

# NLGLA WRITING COMPETITION

## Queer Theory: Weed or Seed in the Garden of Legal Theory?

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### I. INTRODUCTION: WE'RE HERE, WE'RE QUEER . . . NOW WHAT?

Within the last twenty years, a school of thought called “Queer<sup>1</sup> theory” has blossomed simultaneously in the arena of gay politics and

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\* In the spirit of Queer theory, this paper includes many examples and citations “in the margins” (read: footnotes). I encourage you to overcome any apprehensions at the quantity and length of the footnotes; instead, boldly venture into this material and create your own critical evaluation of Queer theory and my appraisal of it.

1. Although “queer” has historically denigrated homosexuals, it has evolved into “Queer”—with a capital Q—to reflect the recent renunciation of its negative uses and the reclamation of the term by sexual minorities. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society*, 83 CAL. L. REV. 1, 347 (1995).

For me, the taking back of negative words has been a survival strategy. I came out in the early 80s, when all the words available to me to articulate my desire were

in many academic subjects, (including literature<sup>2</sup> and sociology<sup>3</sup>). Since law students have a unique opportunity to turn academic discussion into sociopolitical reality through their lawyer-legislator careers, Queer theory's absence from legal academia has impeded juridical change in the "real" world. In this paper, I suggest it is time for Queer legal theory (QLT) to enter jurisprudence and the law school classroom.<sup>4</sup> First, I will discuss the major tenets of Queer theory and outline its historical context. Second, I will describe the doctrinal debate surrounding Queer theory and its relationship to existing social, political, and legal theories. In particular, I will consider the identity-politics issues central to gay, lesbian, bisexual, transgendered, or transsexual (GLBTT) theory and other minority theories as they relate to the doctrinal legitimacy of a QLT. Finally, I will explore the pragmatic viability of a QLT by examining, first, a proposed methodology for QLT, and, second, how QLT could be introduced and taught in American law schools in spite of institutional impediments.

## II. WHAT IS QUEER THEORY?

### A. *On the Q.T.: A Definition?*

Despite Queer theory's potential to expose social inequality, it has not yet captured the attention of the public. Furthermore, some academic fields give it more credence than others; for example, a straight graduate student in literature, film, or anthropology is more likely to have encountered the movement than a gay biochemistry student. In describing this essay to other people, I encountered two dominant reactions: (1) "I have never heard of Queer theory. What are you talking about?" or (2) "I'm gay (or lesbian) so I guess Queer theory is about me? What do I need to know about Queer theory?" (Un?)fortunately, neither I nor anyone else can answer these questions with a simple, yet complete, definition of Queer theory.

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constructed negatively: lesbian, lessie, dyke, . . . cunt, pussy, fuck . . . . It has been a long haul back to reclaiming the right to call my cunt, my cunt[.]

CHERRY SMITH, LESBIANS TALK QUEER NOTIONS 27 (1992).

2. See e.g., EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

3. See e.g., *QUEER THEORY/SOCIOLOGY* (Steven Seidman ed., 1996).

4. I have chosen to examine Queer legal theory in relationship to law schools rather than to law in general to narrow the discussion to the legal arena with which I, as a 1999 law school graduate, am most familiar. Since a law school must provide curricula relevant to legal practice, a focus on law schools will still allow me, subsequently, to illustrate several areas of legal practice where a Queer perspective would be meaningful.

Teresa de Lauretis coined the term “Queer theory” in 1991.<sup>5</sup> Her use of the word “Queer” transformed an historically derogatory sting into an inclusive umbrella for many GLBTT people. Nevertheless, the use of a former pejorative caused tension within the GLBTT community.<sup>6</sup> In particular, a generation gap emerged with older people cringing at “queer” after so many years of hearing it as a weapon of animus. Other people casually use “Queer” as a synonym for “gay,” but “Queer theory” is a technical idea and should not be carelessly tossed into the GLBTT category without further explanation. Rather than adopting the impossible task of positively defining Queer theory, I will illustrate what it is not.

Three primary models of sexuality have dominated Western twentieth-century discussion: natural, biological, and social. The *natural* model relies on the idea of universal norms.<sup>7</sup> Its proponents believe society has a moral and ethical obligation (and capacity) to encourage “natural,” and discourage “unnatural,” sexualities.<sup>8</sup> For example, sexual relations between married persons are considered “natural” but incest and pederasty are “unnatural.” Under the *biological* model, sexuality is an innate force that society must struggle, though fail, to contain.<sup>9</sup> Consequently, sexual desire may

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5. See Teresa de Lauretis, *Introduction to Queer Theory: Lesbian and Gay Sexualities*, 3 DIFFERENCES: AM. J. FEMINIST CULTURAL STUD., Special Issue 2, 1991, i, iii, xviii (1991). The author used “Queer theory” to argue it was not productive to represent GLBTT sexuality as an “other” sexuality or an “optional lifestyle.” See *id.* at i, iii. Yet, only three years after she introduced the phrase, she abandoned it, alleging “Queer theory” had been adopted by the mainstream forces and institutions it meant to resist. See Annamarie Jagose, *Queer Theory*, in AUSTRALIAN HUMANITIES REV. (visited Apr. 7, 2000) <<http://www.lib.latrobe.edu.au/AHR/archive/issue-Dec-1996/jagose.html>>. Since that time, she has distanced herself from her initial optimism about Queer theory as a viable sociopolitical movement.

6. According to one commentator:

Queer! Ah, do we really have to use that word? It’s trouble. Every gay person has his or her own take on it. For some it means strange and eccentric and kind of mysterious. That’s okay, we like that. But some gay girls and boys don’t. They think they’re more normal than strange. And for others “queer” conjures up those awful memories of adolescent suffering. Queer. It’s forcibly bittersweet and quaint at best—weakening and painful at worse. Couldn’t we just use “gay” instead. It’s a much brighter word. And isn’t it synonymous with “happy?” When will you militants grow up and get over the novelty of being different?

*Anonymous Queers, Queers Read This*, reprinted in WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 79, 80 (2d ed. 1997) (reprinting a newspaper distributed at a New York City Gay Pride parade in June 1990).

7. See WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, SEXUALITY, GENDER, AND THE LAW 227 (1997).

8. *Id.*

9. See *id.*

jeopardize other social norms (such as a monogamous marital relationship) because the sexual actor “just couldn’t help himself.” So far, the natural and biological theories have monopolized popular, and legal, discourse. Yet, Queer theorists adopt a *social* model, which treats sexuality as the product of intersecting cultural and historical events.<sup>10</sup>

Queer theory views sexuality as a widespread social condition and, thus, a matter of importance to all individuals whether they are in the sexual minority or majority.<sup>11</sup> In fact, Queer theory embraces anyone who identifies herself as “Queer,” and, consequently, evades definition of its ever-evolving membership.<sup>12</sup> With Queer theory’s potential breadth, the history of the term “Queer” also reminds Queer theorists “to avoid replicating oppressive aspects of the past and present” and, instead, to honor inclusiveness and egalitarianism.<sup>13</sup>

Further, scholars often describe Queer theory as postmodern<sup>14</sup> by virtue of its slippery membership; its skepticism toward universalist theory, foundationalism, and stability; its emphasis on embedded cultural ideas and local narratives;<sup>15</sup> and its recognition of the legitimacy of multiple identities. Ergo, Queer theory, like other postmodern movements,<sup>16</sup> is hard to link to a narrow definition. It

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10. *See id.*

11. *See id.* at 227-28.

12. “Queer” escapes definition because its meaning expands with every individual assertion of Queerness. “This word works so well because it appropriates a former badge of shame and because it suggests that it is not our business or duty to appear acceptable, that there is something unassimilable in nonheterosexuality and only its [Q]ueerness—its difference—can define it.” Thomas Yingling, *Fetishism, Identity, Politics*, in WHO CAN SPEAK? 155, 160-61 (Judith Roof & Robyn Wiegman eds., 1995).

13. Valdes, *supra* note 1, at 349. “This history is not for lesbians [and gays] only; it deserves attention by straight, non-straight, and anti-straight readers.” Kathleen Martindale, *What Makes Lesbianism Thinkable?: Theorizing Lesbianism from Adrienne Rich to Queer Theory*, in FEMINIST ISSUES 67, 67 (Nancy Mandell ed., 1995).

14. “Postmodernism is an elusive idea that is not so easily defined. Postmodernism is neither a theory nor a concept; it is rather a skeptical attitude or aesthetic.” GARY MINDA, POSTMODERN LEGAL MOVEMENTS 224 (1995). Notwithstanding the “you can’t catch me” spirit of postmodernism (and Queer theory), it is frequently described in the terms I have applied to Queer theory here (i.e., antiuniversal, pro-multiplicity of identity, pro-narrative, deconstructionist, etc.).

15. “I hate straight people who think stories about themselves are ‘universal’ but stories about us are only about homosexuality.” *Anonymous Queers, Read This*, *supra* note 6, at 79.

