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Afterword & Prlogue: Queer Legal Theory

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Afterword & Prologue

Queer Legal Theory

INTRODUCTION

Thus far, this Project has documented and critiqued the conflation of sex, gender, and sexual orientation as an ongoing phenomenon that is omnipresent and malignant, both culturally and legally. In doing so, the Project has endeavored to begin to elucidate the conflation's multiple meanings and consequences for law and society. Now the time has come to address directly the relevance of this phenomenon and its power to legal theory and theorists. Now the time has come to consider how legal theorizing can and should help transcend conflationary traditionalism; to consider how legal theorizing can and should help overcome the social and sexual active/passive divides of law and society; to consider how legal theorizing can and should help reform the fear and penalization of sex/gender diversity, variety, dissent. Now, therefore, this Project considers and underscores the theoretical *and* political implications that may be drawn from the preceding Chapters.

Accordingly, the thoughts and points below encompass and blend theory and politics: to paraphrase the Feminist adage, here the theoretical is the political because the historic incorporation of prevailing conflationary arrangements into sex/gender ideology has necessarily and thoroughly politicized any discussion of them. More specifically, this historic politicization makes it impossible to theorize about sex/gender arrangements without triggering the sex/gender politics that maintain the conflationary, hetero-patriarchal *status quo*. In this discussion, therefore, the theory and politics of pending sex/gender issues unavoidably are considered in tandem.

But this discussion also brings into play and focus a new voice and constituency—in itself a political move: this discussion puts sexual minorities at the center of legal theory and politics. In doing so, this discussion endeavors to amplify and enrich contemporary critical legal discourse with the dual purposes of expanding and upgrading the sexual politics of law and legal theory and of educating and reforming legal culture and doctrine. This amplification and enrichment, in other words, is significant for sexual minorities within (and outside of) legal culture, but also for the law itself.

This Afterword & Prologue therefore issues a call for the initiation of Queer legal scholarship as a theoretical and political enterprise devoted to the education and reformation of legal discourse, culture, and doctrine regarding matters of (special) concern to sexual minorities. This Afterword & Prologue also outlines a few thoughts to help define the meaning and

purpose of this venture. Queer legal theory, at the most basic level, is critical to meeting the need for responsibility and accountability in the law regarding sexual minorities. However, Queer legal theory,¹²¹⁹ as envisioned here, also is a voice and project conspicuously missing from, and critically important to, the broader struggle for sex/gender reform. This discussion thus closes the Project on a hopeful note, envisioning a new voice opening new fronts in the ongoing struggle for sex/gender freedom, egalitarianism, and equality.¹²²⁰ But because "equality" is elusive both in theory and in practice, this struggle—and the discussion here—concretely concerns visibility, (self)knowledge, and, ultimately, the dismantling of heteropatriarchy.

Before proceeding, however, it bears emphasis that the discussion presented below is at once an Afterword and a Prologue. As an Afterword, this discussion is distinct, but follows both theoretically and politically, from the discussions presented earlier. As a Prologue, however, this discussion aims more to air some basic theoretical and political issues than to settle them, and it therefore exhorts further work on the creation and cultivation of Queer legal theory—and Queer legal action—as such. This Afterword & Prologue, in other words, intends that the ruminations below will draw refrains and rejoinders. This Afterword & Prologue serves as an invitation—perhaps a provocation—to join in a critical legal discourse grounded explicitly in sexual minority perspectives.

To initiate this discourse and enterprise, Part I considers the meanings and parameters of Queerness, the emergence of sexual minorities as a new voice in legal culture, and the opportunities and dangers that this emergence presents for the prospective formulation of Queer legal theory. Part II considers the goals, strategies, and methods of Queer legal theory, and the relationship of this inchoate, incipient enterprise to existing liberalational legal scholarship like Feminist legal theory¹²²¹ and Critical Race

1219. See *infra* Part I.B.-II.C.

1220. Of course, "equality" is an amorphous and problematic construct that nonetheless this Project pursues with some idealism and optimism. Throughout this Project the term is used to denote Professor Littleton's conception of equality as acceptance. Littleton, *Reconstructing Sexual Equality*, *supra* note 584, at 1285; see also *supra* note 330 and authorities cited therein on "equality" as a social and legal concept, and as a value that this Project consciously defines and pursues.

1221. The term is used here to denote the type of scholarship and discourse that focuses on issues of (special) relevance to women, even though such scholarship and discourse obviously includes differing voices and opinions. See, e.g., Rhode, *Feminist Critical Theories*, *supra* note 21 (outlining the various strands of Feminist legal theory).

This comparison reflects that, in today's sexual minority lexicon, "Queer" basically is to "gay/lesbian/bisexual/trans/bi-gendered" what "Feminist" is to "woman." The two former constructs generally represent a subset of the two latter constructs, defined by a sharpened political awareness, even if that awareness produces various shades of opinion on issues of common concern. As with the "Queer" name, objections exist to the employment of the "Feminist" name, the primary one being its negative resonance. Cf. Nancy Gibbs, *The War Against Feminism*, *TIME*, March 9, 1992, at 50 (discussing how many women shy away from the "Feminist" sobriquet, yet agree on many on the goals regarding equality that underlie and animate Feminism).

Theory.¹²²² Part III ends the Project with a brief return to the Project's main focus—the conflation—as a reminder that conflationary sex/gender arrangements artificially, inexorably, and personally affect and afflict us all.

I

FINDING, NAMING & SITUATING THE MISSING VOICE

The conflationary record in modern and legal culture presented at the beginning of this Project shows how sexual orientation is (mis)used to vindicate, rather than to counter, sex and gender discrimination. The record also shows how this dynamic is particularly detrimental to both women and sexual minorities because conflationary precepts and practices reflect and project hetero-patriarchal biases that devalue sex/gender phenomena associated with both of these groups. In short, this record suggests that a legal theory centered on sexual minorities is a long overdue component of contemporary legal critiques because of the systemic ignorance which profoundly distorts and problematizes “sexual orientation” as a legal construct, and because of the systemic abuse of this construct.

As envisioned below, this enterprise must pursue several purposes, strategies, and methods. However, the nature and name of the enterprise must be addressed first: naming is important in this particular context because the denomination of sexual minorities always has been a contested and contentious matter.¹²²³ Here, the threshold act of naming the proposed venture descriptively and prospectively helps to capture the problematical yet opportune nature of the larger proposition advanced below.

A. Why “Queer”—Balancing History & Hope

As Chapters One and Two of this Project recounted, the invention and construction of sexual minority identity has always sparked naming issues. Most notably, ever since the Uranians attempted a formal self-denomination at the turn of the century, and as mainstream sexologists devised and applied their own labels, the naming of persons or groups marked by same-

1222. As used here, the term refers to the type of scholarship and discourse that focuses on issues of race, ethnicity, class, and nationality, even though such scholarship and discourse involves different communities, experiences, and viewpoints. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1245 (1993) (noting the emphasis on African Americans within Critical Race Theory thus far and introducing an Asian-American perspective). See generally Symposium, *Critical Race Theory*, 82 CALIF. L. REV. 741 (1994); Richard Delgado & Jean Stefancic, *Critical Race Theory: Annotated Bibliography*, 79 VA. L. REV. 461 (1993). See also CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (forthcoming); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al., eds., 1995) (forthcoming); *supra* note 77 and authorities cited therein on Critical Race Theory (and action).

1223. See *supra* notes 149-74 and accompanying text; see also Lawrence Ingrassia, *Gay, Lesbian Groups Seek to Expunge Bias They See in Language*, WALL ST. J., May 3, 1993, at A1 (noting that the first published use of the word “gay” as a substitute for “homosexual” took place in 1935 in a glossary of “Underworld and Prison Slang”).

sex erotic affinities has been controversial, inconclusive, and sometimes bizarre.¹²²⁴ The term “queer,” as conventionally used (including in the preceding Chapters of this Project) invokes this history because that term signifies the denigration of homosexuals generally and of (white) gay men in particular.¹²²⁵ However, as reclaimed in the past few years and as used in this Afterword & Prologue, “Queer”—with a capital Q—captures a more recent, though still disputed and tentative, set of sensibilities.¹²²⁶ In a sense, then, “queer” and “Queer” form a pair of complex tropes that encapsulate the past, the present and, perhaps, the future of sexual minorities in this country.

In effect, the two terms encompass contested symbolism that represent opposite sides of the same phenomenon: the first mobilizes homophobic beliefs and forces while the second catalyzes homosexual pride and energy. Juxtaposed, they represent the extremes of the possible conceptions and roles of sexual minorities in law and society. Against this backdrop, each term necessarily comes with its own experiential and discursive limitations, but both are associated with the history and hopes of sexual minorities (and our antagonists). The conflict between “queer” and “Queer” symbolizes the very struggle sexual minorities face(d) in this and other Euro-American societies.

It therefore must be acknowledged at the outset that the term “queer” invokes a past filled with oppression, horror, and shame, which inevitably makes it highly controversial; many lesbian and gay persons who have personally endured and survived that past recoil at the revival, reclamation, and redeployment of the term, regardless of the reasons given for it.¹²²⁷ The term is also controversial because it primarily invokes white male identity—as an historical term of denigration, “queer” has been used specifically to describe (white) men.¹²²⁸ Thus, the term’s renewed though modified currency raises the specter of reiterating the historic erasure of women and people of color within sexual minority communities. These concerns are addressed further below;¹²²⁹ here, the point to be underscored is that avoiding our reiteration of this history has to be a part of our plans, objectives, and hopes. Indeed, this avoidance is integral and indispensable to defining “Queer” as a nascent genre of critical legal theory that takes the extant discourse of law and culture beyond the substantive shortcomings or analytical oversights of the past.

1224. See, e.g., *supra* Chapter One, Part I.B.

1225. See generally *supra* Chapter One.

1226. See, e.g., *infra* notes 1237-52 and accompanying text.

1227. See, e.g., *infra* note 1236.

1228. See generally *infra* notes 1266-69 and accompanying text. In addition, Robert Westley, Peter Kwan, and Nancy Ota stressed the racialized undertones of “queer” and I thank them for emphasizing this point and its relevance to the conception and execution Queer legal theory.

1229. See *infra* Part I.D-E.

Despite these controversies and dangers, "Queer" also raises and brings with it hopeful (though not limitless) possibilities. Reclaimed with a capital "Q," it speaks to the future, as well as to the present and the past, of sexual minority identity in Euro-American societies. Unlike its lowercase counterpart, "Queer" at once evokes a shame-filled and horrible past, exemplifies a difficult but hopeful present, *and* suggests a complex but open future.¹²³⁰ More importantly, the term in recent years has come to symbolize prideful sex/gender identity, and to exude a sense of continuing mission toward sexual minority emancipation and equality.¹²³¹ Thus, the Queer self-denomination is increasingly being used to signify pride of self and community, and resistance to oppression and domestication.¹²³² In recent years, the term increasingly has become known and understood as a proclamation and celebration of sexual minorityhood.¹²³³

In time, and depending on our (in)actions in the coming few years, the hopes that "Queer" signifies may even come to outweigh and eclipse the history and legacy that "queer" represents—perhaps, in fact, *these* years presently are witnessing just that. If so, the tension of these two terms may abate or evaporate. For the moment, however, it seems clear that "Queer" already has acquired substantive, political, and practical dimensions of current and continuing relevance, which usefully may serve as a springboard toward balancing "queer" histories and "Queer" hopes as we stand on the cusp of creating a sexual minority legal scholarship.

