequences a queer could have encountered had democracy failed. In highlighting the identity of a transgendered person and making it a critical part of the narrative about the future of Spain's democracy, the author brings marginalized members of society onto the center stage of modern Spanish history. Professor Pérez-Sánchez reads the novel as one in which the "queer" is a "responsible, democracy-loving citizen," whose interest in democracy does not reside in the sexual license and liberty it will accord her.<sup>103</sup> *La Madelon's* interest is aligned with her commitment to the political causes of women, sexual minorities, and the working class, and it is informed by the experiences of persecution she suffered as a working-class, Andalu-

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101. See *id.* at 5 MICH. J. RACE & L. at 971, 33 U. MICH. J.L. REFORM at 387.

102. See *id.*

103. *Id.* at 5 MICH. J. RACE & L. at 974, 33 U. MICH. J.L. REFORM at 390.

sian gay man under the fascist regime. She expresses her fears on the night the coup takes place—the loss of liberty and sexual identity she would experience and the possibility that she would have to return to a life incognito. The story represents an overpowering fear and a powerful denunciation by Mendicutti of sexual oppression, a vindication of gender and sexual freedom, and a validation of the “truly democratic respect of differences by counterpointing the gains of democracy with the potential losses of queers that a return to a Francoist-style dictatorship would bring.”<sup>104</sup>

The uniqueness of the novel lies in the fact that the narrator is a sexual other as well as the fact that through this protagonist’s hidden history, the netherworld of gay life is brought to the surface through the telling of this story.<sup>105</sup> The novel is representative of a shift that took place in the cultural expression of the 1980’s that rejected the meta-narratives of nation and democracy that were promoted by the leftist resistance to Franco.<sup>106</sup> Instead, there was a de-centering of the main narrative and an embracing of post-modernism in the cultural effusion that subsequently developed, mostly through the work of young, underground marginal minorities who were not contracted into any kind of intellectual compromise prior to the death of Franco. This movement is symbolized in the work of the celebrated filmmaker Pedro Almodovar.<sup>107</sup> They constituted a movement called *la movida madrileña* [the Madrilenian movement], which represented a collapse of the elitist distinction between high culture and low culture.<sup>108</sup> The disparaging response of those who constituted the core of the leftist resistance to Franco’s regime to *la movida* reflects an inability to deal with popular culture and a frank discussion of sexuality and sexual identity as a serious political topic.<sup>109</sup> But for Professor Pérez-Sánchez, this cultural explosion is a method for attributing gays and lesbians with agency, given that they are forgotten minorities. This attainment of agency is partly accomplished through retrieving literature to help assess the cultural and psychological legacy of the struggles over insubordinate sexual practices. What Professor

104. *Id.* at 5 MICH. J. RACE & L. at 976, 33 U. MICH. J.L. REFORM at 392.

105. *See id.* at 5 MICH. J. RACE & L. at 972–73, 33 U. MICH. J.L. REFORM at 388–89.

106. *See* Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & L. at 978, 33 U. MICH. J.L. REFORM at 394 (summarizing the position of ‘underground, marginal minorities’ as discussed by Teresa Vilaros in *Los monos del desencanto español* [The Withdrawal Syndrome of Spanish Disenchantment]).

107. *See id.*

108. *See id.*

109. *See id.* at 5 MICH. J. RACE & L. at 978–79, 33 U. MICH. J.L. REFORM at 394–95.

Pérez-Sánchez's article brings out is that attempts at controlling sexual conduct cannot be viewed exclusively in terms of the repressive impact. Beyond repression, resistance in the Foucauldian sense must be examined, such as was demonstrated by the surge in gay-rights activism that resulted after the enactment of the law.

