

Seattle University School of Law Digital Commons

Faculty Scholarship

2000

Foreword: Re-Orienting Law and Sexuality

Tayyab Mahmud

Ratna Kapur

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Tayyab Mahmud and Ratna Kapur, Foreword: Re-Orienting Law and Sexuality, 48 *CLEV. ST. L. REV.* 1 (2000).
<http://digitalcommons.law.seattleu.edu/faculty/585>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.

FOREWORD: RE-ORIENTING LAW AND SEXUALITY

RATNA KAPUR¹
TAYYAB MAHMUD²

This symposium issue of the *Cleveland State Law Review* emerges from the Re-orienting Law and Sexuality Conference hosted by Cleveland-Marshall College of Law in October 1999. The symposium locates itself as a continuation of the discourse that surfaced in the American legal academy in 1979 with a symposium issue of the *Hastings Law Review*.³ It is a discourse that brings into sharp relief technologies of power and strategies of resistance that contend at all sites where law aims to regulate human sexuality. While the initiative of 1979 was further cultivated by other forums of knowledge production within the American legal academy,⁴ this symposium is unique in bringing together legal scholars, legal practitioners, social scientists, and activists to exchange views and experiences from their varied vantage points. Contributions to this issue represent the written part of this interdisciplinary dialogue.

This collection is brought out at a time when affirmations of sexual purity, 'family values' and religion, are sweeping through public discourse and entering the courts and the legislative arena. The battle over the labeling of certain desires, pleasures, sexed bodies, and sexual acts as either illicit or licit, is always contentious. But it has been particularly contentious in the context of alternative sexuality and the new familial structures that are being produced through these different sexual and partner arrangements, which have given rise to myriad legal questions at the domestic and international levels. Historically, the legal regulation of sexual minorities is seen as imbedded in the desire to protect the public interest and public morality. In the contemporary period, sex and sexuality remain hotly contested and

¹Director, Centre for Feminist Legal Research, New Delhi. Visiting Professor, New York University School of Law, Fall 2001.

²Professor of Law, Cleveland-Marshall College of Law, Cleveland State University.

³See *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

⁴See, e.g., *Symposium, Intersexions: The Legal and Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997); *Symposium, InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory*, 75 DENV. L. REV. 1129 (1998); *Symposium: The Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 1 (1995); *Symposium: Same-Sex Domestic Violence*, 8 TEMPLE POL. & CIV. RTS. L. REV. 1 (1999); *Symposium: Constituting Family, Constructing Change*, 7 TEMPLE POL. & CIV. RTS. L. REV. (1998); *Symposium: Queer Matters: Emerging Issues in Sexual Orientation*, 8 UCLA WOMEN'S L.J. 1 (1998); *Symposium: Intersections: Sexuality, Cultural Tradition, and the Law*, 8 YALE J. L. & HUMAN. 1 (1996). See also, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). At the 1998 annual meeting of the American Association of Law Schools, a program entitled "Race, Ethnicity and Sexual Orientation: Crossing New Intersections in Law and Scholarship," formed part of the meeting agenda. The first of its kind, this program was co-sponsored by the association's Section on Gay and Lesbian Legal Issues and the Section on Minority Groups.

politicized. Sexual minorities have become a favorite target for majoritarian surveillance and discipline sanctioned by law. It is the interface of law and sexuality that animates the escalating “cultural wars” around us.

The issue of the sexed subject and sexuality has always been a complex one for advocates and legal academics. The constitution of the sexed subject and sexuality, whether it has arisen in the context of women’s rights to bodily integrity or the sexual conduct and status of homosexuals, has remained a constant site of struggle. In modern history, this struggle issues from historical fractures of universality and liberalism, two foundational premises of modernity.⁵ Modernity posits reason, autonomy, equality, and self-determination as being universal. Liberalism insists on capacities it identifies with human nature – equality, freedom, and rationality; natural capacities that anchor the concept of consent, the foundation of contract, representation and rule of law. The Eurocentric historical career of modernity, however, saw exclusions built into these purportedly universal concepts. Divisions within and empires abroad could be legitimated and sustained only by supplementing universality with, to use Denise da Silva’s evocative construction, “the other side of universality.”⁶ This maneuver, one that situates some human beings in a “moral and legal no man’s land, where universality finds its physical limit,”⁷ is built upon the foundation of difference. And this difference is elucidated through various technologies of exclusions marked through the mind and body.⁸

⁵See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (1990) and ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY* (1991).