1230. For an incisive discussion of the term "Queer" see JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 223-42 (1993). See generally Symposium, *Queer Theory/Sociology: A Dialogue*, 12 *SOCIOLOGICAL THEORY* 166 (1994) (introducing and discussing recent works on "Queer" issues, identity, and politics specifically in sociology—probably the most complete and cutting-edge collection of current writing on cultural Queerness).

1231. The increasing adoption of this term is evidenced by organizations like Queer Nation and Queer Planet, and by its spreading usage in various media, including a growing number of books, essays, and articles. See, e.g., *DISCONTENTS: NEW QUEER WRITERS* (Dennis Cooper ed., 1992) (collecting Queer fiction); *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993) [hereinafter *QUEER PLANET*] (collecting essays on cultural politics); *HOW DO I LOOK?: QUEER FILM AND VIDEO*, *supra* note 255 (critiquing representations of sexual minorities in mass media); *SIGNORILE*, *supra* note 1073 (lambasting the sexual-political *status quo*); David Wojnarowicz, *Being Queer in America: A Journal of Disintegration*, in *HIGH RISK: AN ANTHOLOGY OF FORBIDDEN WRITINGS* 275 (Amy Scholder & Ira Silverberg eds., 1991) (collecting controversial short stories, poetry, and essays). The term seems to be especially prevalent among younger lesbians and gay men, particularly those in their twenties or early thirties. See generally Dan Levy, *A New Generation, Bending the Rules: Young gays, lesbians shred the old labels*, *S.F. CHRON.*, April 28, 1994, at A1, A7 (reporting that the new "Queer" generation has discarded the "old" sexual labels and noting that "Queer" has "become the identity of choice for younger gays and lesbians").

1232. The term "domestication" is borrowed from Professor Robson, who explains that, "[d]omestication occurs when the views of the dominant culture are so internalized that they seem like common sense." ROBSON, *supra* note 86, at 18.

1233. By "sexual minorityhood" I mean the development of a group consciousness, and a subculture that includes the infrastructure associated with other "minority" groups (*i.e.*, neighborhoods, organizations, leaders, artists, writers, performers, media, and so forth). For further elaboration, see Valdes, *supra* note 55; see also *infra* note 1239 and accompanying text. See generally *infra* note 1240 and authorities cited therein on sexual minority history in this country during this century, including in legal culture during recent years.

Substantively, "Queer" serves as a reminder and a challenge (to ourselves) to avoid replicating oppressive aspects of the past and present that we seek to discredit and displace with our critiques. This term challenges us to honor the inclusiveness and egalitarianism that the term, at its best, signifies. In doing so, this term specifically challenges us to avoid indulging and perpetuating the androsexism and racism that afflict sexual minorities as much as they afflict the sexual majority. Politically and practically speaking, the term "Queer" has begun to take hold and is generally well known and understood because the process of reclamation has been underway for some years. Moreover, this process continues to consolidate and disseminate the new(est) understandings of the term. Given this substantive, political, and practical background, "Queer," though imperfect, is the term that singularly and best combines and signifies the advances, shortcomings, opportunities, and dangers that trail, surround, and confront today's sexual minorities.¹²³⁴

"Queer," as a reclaimed and reconceptualized term, therefore seems to best capture the past, present, and future of sexual minority identities, persons, and lives: that it reminds us of a past never to be repeated is a painful but salutary effect; that it brings to mind how women and people of color have been ignored (even) by white gay men is a needed reminder; that it evokes at once the progress we have made, and the progress we have yet to make, has an inspiring yet tempering effect; that it combines history with hopes creates a constructive tension that should charge Queer theorizing for some time to come. Ideally, Queer critiques can and should benefit from this mixture of horrible history and high hope.

Queer legal theory therefore is the name employed in this final portion of the Project to signify a self-conscious, self-defined, and self-sustaining body of liberational *legal* scholarship that voices and pursues the interests of sexual minorities as its particular contribution toward the end of sex/gender subordination.¹²³⁵ Despite the controversy or misgivings that the name attracts,¹²³⁶ it captures and announces the sense of forward-looking and prideful mission, as well as the sense of sex/gender iconoclastic irrever-

1234. Other alternatives are equally or more problematic without the advantages of pride and self-denomination that "Queer" embodies. "Homosexual" is not only largely identified with males, but also ignores transsexuals and the trans/bi-gendered. "Gay and Lesbian Legal Theory" shares the latter problem. "Sexual Minority Legal Theory" is more inclusive but overemphasizes the sexual at the expense of gender. In contrast, "Gender-Atypical Legal Theory" ignores the sex/sexual component. It is also bulky and not very evocative. Although I recognize the shortcomings of "Queer" both within and without the sexual minority community, it seems the best option available—and compelling on the merits.

1235. In adopting "Queer" as the operative term for this venture, this Project also follows in Professor Rhonda Rivera's pioneering steps. See Rivera, *supra* note 83 (using "Queer" in the titling of a relatively early work on sexual minorities and the law).

1236. See generally David Link, *I Am Not Queer*, REASON, Aug.-Sept. 1993, at 45 (describing the increasing acceptance of same-sex couples and concluding that the radicalism of Queerness is unnecessary, and probably even counter-productive).

ence, egalitarianism, and inclusiveness, that ought to inspire, animate, and permeate the genre of legal scholarship envisioned here. More concretely, Queer legal theory can and *should* build and benefit from Queer consciousness and activism: Queer legal theory must proceed from and incorporate the “Queering” of sexual communities that has taken place during the past several years. And though the term’s sense of radicalism may not be necessary or beneficial forever, it is both necessary and beneficial now, and will remain so for as long as the subordination of sexual minorities remains lawful and real. Therefore, the next consideration is how to negotiate the gains and limits of Queer consciousness and activism as we progress toward the construction of a Queer critical legal theory.

B. From Queer Cultural Politics (& Studies) to Queer Legal Theory

Since the Stonewall Riots of 1969, persons with same-sex erotic affinities have traversed through various stages of societal and self denomination: we have gone from being “queers” and “homosexuals” to being “gay” and “lesbian” and “bisexual” and, most recently, to being “Queer.”¹²³⁷ In the past few years, this progression and its present culmination in Queer identity has spawned a cultural politics marked by a sharp-edged sense of community consciousness and personal commitment to activism.¹²³⁸ This progression also has included the construction of a culture, the cultivation of a history, the organization of communities, and the study of the tribe.¹²³⁹ This progression in the construction and denomination of sexual minorities of course is a testament to the change in consciousness and activism that has marked these twenty-five years.¹²⁴⁰ This progression, in turn, now can

1237. See generally JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 237-68 (1992) (summarizing the history of identity politics, the evolution of labels, and the formation of sexual minority consciousness); Ingrassia, *supra* note 1223 (discussing efforts by gay and lesbian groups to eliminate biased language).

1238. Since the early 1980s, an increasing sense of radicalization has spread through sexual minority communities under the rubric of Queer identity, principally as a result of national indifference to the HIV pandemic. This sense of radicalization motivated the formation of grassroots activist groups from coast to coast, especially ACT UP and Queer Nation. See generally FRANK BROWNING, *THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY*, 26-54 (1993) (recounting the history of the Queer Nation chapter formed in San Francisco during the early 1990s); CRIMP & ROLSTON, *supra* note 172 (recounting the history of ACT UP); D’EMILIO, *supra* note 1237, at 262-68 (discussing the impact of AIDS on the gay and lesbian movement).

1239. These socio-political actions are perhaps best captured by the creation of university and other courses on sexual minority history, culture, and life. See, e.g., Mary C. Cage, *A Course on Homosexuality: “Sociology of Gays and Lesbians” Attracts Criticism, But Many Students Like It*, *CHRON. HIGHER ED.*, Dec. 14, 1994, at A19 (reporting on the introduction, success, and fear of one such course at Kent State University). These actions thus are a reflection of the recent attainment of sexual minorityhood. See *supra* note 1233; *infra* note 1240.

1240. These developments have seen the emergence of sexual minorities as fully functional and cohesive communities brought together by a sense of affinity and commonality to attain sexual minorityhood. See *supra* note 1233; D’EMILIO, *supra* note 86 (providing an excellent brief history of the progression toward sexual minorityhood in this country during the middle decades of this century). Thus, it is no coincidence that the American Association of Law Schools only recently finalized a policy

provide a point of transition from Queer cultural politics and studies to Queer legal theory and, ultimately, to Queering legal culture and doctrine.

It seems evident that the emergence of Queer cultural consciousness, activism, and studies during the past several years has helped to pave the way for lesbian, gay, bisexual, and trans/bi-gendered authors to surface in legal culture because this consciousness, overall, has helped to establish an intellectual base, a cultural context, and a climate of relative safety. Indeed, this change in broader social circumstances is reflected in legal culture most noticeably both by the ongoing expansion of law school courses in sexuality or sexual orientation¹²⁴¹ and by the recent emergence of writings on sexual orientation issuing from scholars self-identified with sexual minorities.¹²⁴² These courses and writings have produced a virtual explosion of ideas in just a few years, creating a rich and expanding body of sexual orientation discourse and scholarship for the first time in the history of American legal academia. However, this body of scholarship generally has not yet come to be understood or recognized as representing a genre of critical legal theory.¹²⁴³

This lack of recognition springs in part from the fact that this body of discourse and literature generally has not positioned, articulated, or represented *itself* as a genre of legal theory.¹²⁴⁴ In other words, sexual minority discourse and scholarship to date has illuminated legal issues and accumu-

that includes "sexual orientation" in its non-discrimination policy, alongside race, sex, religion, and others. See *Final Report of ECR 6.17 Working Group Approved*, NEWSLETTER, (Association of Am. Law Sch., Washington, D.C.), November 1993, at 12; Additional Statement of Barbara Cox, Arthur Leonard, and Robert Wasson (Sept. 14, 1993) (on file with author) (registering their reservations about the distinction drawn in the Final Report between sexual orientation and sexual conduct). See also Gene P. Schultz, *The Inclusion of Sexual Orientation Nondiscrimination Policies: A Survey of American Law Schools*, 2 LAW & SEXUALITY 131 (1992) (analyzing the non-discrimination policies of law schools with respect to sexual orientation and suggesting directions for future research).

1241. See Francisco Valdes, *Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum: Reports From the Field*, 1 NAT. J. SEX. ORIENT. L. (available on the Internet via telnet at "listserv@unc.edu") (1995) (reporting the exponential, though uneven, spread and development of such courses among American law schools in recent years).

1242. See, e.g., *supra* note 83 and authorities cited therein on sexual orientation and the law, oftentimes authored by sexual minority legal scholars.

1243. These writings undeniably manifest the tremendous fertility of sexual minority legal issues, as well as the intellectual energy that exists for their exploration, but generally, they have not yet generated a sense of common viewpoint, purpose, or identity as such. In other words, these writings as a whole have not yet coalesced into a self-conscious, self-defined, and self-sustained critical enterprise that is intended and understood as being akin to the Feminist or Critical Race enterprises regarding critical legal theory.