16. Brooklyn Law School Professor Gary Minda has argued feminist legal theory, critical race theory, critical legal studies, the law and literature movement, and even law and economics, are postmodern theories. Yet, the fluidity of postmodernism leaves the question of who or what is postmodern open to vigorous debate. *See generally* MINDA, *supra* note 14 (analyzing the effect of modern political and social movements on the law).

resists classification at every turn and, hence, faces the question of “canon or cannot”? Yet, in spite of Queer theory’s resistance to classification, the academics reputed to be “Queer theorists” direct its development.<sup>17</sup> Theorists must write. To the degree they commit themselves to ideas, they lay a foundation (albeit postmodern) for Queer theory.

While modernists theorize from an assumed unity, postmodernists, including Queer theorists, theorize from fragmentation.<sup>18</sup> Therefore, Queer theorists widely recognize that “Queer theory has no time for disputes about whether bisexuals are really gay or transsexuals really women,”<sup>19</sup> because the categories “gays” and “women” are artificial, as is the fixedness of the identities they presuppose. Queer theory embraces indeterminacy, making it broadly inclusive across the lines that have traditionally defined gender and sexuality. “Queer means to fuck with gender. There are straight [Q]ueers, bi-[Q]ueers, tranny [Q]ueers, lez [Q]ueers, fag [Q]ueers, SM [Q]ueers, [and] fisting [Q]ueers . . . .”<sup>20</sup> But in addition to the diverse categories of “Queers,” Queer theory also aspires to include people who do not conform to a culturally tidy label. For instance, in a letter published in the advice column “Ask Beth,” a straight man debates telling his girlfriend about his preference to wear “her panties and pantyhose” instead of his own underwear.<sup>21</sup> He asks Beth what he can do to convince his girlfriend he is “not really off the wall.”<sup>22</sup> He further notes, “I, and others like me, lack the acceptance that gays now generally enjoy.”<sup>23</sup> Without Queer theory, the cross-dressing straight man is in an identity limbo that the categories of gender and sexuality, even with the five options reflected in GLBTT identity, cannot fully describe.

To address gaps in identity categories, Queer theory borrows deconstruction from postmodernism to critique the concept of

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17. Queer theorists include Judith Butler, Eve Kosofsky Sedgwick, Steven Seidman, and Michael Warner. Theorists in the field of Queer legal theory include Carl F. Stychin, Janet E. Halley, and Francisco Valdes.

18. See RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* 43-44 (1998).

19. Mary McIntosh, *Queer Theory and the War of the Sexes*, in *ACTIVATING THEORY: LESBIAN, GAY, BISEXUAL POLITICS* 30, 31 (Angelia R. Wilson & Joseph Bristow eds., 1993).

20. Anonymous, *Queer Power Now* (1991) (leaflet circulated in London), *reprinted in SMITH*, *supra* note 1, at 17.

21. See MARJORIE GARBER, *VESTED INTERESTS: CROSS DRESSING & CULTURAL ANXIETY* 128 (1992).

22. *Id.*

23. *Id.*

“identity” and the identity-based rights discourses that rely on definitional and categorical identity closure. While Queer theory operates in the realm of social and political goals, it is not concerned directly with GLBTT equality. Instead, Queer theory focuses “on the manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm; and an implicit, if not explicit, questioning of the goals of formal equality that, on their face, simply reify the very categories that have generated heterosexual privilege and [Q]ueer oppression.”<sup>24</sup> Within this ideological framework, Queer theory seeks to foster social change by keeping its own status as a theory undefined, its techniques postmodern, and its membership open (thereby not only addressing the concerns of specific social communities but also welcoming participation from anyone interested in supporting Queer politics, including straights). Nevertheless, because sexual *minorities* have faced the most sexual-orientation-based oppression, and have the most to gain from critical analysis of sexual identity categories, people traditionally identified as GLBTT make up the vertebrae of the Queer theory movement.<sup>25</sup>

### B. *Hystory*

Queer theory unfolded from the work of social constructionist Michel Foucault.<sup>26</sup> He believed the introduction of psychoanalysis and the genesis of medical indexing in the nineteenth century led to the invention of the category “homosexual.”<sup>27</sup> As early as 1968, sociologist Mary McIntosh “proposed that the homosexual should be seen as playing a social role rather than as having a condition.”<sup>28</sup> But it was the late 1970s before Foucault argued social and medical scientists had adopted the term “homosexual,”<sup>29</sup> (creating a same

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24. RUBENSTEIN, *supra* note 6, at ix.

25. See Valdes, *supra* note 1, at 355.

26. Foucault, who died of AIDS in 1984, was a French historian and philosopher. He was also a “gay” man. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978). As Foucault’s seminal work, *THE HISTORY OF SEXUALITY*, *supra*, is often cited as the birthplace of Queer theory.

27. See *id.* at 101-02. In contrast, John Marshall has argued homosexual identity did not emerge in the late nineteenth century as Foucault suggests, but rather much later with the rise of the politically overt “homophile” movement of the 1950s and 1960s. See McIntosh, *supra* note 19, at 43-44.

28. Mary McIntosh, *The Homosexual Role*, 16 *SOC. PROBS.* 182 (1968), reprinted in *FORMS OF DESIRE* 25, 29 (Edward Stein ed., 1990).

29. There has been some debate about the first use of the term “homosexual.” See David M. Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in *SAME*

sex/different sex polarity) because they thought it more objective and descriptive than a “normal/abnormal acts” distinction.<sup>30</sup> Foucault and the Queer theorists recognize “homosexual” is not an objective term at all but a social invention with a “heavy complement of ideological baggage.”<sup>31</sup> Throughout the twentieth century, nation-states have used homosexual identity in times of crisis to attack “Communism, fascism, bourgeois capitalism, colonialism, the West and north, the east and south, environmentalism, Europe, and North America.”<sup>32</sup> The tidy binary<sup>33</sup> “heterosexual/homosexual” also inaccurately describes the multiplicity of individual sexual behaviors. The hierarchy of heterosexual over homosexual presupposes a fixed sexual identity.<sup>34</sup> The binary provides no label for the fluid experience of a “bisexual” nor a term for a “heterosexual” man who engages in a “homosexual” act.

Before science constructed sexuality as a distinct human characteristic, sex *acts* were categorized outside a framework for

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SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 203, 203-204 (John Corvino ed., 1997). Halperin credits Charles Gilbert Chaddock with inventing “homo-sexuality” to replace the prior, broader category of “sexual inversion.” *See id.* Foucault, in contrast, avers that “Westphal’s famous article in 1870 on ‘contrary sexual sensations’ can stand as [the term ‘homosexuality’s’] date of birth.” ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 10-11 (1996). Furthermore, the term “heterosexual” was not invented until 1901 to describe the mental disease of “excessive attraction to the opposite sex.” Martindale, *supra* note 13 at 67, 72-73.

30. *See id.* at 205.

31. *Id.* at 206.

32. CARL F. STYCHIN, A NATION BY RIGHTS 194 (1998). According to Stychin, homosexuality becomes a symbol of modernity, contrasted to a “traditional” way of life based on heterosexual marriage and strict gender roles that existed before the perversion of the colonial encounter. But the appeal to tradition is not limited to the postcolonial state. In the West, homosexuality is constructed as undermining traditional values and is associated with the urban, which, in turn, is assumed to be in decay and social decline. Nostalgia for a mythical past, which predates the emergence of a gay or lesbian identity, is invoked. *See id.*

33. According to postmodern French philosopher Jacques Derrida, we traditionally assume the privileged term in a binary opposition (here, “heterosexual”) is independent of the subordinate term (here, “homosexual”), while the subordinate term is a dependent perversion of the privileged term. *See* Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2524-25 (1992). Deconstruction, however, demonstrates that the privileged term also depends on the subordinate. *See id.* at 2524-28. Derrida uses the term “dangerous supplement” to describe the subordinate term’s potential to achieve privilege and the endless possibilities of reversal through deconstruction. *See id.* As a result, the meaning of the terms themselves is unstable. *See id.* at 2527-28.

34. *See* LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE 141 (Catherine Porter & Carolyn Burke trans., Cornell Univ. Press 1985) (1977).

classifying *orientation*.<sup>35</sup> Until the eighteenth century, canonical law, Christian pastoral law, and civil law governed social behavior through the marriage relation.<sup>36</sup> Breaking the rules for marriage precipitated equal condemnation whether the violation involved a “homosexual” or “heterosexual” sex act.<sup>37</sup> Queer theorists do not claim recency for GLBTT sexual *behavior* but rather Queer *identities*. Thus, “‘sexuality’—as a positive, distinct, and constitutive feature of human personalities—is a relatively modern invention.”<sup>38</sup>

Foucault’s theory of the social construction of sexuality became Queer theory’s first salvo in the essentialist versus constructionist debate. To essentialists, sexual orientation is an objective, culturally independent (but not *necessarily* biological or immutable) characteristic.<sup>39</sup> Meanwhile, constructionists, like Foucault, argue sexual orientation as identity is a recent cultural product.<sup>40</sup> Yet, constructionists agree with essentialists that sexuality may still be beyond individual “choice” because society makes available a limited selection of identities.<sup>41</sup> Within the three models of sexuality (natural, biological, and social), essentialism generally theorizes from the biological model (relying upon “empirical” or “scientific” evidence), while constructionism relies on socially defined constructs and labels.<sup>42</sup>

Essentialism and constructionism, however, have never been compact categories. For example, John D’Emilio, a “Queer materialist,” offers an economics-based model of construction to compete with Foucault’s hypothesis.<sup>43</sup> Under D’Emilio’s Marxist analysis, gay identity did not emerge until the 1950s when the transition from a household family-based economy to a fully developed capitalist free-labor economy liberated sex from the

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35. See Halperin, *supra* note 29, at 207.