⁶Denise Frerreire da Silva, *Interrogating the Socio-Logos of Justice: Considerations of Race Beyond the Logis of Exclusion*, 1 (paper presented at 2000 Summer Institute of the Law and Society Association) (manuscript on file with authors).

⁷*Id.* at 2.

⁸For very productive analyses of strategies of exclusion cultivated by liberalism, see, Bhikhu Parekh, *Superior People: The Narrowness of Liberalism From Mill to Rawls*, *TIMES LITERARY SUPPLEMENT*, Feb. 25, 1994, at 11; C.B. MACPHERSON, *THE POLITICAL THEORY OF PASSIVE INDIVIDUALISM: HOBBS AND LOCKE* (1962); CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988); CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) and UDAY SING MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999). Foucault’s concept of “bio-power” is helpful to appreciate how bodies are the primary target and space of inscription of modern power. Locating it as the link between microphysics and macrophysics of modern power, Foucault conceptualizes bio-power as forms of power exercised over individuals specifically to the extent that they are living beings: a politics concerned with subjects as members of a population, in which 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. MICHEL FOUCAULT, *1 HISTORY OF SEXUALITY: AN INTRODUCTION* 1, 143 (1981). Examination and designation of the body is indispensable for its regulation by and subjection to modern power. It is to bring into sharper relief this interdependency between designation and subjection, that Foucault, instead of speaking about law, speaks of a “scientific-legal complex” or of a “epistemologoco-juridical formation.” Michel Foucault, *Governmentality*, 6 I & C 5, 23 (1979). In a similar vein, Giorgio Agamben holds that “the production of a biopolitical body is the original activity of sovereign power.” GIORGIO AGAMBEN, *HOMO SACER: POWER AND BARE LIFE* 6 (Daniel Heller-Roazen trans., 1998).

The sexed body and women's sexuality witnessed various permutations of exclusion, to which early feminist scholars drew attention. In the late 70's and early 80's, when sex was considered as separable from gender, natural and universal sexuality was argued to be a major cause of women's oppression.⁹ It was the site on which women were represented as passive, submissive and subordinate. Yet this understanding of exclusion and oppression has subsequently been contested by those who argue that sexuality is a much more complex arena of life. It is a site not only of danger but also of pleasure, and that sexual pleasure has also been a creative and disruptive force.¹⁰

These early debates on sexuality were polarized along the lines of sexuality as domination and sexuality as freedom and liberation. However, postmodern insights on power and sexuality have enabled us to challenge these binaries, moving beyond representing sex as purely subordinating or a space of unmodified sexual freedom and pleasure.¹¹ Such insights have enabled us to understand how the sexed body is itself constituted through the process of materialization where sexual norms are constantly under siege from the differently sexed bodies, which over time redraw the boundaries of exclusion and inclusion.¹² They challenge the linear and static understandings of sex and sexuality, as failing to address the resistive aspects of sexuality, and not recognizing that sex is materialized through certain regulatory practices.¹³ These practices, whether it is the heterosexual norm or other domains of power such as race and class, create differently sexed bodies. The more closely the sexed subject resembles the dominant norms, the more legitimacy and eligibility for

⁹See, e.g., Susan BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); Catherine MacKinnon, *Feminism, Marxism, Method and the State: And Agenda for Theory*, 7 *SIGNS: JOURNAL OF WOMEN, CULTURE AND SOCIETY* 515 (1982); and Catherine MacKinnon, *Feminism, Marxism and the State: Toward a Feminist Jurisprudence* 8 *SIGNS: JOURNAL OF WOMEN, CULTURE AND SOCIETY* 635 (1983).

¹⁰See, e.g., Carol Vance, *Pleasure and Danger: Toward a Feminist Politics of Sexuality*, in *PLEASURE AND DANGER* (Carol Vance ed., 1984); Katherine Franke, *Theorizing Yes: An essay on Feminism, Law, and Desire* 101 *COLUM. L. REV.* 181 (2001).

¹¹For a good introduction to postmodernism, see, MADAN SARUP, *AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM* (1988); MADAN SARUP, *IDENTITY, CULTURE AND THE POSTMODERN WORLD* (1996). For the utility of postmodernism for legal scholarship, see, PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1993); Anthony E. Cook, *Reflections on Postmodernism*, 26 *NEW ENG. L. REV.* 751 (1992); Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 *AM. U. L. REV.* 687 (1996); *POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT* (Costas Douzinas et al. eds., 1994); and *POSTMODERNISM AND SOCIAL INQUIRY* (David R. Dickens & Andrea Fontana eds., 1994).