1244. For notable exceptions in recent years, see ROBSON, *supra* note 86 (discussing the impact of the law on lesbians); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (discussing and urging the use personalized narratives to express resistance to the suppression of identity, especially in the context of the military's exclusionary policies); Fajer, *supra* note 24 (discussing the importance of storytelling to the success of gay-rights litigation); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (discussing pro-gay equal protection arguments); Ortiz, *supra* note 85 (discussing the constructivist debate in light of gay politics); Eskridge, *supra* note 10 (book review).

lated insights regarding legal doctrine, but it has not yet developed or articulated a sense of group identity and positionality¹²⁴⁵ vis-à-vis legal culture and doctrine. However, these recent and ongoing developments *do* manifest the existence of a critical mass of sexual minority consciousness within the legal culture. These circumstances, in other words, indicate the cultural and intellectual viability of Queer legal theory as a self-conscious, self-defined, and self-sustaining enterprise.

Thus, the general circumstances seem to invite a proactive precipitation of Queer legal theory as a genre of legal scholarship with an independent critical focus and stance.¹²⁴⁶ Of course, as is the case in culture generally, naming is a key step toward securing this gain within legal culture because self-signification is a prerequisite to the projection of an identi-

1245. See *infra* Part I.F (discussing positionality as a methodology of critical legal theory that emphasizes the position of the author in relationship to the topic, the impact of the author's "subject position" on her or his critique, and the relationship of the author and the topic to other structures or systems of subordination).

1246. Apart from the points made in the text, the time seems auspicious for several reasons. In recent years, sexual minority issues have drawn unprecedented public attention. See, e.g., Osborn & Smith, *supra* note 154. Additionally, Feminism in recent years has begun to recognize its past biases, at least those regarding gays and lesbians. See, e.g., Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1191 (1991).

Similarly, basic support systems for Queer scholarly discourse are being put in place. In recent years venues for the discussion of sexual minority legal issues have proliferated: the National Lesbian and Gay Law Association, the Section on Gay and Lesbian Legal Issues of the American Association of Law Schools, and the Committee on the Rights of Lesbians and Gay Men under the Section on Individual Rights of the American Association of Law Schools are only a few examples of this proliferation. At the state level, in 1993 the State Bar of California became the first in the country to form a Standing Committee on Sexual Orientation Discrimination. All of these entities help to expand and ensure the continuing exchange of knowledge, experience, and ideas relating to sexual minority legal issues.

At the same time, sexual minority courses, students, and faculty increasingly populate the corridors of American legal education. See Valdes, *supra* note 1241. Likewise, across various disciplines, a burgeoning lesbian/gay literature facilitates sophisticated insights and feisty discourse. See generally sources cited *supra* Chapter One. Various journals have cropped up to accommodate this literature. See *supra* note 86. Most recently, sexual minority scholars in law and the social sciences have begun to explore the use of the Internet to "publish" new journals having an instantaneous and global reach at minimal cost. For instance, the NATIONAL JOURNAL OF SEXUAL ORIENTATION LAW published its inaugural "issue" via the Internet in 1994, while QUEER, a new cross-disciplinary journal, plans to do the same during 1995. To access the first of these new journals on-line, individuals can subscribe (without charge) by sending the following message (replacing the italicized phrases with the appropriate information) by teletype to listserv@unc.edu: "subscribe gaylaw first-name last-name."

Most significantly, this type of literature has begun to appear in legal journals such as this one. The outpouring of publications in various legal periodicals relating to sexual minority legal issues may be appreciated by glancing at the periodic bibliographies compiled since the late 1980s. The best of these was compiled by law librarians in 1994. See Standing Committee on Lesbian and Gay Issues, American Association of Law Libraries, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969-1993*, 86 LAW LIBR. J. 1 (1994). For another recent and notable example, see Symposium, *Sexual Orientation and the Law*, 79 VA. L. REV. 1419 (1993).

Even the federal government is opening up, albeit in tiny and uncertain ways. See, e.g., Stephen Burd, *NIH Strategic Plan Sends Message to Scientists that Administration Will Support Sex Research*, CHRON. HIGHER EDUC., May 26, 1993, at A20 (reporting that the Clinton Administration has followed a "low profile" policy to revive studies on adult sexuality—a "total turnaround" from the sex-phobic policies of the Reagan and Bush Administrations).

fiable and recognizable perspective. Clearly, then, the time has come to find, name, and situate this missing voice¹²⁴⁷ in legal culture and in critical legal theory.

As might be expected, and for the reasons outlined above, the term Queer also has remained controversial and unclaimed specifically within the vocabulary of law and legal theory: Queer, with a capital Q, remains dormant in law, despite its potential capacity for self-empowerment, because it is controversial and problematic. Nonetheless, as noted above, the power of the term in sexual minority communities seems to resonate more loudly and compellingly with each passing year. Therefore, at least during the next several (and formative) years, sexual minority self-denomination within legal culture will take place in a context in which ongoing social and (sub)cultural eruptions clearly have outstripped events within the law.¹²⁴⁸

This scenario effectively crystallizes the choice over naming that faces sexual minority legal scholars today and in the several years to come. Because Queerness has taken hold culturally to denote a sharply liberationist outlook, and because this outlook is becoming increasingly established in sexual minority cultural discourse, a central point becomes increasingly certain: sexual minority voices within legal culture necessarily will either have to align with or depart from the term's recent and increasing significance as an emancipatory self-inscription. Naming the incipient scholarship of lesbian, gay, bisexual, and trans/bi-gendered voices in legal culture, therefore, is a short-term choice of self-denomination that will signal the longer-term directions of sexual minority self-definition within the law.

Thus, borrowing from its contemporary and cultural meaning(s), "Queer" as legal theory can and should help to signify inclusiveness and diversity. As culturally (and politically) reclaimed, the term's elasticity can and should accommodate all identities grouped into or within sexual minority categories, including the bisexual¹²⁴⁹ and the trans/bi-gendered.¹²⁵⁰ Using Queer cultural politics and studies as a substantive point of departure,

1247. The phraseology is borrowed from Leonard, *supra* note 23 (discussing the virtual absence of consideration of lesbian issues in Feminist legal writings).

1248. These (sub)cultural eruptions are exemplified by the ACT UP and Queer Nation movements, begun in the 1980s. See *supra* note 1238.

1249. Bisexual, as used here, principally signifies persons who self-identify as being erotically interested in or drawn to members of both sexes, whether in contemporaneous or serial fashion. Like other sexual minorities, bisexuals are deemed to violate sex/gender dictates and are thus mistreated as sex/gender outlaws. See *supra* Chapter Four, Part I.E.4.d. See generally *Bi ANY OTHER NAME*, *supra* note 26; *TWO LIVES TO LEAD*, *supra* note 26.

1250. Trans/bi-gendered, as used here, principally signifies transsexuals, cross-dressers, and transvestites. See generally *supra* note 118. Like other sexual minorities, these persons are deemed to violate sex/gender dictates and are thus mistreated as sex/gender outlaws. See *supra* Chapter Four, Part I.E.4.e; see also, e.g., CAROLINE COSSEY, *MY STORY* (1991) (recounting the life of Tula, a high-glamour fashion model whose career was almost destroyed when she was exposed as a transsexual); CHRISTINE JORGENSEN, *CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY* (1967) (recounting her experiences as a transsexual).

Queer legal theory can be positioned as a race-inclusive enterprise, a class-inclusive enterprise, a sex-inclusive enterprise, and a gender-inclusive enterprise, as well as a sexual orientation-inclusive enterprise. Thus, Queer legal theory, perhaps even more so than Queer consciousness and Queer activism to date, must convey a sense of political resolution that this Project seeks to invoke: reflecting the gains and challenges of sexual minorities since the Stonewall Riots, Queer legal theory must connote an activist and egalitarian sense of resistance to *all* forms of subordination, and it also must denote a sense of unfinished purpose and mission.

Additionally, and more specifically, using Queer cultural consciousness and political activism as a point of departure for Queer legal theory allows sexual minority scholars to align with and benefit from the tide of larger events, and thereby to help cement the broader historical progression from being called queer to calling ourselves Queer.¹²⁵¹ In this way, Queer as legal theory can come to represent another step in the ongoing development of sexual minority (sub)cultures and (self)identities. And, perhaps by making and naming our critical legal perspectives Queer, we can also help ourselves to better appreciate and balance sameness and difference within and beyond sexual minority communities.¹²⁵²

C. *Can You(?) / You Can Be Queer*

As noted at the outset of this Project, American culture employs "queer" to demigrate persons suspected of being gay but, as outlined immediately above, in recent years "Queer" has come to signify principally a rebellious resistance to heterosexist customs and precepts. As a result, "Queer," like "queer," tends to indicate minority "sexual orientation." But it need (and should) not be so: "Queer" is a description of consciousness regarding sexuality and its relationship to one's self and to one's culture.¹²⁵³ Thus, even though most persons who self-identify as Queer today probably are gay, lesbian, bisexual, or trans/bi-gendered, one *can* be gay or lesbian or bisexual or trans/bi-gendered without being Queer; Queer con-

1251. See *supra* notes 1237-40 and accompanying text.

1252. The San Francisco chapter of Queer Nation was dissolved amidst allegations of racism and androsexism, and due in part to an inability to form alliances with older, more experienced gay and lesbian activists. See Maia Ettinger, *Color Me Queer: An Aesthetic Challenge to Feminist Essentialism*, 8 BERKELEY WOMEN'S L.J. 106, 120 (1993). This example illustrates the need for a balance of respect and appreciation of sameness and difference in the Queer movement.

Of course, the sameness/difference discourse is well-developed among Feminist and Critical Race circles, and is ongoing. See, e.g., *supra* note 22 and authorities cited therein on the construction of sameness and difference. For a further exploration of this subject specifically in the Queer legal context see Francisco Valdes, *Sex, Race, Class & Age in Queer Legal Culture: Identity & Reconstruction Through (Inter)Connectivity*, 5 S. CAL. REV. L. & WOMEN'S STUD. (forthcoming 1995) (discussing the ways in which sex, race, class, and age (dis)similarities between and among members of sexual minorities affect the cohesion of group efforts, in Symposium, *Lesbians Issues and the Law*).

1253. See generally Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, in QUEER PLANET, *supra* note 1231, at 193.

consciousness is neither innate nor uniform among sexual minorities. The converse likewise is true: one can be Queer without being gay, lesbian, bisexual, or trans/bi-gendered because the sex/gender consciousness that the term invokes is not necessarily limited to (white) gay, lesbian, bisexual, or trans/bi-gendered people.

This observation means that the articulation and development of Queer critiques need not be reserved in exclusionary or automatic fashion only for sexual minority scholars.¹²⁵⁴ Of course, those of us stigmatized on the basis of minority sexual orientation(s), cross-gender sensibilities, or anti-conflationary attitudes are the most likely to adopt and voice Queer perspectives sooner rather than later. Again, historical circumstance makes this so; as with race, class, sex, and gender, those at the margins or at the bottom feel the most pressing motivation to act. Therefore, chances are that within legal culture, as within society at large, most persons (though not all) who presently self-identify and act Queer will be lesbian, gay, bisexual, or trans/bi-gendered.