36. See MICHEL FOUCAULT, *The Perverse Implantation*, in 1 THE HISTORY OF SEXUALITY, *supra* note 26, at 36, reprinted in RUBENSTEIN, *supra* note 6, at 130, 131.

37. See *id.* at 36, reprinted in RUBENSTEIN, *supra* note 6, at 131.

38. John Corvino, *Introduction*, in SAME SEX: DEBATING THE ETHICS, SCIENCE AND CULTURE OF HOMOSEXUALITY xxiv-xxv (John Corvino ed., 1997) (referring to the work of David M. Halperin).

39. See *id.* at xxii.

40. See *id.* at xxii-xxiii.

41. See *id.*

42. ROBSON, *supra* note 18, at 11.

43. See Corvino, *supra* note 38.

demands of procreation.<sup>44</sup> Capitalism allowed “some men and women to organize a personal life around their erotic emotional attraction to their own sex. It has made possible the formation of urban communities of lesbians and gay men and, more recently, of a politics based on sexual identity.”<sup>45</sup> Between essentialist and constructionist ideologies, though, there is no question constructionists won the theoretical war—“essentialism having become more of an insult than a viable competing theory.”<sup>46</sup>

The demand for Queer theory also arose independently of the gay men who first championed Foucault’s writing, when Queer voices began to echo through the lesbian feminist community.<sup>47</sup> Institutionally, feminism had broken major academic ground during the 1970s and 1980s by establishing “Women’s Studies” and related subjects within universities. The GLBTT curricula, in contrast, emerged only slowly and sporadically. Consequently, feminism became the central context for examining lesbian identity.

Since history is important to constructionist perspective, lesbian feminists have reminded Queer theorists that “lesbian” identity arose later than “homosexuality.”<sup>48</sup> According to feminists, this delay can be explained by patriarchal notions that completely overlooked female sexuality and prevented “women-loving women” from seeing themselves in terms of a lesbian sexual identity.<sup>49</sup> But once lesbians achieved sexual identity in the twentieth century, lesbian feminist poet Adrienne Rich attempted to give content to “lesbianism” through her groundbreaking essay *Compulsory Heterosexuality and Lesbian*

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44. See John D’Emilio, *Capitalism and Gay Identity*, in *THE MATERIAL QUEER* 263 (Donald Morton ed. 1996). The modernist concept of “materialism” as articulated by Marx and Engels is tied to the objective properties of the historical world including the objective structure of conflicts and class antagonisms. Thus, to Queer materialists, Queer theorists embrace “a commitment to pleasure in place of Enlightenment and civil rights/feminist/gay-lesbian aspirations for progressive liberation, equity, democracy, and social justice.” James R. Bennet, *Introduction to Materialist Queer Theory: A Working Bibliography*, in *THE MATERIAL QUEER*, 381, 381-82 (Donald Morton ed. 1996).

45. D’Emilio, *supra* note 44, at 266.

46. ROBSON, *supra* note 18, at 11.

47. For reasons of brevity and scope, I have chosen not to discuss independently the roles of each feminist subgroup (such as cultural or radical feminism) in the development of Queer theory. Thus, this explanation varies in its applicability to the diverse subgroups of feminist theory.

48. See Martindale, *supra* note 13, at 71.

49. See *id.*

*Existence*.<sup>50</sup> According to Rich, lesbianism is a choice; not to choose a sexuality but to resist patriarchy.<sup>51</sup> Heterosexuality, in contrast, is not a choice but rather, a “collaboration with the enemy in the interests of survival.”<sup>52</sup> Because Rich believed patriarchy would crumble in the face of lesbianism, she tried to unite feminism and lesbianism into a single social force.<sup>53</sup>

Feminist deconstructionists attacked Rich’s approach for attempting to make lesbianism “seductive in heterosexual terms.”<sup>54</sup> Rich’s broad definitional strategies could not withstand the criticism of lesbian socialist-feminist Ann Ferguson who accused Rich of desexualizing lesbianism and demanded a more specific view of lesbianism tied to genital sexuality.<sup>55</sup> Ferguson’s analysis of Rich precipitated a crisis of representation in the value and meaning of the term “lesbian” and eventually produced a fragmented multiplicity of possible meanings.<sup>56</sup>

Rich’s model, and Ferguson’s critique, of lesbian identity created much instability within the category “lesbian.” As a result, lesbian feminists listened when Gayle Rubin, a lesbian sex-radical and anthropologist, introduced Foucauldian analysis into the so-called “sex wars”<sup>57</sup> through her article *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*.<sup>58</sup> Rubin’s strategy differed dramatically from Rich’s approach, which had tried to blur the boundaries between heterosexuality and lesbianism. Rubin attacked the idea of sexual hierarchy and, in the process, created the postmodern field of “Lesbian Studies,” parallel but separate from “Women’s Studies.”<sup>59</sup> Although Rubin’s postmodern lesbian feminists are a minority among American feminists, they are known

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50. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 177 (Ann Snitow et al. eds., 1983).

51. See *id.* at 192.

52. Martindale, *supra* note 13, at 75.

53. See *id.*

54. *Id.* at 78.

55. See *id.* at 77-78.

56. See *id.* at 79.

57. The “sex wars,” which reputedly arose at a 1982 Barnard College women’s studies conference, were a “symbolic contest between feminists and sex radicals over [what had become] . . . a stratified and unitary sexual system.” Martindale, *supra* note 13, at 82.

58. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carole S. Vance ed., 1984).

59. See Martindale, *supra* note 13, at 83.

in elite universities, journals, and conferences, as the female voice in Queer theory.<sup>60</sup>

Regardless of whether Foucault's original gay male fans or the postmodern, lesbian feminists who embraced his ideas pushed Queer theory into social or political discourse, the rise of social constructionism ushered Queer theory into academia of the 1990s with frenzied enthusiasm.<sup>61</sup> As GLBTT subjects gradually became the stuff of university classes and dissertations, academics looked for ways to theorize GLBTT oppression beyond the identity politics of feminism and the civil rights movement.<sup>62</sup> Building on Foucault's model of the medical and psychoanalytic origins of sexual identity, Queer theory's inclusive postmodern understanding of constructed identity provided a new and useful model for scholars in many fields.

### C. *No Mo' Po-Mo Homo! Queer Theory & Identity Politics*

Like other constructed concepts, Queer theory arose in a cultural, historical, and theoretical context. It has relied on other theories, like lesbian feminism, to contribute scholarship to its development. It has also shared, with critical race and other minority theories, the goal of serving historically oppressed communities. So as GLBTT political theory has borrowed many of its strategies from the civil rights movements of the 1950s and 1960s, Queer theory has drawn on postmodern movements, like the critical legal studies' critique of rights.<sup>63</sup> Moreover, Queer theory's position vis-a-vis other minority theories may affect its ability to move from the kiddie table to dine with the grown-up theorists. Queer theory's doctrinal (and political) viability hinges upon its ability to build coalitions based on mutual support with other, more established, movements. Hence, I will next discuss what Queer theory's identity politics critique offers existing

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60. See *id.* at 86.

61. Notably the most celebrated fans of sex theory "have tended to be cultural critics or philosophers rather than historians, psychologists, or social scientists and so questions about the difficulty of their writing and its 'accessibility' have been complexly interwoven with questions about race, class, and political accountability." Martindale, *supra* note 13, at 87.

62. See *infra* Part III.

63. Proponent Mark Tushnet explains the critical legal studies' critique of rights as making four assertions: (1) rights are unstable, (2) possessing rights produces no determinant consequences, (3) rights falsely reify real experiences which should be valued for their own sake, and (4) reliance on a rights discourse impedes advancement by progressive social forces. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984).

minorities theories, focusing on the GLBTT rights groups that Queer theory also struggles to serve.

The biggest impasse between Queer theory and other minority theories is identity politics. "Identity politics" is academic slang for oppressed groups using their group identities (whether based on race, gender, sexual orientation, national origin, etc.) to try to further their political voices. Under an identity politics rubric, group members identify common experiences based on their identity and celebrate political victories and set-backs as a unified, and often homogeneous, community. For example, race unites African-Americans as a group. They assert that their skin color has caused them to have particular experiences, such as being the victims of discrimination. As a result, they have politically mobilized to fight discrimination on the basis of race.