¹²See generally, MICHEL FOUCAULT, 1 *HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley, trans. 1978); MICHEL FOUCAULT, *THE USE OF PLEASURE* (Robert Hurley trans., 1985). For engagement with postmodernism by sexual orientation scholars, see, Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 *VA. L. REV.* 1833 (1993); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994); and William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Towards a Gaylegal Agenda*, 102 *YALE L. J.* 333 (1992).

¹³JUDITH BUTLER, *BODIES THAT MATTER* 2 (1993).

inclusion she acquires. The greater the distance of the sexed subject from these norms, the more she is disavowed and excluded from discursive legitimacy and citizenship. Yet the very process of her exclusion also partly constitutes her.¹⁴

Drawing on the insights of postmodern and social constructionist theories, sex and sexuality must be understood within a matrix of power, knowledge and resistance.¹⁵ The subject is constituted along the fault lines between operations of power and maneuvers of resistance. While the modern power/knowledge complex constitutes a subject amenable to discipline, there remains a surplus of the subject's "real" beyond the symbolic.¹⁶ It is this surplus that marks the subject, and carries the potential for the emergence of an alternative sexual subject; a resistive subject who produces counter-knowledges that challenges dominant meanings and constructions of sexuality.¹⁷ In the ongoing tension between structures of domination and desire, the subject "repeatedly passes from language to language."¹⁸ These sustained border crossings evidence the fact that beneath the dominant technologies of modern power one finds a "polytheism of scattered practices' . . . dominated but not erased by the triumphal success of one of their number."¹⁹ Through engagements with the power of the law, alternative sexual subjects produce bodies that are attributed different meanings. And these different meanings shape the materiality and lived reality of the body. Thus, the homosexual may have been cast as a pathologized body through dominant medical and legal discourses, but through the process of resistance and the simultaneous production of knowledge, the shapes and contours of this body altered. It was no longer delinquent, diseased or deviant, but human; a body imbued with rights, rather than one that ought to be isolated, incarcerated, or eliminated. This process of mapping and codification of the lives and reality of resistive or differently sexed others, is continuous and constantly disrupts and re-fashions dominant sexual, familial, cultural and legal paradigms.

Through resistance, another space, marked for exclusion, is rendered visible and insistent on inclusion. Sex and sexuality is thus a site of complexity and contradiction. It is not exclusively defined and shaped by power, but is produced both through the exercise of power, in particular the process of exclusion, but also by resistance, in particular by insistent visibility. When the transgendered sex worker, for instance, defines herself as female, as a worker, and a solicitor of sex, she transgresses every boundary established for sexed subjects and produced through sexual normativity. She 'stalks the borders of the heterosexual imperative',

¹⁴*Id.* at 4.

¹⁵See generally, *SUPPOSING THE SUBJECT* (Joan Copjec ed., 1994); *GEOGRAPHIES OF RESISTANCE* (Steve Pile & Michael Keith eds., 1997).

¹⁶See SLAVOJ ZIZEK, *THE SUBLIME OBJECT OF IDEOLOGY* 3 (1989).

¹⁷See FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME ONE* (1978) (where he argues that legal regulation or prohibitions, confine and limit the expression of some sets of sexual practices or identities, but that in the process of articulating this prohibition, the law simultaneously provides a space of discursive resistance and resignification).

¹⁸GILLES DELEUZE & FELIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 94 (Brian Massumi trans., 1987).

¹⁹MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 48 (Steven Rendall trans., 1984).

challenges the definition of 'productive labor,' and renders visible the intersection of consent and compulsion occluded by liberalism's assumption about the location of labor in the "free market". By insisting on making visible her exclusion from sexual normativity, she exposes its translucency and thus also renders it vulnerable.

In the arena of law, the sexed body is constituted in myriad forms – as criminal, delinquent, procreative, but rarely as erotic or pleasurable. Law, born of violence and projected as force,²⁰ operates along trajectories of regulations, prohibitions, and penalties, designed to monitor, deter, and punish. In the context of sexuality, these prohibitions operate along the fault-lines of normative sexuality - marital, non-commercial, and heterosexual. Yet legal prohibitions, as expressions of power, are productive in contradictory ways. While they produce sites of regulation and discipline, they also produce resistive practices that move beyond the focus of disciplinary surveillance. As a result, legal prohibitions can, among other things, eroticize the very practices they seek to outlaw. By enumerating a set of sexual practices that are prohibited, or sexed subjects who are designated as deviant, delinquent or criminal, law brings such practices and subjects into the public domain and invests them with erotic potential, through the very acts of prohibition and punishment.