However, this present reality should not be (mis)construed to essentialize an over-simplified, over-generalized, and, perhaps, temporary correlation between minority sexual orientation(s) and "authentic" Queerness. The overly narrow, possibly temporary, and falsely essentialist underpinnings of such a correlation are as untrue and problematic as the narrowness and essentialism that at times have limited Feminist and Critical Race critiques of law.¹²⁵⁵ Thus, Queer legal theory should not limit its focus or parameters exclusively to the experience of sexual minorities, or assume that only sexual minority viewpoints and voices have something to say about sexual oppression; a majority sexual orientation does not and cannot disqualify, and should not marginalize, any person with Queer consciousness and commitment.¹²⁵⁶ Such narrowness would unduly limit Queer critiques and, ultimately, Queer empowerment because the notion that only queers can be Queer ignores that nonqueers—or "straight" Queers—may possess exper-

1254. As with Feminist and Critical Race Theory, the question of eligibility or authenticity is complex and controversial. See generally Chang, *supra* note 1222, at 1248 n.15 (1993) (reviewing the identity/eligibility/authenticity literature in various genres of critical legal theory); see also *ENGENDERING MEN* (Joseph A. Boone & Michael Cadden eds., 1990) (a collection of essays generally viewing at least gay men as being capable of engaging in Feminism); *MEN IN FEMINISM* (Alice Jardine & Paul Smith eds., 1987) (a collection of essays generally questioning the capacity of men to engage in Feminism); Jerome M. Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 *LOY. L. REV.* 61, 72-77 (1992) (discussing eligibility and authenticity in the crafting of Critical Race Theory). Of course, questions of eligibility and authenticity also implicate questions of voice. See *infra* note 1256.

1255. See, e.g., *supra* note 1254 and authorities cited therein on authenticity; see also *infra* notes 1322-23 and accompanying text.

1256. This point, of course, again implicates the eligibility/authenticity question. See sources cited *supra* note 1254. More generally, this point also implicates the notion of "voice," which has been most fully explored within legal culture in the context of Critical Race Theory. See, e.g., Johnson, *supra* note 77 (reviewing the scholarship and the viewpoints expressed in that debate); see also *infra* 1292 and authorities cited therein on voice, authenticity, and narrative.

iences and insights that can enrich and advance Queer legal theory's campaign against sexual oppression. Essentializing (de)limitations are unwarranted and unproductive for an enterprise that, as conceived here, is self-consciously iconoclastic, inclusive, and expansive.

Moreover, a limited view of Queerness wrongly assumes that the purposes and objectives of Queer legal theory affect or involve only the interests of sexual minorities. This Project in its entirety demonstrates the contrary: sex/gender issues transcend these confines.¹²⁵⁷ To be sure, sexual minorities (and women) are the primary designated targets of conflatory hetero-patriarchal ideology because we have been constructed as the sex(ual) "others." However, as previously noted, the conflation regulates, and impinges on, everyone.¹²⁵⁸

Consequently, the common denominator that should delineate Queerness in legal culture and theory should not be minority sexual orientation as such, but a willful (political) consciousness devoted to the containment and reformation of Euro-centric hetero-patriarchy.¹²⁵⁹ Although this sort of consciousness presently may be more concentrated within sexual minority communities, the involvement of Queers from the sexual majority cannot be, and should not be, discouraged or precluded. Queer legal theory, devoted specifically to the eradication of sexual orientation discrimination and more generally to the attainment of sex/gender reform, should embrace and enlist the voices of all Queers, regardless of sexual orientation or any other aspect(s) of personhood.

D. Lesbians, Gay Androsexism & Queer Legal Theory

One primary danger posed by Queer legal theory as a sexual minority enterprise is that gay male androsexism could marginalize lesbian voices, experiences, and interests in the same way(s) that society generally has subordinated the female to the male. Unfortunately, sex/gender history and experience demonstrates that the danger is real and that wariness of it is necessary. Indeed, this danger already has generated some reluctance about a Queer undertaking. For instance, in the leading exposition to date of lesbian legal theory, Ruthann Robson cautions, "The risk is that [Q]ueer theoretical work will . . . perpetuat[e] the invisibility of lesbians. . . . If this trend continues, [Q]ueer legal theory will in fact be gay male legal theory."¹²⁶⁰ Professor Robson's warning correctly, and undeniably, flags the power of androsexism within sexual minority communities.

But this danger need not become Queer reality: with precaution and diligence, a Queer enterprise *can* (and must) avoid replicating the male/female sex/gender hierarchy of the sexual majority. Indeed, as conceived

1257. See *supra* Chapters One and Two.

1258. See *supra* Chapter Four, Part I.C.

1259. See *supra* note 12-14 defining androsexism, heterosexism, and hetero-patriarchy.

1260. ROBSON, *supra* note 86, at 22.

here, this enterprise is specifically marked by a self-conscious awareness of and disdain for hetero-patriarchal pecking orders.¹²⁶¹ In fact, at its best, Queer legal theory can and should provide a platform upon which sexual minorities may demonstrate to the sexual majority how society as a whole might work toward a more general dismantlement of hetero-patriarchy and its oppressive, divisive hierarchies.

Additionally, the focus in a lesbian-specific (or, for that matter, in a gay male-specific) legal theory may engender a kind of incompleteness similar to the limitations of critiques in other genres of critical legal theory that at times have ignored multiplicity and intersectionality; while a focused viewpoint may voice with clarity a singular perspective, it also may limit the peripheral vision of that viewpoint.¹²⁶² More specific legal theories are more likely than a self-consciously inclusive and expansive Queer critique to overlook sex/gender commonalities (and differences). Consequently, Queer legal theory must position itself to promote expansive critical insights regarding the interlocking nature and operation of androsexism and heterosexism, which (re)generate the hetero-patriarchal structures and systems that keep *all* sexual minorities (and *all* women) down. In other words, Queer legal theory is necessary in part because it can help to bridge both the reality and the perception of sameness and difference among and between various sexual minorities (and women).¹²⁶³

On balance, then the danger(s) posed by gay male androsexism should not foreclose a lesbian and gay male Queer collaboration (along with bisexuals and the trans/bi-gendered) because splintered critiques will unduly narrow the base of energy and experience from which Queer power and insights are to be drawn. This narrowness in turn would preclude actions, collaborations, reforms, and empowerment that are too valuable to forgo.¹²⁶⁴ Consequently, the inclusiveness and expansiveness of Queer legal theory, as imagined and urged here, necessarily must reach beyond the isolating specificity of critiques anchored only to one or another sexual minority.

However, an inclusive and expansive Queer legal theory cannot belittle or deny the usefulness and necessity of lesbian-specific scholarship, or of other similarly focused critiques. Room exists for both because the two types of critiques represent differing levels of experiential specificity regarding the same general phenomena: sex/gender oppression folded into and conflated with sexual orientation oppression. The two types of critiques can thereby fuel each other, and together they can chip away at the

1261. See Chapter Four, Part I.E.3-4.

1262. See generally *infra* notes I317-18 and authorities cited therein on multiplicity and intersectionality.

1263. This point is considered in further detail in Valdes, *supra* note 1252; see also generally authorities cited therein on sameness and difference in Feminist and Critical Race scholarship.

1264. See generally *infra* Part III.D.

androsexist *and* heterosexual domination of legal culture and legal doctrine.¹²⁶⁵ Thus, exposing sources of group-specific oppression is a beneficial and necessary part of Queering the law, even while exposing the relation(s) of particular constructs to other constructs is also an indispensable part of this Queering process.

The point, then, is that specific critiques should not be deemed to deny or obviate Queer critiques because Queer inclusiveness and expansiveness can add dimensions that, by definition, are more likely to be missing from more specific efforts. Thus, lesbian legal theory can (co)exist with(in) Queer legal theory. Indeed, lesbian-specific viewpoints should and will be a major force in shaping and informing Queer theory. However, lesbian legal theory cannot serve as a *substitute* for it. At the same time, Queer legal theory cannot substitute for lesbian legal theory.

Rather, Queer legal theory and lesbian legal theory need each other: the former is indispensable to sexual minority empowerment in law and society while the latter is indispensable to the former. The two overlap because they represent overlapping phenomena and constituencies. The two have a mutual interest in each other's (mis)fortunes because both have a common and continuing interest in dismantling hetero-patriarchy. Thus, in the final analysis, lesbian legal theory can and should help Queer legal theory realize its potential, and vice versa.

Accordingly, the concern over gay male androsexism and the dangers that it poses for Queer theorizing should serve constructively to heighten our individual and collective vigilance against the potential for a wholesale or creeping influence of androsexism within Queer critiques. Because it counters the tradition of male supremacy that has run through Western history, this heightened vigilance may not come easily, but it is also not impossible. But, by definition, the term "Queer" reflects and invokes this type of heightened awareness for sex/gender egalitarianism and against sex/gender imperialism. The key, then, is to live up to the standards of the term, and the challenge is to join in the fulfillment of the ideals underlying this commitment.

E. "*Rac(e)ing*" Queer Sensibilities

Another primary danger regarding Queer legal theory concerns race, and raises threshold matters over racism akin to those facing Queer scholars over androsexism. As with androsexism, Queer legal theory must and can avoid the similar danger of carelessly (or intentionally) reiterating the racist biases that, like androsexism, pervade our social and legal environments. The vigilance of Queer legal theory against racism is again especially important due to our cultural backdrop: the larger Queer social movement already has experienced problems with racial (dis)harmony because it has

1265. See *supra* Chapter Four, Part I.E.

not (fully) excised racist overtones and undertones from its ranks.¹²⁶⁶ This failure excludes people of color from Queer venues, replicating and compounding the race divisions of the sexual majority. This failure thus demonstrates how deeply we are mired in acculturation, and how crucial it is for Queer legal theory to intercede during these formative times on behalf of Queers of color. Queer as legal theory, using Queer cultural politics and studies as its point of departure, has the opportunity and obligation to discontinue, interrupt, and condemn the replication of racism both in sexual minority cultural venues and legal projects.

This opportunity is also an obligation because the exclusion or marginalization of people of color within Queer settings is antithetical to the inclusiveness and expansiveness that is definitive and constitutive of Queerness as the term is used here. As in the case of androsexism, Queer undertakings proactively must show and apply a heightened sensitivity to, and an uncompromising opposition against, the omission of race, ethnicity, and class from Queer critiques.¹²⁶⁷ Queer as legal theory cannot tolerate or ignore any show of wholesale or creeping racism, ethnocentrism, or classism in Queerness. The inclusiveness and egalitarianism of Queerness demands that Queer legal theory not ignore the lives and presence of Queers of color, of varying ethnic backgrounds, or of (dis)advantaged economic backgrounds: to do so would be to lend support to the oppression that subordinates groups based on race, ethnicity, or class more generally. As legal theory, the Queer enterprise must take a proactive stance toward race, ethnicity, and class, toward their particularized intersection with (homo/bi)sexuality, and toward their broader relation to sex/gender issues.

At the threshold—where we stand today—this concern therefore necessitates nothing less than a sustained effort to make the historic and unfinished fight against racism, ethnocentrism, and classism integral to Queer critiques of the law. This effort in turn requires an affirmative interrogation of why and how Queerness plays differently in different racial, ethnic, or class contexts,¹²⁶⁸ as much as it requires an interrogation of

1266. People of color have long and pointedly complained about the racism of gay and lesbian persons and groups. See, e.g., *BLACK MEN/WHITE MEN: A GAY ANTHOLOGY*, *supra* note 207; *BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN*, *supra* note 297; *COMPAÑERAS: LATINA LESBIANS (AN ANTHOLOGY)*, *supra* note 297; *IN THE LIFE: A BLACK GAY ANTHOLOGY*, *supra* note 297; *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherrie Moraga & Gloria Anzaldúa eds., 2d ed. 1983).