An identity politics critique, thus, distinguishes Queer theory from other minority theories. Although other minority theories have struggled for widespread acknowledgment, if not approval, of their group identity, Queer theory's critique focuses on the limits of identity politics. In 1990, Judith Butler<sup>64</sup> contributed the most recent major evolution in Queer theory with the revelation that gender and sexuality are not only *constructed*, but *performed*.<sup>65</sup> According to Butler, "[t]he culturally enmired subject [like a woman who has sex with other women] negotiates its constructions [by behaving like a 'dyke'], even when those constructions are the very predicates of its own identity."<sup>66</sup> Butler encourages Queers to reject the canon as a goal and instead "proliferate and intensify the crisis of identity politics' . . . to allow for and revel in the anxieties or pleasures produced by the 'uncontrollability' of the categorical terms established by regulatory disciplines and institutions."<sup>67</sup> Thus, Butler sees the categories, and their inherent performative obligations,<sup>68</sup> as confining rather than liberating their constituency.

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64. Butler is a Professor of Rhetoric and Comparative Literature at the University of California at Berkeley. Books by Butler include JUDITH BUTLER, *SUBJECTS OF DESIRE* (1987) and *BODIES THAT MATTER* (1993).

65. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

66. *Id.* at 143.

67. David Román, *Speaking with the Dead*, in *WHO CAN SPEAK?*, *supra* note 12, at 165, 172.

68. For example, if an urban black man's behavior deviates from the expectations of his peer group, and he ventures into the world of suburban middle America, he may be accused of "acting white."

Queer theory does not assume identity politics is never useful, but rather it challenges GLBTT, feminist, and critical race theorists to go further in their critique and to examine the origins and confines of the identities with which they attempt to assert themselves. According to Butler:

The theories of feminist identity that elaborate predicates of color, sexuality, ethnicity, class, and ablebodiedness invariably close with an embarrassed “etc.” at the end of the list. Through this horizontal trajectory of adjectives, these positions strive to encompass a situated subject, but invariably fail to be complete . . . . The internal paradox of this foundationalism is that it presumes, fixes, and constrains the very “subjects” that it hopes to represent and liberate.<sup>69</sup>

Queer theory, in contrast, offers an alternative way of thinking about identity, not just another category for the list. Yet, because Butler’s thesis threatens the core of identity-based groups, identity politics has become the most controversial aspect of Queer theory.

Some scholars have criticized Queer theory’s attack on identity politics as robbing oppressed groups of the valuable symbols of identity that have given them hope for future change. Additionally, without identity politics, groups may lack the necessary cohesion to get anything done. For instance, GLBTT theorists believe Queers can be distinguished “not only by sex, race, and class characteristics but also by sexual desires and practices.”<sup>70</sup> They consider the term “Queer” to be an overly broad category, defined by its opposition to a straight norm, which includes anyone who subscribes to “deviant” sexual practices.<sup>71</sup> Thus, the GLBTT community warns Queers that they will find they have little in common with each other and may be plagued by profound tension and contradiction.<sup>72</sup> The scenario is akin to the prerequisites of a class action lawsuit (the postmodern version of a modern two-party lawsuit) which requires a definable class with

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69. BUTLER, *supra* note 65, at 143.

70. Elizabeth Grosz, *Bodies and Pleasures in Queer Theory*, in WHO CAN SPEAK?, *supra* note 12, at 220, 222.

71. *See id.* at 224. Interestingly, the dichotomy between “normal” and “abnormal” returns the discussion to the natural theory of sexuality where GLBTT persons have historically been “abnormal”!

72. *See id.*

representatives who are members of the class.<sup>73</sup> The class identifies itself by essential, if constructed, qualities.<sup>74</sup>

To Queer theorists, however, the potential benefits and lessons of deconstructing identity politics dramatically outweigh concerns about the symbolic value of identity or the risk of fighting for too many “types” of people through a single movement. Within the GLBTT legal umbrella, lesbian law scholar Ruthann Robson<sup>75</sup> recently introduced lesbian legal theory as an independent movement suspicious of the inclusivity promised by Queer theorists.<sup>76</sup> Yet identity politics has caused Robson to speak for the entire lesbian community. Her lesbian identity has been commodified in exchange for entry into the privileged scholarly canon, and she is expected to act “true to type.”<sup>77</sup> But since “lesbian” (or “gay”) turns on no absolute, the identity politics of sexual orientation may reflect on the speaker’s or listener’s sexual desire, sexual acts, orifices, genders, anatomy, or something else. The instability of the terms of identity increases the risk of misappropriation by people opposed to equality (and necessarily excludes straight people opposed to the heterosexual<sup>78</sup> status quo).<sup>79</sup>

Notwithstanding Queer theory’s rejection of identity politics, its success depends on its ability to build coalitions and find common ground with other minority theories. By conscientiously deconstructing sex, gender, and sexual orientation, Queer theory will offer new strategies to GLBTT and feminist theory. In addition, in light of the historical exclusion of Queers of color from the social culture of white Queers, critical race theory is a timely reminder to QLT of its duty to include

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73. See Fed. R. Civ. P. 23(a) (requiring commonality, adequacy of representation, numerosity, and typicality).

74. See Robson, *supra* note 18, at 65.

75. Robson is an attorney on the faculty of City University of New York (C.U.N.Y.) Law School. She is the strongest voice in support of lesbian legal theory and the author of *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992), and two short story collections, *CECILE* (1991), and *EYE OF A HURRICANE* (1989).

76. See ROBSON, *supra* note 18, at 43-44.

77. See Judith Roof & Robyn Wiegman, *Objects Without Subjects*, in *WHO CAN SPEAK?*, *supra* note 12, at 151, 152-53.

78. Heterosexism refers to the belief that heterosexuality is superior to homosexuality. It differs from homophobia which refers to a psychological and individual reaction to homosexuality. See Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories”*, 4 *L. & SEXUALITY* 83, 84 n.1 (1994).

79. See Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed., 1991), reprinted in RUBENSTEIN, *supra* note 6, at 139, 140.

and expand Queerness to all racial groups.<sup>80</sup> Thus, it is important for these groups to cast their influence on Queer theory in its formative stages and take from it a critical reevaluation of the terms they use to define themselves. One important context for this reconciliation is the law. Resultantly, I next address Queer *legal* theory as a jurisprudential movement, and thus, a possible site for informing, and learning from, other minority theories.

### III. QUEER THEORY AS A LEGAL THEORY

#### A. *Strike a Pose: Strategies for Queer Legal Theory*

Law changes s-l-o-w-l-y. All three branches of government contribute to the development of law with uneven interest in the input of the academy. Nevertheless, in 1992, Judge Richard A. Posner admitted his own “belated discovery that judges know next to nothing about [sex and sexuality] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much . . . screened out of the judiciary.”<sup>81</sup> Ignorance notwithstanding, getting the Ivory Tower’s Rapunzel to cast down her hair to a drag queen clutching a sex-based legal theory will be difficult, too. Thus, although the frequency and volume of voices calling for a QLT rapidly increased during the mid-1990s, Queer theory has just begun to penetrate the boutique of legal ideas.

But, having uttered the first ringing tones of Queerness, advocates of QLT refuse to shut up. Francisco Valdes, a law professor

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80. See Valdes, *supra* note 1, at 359.

81. RICHARD A. POSNER, *SEX AND REASON* 1 (1992). “Renaissance Judge” Posner has sustained extensive criticism from sexual minority theorists for his reductionist efforts to explore sex through a cost-benefit analysis. See *id.* According to Posner, the three benefits of sex are procreative, hedonistic, and sociable, and the three costs are personal risks (like children or sexually transmitted diseases), social disapproval, and ease of concealment. See *id.* According to Posner’s calculus, masturbation is a popular sexual activity because it supplies the benefit of pleasure with nominal cost. See *id.* According to Ruthann Robson:

The complexity of lesbian lives, including lesbian sexualities, is lost in *Sex and Reason*. Our sexualities are obscured by a morass of sociobiological theory that prefers the simplistic to the complex. We emerge as stereotypes, crafted with a male perspective, when we emerge at all. It is no wonder that Posner’s lesbians are not very sexy.