In *Re-orienting Law and Sexuality*, we revisit the sexed subject and sexuality from the perspective of the sexually marginalised subject – the sexual subaltern. The subaltern subject emerged from the post-colonial world through the writings of the South Asia Subaltern Studies group.²¹ Their project aimed at interrogating and destabilizing the hegemonic tenor of historiography, one that posits social change as a linear evolutionary process of transition, and sees dominating elites as the only agents of change. Subaltern Studies proposes that moments of change be pluralized and plotted as confrontations rather than transition, and that the dominated subalterns are the primary subjects and agents of social change. Location of agency of change in the subaltern requires an examination of domination and resistance from the perspective of the subaltern. Ranajit Guha, the pioneers of the paradigm, defines the word subaltern as "a name for the general attribute of subordination . . . whether this is expressed in terms of class, caste, age, gender and office or in any other way."²² Subaltern, thus, is a relational rather than an ontological identity. Subaltern Studies offers a conceptual approach for retrieving and registering the presence of the subaltern both historically and in contemporary societies. It is a posture of social inquiry that intervenes "along the dividing line that produces domination and subordination not only in the past but also in the present."²³

Subaltern Studies sees hegemonic history as part of modernity's power/knowledge complex, as having absorbed the concerns and objectives of policy, and

²⁰Jacques Derrida, *The Force of Law: The "Mythical Foundation of Authority,"* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 31 (Drucilla Cornell et al. eds., 1992).

²¹See *SELECTED SUBALTERN STUDIES* (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988); and *MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL* (Vinayak Chaturvedi ed., 2000).

²²Ranjit Guha, *Preface*, in *SELECTED SUBALTERN STUDIES* 35 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).

²³JOHN BEVERLEY, *SUBALTERNITY AND REPRESENTATION: ARGUMENTS IN CULTURAL THEORY* 7 (1999).

thus deeply implicated in the "general epistemic violence of imperialism."²⁴ It reads the official archive against the grain and focuses on "listening to the small voice of history."²⁵ It forces historians and social analysts to confront their own complicity in creating and reproducing relations of power and subordination as they act within the knowledge production enterprise. It suggests the primacy in social conflict of determinations of consciousness, contradiction, and political agency that are in a broad sense *cultural* rather than economic or political in the narrow sense of party politics. Subaltern Studies makes visible the fissured character of the national narrative itself, and posits identity as decentered, plural, contingent, provisional, and performative.

Eschewing the myth of value-free scholarship, Subaltern Studies aligns itself with subordinated groups and explores their needs, desires, strategies, and possibilities. It is, thus, not only a new form of knowledge production, but also heralds a way of intervening politically in that production on the side of the subaltern. It entails not only a new way of looking at or speaking about the subaltern, but also the possibility of building relationships of solidarity between ourselves and the people and practices we posit as our objects of study. Whereas the research agenda of Subaltern Studies was initially limited to the history of colonial India, later contributions transcend both regional and disciplinary boundaries.²⁶ We see Subaltern Studies as capable of furnishing the unifying theme for many fruitful critical approaches to the study of law and society percolating in the American legal academy. It helps us to incorporate insights offered by the "outsider jurisprudence,"²⁷ "jurisprudence of reconstruction,"²⁸ "anti-subordination legal theories,"²⁹ "asking the other question,"³⁰ and the counter-hegemonic "stories from the bottom."³¹ The subaltern perspective insists that nothing less than staging an

²⁴Gayatri Chakravorty Spivak, *Three Women's Texts and a Critique of Imperialism*, 12 CRITICAL INQUIRY 243, 251 (1985).

²⁵Ranjit Guha, *The Small Voice of History*, in SUBALTERN STUDIES 1-8 (1988).

²⁶See, e.g., Latin American Subaltern Studies Group, *Founding Statement*, 2:20 BOUNDARY 110 (1993); Frederick Cooper, *Conflict and Connection: Rethinking African History*, 99 AM. HISTORICAL REV. 1516 (1994); and Rosemary Sayigh, *Gendering the 'Nationalist Subject': Palestinian Camp Women's Life Stories*, in X SUBALTERN STUDIES 234 (Gautam Bhadra et al. eds., 1999).