This last section of Professor Pérez-Sánchez's article is the most powerful in its analysis of the role of popular culture as an important political and subversive space.<sup>110</sup> The analysis of the relationship of popular culture to the past as represented by Franco's regime, and the possibilities open to marginalized groups in the newly emerging democracy, is the most engaging part of the article. The role of popular culture has been a critical space of subversion and expression, particularly in repressive environments. The cross-dressed woman in Chinese and Japanese stage traditions, where the transvestite figure creates a crisis in gender categorization,<sup>111</sup> or the daring song and dance sequences in Hindi commercial cinema that challenges both cultural and sexual normativity in an increasingly reactionary political and cultural environment, keep the possibilities of a subversive politics and liberation of the sexual subject alive. Most of the references to popular culture and the cultural explosion in the article, however, are to works that emerged after democracy had been established. There is little that is said about the cultural resistance that took place during the period between 1970–78. What was going on during this period of the Franco repression? What was the "flurry of writing" that took place then?

The discussion about the literary and cultural explosion that took place in the 1980's represent not only the unleashing of subaltern sexual identities into the public arena, but also the importance of parody and performance as a form of expression for sexual sub-groups and other marginalized subjects. Popular culture provides an alternative site of resistance and is a vital force, especially in non-democratic repressive regimes, where the spaces of resistance in the legal domain become stilted and non-dynamic.

Even in democratic regimes, popular culture provides an important arena for resistance to neo-conservative and nationalist forces. In the United States, for example, films such as *Dogma* (which poses a critical challenge to religion made by fallen angels who are

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110. See, e.g., HENRY A. GIROUX, *DISTURBING PLEASURES: LEARNING POPULAR CULTURE* (1994).

111. See Marjorie Garber, *The Occidental Tourist: M. Butterfly and the Scandal of Transvestism*, in *NATIONALISMS AND SEXUALITIES* 121–46 (Andrew Parker et al., eds., 1992).

aiming to find a way back into heaven) challenge the over-inflated influence of the Christian Right on cultural and political life. At a time when right-wing forces are bent on opposing the extension of hate crimes legislation to cover sexual orientation, the celluloid representation of Teena Brandon, the transgendered teenager from Nebraska, in *Boys Don't Cry*, becomes a vital expression of the violence and brutality that sexual minorities experience as a result of unfettered hatred.

In the 1991 film *Paris is Burning*, Jeenie Livingston documents the challenge posed by miming at transvestite balls in Harlem. The film looks at how the young gay men of Harlem, who created "voguing," turned these stylized dance competitions into dazzling expressions of personal pride. Through their constant re-enactment of high fashion, sexual normativity, and status, they challenge the stability of gender categories and dominant culture.<sup>112</sup>

By way of comparison, Indian commercial cinema has provided popular and subversive spaces within post-colonial South Asia, South-East Asia, and the Middle East, as well as in the Asian diaspora. The sexualised song and dance sequences have been of particular relevance to women in a cultural context where sexual expression is highly curtailed and restricted. Even the legal challenges to these sequences involve a contest between the hegemonic and counter-hegemonic representations of sexuality, what constitutes culture, and the limits of censorship and free speech.<sup>113</sup> The new generation of film heroines are now "vamping" it out on screen, occupying the dominant narrative, prompting the possibility of a re-signification and re-reading of the script by the spectator.<sup>114</sup> The recuperation of the agency of sexually stigmatized communities through popular culture places the activity beyond the charge that such cultural products are simply hedonistic. Such works challenge hegemonic definitions of the "political" and assist in de-centering the authority of law.

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112. For a more detailed discussion of this film, see Judith Butler, *Gender is Burning: Questions of Appropriation and Subversion*, in *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 121–42 (1993).

113. See Ratna Kapur, *Post-colonial Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India*, 9 COLUM. J. GENDER & L. (forthcoming 2000) (on file with authors).