ROBSON, *supra* note 18, at 201. Two articles further critiquing Posner’s view suggest that his analysis of sexual behavior would be virtually unaffected by a debunking of the sociobiological theory of sex are Gilliam Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992), and William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992). See also ESKRIDGE & HUNTER, *supra* note 7, at 238-42.

at California Western School of Law, has produced the most systematic explanation of why we need a QLT and, perhaps more importantly, how it could be implemented.<sup>82</sup> Valdes' central purpose is exposing what he calls the "conflation triangle" that has led to the historical confusion and distortion of sex, gender, and sexual orientation.<sup>83</sup> The triangle consists of three legs, each beginning and ending with constructs of "sex."<sup>84</sup> The first leg conflates sex and gender such that every person's sex is also his or her gender.<sup>85</sup> The second leg conflates gender and sexual orientation so notions of masculinity and femininity become coalesced into models of sexual orientation (e.g., society recognizes "sissies" and "tomboys" as evolving into "fags" and "dykes").<sup>86</sup> The third leg conflates sex and sexual orientation such that society concludes an individual's participation in a same-sex couple means he or she has a "homosexual" orientation.<sup>87</sup> Valdes believes confronting the conflation will allow law to resist bias and make antidiscrimination laws more fair and effective.<sup>88</sup> To Valdes, QLT is a workable solution to the conflation trap because it introduces Queer cultural consciousness into jurisprudence—which has not yet recognized meaningful legal identities for sexual minorities.<sup>89</sup>

Valdes proposes eight strategies for QLT and argues for an ultimate goal of "sex/gender dignity and freedom for every individual."<sup>90</sup> His tactics include (1) fighting conflationary stereotypes, (2) bridging social science knowledge and legal knowledge, (3) using narratives, (4) developing constructionist sensibilities, (5) conceptualizing "sexual orientation," (6) defending desire as such, (7) transcending "privacy," and (8) promoting positionality, relationality, and (inter)connectivity.<sup>91</sup> Further, through

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82. I have adopted Valdes' model as an example because he articulates several specific strategies for implementing a Queer legal theory. For further discussion of the need for Queer legal theory and the importance of admitting the tension between the assertion and deconstruction of identity categories, see Carl F. Stychin, *Towards a Queer Legal Theory*, in *LAW'S DESIRE* 140 (1995).

83. See Valdes, *supra* note 1, at 12.

84. See *id.*

85. See *id.* at 12-14.

86. See *id.* at 14-15.

87. See *id.* at 15-16.

88. See *id.* at 9-10.

89. See *id.* at 351-52.

90. *Id.* at 362.

91. See *id.* at 364-72.

his writing, Valdes explains how and why he has chosen these techniques.<sup>92</sup>

First, according to Valdes, QLT must resist the stereotypes implicit in the conflation.<sup>93</sup> If they are not addressed, efforts toward both social and sexual equality will be necessarily limited to a system that subordinates some and privileges others.<sup>94</sup> Second, QLT must introduce social science knowledge into law.<sup>95</sup> There has been, thus far, an uneasy tension between the use of social science and law, for example, in evaluating the scienter of criminal defendants<sup>96</sup> or as a tool in child custody evaluations.<sup>97</sup> But if QLT successfully overcomes legal reticence, social science provides a rich body of research which illustrates the personal social ramifications of being a sexual minority and teaches legal culture the real consequences of heterosexism.

Extending the idea of putting “reality” ahead of stereotype, Valdes’ third strategy for QLT is to invoke the narrative method (and simultaneously acknowledge the limits of scholarship).<sup>98</sup> Narrative method is learning and illustrating what it means to be Queer through experiential examples.<sup>99</sup> For example, when Justice Powell was deliberating on how to vote in *Bowers v. Hardwick*,<sup>100</sup> he was frustrated by his inexperience with Queer issues. Although he thought he knew no gay people, at the time, one of his law clerks was gay. QLT would encourage his clerk to bring his experiences to the law (as

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92. See *id.* at 364.

93. See *id.* at 365.

94. See *id.* at 249.

95. See *id.* at 365.

96. “[S]ince the mid-1970s constitutional law has *required* that capital juries . . . must consider, among other things, the background and character of the defendant.” Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559-60 (1995). Complex social histories are crafted based on “counseling with members of the prisoner’s family, loved ones, and friends in order to uncover intimate information which could be critical to the litigation. The investigation must cover the inmate’s childhood, family life, education, relationships, important experiences, and overall psychological make-up.” *Id.* at 650 n.29 (quoting Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 895 (1990-91)).

97. See HOMER H. CLARK, JR. & CAROL GLOWINSKY, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 1089-92 (5th ed. 1995) (identifying issues that courts must negotiate with the psychologists and social workers who perform custody evaluations).

98. See Valdes, *supra* note 1, at 366.

99. See *id.*

100. 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia sodomy statute criminalizing consensual sexual acts between two male adults in the privacy of the defendant’s home). Justice Powell cast the deciding vote in this five-to-four decision. See *id.*

represented in Justice Powell). Additionally, QLT should develop a narrative literature from which legal actors can draw insight, whether or not they have personal relationships with Queers. Borrowing from the use of narrative in the struggles of other marginalized groups (notably in critical race theory), QLT can give voice to the experiences of sexual minorities within the legal system.

Jurisprudents are increasingly realizing that the strength of a narrative may be a compelling, or dispositive, factor in decision making.<sup>101</sup> Moving toward a Queer legal narrative means Queers must inform judges who, as Posner candidly recognized, generally lack any personal experience as Queers, of the contours of Queer experiences.<sup>102</sup> Narratives will help judges root legal understanding of Queers in reality rather than heterosexist fiction. As a result, while the evolution of a Queer narrative may be slow, convincing courts to listen will eventually become a self-sustaining task because the judicial narrative will both reflect and construct social reality.<sup>103</sup> Simultaneously, narratives will serve as real world reminders to Queer theorists of the concrete and compelling effects of heterosexism and encourage them to continue developing QLT in politically meaningful ways.

Fourth, by developing constructionist sensibilities, QLT will be constantly reminded of Queer diversity.<sup>104</sup> By testing essentialist categories (which pervade statutory definitions) against reality, QLT can argue for more fairness by “debunk[ing] the claimed naturalness, normality, morality, and essentiality of sex/gender subordination under hetero-patriarchy.”<sup>105</sup> Fifth, QLT should complement its deconstruction of legal categories by conceptualizing “sexual orientation” into a coherent idea. Although making such a move risks essentialism, if approached self-consciously and inclusively, it is an important first step to fixing the “sexual orientation” loophole in antidiscrimination doctrine thus giving Queers the opportunity to attain civil rights. Sixth, by suggesting QLT “defend desire as such,” Valdes argues for the legitimation of bodily pleasure as an important feature of human

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101. See Larry Cata Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611 (1998).

102. See POSNER, *supra* note 81, at 1.

103. “[N]arrative drives law. Legal rules and standards are secondary.” Backer, *supra* note 101, at 616.

104. See Valdes, *supra* note 1, at 366-67.

105. *Id.* at 367.

experience.<sup>106</sup> Defending desire means facing the widespread sense of sexual proscription that emanates from many organized religions and, even more broadly, the prudish mythology that surrounds them.<sup>107</sup> Queer sex must be deshamed and the danger associated with it must be defanged so that in the law and elsewhere Queerness is not just tolerated but celebrated.<sup>108</sup>

Seventh, transcending “privacy” means promoting the idea that sexuality functions in public, as well as private, life.<sup>109</sup> Valdes gives the example of the gays-in-the-military “don’t ask/don’t tell” policy where the “privacy” of the heterosexist majority was used to impede calls for equality.<sup>110</sup> By insisting gays-in-the-military “don’t tell,” the military stigmatized and isolated private gay behavior, essentially locking the “closet” door.<sup>111</sup> Similarly, although the “privacy” of married<sup>112</sup> and unmarried<sup>113</sup> heterosexual people was deemed a “fundamental right,” it was used against Michael Hardwick who was not entitled to “privacy” in committing the *crime* of sodomy.<sup>114</sup> “Privacy” has not helped Queers in the legal system but QLT can react by offering a more sophisticated assessment of the relationship between sexuality and public participation in society.

Finally, Valdes’ eighth strategy for QLT addresses identity politics and coalition-building by bridging the perceived divides of sex, race, class, age, and disability to build intersectional bodies with an expansive and self-educating critique.<sup>115</sup> Overall, a meaningful goal of QLT must be to call attention to the legal (and social) fiction of “homosexuality.”<sup>116</sup> Valdes’ strategies identify core legal assumptions whose time for rethinking has come.<sup>117</sup> Adding Queer voices and calling “privacy” a spade are just the beginning, but they

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106. *Id.* at 368.

107. *See id.*

108. The challenge to defend desire is formidable. As recently as 1997, the sitcom *Ellen* lost advertisers for an episode where two women shared a brief kiss.

109. *See* Valdes, *supra* note 1, at 370.

110. *See id.*

111. *See id.*

112. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a Connecticut anticontraception statute as unconstitutionally violative of the *penumbral* privacy rights to which a married couple is entitled within their own bedroom).

113. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down a Massachusetts anticontraception law as unconstitutionally invasive of the privacy rights of unmarried persons).

114. *See* Bowers v. Hardwick, 478 U.S. 186, 190-92 (1986).

115. *See* Valdes, *supra* note 1, at 371-72.

116. *See id.* at 362-64.

117. *See id.* at 364-72.

are nonetheless a beginning, and they dramatically illustrate the possibility of a new legal landscape, influenced by actual social and personal experience, for thinking about Queers.

B. *Queer Theory in the Legal Academy: If Paris Is Burning, Who Has Standing?*

1. The Political Climate of Law School

Although writers like Valdes contribute arguments and source materials to legal academic literature, their audience is narrow and self-selective. Only legal scholars who go looking for a QLT will find it. Consequently, QLT needs to reach out more broadly to law schools where simply listing a course in the catalog may prompt the question “What is Queer theory?” and, more importantly, “Why should a law student care about it?” These inquiries are the sites of social change whether the asker agrees with Queer theory or not because the questions make Queers visible and provide a doorway to theoretical discussion.