²⁷Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 UNIV. OF MIAMI L. REV. 575 (1999); Francisco Valdes, *Poised at The Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LAT. L. REV. 1 (1997).

²⁸Angela Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

²⁹Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C-R.-C.L. L. REV. 395 (1993).

³⁰Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

³¹Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C-R.-C.L. L. REV. 323 (1987).

“insurrection of subjugated knowledges”³² will suffice as a productive strategy to “bring hegemonic historiography to crisis.”³³ This imperative is nowhere more urgent than in the study of law and sexuality.

The subaltern subject unsettles the dominant subject and the dominant culture and forms of knowledge that constitute this subject, through reiteration, mimicry, and negation, creating the possibility of recasting and even displacing both. The sexual subaltern constitutes the organizing category for this symposium issue. Through cross-gender, cross-cultural, and multi-disciplinary analyses, the contributors engage with a host of issues that become contentious because of the sexual location of the subject, that is, as a sexual subaltern. Through their engagements with legal issues such as family, same-sex adoption, lesbian custody, sex work/prostitution, and anti-subordination strategies of sexual minorities, these articles examine how the law targets alternative sexuality, and how the law may be engaged to advance the project of anti-subordination and justice. At the same time these engagements offer knowledge about the lived material reality of subaltern sexed subjects from varied perspectives. A dominant theme that emerges is that defeats or victories in engagements with the law cannot be read in simple or stable binary terms. Whether through courtroom battles or legislative initiatives, local referenda or community organizing, sexual subalterns disrupt legal boundaries, and simultaneously produce different sexual subjects. At the very least, these engagements themselves unmask sexual normativity as being socially constructed rather than natural and universal.

The law and its regulation of sexuality remain a critical terrain on which the construction of marginalized sexualities are constantly contested and challenged. The issues raised in these articles represent how law is a site of struggle and engagement rather than just an instrument of prohibition, sanction and social control. The papers in this volume address the equivocal results of legal claims and legal recognition. They bring out how a specific sexual practice or construction is neither totally repressive nor liberating. Each practice is capable of being redefined and reshaped. Ratna Kapur challenges the West’s received wisdom about sex, desire, and the law in India. As a comparative study of the legal issues around India’s sexual culture and the West’s relation to that culture, her work stimulates dialog across many previously unattended fictional dichotomies in legal thought and practice. Such dichotomies as “the West and the Rest,” the powerful and the impoverished, and in the sexual context, between those whose sexual identities comport with the law and those whose sexual identities are at odd with it, “sexual subalterns,” tend to perpetuate legal structures that completely fail to recognize the rights of those legal “others.” Kapur shows how plurality of sexual practices and resistance of sexual subalterns complicates the notion of culture, as something that is constantly negotiated and in the process of construction. Kapur is concerned that the only safe way to discuss sex publicly is through the discourse of violence, coercion, and victimization. This posture proliferates legal regimes that do not recognize those of non-traditional sexual identities, making “others” of them. Kapur calls for new conversations across the divide between the law and its “others.”

³²Thomas Keenan, *Fables of Responsibility: Abberations and Predicaments*, in ETHICS AND POLITICS 140 (1997) (quoting Michel Foucault).

³³Gayati Chakravorty Spivak, *In Other Worlds: Essays*, in CULTURAL POLITICS 197 (1988).

Rebecca Isaacs reviews recent American legislative battles and skirmishes surrounding proposals both establishing and curtailing gay/lesbian rights agendas. She calls for an "offensive reaction, that is, even while under attack you assert your vision" in the face of the challenges to gay/lesbian rights legislation. Isaacs insists that needs and aspirations of all sexual minorities be accommodated in the struggles for rights and justice. She focuses on the three arenas of family law, the intersection of civil rights for minorities with religious liberty rights, and hate-crimes.

For Martha Ertman importing private business models to domestic relations law has the potential of contributing to a reconstruction of law and sexuality, and the "denaturalization of the conventional heterosexual family." Through her analyses of case law she illustrates how traditional principles of contract law can carve out some legal recognition of the rights and responsibilities created in the context of same-sex relationships even when standing law proscribes legal recognition of the relationships themselves. For Ertman, the term 'queer' "effects a significant theoretical change that explicitly rejects the relevance of conduct and status in determining identity." She argues that "queer" is a set of beliefs, not of conducts, and marginalized and subordinated groups can actually be made majoritarian by redefining who "they" are along lines of belief and sensibility rather than, as is the case in the struggles of the sexually marginalized, conduct.