1267. The joinder of class with race and ethnicity in this discussion recognizes the way in which racism causes economic marginalization and material poverty. See, e.g., Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 *HARV. BLACKLETTER J.* 1 (1991) (exploring the reasons for the continuing segregation of African-Americans in pockets of impoverishment).

1268. This phenomenon is made painfully obvious by the experience of discussion on the subject. At the 1994 Critical Race Theory Workshop, which met at the University of Miami, the meeting fractured over the discussion of (homo)sexuality. At the 1995 Lavender Law Conference, which met in Portland, the discussion of Queer legal theory at the lesbian legal theory panel also veered into, and impaled itself on, race and class (and sex) differences. I participated in both events. For a discussion of these events, see Valdes, *supra* note 1252.

where and when racism, ethnocentrism, and classism—perhaps even of the unconscious type—confine Queer theorizing in arbitrary or unproductive ways.¹²⁶⁹ From the outset, Queer legal critiques therefore must take the time and make the effort expressly to discuss and expose the role of race, ethnicity, and class in the (mis)fortunes visited by the law on Queer (and other) lives. In this way, “Queer” as legal theory can avoid importing the assumed and imposed whiteness of “queer” as cultural epithet and also align itself with the greater civil rights movement for equality in color and class relations.

F. *Positionality, Relationality & Queer Legal Theory*

Of course, the inclusiveness and expansiveness urged above as touchstones for Queer legal theory are not intended to give the impression that this genre of scholarship and discourse can be all things to all persons at all times. Certainly, Queer legal theory could not measure up to such a standard—and should not even try. Instead, this expansiveness and inclusiveness require mainly that Queer legal theory help to situate “positionality” and “relationality” within legal culture, discourse, doctrine, and scholarship in more pronounced and explicit ways.¹²⁷⁰

To this end, Queer critiques must be vocal and specific regarding the positions, perspectives, and interrelationships implicated in or by *our* work. In other words, Queer legal theory must work positionally and relationally by deed and example: Queer scholarship must embrace, conduct, and espouse a type of positional thinking that continually and openly recognizes and acknowledges the subject position of the work and author, but that does not unduly limit its critical inquiries. For example, this Project is positionally Queer when it is most focused on how a certain social or legal construct perpetuates heterosexism specifically, but is positionally Feminist when it is most focused on how a certain social or legal construct perpetuates androsexism, and is positionally Race Critical when it is most focused on how a certain social or legal construct perpetuates Euro-centrism or racism. On the whole, and especially in this Afterword & Prologue, this Project operates from the subject position of a Queer Critical Race Feminist—the position I occupy.

1269. The concept of “unconscious” racism is elaborated in Lawrence, *supra* note 77.

1270. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (proffering “positionality” as a critical Feminist methodology that acknowledges the existence of empirical truths, values, and knowledge, and also their contingency). “A stance of positionality can reconcile the apparent contradiction within feminist thought between the need to recognize the diversity of people’s lives and the value in trying to transcend that diversity.” *Id.* at 885. This concept, in conjunction with the concept of relationality, is employed here in the same sense generally, but with a more pronounced emphasis on including the subject position of the person authoring a critique as part of the positions and inter-relations implicated by or in the critique. For further discussion of positionality and relationality along these lines see Valdes, *supra* note 1252.

Additionally, during each of these recurrent cross-shifts in focus, this Project is (or tries to be) at all times relational by keeping the interplay of heterosexism, androsexism, and (perhaps to a lesser extent) Euro-centrism and racism in the foreground of the discussion even as it unfolds in stages. The positionality and relationality of this Project thus enables holistic and contextual discussions of the conflation's three endpoints and their inter-related positions and prejudices.¹²⁷¹ Anything short of this treatment would leave the discussion lacking completeness because the three endpoints and the various acts or strains of discrimination founded upon them can and do operate in tandem; a discussion of discrimination involving either sex, gender, or sexual orientation should be framed positionally and relationally within a single work or project precisely because these endpoints and "-isms" operate in tandem in modern and legal culture.¹²⁷²

But, obviously, the workings or effects of each among many biases in a particular setting cannot be the specific focus of critical inquiry at exactly the same time. In other words, this Project (and others) can, should, and must blend and balance, incorporate and integrate, each of these constructs, positions, and analyses within and throughout a single critique, but I (or others) cannot train on and operate from all constructs, positions, and analyses precisely at once. Instead, the proper and necessary objective is to be—and stay—alert to the ways in which various "-isms" converge and interact in the social or legal construct that is under inspection at any given moment; the attainable and beneficial point is to cross-reference insights and critiques consciously among the various constructs, positions, and analyses to make sure that the critical focus is trained holistically and contextually on each of these "-isms" as appropriate. Of course, in doing so, we also position ourselves to keep track of the interrelationships among the "-isms" that affect or effect the construct or phenomenon under inspection.

Thus, inclusive and expansive sensibilities, and this resulting positional and relational thinking, should help Queer legal theorists to resist myopic analytical and discursive tendencies. Such tendencies are detrimental to and troublesome for Queer (and other) legal theorizing because they can and do wrongly reduce a given construct and its critique to a single dimension. This sort of reductionism then facilitates or invites a false sense of essentialism regarding that one dimension, which leaves uninspected relevant aspects or interrelationships of the construct. This false sense of essentialism, in short, lulls and dulls the analysis and truncates the discussion of the construct. To advance Queer prospects of avoiding these pitfalls, and with these notes on the basic nature of the venture in mind, the next task is to consider the goals, strategies, and methods that Queer legal theory can or should adopt.

1271. See generally *supra* Chapter Five, Part II.A-C.

1272. See *supra* Foreword, Part I.A-D; see also *supra* Chapter One, Parts I-II; Chapter Two, Part IV; Chapter Four, Part I.

II

GOALS, STRATEGIES & METHODS

Many of the goals, strategies, and methods of Queer legal theory are suggested by the experiences (both successes and mistakes) of Feminist and Critical Race scholars in recent years. However, this Project's examination of the conflation suggests further points relating to strategy and methodology. Thus, Queer legal theory may and must learn from other critical enterprises, but also should and must carve out new stances and territories as it situates itself among these other schools of outsider jurisprudence.¹²⁷³

A. *Queer Goal(s): Beyond Euro-centric Hetero-Patriarchy*

At its most basic level, and drawing from the recent proliferation of sexual minority discourse and scholarship, Queer legal theory's work must include several related tasks. At the outset, sheer survival is at stake;¹²⁷⁴ to ensure our survival (and ultimately, our success) under the (mis)rule of law, Queer legal theory must strive to weave the experiences of sexual minorities *as sexual minorities* into the law's fabric—at every level and in every context—to make us explicitly and determinedly visible to the law. In this sense, the continuing purpose of Queer legal theory would be to make the law ever more responsive and accountable to sexual minorities *as sexual minorities*. First and foremost, then, Queer legal theory must aim to inform and reform a legal culture that is generally content with neglect and ignorance, if not with disdain and persecution, regarding the realities of sexual minorities and minorityhood.¹²⁷⁵

Queer legal theory therefore must strive to promote the attainment of sex/gender equality while avoiding reinscription of (modified) conflationary notions: the point is not simply to rearrange or "equalize" the impact of conflationary precepts and practices, but to rid ourselves of them, providing sex/gender acceptance and autonomy for all, regardless of sex, gender, or sexual orientation. Queer legal theory's goal can be nothing short of sex/gender dignity and freedom for every individual.

However, Queer pursuit of sex/gender equality does not and need not mean that issues of sex or gender would predominate over issues of sexual orientation—or that "women's" issues would eclipse lesbian, gay or bisexual issues—because, in fact, these issues go hand-in-hand under the conflationary *status quo*. Indeed, such thinking indicates a belief that sex and

1273. The term "outsider jurisprudence" was coined in Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 & n.15 (1989). See generally Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform*, 52 OHIO ST. L.J. 847 (1991) (discussing the term and the development of "outsider jurisprudence").

1274. See ROBSON, *supra* note 86, at 17 (identifying survival as one purpose of Lesbian legal theory).

1275. See *supra* note 1233.

gender issues somehow are separable from sexual orientation issues, but the record of the conflation's operation in modern culture and legal culture shows any such belief ultimately to be misguided. Queer legal theory must pursue sex and gender equality and dignity because it is integral to and intertwined with sexual orientation equality and dignity, and vice versa. The two are conflated because the endpoints upon which such equality and dignity pivots are conflated.

Ideally, therefore, this enterprise also will connect with Feminist legal theory to help realize the sex/gender "connectivity"¹²⁷⁶ specifically of women and sexual minorities and thereby to help advance the common interest in overcoming hetero-patriarchy. The broader point of Queer critiques consequently must be to shake the legacy of sex/gender invisibility and ignorance within the law, which helps to fuel the social and legal subordination of sexual minorities *and* women. Queer legal theory, on its own and in collaboration with Feminist legal theory, must dedicate itself to dismantling the hetero-patriarchal male/female divides and active/passive hierarchies that constitute the traditionalist subordination both of women and of sexual minorities under the conflation of sex, gender, and sexual orientation.¹²⁷⁷

Finally, and even more broadly, Queer legal theory must demonstrate and espouse the sort of clearly positional and relational thinking that so far has been missing from critical legal theory in general.¹²⁷⁸ Only this sort of thinking (and writing) can bring the position and perspective of the author and her/his critique into the open, thereby helping to unpack the relation of one critique or social construct to other critiques and social constructs. As mentioned above, positionality and relationality poise us better to appreciate the interlocking nature of racism, classism, androsexism, and heterosexism; positionality and relationality are important to the operation and goals of Queer legal theory precisely because they create the analytical and discursive dynamic necessary to a comprehensive deconstruction both of the design and the operation of inter-connected subordination structures and systems.

In this spirit, Queer efforts must take their place among, and make their contributions to, the body of liberationist and outsider legal scholarship developed in recent times not only by Feminism, but also by Critical Race Theory. The ultimate point of Queer legal theory therefore must be to help promote egalitarianism and equality broadly—as an overarching prin-

1276. See Valdes, *supra* note 1252 for a further elaboration of "(inter)connectivity." Basically, the term "connectivity" describes the "capacity for connection" between habitats or eco-systems or between computer components or systems. As used here, the term denotes the "capacity for connection" between women and sexual minorities as traditional objects of hetero-patriarchal disfavor and as similarly situated contemporaries struggling for liberation. In like vein, (inter)connectivity signifies the connectivity of systems. See also *infra* Part II.C.8.

1277. See Chapter One, Part I.A.

1278. See *supra* notes 1270-72 and accompanying text.

principle of law and as a non-negotiable fact of life. Ultimately, subordination is the reality that Queer legal theory, like Feminism and Critical Race Theory, must seek to surmount. Several strategies and methods, outlined below, stand out as necessary or conducive to the accomplishment of this ultimate and elusive goal—of replacing debasement and subordination with respect and opportunity by and through Queering the law.

B. *Queer Strategy: Eradication of the Conflation*

As the preceding Chapters of this Project painstakingly have endeavored to show, the conflation sustains Euro-centric hetero-patriarchal traditions and practices based on sex, gender, and sexual orientation hierarchies that especially and intentionally disfavor sexual minorities and women. Moreover, as the joint record of modern culture¹²⁷⁹ and legal culture¹²⁸⁰ specifically demonstrates, sex/gender inequality will continue as long as the conflation permits dominant social and legal forces to recycle and reinforce these traditions and practices. Therefore, in order to dismantle the Euro-centric hetero-patriarchal *status quo* and to attain the ultimate goal of sex/gender equality, Queer legal theory must pursue a strategy that relentlessly combats the conflation and its sex/gender ideology.