Unfortunately, having a good idea and implementing it are not the same. Whatever theoretical hurdles QLT overcomes, becoming a pragmatically viable law school subject is another beast entirely. In spite of the efforts of American law schools to inhabit a “sacred” domain of truth and reason, they *are* political bodies, subject to the same pressures as the rest of society. This truism leaves QLT in a curious position—its struggle to get into the law school may be hard-fought because it resists becoming a traditional department in a static academic structure. Should it succeed, however, because it challenges the organization of conventional institutions, it may be capable of influencing the entire academy.<sup>118</sup>

The popular press provides evidence of the general skepticism toward Queer theory (for those who know it exists!). One editorial described Queer theory as the “sort of ineffable twaddle American universities . . . are foisting on an unwary public.”<sup>119</sup> The author further accused Queer theorist Eve Kosofsky Sedgwick<sup>120</sup> of

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118. See WILLIAM G. TIERNEY, *ACADEMIC OUTLAWS: QUEER THEORY AND CULTURAL STUDIES IN THE ACADEMY* 116 (1997).

119. Samuel Francis, Editorial, “*Queer Theory*” Is Latest Fruit of Nutty Professors, *LAS VEGAS REV. J.*, Jan. 26, 1998, at 7B.

120. Sedgwick, previously an English professor at Duke University and currently teaching at CUNY, has been attacked by many Queer theory skeptics for her provocatively titled articles including *Jane Austen and the Masturbating Girl*, *How to Bring Your Kids Up Gay*, *Is the Rectum*

pioneering “some of the battiest ideas about higher learning since Jerry Lewis played the Nutty Professor.”<sup>121</sup> Another commentator thinks “everyone except [Q]ueer theorists seems to know that Foucault is dead, [and] that he pretty much admitted before he died that he had been a young poseur.”<sup>122</sup> Yet another journalist accuses Queer theorist Michael Warner<sup>123</sup> of “defend[ing] promiscuity in the age of AIDS.”<sup>124</sup> One editorial insists “This is not an academic discipline. This is propaganda.”<sup>125</sup> This sentiment is taken to a ridiculous extreme in an article which bemoans the dumbing-down of college curricula with courses like “the works of Pee Wee Herman and watching Oprah or Montel Williams” and “[Q]ueer theory.”<sup>126</sup> Another writer, who sees Queer theory as less threatening, reports it has “merely taken [its] place alongside the canonical subjects” yet she wonders at its “faddishness.”<sup>127</sup>

Queer theorists have generally responded to these assaults by throwing their hands in the air frustrated that they have been “‘misspelled, misquoted, mis-paraphrased’ by journalists who ‘wouldn’t have been caught dead reading [their] work.’”<sup>128</sup> Whether this is a legitimate appraisal of journalistic practices or not, it seems, for the present, Queer theory should first establish itself in academia before engaging a wider audience. Because it emerges from an elaborate theoretical foundation, and does not lend itself to sound bites, the visceral reactions evident from these commentators run the risk of silencing Queer theory before it has spoken. Queer theory is not too heady for the general public, but it may be too new. It will

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*Straight?*, and *Homophobia, Misogyny and Capital: The Example of Our Mutual Friend*. See David Kurnick, *Queer Therapy*, THE VILLAGE VOICE, August 4-10, 1999, at Arts: Books.

121. Francis, *supra* note 119, at 7B.

122. David Dalton, *Sex Panic: Gay Group-Think Promotes Murderous Irresponsibility*, S.F. EXAMINER, Jan. 12, 1998, at A23.

123. Warner is an English professor at Rutgers University. He has written extensively on censorship and the public sphere, the construction of American literary history, and the social and political implications of literary theories. He also edited *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (1993).

124. Paul Mulshine, *Rutgers Professor of Queer Theory Is a Real Panic*, STAR-LEDGER (Newark), Jan. 11, 1998, at 3.

125. Carl Tobias, Commentary, *Reforming the Ninth*, WASH. TIMES, Jan. 5, 1998, at A13.

126. Walter E. Williams, Commentary, *New Forces Emerge to Fight Education Malaise*, ANCHORAGE DAILY NEWS, June 2, 1997, at D7.

127. Margaret Talbot, Viewpoint, *White Hot—Academia Is Consumed by Whiteness Studies*, COM. APPEAL (Memphis), Dec. 7, 1997, at B5.

128. Lee Siegel, *The Gay Science: Queer Theory, Literature, and the Sexualization of Everything*, NEW REPUBLIC, Nov. 9, 1998, at 30, 37 (quoting Eve Kosofsky Sedgwick).

benefit from as much behind-the-scenes alliance-building as possible, if it is ever to emerge into the public political and social sphere.

Within individual law schools, anxiety stems not from the doctrinal questions of who and what Queer studies is for or about, but from the kind of hostility demonstrated in the media. There is a crisis in the “institutional demands that arrive in the form of justifications for new programs, courses, and hires from not always sympathetic deans, chairs, and colleagues.”<sup>129</sup> Publicly or religiously funded schools may face even greater demands from the local governing bodies of higher education.<sup>130</sup> But, classic heterosexism may be at play too. In 1990 and 1997, Yale University rejected offers from alumni David R. Kessler<sup>131</sup> and Larry Kramer,<sup>132</sup> respectively, to fund a full-time professor of gay studies on the grounds “that the field lacked the academic cred[ential]s to justify a permanent position.”<sup>133</sup> Nevertheless, by 1990, thirty-five accredited law schools offered courses entirely on GLBTT or Queer studies,<sup>134</sup> and even more courses have developed throughout the decade. Queer theory need not resign yet. Like all other legal change, the evolution of law school curricula may be glacial, but it is still moving.

An additional hurdle is that law schools rarely embrace interdisciplinary approaches outside the “logical” and “concrete” abstractions of economics and philosophy.<sup>135</sup> Although law schools marginalize literature, they put economics on a curricular pedestal. Perhaps law schools fear the legitimacy of their legal curricula may be endangered if they broaden their approach.<sup>136</sup> Or maybe they are simply unable to acquire professors capable of bringing a sophisticated approach to legal subjects informed by other

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129. Román, *supra* note 67, at 173.

130. *See id.* at 174.

131. Kessler is a San Francisco psychiatrist and Queer activist.

132. Kramer is an author and activist who founded the Gay Men’s Health Crisis, an AIDS service organization, but later dissociated himself from it (calling Gay Men’s Health Crisis the “biggest siss[y] of them all”) to become one of the founders of AIDS Coalition to Unleash Power (ACT-UP), a radical AIDS awareness organization. *See* Richard Goldstein, *It’s Here! It’s Queer! It’s Too Hot for Yale! Gay Studies Spawns a Radical Theory of Desire*, VILLAGE VOICE, July 29, 1997, at 38.

133. *Id.*

134. *See* Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscriminatory Policies: A Survey of American Law Schools*, 2 L. & SEXUALITY 131, 135 (1992).

135. *See* Judith Resnik, *On the Margin: Humanities and Law*, 10 YALE J.L. & HUMAN. 413, 414 (1998).

136. Some law schools have described narrative approaches in literary or critical studies on feminist, gender, Queer, or critical race theory as “undertheorized.” *See id.* at 414 n.6.

knowledge.<sup>137</sup> Either way, Queer theory's historical and literary origins leave it vulnerable to antihumanities attacks. But the success of other minority academic fields (however limited) offers hope to Queer theory too. Women's Studies is widely recognized as a legitimate academic field, and many other more narrow, outsider academic subjects are fighting and winning their way into academia.<sup>138</sup> With the concurrent growth of Queer politics, Queer theory may also continue to gain access to funding sources that make it easier to justify to law schools (as a financially low-risk proposition).

A further curricular concern at law schools may be the demand for more pragmatism in legal education, often in the way of clinical programs. If the students and the marketplace want hands-on training, why offer yet another theory? In particular, is it reasonable to expect law students, much less lawyers, judges, or legislators, who must respond to less camouflaged political influences, to consciously adopt the complex and abstract QLT?<sup>139</sup> Or, is QLT too trendy, or even too sexy, to merit serious attention? With the overall lack of tenured positions in academia, conservative law schools may be concerned that QLT is only pseudointellectual charlatanism, a gimmick to get attention and a job. Further, they will worry about how their alumni and other potential funding sources may react to something new, especially when the "new idea" is that sexual and gender identity are performative. Yet, the breadth and depth of Queer theory offers practical insight to all future legal workers by exposing them to real issues in the lives of the individuals (same-sex marriage, adoption, etc.) and even corporations (employment discrimination, domestic partner benefits, etc.), they will encounter. Moreover, because Queer theory is only one track of a broader political message, legal successes outside academia will eventually eradicate some fears

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137. In considering this argument, it is important to remember that most law professors have received no graduate training outside of law school. Further, law professors have not been subjected to the teaching instruction demanded in other graduate schools because Juris Doctor students rarely attain teaching positions while they are in law school.