Karen Engle argues that "it is because we have been singled out for special treatment that we need special rights." She examines how, rather than recognizing that gays are, as a class, in need of particular protection in addition to existing civil rights laws, many proponents of gay rights defend such measures as anti-discrimination ordinances on the grounds that the protection they afford do not create any special rights for gay people. Engle proposes to call such ordinances and other special legal protections what they are: special rights. Ordinances and other protections would indeed extend rights to gays not enjoyed by others, and such rights are justified by the unique dangers and deprivations already facing homosexuals. She argues that special rights for the gay community are justifiable because gays do not melt into to the rest of the community, but legally and socially are made to stand apart, by actions of discrimination and even violence that other classes of people do not face in the same manners.

Brenda Cossman examines four decisions of the Supreme Court of Canada to illustrate the progressive, yet tentative nature of the gay community's acquisition of legal recognition in Canada. Stressing that neither legal victories nor defeats are ever total and unequivocal, Cossman demonstrates that even when homosexuals accomplish legal victories, conservative public sentiment is likely to result in forms of backlash, which may be viewed as pseudo-legal reprisals. It is a site of contradiction where victories do not necessarily displace old legal doctrines, but interact with legal discourse in ways that are complex and where victories are never unequivocal. To win a victory around same-sex marriage can be read as an act of resistance, as a challenge to the meaning and definition of the institution of marriage. Yet, it can also be read as an assimilative move, a maneuver to gain discursive legitimacy – to abide by the heterosexual imperative. The result is not entirely liberating, let alone transformative. The move is equally co-optable as well as being read as one of resistance. It is this complexity that is also examined in other contributions to this symposium issue.

Robert Salem, while acknowledging that measures protecting the rights and interests of sexual minorities at the state and federal levels are preferable, explores

the efficacy of local ordinances that mandate anti-discriminatory treatment for gay people. Currently 20% of the U.S. population live in communities where such ordinances are in effect. The state and federal legislatures have taken notice of the increasing grass roots support of such local ordinances. The grassroots efforts that have birthed so many local ordinances are, for Salem, a model to achieve greater protections at the state and national levels.

April Cherry argues that the work requirements found in the new welfare regime may push more women into prostitution or other forms of legalized sex-work through implicit recognition of prostitution and other sex-work recognized as "legitimate work." She sees the 1994 welfare reforms largely predicated on the public perception of the typical welfare beneficiary as young, black, indolent, and sexually promiscuous. Using the new welfare regime, the state may push more women toward work, regardless of the type of work available to marginalized sections of the population. Cherry's concern is that the state's coercive power will push more women toward the economic necessity that underlies the reasons women engage in illegal income-producing activities, including prostitution.

In contrast, Amalia Cabezas, with particular attention to the sex industry in the Dominican Republic, traces the intertwined histories of the women's movements and struggles for the legal recognition of the rights of "sexual outlaws" over the last several decades. Traditionally, of course, practitioners of the "oldest profession" have never been afforded the benefits of their work that legal legitimacy could bring, regardless of the prominent place of sex labor in such economic systems as the Caribbean tourist industry. Cabezas argues that analyses and policies concerning sex work must be animated by more than the oversimplified view of sex-work as solely a form of female degradation and exploitation.

Patricia Falk illustrates the importance and the process of obtaining equal legal status for sexual minorities, by focusing on the issue of second parent adoption, the legal recognition of parental rights of the non-biological parent in a committed, same-sex relationship. Without such rights, a non-biological gay parent has no legal platform from which to assist in making life decisions for the child, nor any right to be recognized as a parent if the biological parent dies. She cites sociological literature on the effects upon the child of growing up with two same-sex parents that establishes that children in such relationships are as well-adjusted as those with two opposite sex parents. She shows how this evidence in the sociological literature has become increasingly relevant in court decisions about second parent adoption.

Susan Becker's review of the variety of circumstances and legal regimes under which gay/lesbian couples seek to become a child's legally recognized parents through adoption, shows that the states' stances on this legal recognition of the *de facto* second parents vary. Becker also underscores the incommensurability of the legal bias against same-sex second parent adoption with the national and local needs for adoptive homes for foster children. Becker undertakes an exhaustive study of Ohio's statutory and case law about the issue. She also evaluates litigation strategies deployed by litigants and lawyers to secure adoption rights for same-sex couples.