Eradicating the conflation must be a fundamental strategic effort of Queer legal theory because social and legal institutions both invoke and ignore conflationary traditionalism and active/passive sex/gender attitudes in order to justify the social and sexual *status quo*.¹²⁸¹ This *status quo* inexorably constructs sexual minorities and women as defective or inferior in order to rationalize the sex/gender wrongs inherent in the conflationary system. The conflation, in short, is central to the subordination both of sexual minorities and women; concomitantly, the eradication of the conflation is central to the sex/gender freedom and equality of both. In all that it does, then, the strategy of Queer legal theory self-consciously and resolutely must be non-conflationary,¹²⁸² post-conflationary,¹²⁸³ and anti-conflationary¹²⁸⁴.

C. *Queer Methods: Making it Happen*

With sex/gender equality as the ultimate goal and with the eradication of the conflation as the basic strategy, the next consideration is: which methods, or tactics, can or should Queer legal theory employ? Again, some of these methods and tactics have been identified and employed by

1279. See Chapter One.

1280. See Chapter Two.

1281. See *supra* Chapter One, Part III; Chapter Four, Part III.B.

1282. See *supra* note 1133.

1283. See *supra* note 1134.

1284. See *supra* note 1135.

Feminism and Critical Race Theory. A few are relatively novel, or unique to Queer legal theory.

1. *Fighting Conflationary Stereotypes*

The first method or tactic must be to fight specifically against both social *and* sexual gender stereotypes that facilitate the manufacture and use of socio-sexual identity to devalue and subordinate sexual minorities and women.¹²⁸⁵ These hetero-patriarchal stereotypes, as discussed earlier, encapsulate the active/passive paradigm and the deductive/intransitive construction of gender under which the conflation of "sex," "gender," and "sexual orientation" takes place.¹²⁸⁶ Accordingly, these stereotypes block sex/gender equality socially as well as sexually.¹²⁸⁷ To eradicate the conflation and to attain sex/gender equality both socially and sexually, Queer legal theory therefore must guard against, confront, and do battle with each and every conflationary stereotype that it encounters being used to subordinate (or privilege) humans.

2. *Bridging Social Science Knowledge & Legal Knowledge*

Queer legal theory also must endeavor to import and employ the knowledge assembled by the social sciences in recent years regarding sexual orientation and sexual minorities.¹²⁸⁸ As noted above, this research continues and shows no sign of flagging in the near future. This accumulating knowledge can help Queer legal theory elucidate the ramifications of sexual minorityhood for legal rules and doctrine. Additionally, the facts and insights drawn by the social sciences provide a potent arsenal to help counter the dominant sex/gender myths and conflationary prejudices that work against sex/gender equality.

Thus, social science research can help to illuminate the development and enlighten the application of the law, thereby helping legal decisionmakers to conform their actions to current social realities.¹²⁸⁹ Indeed, social science research already has begun to inspire sexual minority critiques of the law.¹²⁹⁰ Hopefully, over time, this bridging of social science and legal knowledge will come to substitute informed care for the ignorance and malevolence regarding sexual minorities that currently prevails in legal culture.¹²⁹¹ In this vein, Queer legal theory must help to disseminate and marshal this record further, even as it continues to be amplified, to ensure the continuing education of legal culture until the day

1285. See *supra* notes 899-907 and accompanying text.

1286. See *supra* notes 998-1000 and accompanying text.

1287. See generally *supra* Chapter Four.

1288. See, e.g., sources cited *supra* note 86.

1289. See generally *supra* Chapter Five.

1290. See *supra* Part I.B.

1291. See *supra* Chapter Two.

arrives when legal culture matures enough to reject the belief that heterosexism is acceptable either in law or society.

3. *Using Narratives*

The third tactic or method entails recognition of scholarship's limits: even though social science data is critical to the advancement of sex/gender equality, by itself it simply cannot be, and is not, enough. To enlist legal culture earnestly in the battle against heterosexism, Queer legal theory must supplement the use of social science scholarship with narrative scholarship. Queer legal theory must compile and employ narratives, or counter-narratives, to air in legal venues the stories of sexual minority lives caught in the legal system for one reason or another.¹²⁹² Using narratives, like using social sciences data, can help combat conflationary prejudice and stereotypes by focusing decisionmakers on facts and weaning them away from fictions, but its special power is in the capacity of stories to elicit a sense of empathy with sexual minority equality claims and in its corollary ability to root both action and theory in reality.¹²⁹³

By capturing the humanity, complexity, and diversity of Queer lives and Queer legal issues, the use of narratives can dramatize in concrete, compelling, and undeniable ways the injustice of heterosexism to help inform and guide the actions of legal decisionmakers.¹²⁹⁴ But narratives also can help ensure that Queer legal theory is grounded in and textured by the everyday realities of sex/gender inequality and discrimination. The use of narratives on the whole thus serves to make Queer legal scholarship both persuasive to decisionmakers and responsive to lived realities.

4. *Developing Constructionist Sensibilities*

The use of diverse narratives in turn should help facilitate the next tactic or method: by reminding us continually of Queer diversities and realities even as we pursue Queer commonalities and theories, narratives can help us to avoid the pitfalls of essentialism and motivate us to explore the critiques made possible by the insights of social constructionism.¹²⁹⁵ The

1292. See generally Abrams, *supra* note 76 (discussing the emergence of feminist narrative scholarship as a distinctive from of critical legal discourse); Fajer, *supra* note 24 (discussing the use of narratives in legal discourse generally and in sexual minority scholarship more specifically).

1293. See Henderson, *supra* note 76 (analyzing the use of empathy as a litigation strategy by parties that represent traditionally subordinated groups). But see Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994) (critiquing the use of empathy as a legal strategy and as a tool for social change).

1294. See Eskridge, *Gaylegal Narratives*, *supra* note 1244; see also Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (responding to recent critiques of narratives in critical legal studies, specifically from a gay male perspective); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994) (also responding to recent attacks on the use of narratives in the race/ethnicity context).

1295. See *supra* notes 85 and 315 and accompanying text.

development of constructionist sensibilities of course proceeds from a clear awareness that the conflation itself, as well as its cultural and ideological underpinnings, is a socially contrived rather than “natural” phenomenon.¹²⁹⁶ More generally, a constructionist sensibility is critical to Queer legal theory because it encourages exploration of potential alternatives to the sex/gender *status quo*—alternatives which are almost unimaginable under the conflation but which are hinted at by the Native American example.¹²⁹⁷

Obviously, however, once this awareness is developed it also must be articulated repeatedly, and disseminated widely, if it is to make a difference. Within law, Queer legal theory can and should help to make this difference in order to help debunk the claimed naturalness, normality, morality, and essentiality of sex/gender subordination under hetero-patriarchy.¹²⁹⁸ This tactic therefore entails not only the embrace and cultivation of constructionist sensibilities but also their active and insistent dissemination.

5. Conceptualizing “Sexual Orientation”

Constructionist sensibilities also benefit and lead to the next tactic or method, which calls for Queer legal theory to join in the unfinished task of conceptualizing “sexual orientation” as a functional legal and social construct. Cultural notions of “sexual orientation,” as explained earlier, are recent, and they continue to be controversial.¹²⁹⁹ The law also has had little success in defining it.¹³⁰⁰ Moreover, as illustrated by the sexual orientation loophole in current anti-discrimination doctrine, this conceptual uncertainty permits dominant forces in law and society to manipulate “sexual orientation” toward ends inimical to sex/gender equality claims.¹³⁰¹ The brief and fitful history of “sexual orientation” therefore points to a vital task: the conceptualization of “sexual orientation” (and, concomitantly, of “sex” and “gender”) sensibly and coherently.¹³⁰²

The outcome of this pending task naturally will have important ramifications in both law and society because it will shape the accommodations that society will have to make in learning to live with its sexual minorities in peace and harmony. Moreover, this outcome directly will affect sexual minorities for decades to come because it will represent the contemporary construction of sexual minorities as persons and as groups. Therefore, Queer legal theory must help inform and guide that outcome to ensure that

1296. See *supra* notes 1026-36 and accompanying text.

1297. See, e.g., *supra* Chapter Four, Part III.A.4.

1298. See *supra* Chapter One, Part III; Chapter Four, Part III.B.

1299. For example, how “conduct” and “desire” fit into “sexual orientation” remains problematic and unresolved. See, e.g., *supra* notes 1046-61 and accompanying text.

1300. See, e.g., Halley, *supra* note 1244, at 512, 513-16; Ortiz, *supra* note 85, at 1843-44, 1851-53.

1301. See, e.g., *supra* notes 428-36 and accompanying text.

1302. See Valdes, *supra* note 55.

sexual minorities will attain human and civil rights that society currently arrogates to the sexual majority.

6. *Defending Desire As Such*

In helping to conceptualize “sexual orientation” as a legal concept, Queer legal theory should defend desire as the next tactic or method in the overall promotion of sex/gender reform and equality. The problem, of course, is that the very notion of erotic desire as a legally significant experience remains mired in generalized “ancient proscriptions” against bodily pleasures instilled by organized religion, which (still) dominate Western social and legal traditions.¹³⁰³ Thus, the Supreme Court in *Bowers v. Hardwick* found it quite easy to assert a transparently simplistic but profoundly important claim: that “privacy” resulting in the protection of same-sex desire was “at best, facetious”¹³⁰⁴ because same-sex relations were irrelevant to the formation or enjoyment of family relations and, by implication, because same-sex relations and desires were humanly, culturally, and legally frivolous.

But, of course, social and legal experience shows the opposite is true: sexual and affectional intimacy, driven by erotic desires, is integral to humanity¹³⁰⁵ and society because both intimacy and desire are “affirmations of life [and therefore] are diametrically opposed to dogmatic regimes” such as the dominant Euro-American sex/gender system.¹³⁰⁶ Despite the traditionalist dogmatism underlying claims like the Supreme Court’s in *Bowers*, human intimacy and desire are neither frivolous nor legally insignificant, whether it is cross-sex or same-sex. Queer legal theory’s defense of desire thus can and should help in the effort to make this point clear to the law and throughout society.

By way of example, in his chilling account of gay life in Fidel Castro’s Cuba, Reinaldo Arenas explains how “[a]ll dictatorships are sexually repressive and anti-life. . . . It was logical for Fidel Castro to persecute us, not to let us fuck, and to try to suppress any public display of the life force.”¹³⁰⁷ The same words describe exactly the dominant forces’ oppression of sexual minorities in this country, as *Bowers* pointedly made clear, and as the Gays-in-the-Military travesty more recently confirmed.¹³⁰⁸ In both contexts, the sexual tyranny was and is the same: the majority fears the inner feelings—the very beingness—that define the minority.

1303. See generally *supra* notes 1026-39 and accompanying text.

1304. *Bowers v. Hardwick*, 478 U.S. 186, 192, 194 (1986).

1305. *Id.* at 205-08 (Blackmun, J., dissenting).

1306. See REINALDO ARENAS, *BEFORE NIGHT FALLS* 93 (1993).

1307. *Id.*

1308. See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 465-74 (1994) (analyzing the Gays-in-the-Military affair from a status/conduct perspective).