138. For example, during the winter of 1994-1995, Northwestern University responded to students who went on a hunger strike to protest the absence of an Asian-American Studies program by expanding its curriculum.

139. A counter example to this concern is the increasingly widespread practice of using both male and female pronouns when referring to a hypothetical individual. This particular consciousness, apparent in law as well as other fields, reflects feminist success in adding "she," where there had only been the default "he" before.

of its trendiness as will the fact that even now Queer theory is thriving in academic popularity.

Should QLT win admission, new issues will arise about the pedagogy of an (allegedly) uncanonized subject. Possibly, it is better to have no canon because students must think more creatively—they will not get trapped “in the box” because there is no box. Yet, “no box” may be an inadequate answer to law school administrators. An alternative avenue into legal academia may be through texts and courses examining postmodernity. Since canon-aversion is a postmodern trait, however, QLT may not be helped much by a postmodern alliance. Instead, Queer theory could begin with the late 1980’s and 1990’s canon for GLBTT legal theory as a starting point and then deconstruct it and search for better solutions. Since GLBTT law is itself just beginning to crack the law school doors, Queer theory may be able to attach itself to GLBTT legal theory and then later redistinguish itself once a law school audience has had some preliminary exposure to Queer theory. Thus, although GLBTT legal theory embraces the identity politics that QLT critiques, QLT’s best strategy may be to build upon its common ground with GLBTT legal theory and slowly invade its canon. Tactically, Queer theory could remain generally untethered to the doctrine yet introduce critical readings into (comparatively) more textually legitimated GLBTT legal theory.

Canonicity is not just generating a list of validated texts but “the politically inflected codification of fantasies about collective origin or identity. It allows something to be entertained that otherwise would remain illicit . . . but it also occurs only at the cost of some repression.”<sup>140</sup> In this respect, “canonization is akin to both colonization and comodification.”<sup>141</sup> But if QLT is able to retain its fluidity (through freedom from a canon) and become a legal academic tool at the same time, it will enrich the credibility of Queer theory’s claim to approach identity as flexible and unfixe.

Speaking of the “love that dare not speak its name” at all is a relatively new phenomenon for law schools. The earliest law review articles on the subject of “homosexuality” did not appear until the late seventies and early eighties.<sup>142</sup> Today, there are two preeminent case

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140. Yingling, *supra* note 12, at 155-56.

141. Roof & Wiegman, *supra* note 77, at 151.

142. The pioneer author of the earliest Queer law review articles was Rhonda Rivera. See Rhonda Rivera, *Recent Developments in Sexual Preference Law*, 30 *DRAKE L. REV.* 311 (1980-

books which deal with issues in sexual orientation law: *Cases and Materials on Sexual Orientation and the Law*<sup>143</sup> and *Sexuality, Gender, and the Law*.<sup>144</sup> Although both texts include materials on Queer theory, as case books, most of their contents are appellate opinions that do not themselves explicitly discuss Queer theory.<sup>145</sup>

There is a risk that *any* law school course on sex will struggle (and possibly fail) to reconcile pedagogy and jurisprudence. In addition to boundaries on explicitness, and the potential awkwardness of applying the Socratic method, finding a productive way to discuss desire and sexual practices in the context of training lawyers may be difficult.<sup>146</sup> QLT must decide whether a call for narrative and defending desire can accomplish reality-based goals without complex explications on “finger-fucking” or other sexual acts. If the dialogue moves, because of modesty, too far away from sex, nothing may remain to the discussion beyond the struggles of identity politics groups. Can QLT be taught without being inherently limited by social hetero-normativity? This conflict will be the hardest for Queer theory to resolve. Any group that identifies itself based on difference and rejection of the “norm” may have to swallow some of its principles to earn a place in mainstream (including law school) dialogue. Fortunately, QLT need not adopt an all or nothing approach. As its entrance into the popular media may necessarily be delayed until it has amassed foundational support among legal theorists, its most extreme attacks on institutionalism may need to be tabled until it has found a clandestine location within legal institutions from which it may critique them. The legacy of radical feminists like Catherine MacKinnon (herself a law professor) and Andrea Dworkin illustrates

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1981); Rhonda Rivera, *Our Strait Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

143. RUBENSTEIN, *supra* note 6. The author, William B. Rubenstein, is an Associate Professor at Stanford Law School.

144. ESKRIDGE & HUNTER, *supra* note 7. William N. Eskridge, Jr., is a Professor of Law at Georgetown University Law Center. Nan D. Hunter teaches at Brooklyn Law School. For a review comparing the approaches of Rubenstein and Eskridge-Hunter, see Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2668-77 (1997) (describing Rubenstein’s approach as descriptive and the Eskridge-Hunter text as normative).

145. On March 22, 2000, I ran a Westlaw search in the ALLCASES database (the largest search engine of American case law) for each time the word “queer” appeared in the same paragraph as the word “sex.” There were 34 hits. In almost every instance, one of the parties had hurled the word “queer” as a pejorative insult. “Queer theory” was never mentioned.

146. See ROBSON, *supra* note 18, at 215.

the possibility of producing dramatic institutional critiques from within.<sup>147</sup>

Nevertheless, elitism continues at the law school. As Robson suggests, “[t]he university becomes the universe” and, as a result, the law school conversation is dictated by the people who have not been excluded.<sup>148</sup> The merit standards that dictate access to law school for student admission, and faculty hiring, promotion, and tenure are themselves elitist. The school further reinforces the elitism for admitted students.<sup>149</sup> Since QLT attempts to give voice to the historically excluded, the paradox is visible: How can it be reasonable to expect a law school, rooted in exclusion, to embrace the persons historically most excluded? The problem is akin to Posner’s observation that sexual minorities were systemically eliminated from judicial jobs, thus, leaving nobody on the bench personally sympathetic to the issues sexual minorities face.<sup>150</sup> But every historically oppressed group, and especially numerical minorities, has had to contend with similar access problems, and the solutions have varied from patience to becoming an exception (yet still a minority voice) to joining the norm to modifying the norm. These strategies are available to QLT too.

Finally, law schools of the late 1990s have also developed a postmodern countertendency to “grand theory,”<sup>151</sup> which manifests itself in expressions of anxiety. In the following passage, Robson demonstrates the obstacles she has faced to advancing lesbian legal theory. Queer theory may be subject to a similar accusation of being insincere in its inclusivity:

The site is an interview for a law school faculty position. The topic was my recent scholarship in lesbian legal theory.

“Surely,” the interviewer said, “you aren’t advancing that there be a separate animal such as lesbian legal theory. If you are, then where will it all end? Shall we have a legal theory for left-handed Albanians? Shall we

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147. “MacKinnon claims that gender inequality *in law* is not the result of irrational discrimination, but rather the result of the systematic social subordination of women. She argues that gender hierarchy and sexual domination between men and women are taken as unobjectionable, natural, and even ‘intrinsic’ to traditional gender roles.” MINDA, *supra* note 14, at 138-39 (emphasis added).

148. ROBSON, *supra* note 18, at 53.

149. *See id.* at 57.

150. *See* POSNER, *supra* note 81, at 1.

151. *See* Franke, *supra* note 144, at 2680.

have a legal theory for green-eyed golf aficionados? And why don't we have a theory for white male law professors like myself?"

"Surely," the interviewer said after I had voiced a reply to which he did not listen, "you aren't suggesting that all lesbians are the same. You can't presume yourself to speak for Russian lesbians, can you? You can't speak for poor or Black lesbians, can you?"<sup>152</sup>

The flip side of this concern is what will become of QLT if legal academia announces the death of postmodernism (perhaps as antipragmatic or nihilistic). The answer for Queer theory would depend, primarily, on what comes next. Since "identity politics" are themselves "postmodern" in identifying a multiplicity of viewpoints, new kinds of critiques, like Queer theory's examination of "identity politics," could be the next wave to permeate academia. And if theory goes another direction, it may render a Queer reading unnecessary anyway (i.e., if postmodernity dies and "identity politics" with it, there may not be a need for Queer theory).

These obstacles notwithstanding, John D'Emilio asserts the importance of the university, and thus the law school, as a social space that participates in contemporary ideological movements.<sup>153</sup> The on-campus turmoil of the 1960s demonstrated universities are not sites of the disinterested, dispassionate, and detached pursuit of truth. Because universities reflect the dominant values, including inequalities, of the society they inhabit, they are capable of producing change, but perhaps more importantly, they indicate social victories.<sup>154</sup> If D'Emilio is correct, and his thesis applies as much to law schools as universities in general, getting QLT into the law schools will be a major achievement. If not, there may be a cost to society as law schools will miss the opportunity to test QLT's attempts to make law more fair to sexual minorities and cultivate a more honest discussion of sexual identity.