Kevin O'Neill examines the Supreme Court's reluctance to enlarge civil rights protection for the gay/lesbian community under the constitutional auspices of due process and equal protection. He offers an alternative: the first amendment guarantee of the right to petition the government for a redress of grievances. The petition clause proved to be a good basis for challenging Cincinnati's ordinances prohibiting special legal status for gays and lesbians before the Sixth Circuit Court of

Appeals. O'Neill demonstrates that the ordinance was likely to lead to an inability of gay rights proponents to address their issues to the City Council due to the provisions of the city charter. O'Neill's aim is to "plant the seed" for future challenges to ordinances prohibiting special protection for sexual minorities by way of the petition clause.

What emerges from these articles, is how law erases the complexity of experiences of sexual subalterns in areas as diverse as prostitution/sex work and homosexual adoptions. Each contributor brings an analysis to law that strips away its homogenizing influence, and presents stories that reflect the multiple experiences and implications of prostitutes/sex workers, gays, and lesbians engagement with law when they stake claims to being parents, partners, or just human beings. The effort is to bring these complexities and subjectivities to the fore.

The legal claims of ever increasing numbers of sexual subalterns that are taking place within the U.S and elsewhere, is resulting in a backlash, expressed through allegations that an erotic epidemic is taking place, the reassertion of family values, and intensified moral and sexual regulation. In the U.S. this on-going struggle, that has witnessed majoritarian assertion of democratic lawmaking prerogative to rekindle parochial cultural traditionalism to contain expanding spaces of pluralism in the law and the society at large, has been designated "Cultural Wars."³⁴ Within this backlash, the sexual subaltern is repeatedly cast as a sexual predator and insatiable sexual stalker. Yet many of the articles in this symposium represent sexual subalterns as making claims over family, work, human rights, and against discrimination. These are claims that are not driven by some insatiable libidinous urge. They emerge as resistance to legal and social regimes that repress, restrain, and attempt to contain these communities in sexual ghettos. They represent the agency of the resistive subject within a context that is oppressive, and the struggle to map out their identities, lives, families, and communities. Yet these 'desexualized' claims should not be at the cost of claiming space for the sexual desire and pleasure of sexual minorities. The 'politics of sexual shame' as Karen Engle argues erases the desire of the sexual "other" and welcomes them into legitimacy only if they do not 'flaunt' their sexual eroticism.³⁵

Legal engagements produce claims and counter claims about the construction, legitimacy, and the social status of different sexual groups. These engagements send out messages about what constitutes sexual normativity as well as the relative power and autonomy of different sexual subjects.³⁶ They also reveal what kind of bodies and sexualities are inscribed into and normalized through the law, and which one's are not. Sexualities that are disruptive, abnormal, or problematic are regulated, stigmatized, and penalized according to their distance from sexual normativity. At

³⁴See generally, JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFEND AMERICA* (1991); Kenneth L. Karst, *Religion, Sex, and politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991); Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

³⁵See also Frank Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 J. GENDER RACE & JUST. 213 (1997).

³⁶Nicola Lacey, *Sexuality, Integrity and the Criminal Law*, in UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 98, 103 (1998).

the same time, the claims of different sexual groups, to adoption, to safe and healthy conditions of work when performing sexual labor, to freedom from violence and harassment because of one's sexual subaltern status, denaturalizes sexuality (and gender).

When the sexually excluded enact and reiterate these border crossings, they engage in a process of re-shaping, re-scripting, and even scattering the besieged norms. We must remain aware, however, of the limits of a strategy of denaturalization, and foreground the effort to explore the space between essentialist positions and those which adhere to a constructivist position on sexuality. A position that underscores the sexual nature, or pre-cultural existence of sexuality, reinforces the fixed or constrained character of sexuality. However, a constructivist, denaturalized position, must also be attentive to the fact that sexuality cannot be made or unmade summarily. Judith Butler emphasizes how it is a mistake to conflate 'constructivism' with 'freedom of a subject to form her/his sexuality as s/he pleases.'³⁷ She argues that constructivists must take account of the constraints that bring a living, desiring subject into being and provide it with direction. Sexualities are produced under conditions of restraint, through the force of prohibition, repudiation, and threats of social and cultural alienation. Butler argues for instance, that legal prohibitions against sexuality do not simply repress sexuality, but through process of exclusion, they simultaneously generate sexuality.³⁸ For example, in the law, the heterosexual is constituted and reconstituted through a constant deferral to the authority of legal precedent. It is through this process of deferral that the heterosexual body acquires legitimacy. Yet it is also through the repudiation of the homosexual body, that is, the exclusion of any "Other" that heterosexual normativity is constantly re-affirmed.