114. See Shohini Ghosh, *The Troubled Existence of Sex and Sexuality: Feminists Engage with Censorship*, in *IMAGE JOURNEYS: AUDIO-VISUAL MEDIA & CULTURAL CHANGE IN INDIA* 233–260 (Christiane Brosius & Melissa Butcher eds., 1999); Shohini Ghosh, *Deviant Pleasures and Disorderly Women: The Representation of the Female Outlaw in Bandit Queen and Anjaam*, in *FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMEN AND LAW IN INDIA* 150–83 (Ratna Kapur ed., 1996).

Professor Pérez-Sánchez's discussion also raises important questions regarding difference and the ultimate goal of *la movida*. For Professor Pérez-Sánchez the role of the transvestite in Mendu-cutti's novel is symbolic of the right to be different and the goal of Spanish democracy to accept and live with difference so that the traumas of the past are not repeated. But what does the right to be different entail in a democracy? How is it to be accommodated within the egalitarian objectives of a democracy? And by recognizing the right to be different, do we not end up re-creating the difference and reinforcing the prejudices, stigmas, and other social pejoratives that are associated with that same difference?

A broader question about difference is whether the objective of a subordinated sub-group is merely one of resistance and then assimilation once the process of democracy is achieved. What is the statement, "Your humble servant is thus: an independent, liberated, modern woman. And more of a democrat than anybody else," intended to convey?<sup>115</sup> What is the ultimate aspiration of the "queer nation"? Is it to assimilate or to disrupt? Or is there a third possibility, to disrupt through the process of assimilation—that is, by occupying the norm, may the queer destabilize and reconfigure the norm?

In the United States, queers have lobbied for the right to marry,<sup>116</sup> and as well as for parental rights, in order to be treated the same as heterosexual couples. Is engagement with such issues truly liberating for the sexual subaltern subject? And does such engagement modify these structures and institutions in a way that

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115. Pérez-Sánchez, *supra* note 1, at 5 MICH. J. RACE & LAW at 975, 33 U. MICH. J.L. REFORM at 391.

116. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). The case emerged from an appeal by three same-sex couples to the Supreme Court of Vermont after a lower court dismissed their case in 1997, holding that the discrimination in the marriage law against same-sex marriage was not "invalid." The lower court held that there was one surviving rationale for denying lesbian and gay couples the freedom-to-marry—they could not procreate and marriage ensures procreation. This holding was rejected by the Vermont Supreme Court. There were two considerations to be made by the Court: Whether the existing marriage laws were only applicable to heterosexual couples? The Court held they were. And secondly, whether such exclusion rendered the marriage laws unconstitutional? The Court did not go so far as to hold that the marriage laws were unconstitutional. Instead, it acknowledged that the plaintiffs were entitled to all the benefits and protections afforded by Vermont law to married opposite-sex couples. The Court directed the legislature to decide how to achieve that equality in a "reasonable" period of time. The Court did not address the question whether it would be constitutional for the legislature to opt for a "separate but equal" approach, by withholding marriage licenses to same-sex couples while granting the rights, benefits, and responsibilities that accompany such licenses.

does not reinforce dominant social and sexual norms, but rather transforms those institutions?

## V. SUBALTERN RESISTANCE

Professor Pérez-Sánchez captures well the resistance by sexual minorities to anti-queer legal and ideological strategies. Her analysis of the unified Spanish penal code of 1822, and the subsequent changes prompted by shifts in the political and cultural mores is very useful. It demonstrates that the law itself, even when incorporated into codes, is always a contested site. Law always lies along the fault lines between operations of power and practices of resistance. Exploring this dynamic nature of the law and the centrality of subalterns' resistance in this dynamic must be a primary agenda of critical legal scholarship.

A critical question is to explore the sources of subaltern resistance. It cannot emanate only from identity politics, which can reify the subject location of the subaltern. An example of this is the manner in which words intended to insult gay men and women, such as "fruit", "dyke," and "fag," have been appropriated by the gay community as words denoting pride, self-awareness, and self-acceptance. Identity is generally understood as self-perception and expression based on structures of affinity and processes of affiliation. In other words, when a person identifies herself as homosexual or heterosexual, Black or Brown, progressive or reactionary, her assumption and expression of any identity involves agency and choice on her part.