## 2. Epistemology of the Classroom: Who Will Teach Queer Theory?

The problems of admitting QLT to law school may be many, but they are not insurmountable. Since any theory fits more tidily into the scheme and budget of law school classrooms than clinics and other resource-dependent educational tools, the schools may realize they have little to lose in letting it seep into the curriculum. Related to the

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152. ROBSON, *supra* note 18, at 57.

153. See D'Emilio, *supra* note 44, at 215.

154. See Román, *supra* note 67, at 170-71.

institutional burdens, however, is the question of what would-be Queer legal scholars can and should do once they enter the golden gates of law school teaching.

Writing and teaching about sex is difficult. Academics may wonder how they can directly address an explicitly sexual subject matter when most of us have been “enculturated to shame, silences, or, at best, partial entitlement toward sex talk.”<sup>155</sup> A related question is how they can remain focused on “academic” speech which tends to disavow the historical, cultural, and corporeal positionality of its speaker as a means of legitimating itself.<sup>156</sup> Academics may encounter resistance to discussion of taboo topics based on narratives laden with subjective content. Additionally, part of the classroom game for QLT will be to deal with students accustomed to narrowing their experience to an identity category. For instance, “students may attempt to resist but habitually (and repeatedly) begin sentences with phrases such as ‘As a lesbian,’ ‘As a gay man,’ ‘As a straight woman,’ ‘As a regular guy,’ and ‘As an incest survivor.’”<sup>157</sup> But Queer juriprudents will have to negotiate these inherent slips. Because there is so little case law directly raising issues of Queer sexuality, classes must concentrate on theoretical nonlegal texts or student-related experiences. Furthermore, Queer theory lifts every veil in its identity critique but provides little refuge for its scholars who may become professionally vulnerable for opening conversational dens of iniquity in the classroom.<sup>158</sup> Acquiring a body of Queer legal scholars will require teachers willing to resist the status quo (at least in the early years) at the risk of being outside identification with the law school.<sup>159</sup>

Moreover, by bringing QLT to the table, the professor’s sexuality (in spite of the lessons of Queer theory) may become a factor. In a tight job market with fewer tenure-track positions available every day, the implications of being identified as a Queer theorist (whether “homosexual” or “heterosexual”) may limit her opportunities for the future.<sup>160</sup> And what if Queer theory becomes unfashionable? Will there be no work for Queer legal theorists? “Despite what Michael

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155. ROBSON, *supra* note 18, at 215.

156. See Judith Roof & Robyn Wiegman, *Introduction: Negotiating the Question*, in WHO CAN SPEAK?, *supra* note 12, at ix.

157. ROBSON, *supra* note 18, at 220.

158. See Dale M. Bauer, *The Academic Personality*, in WHO CAN SPEAK?, *supra* note 12, at 56, 65.

159. See *id.* at 62.

160. See TIERNEY, *supra* note 118, at 97.

Warner describes as the ‘boom point’ . . . out lesbian and gay scholars negotiating graduate exam reading lists, dissertation committees, research grants, reappointment and tenure rulings are continually vulnerable to the muscle of individual and institutional homophobia prevalent throughout the academy.”<sup>161</sup> A career based in QLT provides no harbor for Queer faculty from these organizational forces. In the words of one academic, “I remember how quickly my enthusiasm . . . dissipated when I noticed how many other institutions were not searching for their ‘[Q]ueer theorist.’”<sup>162</sup>

In addition to opening themselves up to the homophobia any “out” teacher might face, Queer legal theorists will have to talk candidly about sex and sexuality in the classroom, a practice that may be unsavory or off-putting to the academic world in general. Yet, it is in the public sphere and institutional arena where rhetorical actions by Queer scholars can count the most.<sup>163</sup> In fact, part of the value of Queer voices in the law school is that diversifying the student body and faculty will better prepare future lawyers to serve the needs of outsiders. Unfortunately for QLT, although most law schools “give lip service” to the diversity concept, few have realized it.<sup>164</sup>

### 3. Who Is the Audience? Should Law Students Care About Queer Legal Theory?

*This history is not for lesbians [or any other Queers] only; it deserves attention by straight, nonstraight, and anti-straight readers.*<sup>165</sup>

QLT can offer a lot to prospective lawyers. If conscientiously promoted, it “can set an affirmative example of inclusive and expansive egalitarianism for the sexual majority to learn from and to follow.”<sup>166</sup> Likewise, QLT will benefit both the sexual minority and majority by loosening the sex/gender corset that constricts everyone’s range of sex/gender expression.<sup>167</sup> It must “become another meaningful voice within and without outsider jurisprudence to deconstruct ongoing, but historically-rooted subordination.”<sup>168</sup>

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161. Román, *supra* note 67, at 169.

162. *Id.*

163. See Bauer, *supra* note 158, at 66-67.

164. See ROBSON, *supra* note 18, at 219-20.

165. Martindale, *supra* note 13, at 67.

166. Valdes, *supra* note 1, at 377.

167. See *id.*

168. *Id.*

Outsider jurisprudence has much to learn about itself. A critique on identity politics will reveal to racial minorities, women, and Queers the weaknesses within their discourses and will fortify them against attack with narratives of genuine, legitimating experiences. In this light, QLT provides a better chance for substantive change for all disenfranchised minorities. Until outsiders move beyond identity politics, they are limited by what Foucault calls the “repressive hypothesis”—the idea that hegemonic organisms hold some beings and cultural forces in check.<sup>169</sup> Foucault writes, “We must at the same time conceive of sex without the law, and power without the king.”<sup>170</sup> We must think of sexuality without oppressive law “from above” (or perhaps, from history), but we must also resist the temptation to replace it with our own counterlaw; there is not a “true, proper, or real” sexuality lurking beneath cultural construction.<sup>171</sup>

As a result, law students are forced to think beyond specific laws; in fact, QLT encourages them to move beyond the entire legal system to try to reconcile what is “real” with what it is called, and rethink reification. QLT offers a broad education that can give future lawyers a context to explain identity relative to something other than dominant culture.<sup>172</sup> Rather than spoon-feeding law students academic lore based on “the illusory alliance of identity, subject matter, and institutional position,” QLT invites them to chart new horizons for jurisprudence and everyone who encounters it (in other words, everyone).<sup>173</sup>

#### IV. CONCLUSION: A BEGINNING?

Idyllic and fantastic notions of egalitarianism and freedom from labels may sustain QLT, but they will not satiate its critics. Getting into the system that QLT wants to revolutionize requires a fierce pragmatism to give teeth to a legal critique of “constructed sexual identity.” This paper provided a sketch of the belief system tied to the words “Queer theory.” Parts I and II explored the doctrinal impediments and the value of a Queer identity politics critique as it is playing out in GLBTT, feminist, and critical race discourses. Part

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169. See Yingling, *supra* note 12, at 162.

170. 1 FOUCAULT, *supra* note 26, at 91.

171. Yingling, *supra* note 12, at 162.

172. See Judith Roof, *Buckling Down or Knuckling Under: Discipline or Punish in Lesbian and Gay Studies*, in WHO CAN SPEAK?, *supra* note 12, at 180, 182-83.

173. *Id.* at 182.

III.A addressed what issues a QLT might attempt to discuss and recited the strategies Francisco Valdes has proposed for achieving them. Finally, Part III.B also examined the practical institutional hurdles QLT may face at law schools and described why it is still important for QLT to try to get into law school. The relevance of these issues, however, turns on a greater, and more abstract, question: Is there a pragmatic reason to talk about QLT at all? I say yes.

In addition to QLT's potential to liberate judicial discourse with narratives, hide the identity politics ball when heterosexist society tries to reduce Queers to labels, and provide somewhere for the unclassifiable to turn, it can offer something much-needed in jurisprudence: a new conception of identity. Throughout the twentieth century, many minority identities have counted their victories in explicit recognition of their group's status. But for all the lists of protected categories, the battle wages on. Affirmative action has moved along a political spectrum, starting as a chance to even the historically tipped scales but becoming an excuse for demoralization and racism in academia and industry.

Similarly, American courts struggle with one identity crisis after another. For example, immigration courts must determine asylum claims on vague race, gender, religious, or other group identity categories. In a recent case where a gay Iraqi man sought asylum based on his history of persecution for his sexual orientation, the immigration judge asked him whether he was gay and granted asylum without probing further. This might seem like an appropriate outcome, except that a few weeks later the same judge told another asylum-seeker claiming racial persecution in Indonesia that his asylum petition would be denied because he "didn't look" like an ethnic Chinese man. But under the identity rubric, what else can be done? How can a person prove himself "gay" or "Chinese"? Because these categories are socially-based, they are inherently nondescriptive and prevent courts, legislatures, and lawyers from coherent discussion. This definitional problem is exactly the kind of dilemma QLT is eager to address.

Hence QLT needs to be in the law schools, in spite of the sociopolitical hurdles I discussed. Queer theory is enjoying a creative and vibrant discursive moment and it is ready to challenge law school conservatism. Should it succeed, QLT may revolutionize law school and allow new generations of lawyers to emerge from the legal academy critical of identity. Because of its fearless approach to

inclusion and seeking change beyond identity categories, QLT offers solutions to the false identities burdening law.