The constant reiteration and repetition of the performative dimension of sexuality is critical if the performance is ever to acquire authority. The reconfiguring of the norm cannot be brought about through a single act or through a purely theatrical performance. In this way, differently sexed bodies are not simply set up in opposition to normative sexuality. The constant engagement by differently sexed bodies with normative sexuality will lead to a refashioning and reconfiguring of the norm, and the constitution of the sexed body. They constantly disrupt normative boundaries, and remain persistent in their efforts to move from a space of illegitimacy, abjectness, exclusion, and erasure, into the arena of "discursive legitimacy."³⁹

The contributions in this volume reveal that a coherent identity position based on the homosexual/heterosexual divide does not take us very far. To include all difference into an exclusive definition, into a homogenous, undifferentiated unity, is reminiscent of the imperialist move to appropriate all difference through the insidious tool of humanism and the regulatory aims of the liberal project.⁴⁰ To

³⁷Judith Butler, *Phantasmatic Identification and the Assumption of Sex*, in *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 93, 94 (1993).

³⁸*Id.* at 95.

³⁹*Id.* at 8.

⁴⁰See generally, PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992) and PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* (forthcoming).

examine sexuality as a self-contained category is not only reductionist, it denies the intersections of sexuality, with race, gender, religion, and other axes of power. Sexuality is not a separable domain of power from the experience of race, gender, class or ethnicity. To articulate a politics along separable lines, as if one category was distinct and autonomous from the other, denies how each of these categories is in fact an articulation of another. To operate along singular lines and categories sets up new binaries and exclusions. For example, the sexuality of 'Third World' women has come to be represented as the victimization of women by some kind of 'universal patriarchy'.⁴¹ That sex and sexuality take on different shapes, meanings and appearances in and through their articulation in different historical, cultural, and economic contexts remains unaddressed. That the post-colonial sexual subaltern subject may be a resistive subject, or one who (re)shapes culture through her presence and her performance is far removed from the articulation of the 'Third World' woman as a victim of 'universal patriarchy'.

Perhaps this raises an important question for consideration. If the creation of normative boundaries are contingent in part on exclusion and erasure,⁴² and the excluded or erased subject has counter-norm producing potential, then does not the power to exclude also reside in this subject? When norms are reconfigured through reiteration and border crossings, just how disruptive is this process and for whom? These questions caution against reducing our politics to identity - where identity categories become the primary goal of politics, where the assertion of identity constitutes the end rather than the beginning of policy and politics. The contributions in this symposium issue re-visit some of these limitations, through their explorations of differences within sexually stigmatized groups as well as identifying the crossroads at which different identities are formed, displaced, or re-worked. The key to the advancement of the sexual subalterns' agendas does not reside in a politics of exclusion, but in solidarity and coalition-building with other subaltern groups.⁴³ Through the articles in this collection, we explore how different sexual groups are

⁴¹Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 133-152 (Chandra Talpade Mohanty et al. eds., 1991).

⁴²Butler, *supra* note 37, at 11.

⁴³For the interconnections between critical legal scholarship and anti-subordination struggles, and the critical importance of coalition building, *see generally*, Elizabeth M. Iglesias & Francisco Valdes, *Afterword-Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis*, 19 *UCLA CHICANO-LATINO L. REV.* 503 (1998); Sumi Cho, *Essential Politics*, 2 *HARV. LATINO L. REV.* 433 (1997); Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819 (1995); Darren Lenard Hutchinson, *Out Yet Unseen: A Radical Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561 (1997); Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 *LA RAZA L. J.* 69 (1996); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 *WOMEN'S RTS. L. REP.* 297 (1992); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 *S. CAL. L. REV.* 2231 (1992); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 *MICH. L. REV.* 821 (1997); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Moments that Performed the Theory*, 33 *U.C. DAVIS L. REV.* 1377 (2000).

constituted through race, gender, geographical location, economic status, as well as through the exclusions that they practice in order to proceed with their agendas.

The possibility of forging alliances across diverse sexual populations also raises some challenging questions to be considered in the evolution of future politics. What are the disruptive possibilities of an alliance of erotically stigmatized communities? How is stigma associated in varying degrees with each community, reinforced or reduced through such an alliance? How does this diversity challenge sexual normativity as well as the legal regulation of sexuality? Contributions to this Re-orienting Law and Sexuality symposium provides a tentative beginning to discussing some of the most complex and challenging questions confronting legal scholars today.