The terrain where agency is realized is not limitless, however. Technologies of power define the territories where individuals may assume their chosen identity. The apparent free choice of an identity is thus always already saturated with related contextual conventions. It may be useful, therefore, to locate identity formation along the fault lines of effects of power and modes of resistance, with identity always partaking of both. The project of progressive transformative politics demands that when engaged in strategic assertion of any identity, we accentuate and develop those facets of the identity that augment resistance and contain and impede the facets that are in symphony with technologies of power. Only fidelity to this guideline ensures that assumption and assertions of subaltern sexual identities remain in step with the struggle for peace, justice, and dignity.

We continue the turn toward complicating the subject by challenging liberalism's notion of a free and autonomous agent. As Professor Pérez-Sánchez's recounting of resistance demonstrates, we must not reduce the subject to be a mere property and effect of discourse or to equate consciousness with hegemony. We must not posit hegemony as an order that cannot be escaped. Yet we cannot bypass the subject of hegemony, as such avoidance precludes a realistic analysis of freedom. Such a conceptual straight-jacket leads to the impasse of, "[C]an the subaltern speak?"<sup>117</sup> How may we articulate concepts of freedom and subjectivity in a way that does not take the form of a recovery of the authentic self?<sup>118</sup>

Rajeswari Sunder Rajan has attempted to break through this impasse in the context of debates about the sati and the free will/coercion dichotomy.<sup>119</sup> Some feminists have argued that sati is a coercive practice and that women who commit sati are victims, while those who support sati contend that it is a voluntary act and that the woman who undergoes it feels no pain.<sup>120</sup> Sunder Rajan, drawing on the work of Elaine Scarry and her focus on the "radical subjectivity of pain," argues that the focus on the pain of the dying woman reminds us of the woman's subjectivity, as well as the fact that the pain impels the suffering subject towards freedom.<sup>121</sup> Her reformulation avoids the complete erasure of the woman's subjectivity through her experience of pain, while at the same time

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117. GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 197 (1988).

118. Michel Foucault engaged these questions in some of his later work, where he addressed the intimate relationship between modern technologies of power and the belief in authenticity. See *Truth, Power, Self: An Interview with Michel Foucault*, in TECHNOLOGIES OF THE SELF 10 (Luther H. Martin et al., eds., 1988).

119. Keeping in view the need to assess the practice of sati in context, we use the Oxford English Dictionary's definition of sati provided by Sunder Rajan. This states that sati is both a practice where "the Hindu widow . . . immolates herself on the funeral pile with her husband's body" and "the immolation of a Hindu widow in this way." RAJESWARI SUNDER RAJAN, REAL OR IMAGINED WOMEN: POSTCOLONIALISM, GENDER AND CULTURE 35 (1995). Sati is thus referred to both in relation to the burning of the woman as well as the woman who burns, that is, the widow is both the subject as well as the object of the sati. See *id.* For an important discussion about the historic problematic representation of the practice of sati, particularly in Western feminist texts, see Uma Narayan, *Restoring History and Politics to "Third-World Traditions": Contrasting the Colonialist Stance and Contemporary Contestations of Sati*, in DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD-FEMINISM, 41-80 (1997).

120. See Madhu Kishwar & Vanita, *The Burning of Roop Kanwar*, 42 MANUSHI 25 (Sept.-Dec. 1987); Sujata Patel & Kriswhna Kumar, *Defenders of Sati*, 23 ECONOMIC AND POLITICAL WEEKLY 129 (Jan. 1988); Julie Stephens, *Feminist Fictions: A Critique of Feminist Studies of Third World Women, with Special Reference to India* (presented at the Second Subaltern Studies Conference in Calcutta, Jan. 1986) (on file with authors).