This collision between the individual's affectional desires and the state's regimentation and expropriation of sexual life prompted Arenas to note more broadly that:

A sense of beauty is always dangerous and antagonistic to any dictatorship because it implies a realm extending beyond the limits that a dictatorship can impose on human beings. Beauty is a territory that escapes the control of the political police. Being independent and outside of their domain, beauty is so irritating to dictators that they attempt to destroy it whichever way they can. Under a dictatorship, beauty is always a dissident force, because a dictatorship is itself unaesthetic, grotesque¹³⁰⁹

Arenas' words again apply with equal force to the (in)al)treatment of same-sex desire under the sex/gender tyranny of the hetero-patriarchal regime that predominates in this country: a sense of homoeroticism is always dangerous to dominant conflationary conventions because it implies a realm beyond the limits that conflationary forces seek to impose on human beings; same-sex desire, unlike same-sex conduct, is territory that effectively escapes the control of the sex/gender police; being independent and outside of their domain, same-sex desire *per se* is so irritating to dominant sex/gender forces that they attempt to destroy it in whatever way they can; under the conflation's sex/gender tyranny same-sex desire will always be a dissident force because such tyranny is itself insecure, maniacal, and grotesque. Queer legal theory therefore must stand for the defense of desire and against the obsessive, righteous grotesqueness of traditionalist sex/gender tyranny.

The tactic of defending desire thus commits Queer legal theory to winning respect for the range of yearnings regarding consensual affection and intimacy that are felt by all humans in one form or another. But because desire is not rational in the Western sense, this tactic also commits Queer legal theory to engaging the law beyond the limits of (legal) rationality. This tactic or method calls forth a joy in and for humanity that is distinct, though not separate, from the notions (and the limits) of reason or logic that characterize the very culture of the law. In this sense, this tactic may be the most radical or subversive contribution of Queer legal theory to critical legal thinking; defending desire effectively calls for us to "come out of the closet" with respect to human pleasure and its worth. Consequently, the defense of desire as such amounts to much more than a challenge to the rationalized and selective version of instrumental "privacy" that characterizes and delimits the protection of intimacy afforded under the constitutional *status quo*—a version that adamantly seeks to shut out and down the

1309. ARENAS, *supra* note 1306, at 87.

personal identities, lives, and relationships of lesbians, gay men, and bisexuals.¹³¹⁰

7. *Transcending "Privacy"*

The tactics and methods outlined thus far jointly point to another: promoting the realization that sexuality is not just about "privacy" but about the ability to function in various social, economic, and political settings on equal terms. As the reach and effects of socio-sexual identity slow, social and sexual gender cross-stereotypes reflect and reinforce each other to regulate both public and private aspects of life and identity along hetero-patriarchal lines.¹³¹¹ This mutual reinforcement of subordination in the social/public and sexual/private spheres is shown by the way in which a *social* manifestation of perceived or actual "sexual orientation," like cross-gender attributes or membership in a gay-identified professional organization, can trigger discrimination even though no actual or *sexual* manifestation of "sexual orientation" is present. It is this reinforcement, or rebounding, of social and sexual sex/gender perception and subordination that causes lesbians, gay men, and bisexuals to obfuscate "sexual orientation" both socially and sexually with the strategies of the "Closet."¹³¹²

Moreover, as the implementation of the Gays-in-the-Military "compromise" illustrates, current conceptions of "privacy" can be used by dominant forces both as a shield and a sword against sexual minority equality claims. There, the "privacy" of a homophobic majority was asserted as a shield against reforms toward equality;¹³¹³ in other words, the privacy-as-shield claim there asserted that the "right" to disassociate from a disfavored minority by banning their presence from the armed forces was essential to the majority's "privacy." While this claim was not entirely successful, *open* gays, lesbians, and bisexuals remain barred from military service. In this way, "privacy" engineered and secured the (partial) triumph of prejudice over equality. But "privacy" also was used there as a sword to frustrate and forestall reform by imposing forced secrecy (or coerced "privacy") on the minority: the "don't tell" dictate of the compromise policy effectively and formally institutionalized the isolating and stigmatizing "privacy" of the Closet. This (mis)use of "privacy" is wholly incompatible with dignity and acceptance because the appearance of "equality" is granted only at the price of a secrecy not borne by members of the sexual majority serving in the military. In other words, the insistence that only lesbian, gay, and bisexual service members keep their sexualities "private" (and secret)

1310. See, e.g., Hayes, *supra* note 674, at 453-74.

1311. See *supra* notes 899-907 and accompanying text.

1312. See generally THE ORIGINAL COMING OUT STORIES (Julia Penelope & Susan J. Wolfe eds., 2d ed. 1989) (recounting various stories that depict the "Closet" and the social strategies employed by sexual minorities to preserve or abandon it).

1313. See *supra* note 264. See also *supra* note 263 and authorities cited therein on military policies toward sexual minorities.

works like a sword that beats back the expression of sexual minority identity while, at the same time, the “privacy” of the sexual majority is waved as if shielding legitimate concerns and social justice.¹³¹⁴

The Gays-in-the-Military experience thus points out the limitations of legally and socially recognized “privacy” because this sort of “privacy” can be, and is, contoured to cramp and to shame disfavored identities. In practice, then, current versions and applications of “privacy” have the capacity to replay the older and even more insidious *status quo*, discussed in Chapter One, when sexual minority identity was something always manifested secretly, and shamefully, in the dark. The attainment of sex/gender equality therefore requires reforms that will match the scope and context of all sex/gender inequalities.

To that end, Queer legal theory must transcend the limits of current privacy notions and push for sex/gender dignity and equality in all spheres of life. This method or tactic thus calls upon Queer legal theory to insist on more than a formal and cramped right of privacy, but also to make claims not grounded in or limited to conventional (mis)conceptions of privacy.¹³¹⁵ The ultimate goal, dignity and equality, requires the right of sexual minorities to be open—to be active in our occupations and secure in our homes without having to choose continually between a life of closeted deceptions and a life of enduring homophobic bigotries. Transcending “privacy” consequently is a key tactic or method of Queer legal theory.

8. *Promoting Positionality, Relationality & (Inter)Connectivity*

The final tactic or method posited here calls for Queer legal theory to help nurture positionality, relationality, and (inter)connectivity, and thereby to help build social and legal empowerment and reconstruction out of intersectionality, multiplicity, and coalition.¹³¹⁶ Developed by Feminist and Critical Race legal scholars in recent years, “multiplicity” and “intersectionality” show how the law’s response to subordination based on sex and race has been uni-dimensional, and therefore inadequate: “multiplicity” shows

1314. In *Able v. United States*, 847 F. Supp. 1038, 1041-43 (E.D.N.Y. 1994), the first action challenging the Clinton Administration’s “don’t ask, don’t tell” policy on sexual minorities serving in the military (which permits only hermetically closeted personnel to serve) the court expressed skepticism about how this enforced secrecy could be implemented sensibly when the plaintiffs necessarily revealed their sexual orientation in bringing the suit. In order to prevent reprisals, the court enjoined the military from further adverse action against the plaintiffs pending resolution of the case. *Id.* at 1045-46.

1315. See generally Thomas, *supra* note 674 (discussing the chief limitations of privacy doctrine in constitutional law and showing how “privacy” interests in fact implicate “public practices” regarding “body politics”).

1316. See generally Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994) (discussing the overlapping of structures, practices, and systems of subordination and liberation, and the resulting interests of various critical legal methodologies, viewpoints, or theories, especially in relation to race issues); see also *infra* notes 1317-18 on multiplicity and intersectionality in the context of Critical Race Feminism.

that humans and their bigotries toward other humans are layered and multiplicitous,¹³¹⁷ and “intersectionality” shows how this multiplicity constructs multiple axes of discrimination that operate in tandem.¹³¹⁸ Positional and relational analyses, on the other hand, can help promote multiple and intersectional perspectives and projects because they emphasize the positions and relations between and among the various actors, constructs, and phenomena in play.¹³¹⁹

In doing so, and over time, positional and relational analyses can also help to promote (inter)connective perspectives and collaborative projects because they facilitate appreciation for the common ground created through and by multiplicity and intersectionality. Thus, Queer legal theory must learn about and accommodate the experiences and interests of all sexual minorities, including (most prominently at this moment) the still-marginal treatment of bisexual and trans/bi-gendered persons and communities. And, as already discussed, Queer legal theory must bridge the (perceived) divides of sex, race, and class (not to mention age and physical (dis)ability).¹³²⁰

Certainly, this sensitivity to and promotion of multiplicity and intersectionality, (inter)connectivity and coalition, and inclusive and expansive critiques requires patience and long-term self-education. But these tactics and methods also can help ensure that Queer perspectives and projects will realize their full potential as a genre of critical legal theory. The work, then, is well worth it.

D. *The Queer/Feminist Connection & Critical Race Theory*

The preceding discussion of goals, strategies, and methods highlights the fact that women and sexual minorities have a joint and particularized stake in dismantling the conflation and its fusion of androsexism and heterosexism.¹³²¹ To the extent it does not already do so, Feminist legal theory therefore should embrace the points outlined above for the same reason that Queer legal theory must do so: to help overcome hetero-patriarchy and advance sex/gender reform. This common situation and goal indicates, again, that Feminist and Queer agendas in legal doctrine and legal theory intersect, converge, and diverge in myriad ways, some yet to be mapped.

1317. See Harris, *supra* note 85 (pointing out that women of color and other women are omitted from the experiential base of Feminist theorizing).

1318. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40 (advancing the notions of “multi-dimensionality” and “intersectionality” to go beyond analyses that hinge on a “single-axis framework”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251-53 (1991) (illustrating the ways in which antiracist and Feminist politics may collide for women of color).

1319. See *supra* Part I.F.

1320. This goal is one reason why Critical Race Theory and Queer legal theory need to collaborate. See *infra* Part II.D; see also Valdes, *supra* note 1252.

1321. See *supra* Chapter Two, Part VI.

Accordingly, Queer critiques must help to shoulder the burden, hitherto borne mainly (though not inclusively) by Feminist theorists, of examining and challenging along multiple fronts the sex/gender structures and systems that inter-connect to subordinate both women and sexual minorities.

However, the force of Queer/Feminist collaborations depends on mutuality and, to attain mutuality, Feminist legal theory will need to expand its horizons and make itself consciously, more consistently, and expressly inclusive. The explicitness and consistency of this reciprocation of inclusiveness is critical because of recent experience—even though Feminism in the law has challenged androsexist biases, Feminist legal critiques generally have overlooked or underemphasized heterosexist biases in law and society; on the whole, Feminist legal work simply has failed to account for the experiences of sexual minorities, particularly lesbians and bisexual women, in the development of Feminist legal theory.¹³²² Consequently, Feminist critiques of law have missed nuances that could sharpen, broaden, or texture its insights,¹³²³ and along the way also have missed opportunities for empowerment through coalition. Now, with the emergence of Queer legal culture, the time is ripe for Feminist legal culture to signal the passing of these omissions with a conscious and consistent inclusiveness.

In sum, Queer legal theory can, should, and must join the critical enterprise of deconstructing “sex” and “gender.” Feminist legal theory likewise can, should, and must begin to include “sexual orientation” more consciously within its discourse. Through mutual collaboration, the depth and scope of Queer/Feminist legal critiques can help to expand both Queer and Feminist consciousness while advancing the legal and social interests that are important to each and common to both under conflationary traditionalism.