121. Stephens, *supra* note 120, at 2.

recognizes that the experience of pain actuates the woman's desire to escape from it, to be free from it.<sup>122</sup>

Lata Mani also concedes that there is no such thing as voluntary sati but tries to avoid the traps of the position that leads to the complete erasure of the woman as a speaking subject.<sup>123</sup> Rather than ask the question, "can the subaltern speak?," Mani rephrases the query by posing a series of questions, such as, Which groups constitute the subaltern in any text? What is their relationship to each other? How can they be heard to be speaking or not speaking in a given set of materials? With what effect?<sup>124</sup> Altering the questions in this way enables us to retain the insight regarding the positioning of the subject, which in the context of sati is the woman in colonial discourse, and, in the context of Professor Pérez-Sánchez's essay, is the homosexual who exists within the discursive space of Franco's fascism. Such a strategy refuses to concede to colonial discourse something that it did not achieve—the erasure of women—or to the Franco regime the annihilation of the homosexual through the law against dangerous social behavior.

In our search for the sources of subaltern resistance, we may find useful Gramsci's model of a fragmented composite subject that is constituted as an "inventory of traces" of multiple and fragmented hegemonies.<sup>125</sup> A similar becoming point of departure is to imagine a desiring subject who avoids becoming fully determined by the symbolic order because there is always a surplus of the subject's "real" substance over any symbolization.<sup>126</sup> The focus of these models is on the ongoing tension between specific structures of domination and desires that escape hegemonic formations and bear the seeds of change.<sup>127</sup>

It is along the fault lines between domination and desire that "the individual repeatedly passes from language to language."<sup>128</sup> Within this framework, one may analogize a sexual subaltern subject to an agency that operates on multiple fronts, as the indi-

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122. See RAJAN, *supra* note 119, at 35.

123. See Lata Mani, *Cultural Theory, Colonial Texts: Reading Eyewitness Accounts of Widow Burning*, in CULTURAL STUDIES 403 (Lawrence Graussberg et al., eds., 1992).

124. See LATA MANI, CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA 190 (1998).

125. GRAMSCI, *supra* note 17, at 324.

126. See SLAVOJ ŽIZEK, THE SUBLIME OBJECT OF IDEOLOGY 3 (1989).

127. See generally GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA (Robert Hurley et al. trans., 1983).

128. GILLES DELEUZE & FELIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 94 (Brian Massumi trans., 1987).



vidual is him or herself a site of conflicting desires and subjective modalities.<sup>129</sup> Beneath the dominant technologies of modernity there may well survive a “‘polytheism of scattered practices’ . . . dominated but not erased by the triumphal success of one of their number.”<sup>130</sup> It is in this context that we should turn to a “jurisprudence of reconstruction,”<sup>131</sup> and counter-hegemonic “stories from the bottom.”<sup>132</sup> Nothing less than to stage an “insurrection of subjugated knowledges,”<sup>133</sup> will suffice as a strategy to “bring hegemonic historiography to crisis.”<sup>134</sup> Introducing law to the life beneath things as presented by the social order provides the best countervailing force to hegemony.

Edward Said, who alerted us to the constitutive and dominating power of Orientalism, also reminds us that “in human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is obviously what makes change possible.”<sup>135</sup> Even as dictatorships cross-dress as democracies, critical scholars must aim to identify, explore and expand spaces for resistance in the midst of the teeth-gritting harmony that exists between hegemony and coercion.

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129. See Kapur, *supra* note 113.

130. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 48 (Steven Rendall trans., 1984).

131. Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994).

132. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

133. THOMAS KEENAN, *FABLES OF RESPONSIBILITY: ABERRATIONS AND PREDICAMENTS IN ETHICS AND POLITICS* 140 (1997) (quoting Michel Foucault).

134. SPIVAK, *IN OTHER WORLDS*, *supra* note 117, at 198.

135. EDWARD SAID, *THE WORLD, THE TEXT AND THE CRITIC* 246-47 (1983).