And, lest there be doubt, Queer/Feminist enterprise faces no shortage of fertile ground for collaborative critiques of the sex/gender system. Perhaps most notably, the deconstruction of the conflation in modern culture presented in Chapter One shows how sex-derived gender is omnipresent in the construction of all sexual orientations yet conceived by Euro-American societies. Additionally, the deconstruction of the conflation in legal culture presented in Chapter Two shows how the intellectual, normative, and doctrinal dynamics of discrimination “based” on sex and gender cannot be sep-

1322. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 846 (noting that “the dominant discourse often silences those to whom we most need to listen,” such as gay men and lesbians); see also Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103, 107 (1994) (arguing that Feminist theory should be broadened to include sexual orientation issues and that Lesbian legal theory should not adopt a separatist stance); Leonard, *supra* note 23 (discussing the apparent disregard for lesbian issues in Feminist legal writings). See generally Cheshire Calhoun, *Separating Lesbian Theory from Feminist Theory*, 104 ETHICS 558 (1994) (discussing the connection and separation of lesbian and Feminist theorizing, work, and interests in a non-legal context).

1323. See, e.g., Cain, *supra* note 1322, at 841-47 (warning that Feminist legal theory should not prevent one “from seeing the harms that others see”).

arated from the dynamics of discrimination “based” on sexual orientation.¹³²⁴ Whether as legal doctrine or as social reality, discrimination on account of sex, gender, and sexual orientation invariably encompasses fields of experience where the lives and interests of women and sexual minorities frequently meet. So long as the conflation endures, so will this situational commonality and the unity of interests that it represents and (re)produces.

Moreover, the history and impact of the conflation within legal culture shows that the linkage of “queers” and “sissies” and of “dykes” and “tom-boys” is sustained additionally and specifically by law. Yet this record is only a first step: this Project only begins to illuminate how legal issues implicating sex or gender or sexual orientation are inter-linked. The hard work of chasing the shadows, of mapping intersections and (dis)locating interlocking structures and systems of sex/gender (and other) oppressions, still awaits. Only a Queer/Feminist scholarship provides the means to chart and claim the sex/gender terrain that surrounds and presently subordinates us. Therefore, whatever its potential pitfalls or eventual limitations, a Queer/Feminist exploration of law is an undertaking without substitute.

Finally, the Queer/Feminist connection must extend to Critical Race Theory as well. Generally, this extension is grounded on basic knowledge—oppressions of various sorts always interlock because popular prejudice travels in multiples.¹³²⁵ Therefore, to be most effective and most enduring, efforts against various sorts of oppression also must join forces. More specifically, however, the conflationary *status quo*, as the preceding Chapters of the Project show, is a Euro-American construct; when it encountered its native counterpart, the European response was conquest, enslavement, and obliteration.¹³²⁶ The sex/gender system that created the conflation and is sustained by it consequently is thoroughly Euro-centric: it promotes the primacy of white preferences in sex/gender matters specifically, and helps to promote the primacy of whiteness generally. Thus, dismantling the Euro-centric hetero-patriarchal *status quo* inevitably implicates race power relations.

Given the racial and cultural origins, biases, and ideology of the conflation, it simply would be mistaken for Queer and/or Feminist attacks on the conflationary *status quo* to ignore or exclude race, ethnicity, and class factors from post-conflationary and anti-conflationary discourse. It therefore would be foolhardy and self-defeating for Queer and/or Feminist perspectives and projects to (continue to) ignore or neglect Critical Race

1324. Additionally, other authors have advanced similar observations. See, e.g., Capers, *supra* note 24, at 1167-84; Fajer, *supra* note 24, at 607-49; Koppelman, *supra* note 84, at 147, 149-54; Law, *supra* note 84, at 221, 225-35.

1325. As noted previously, various studies have shown that persons with androsexist or heterosexist or racist attitudes also tend to harbor the other biases. See, e.g., *supra* notes 148 and 247.

1326. See *supra* Chapter Three.

Theory. And, for the same reasons, it would be foolhardy and self-defeating for Critical Race Theory to (continue to) ignore or neglect sex, gender, and sexual orientation in its discourse.¹³²⁷ To best serve its self-interests, and to best build momentum toward inclusion and equality, each genre of outsider jurisprudence instead must join with the others to realize a critical mass of common efforts, aspirations, and successes.

III

FINAL CONSIDERATIONS

The various Chapters of this Project have outlined and critiqued the conflation of sex, gender, and sexual orientation over a century, across borders, and throughout numerous segments and institutions of Euro-American societies to document its malignant and malevolent power, and to inspire resistance to it. Now, at the finish, two considerations merit emphasis. The Project closes with these two final points as reminders of the consequences that attend the conflation's continued supremacy over our sex/gender affairs.

First, even though the conflation of sex, gender, and sexual orientation is most devastating to women and sexual minorities, it affects and regulates every single person within American law and society.¹³²⁸ In like vein, its distortion of anti-discrimination legal rules and doctrines makes us *all* vulnerable to arbitrary harm.¹³²⁹ Therefore, each of us should recognize the personal and perpetual implications of the conflationary *status quo*.

Accordingly, legal scholars and theorists of all stripes, legal institutions of all sorts, and legal decisionmakers at all levels should join with women and sexual minorities, with Feminists and Queers, to confront and dismantle this conflation. Each of us, regardless of sex, gender, and/or sexual orientation, personally and cooperatively should strive to become conscious of our internalized conflationary suppositions, and of our mental or behavioral habits that may be based on those suppositions, so that we may begin to question and (re)assess them. In this way, legal culture slowly but steadily may begin to withdraw its support of historic sex/gender inequalities and terminate its complicity in the conflation's perpetuation of subordination.

Second, the conflation is a social construction serving certain and discernible ideological ends. It is not a universal, "natural," or preordained condition of humanity, and it does not serve a beneficial need or pur-

1327. An excellent example of inclusive work from this perspective is Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda"*, 1 AFR.-AM. L. & POL'Y REP. 33 (1994) (analyzing the role and relationship of sexual minority rights and issues within the larger context of civil rights efforts).

1328. See *supra* notes Chapter Four, Part F.

1329. See *supra* notes Chapter Four, Part F; see also *supra* Chapter Two.

pose.¹³³⁰ Yet, even if insistently deemed "natural" by diehard traditionalists, the conflation still remains a malignant and unjust force in law and in society. Thus, even though the preceding discussions considered directly whether this conflation is an organic or an artificial construct,¹³³¹ it bears emphasis that one's outlook on this point does not alter any of this Project's lessons and conclusions because the conflation *wrongfully* affects lives and cultures regardless of which way its origins and nature are characterized. In theory, as well as in practice, the conflation's endpoints—"sex," "gender," and "sexual orientation"—and their corresponding categories continue to regulate all humans and devalue the lives and opportunities of both women and sexual minorities.¹³³² The conflation thus perpetuates arbitrary sex/gender inequities that the nation formally has repudiated or should repudiate.¹³³³

As a destructive force, the conflation merits legal and social rejection regardless of whether the destruction it wreaks is deemed natural or artificial, and even if "sissies" do tend to be "queers" or "tomboys" do tend to be "dykes," or vice versa. These correlations do not and could not justify or excuse arbitrary discrimination against any person or group. Ultimately, then, the natural/artificial conclusion really does not matter.¹³³⁴

1330. See *supra* notes 1026-1039 and accompanying text.

1331. See, e.g., *supra* Chapter Four, Part III.

1332. See *supra* Chapter Four, Part I.E.

1333. As a society we have formally repudiated arbitrary inequality or discrimination based on "sex" and "gender." Thus, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "sex." 42 U.S.C. § 2000e-2(a) (1988). Moreover, the Supreme Court has also held that the Equal Protection Clause of the Fourteenth Amendment (and the equal protection component of the Fifth Amendment) guards against discrimination on the basis of "gender." See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682-91 (1973); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971); see also *supra* note 335 and authorities cited therein on the repudiation of sex and gender discrimination.

However, as a society, we have not formally repudiated arbitrary inequality or discrimination on the basis of "sexual orientation." See, e.g., *Bowers v. Hardwick*, 476 U.S. 186, 191-96 (1986) (holding that homosexuality is not protected as a fundamental right under substantive due process principles); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990) (holding that homosexuals are not a suspect or quasi-suspect class under equal protection principles); see also *supra* note 331 and authorities cited therein on the non-repudiation of sexual orientation discrimination.

As illustrated by the recent history of AIDS-induced activism, by the current controversy over openly lesbian and gay people in the armed forces, by the ongoing problems regarding the Boy Scouts, and by various other current controversies, the "status quo" appears, in fact, to present an increasingly difficult situation. See generally *supra* Chapter One, Part II.B. Additionally, some courts have begun to listen more attentively to the civil rights claims of sexual minorities. See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992) (ruling in favor of a lesbian Army chaplain and holding that the military must come forward with a rational basis for its discriminatory policy toward homosexuals rather than a conclusory assertion); *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992) (striking down the sodomy statute on state constitutional privacy grounds).

Of course, despite the nation's formal commitment to some "equality," the concept is itself ambiguous and contested, thus making our attainment of it even more elusive. See *supra* note 330 and authorities therein cited on equality (and lack thereof) in American law and society both historically and currently.

1334. Of course, the traditionalist claim insists that it does matter because of the naturalness/normality/morality trinity that is asserted to justify the essentiality, utility, and necessity of the

In fact, the query ultimately begs the question: the conflation's "real" nature does not settle the matter of its efficacy as sex/gender policy in light of fundamental (yet unfulfilled) principles espoused by this nation that mandate freedom and equality for all.¹³³⁵ Thus, the paramount point is that, whether considered organic or constructed, the conflation *does* exist. It is as real as its history, and as ugly as its record. We must hold it and its adherents accountable on the basis of this record in law and in society, and then (re)shape our (re)actions toward and against it accordingly.

CONCLUSION

Queer legal theory is a needed, viable, and timely undertaking for the reasons that make Queerness a controversial and problematic, yet hopeful, construct. However, to realize its potential, Queer legal theory must traverse the dangers of our culture and avoid replicating the androsexism and racism that is endemic to American society as a whole. If we manage it, then perhaps Queer legal theory can set an affirmative example of inclusive and expansive egalitarianism for the sexual majority to learn from and to follow.

At the very least, Queer legal theory must be recognized as beneficial and urgent both to sexual minorities and to the sexual majority because it can help to ameliorate the sex/gender strictures that delimit everyone's range of sex/gender expression. Queer legal theory, like other genres of critical legal thought, can help to uncover the hidden assumptions and arbitrary determinants of legal rules and actions, and thereby help to implement overarching ideals regarding equality and non-discrimination. When honored in practice, these ideals can serve to protect *everyone's* sex/gender liberties and individuality. In short, Queer legal theory can, should, and must take its place among other movements of outsider jurisprudence to aid in dismantling historic and continuing subordinations.

conflationary *status quo*. See *supra* Chapter One, Part III; Chapter Four, Part III.B. This claim, of course, is facilitated by the sheer breadth and weight of conflationary traditionalism: the conflation and its active/passive themes and traditions are so historically omnipresent and so culturally internalized that they allow custom to be confused for—or substituted for—"nature." See generally RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1993) (examining how interplay of culture, politics, and ethnicity generally shape the perceptions and analyses of anthropologists and questioning whether the resulting constructions of social realities may ever be called, or may be relied on as being, "objective").

1335. See generally *supra* note 330 and authorities cited therein on equality and its problematization.

