

Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law

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

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

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

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1. Ratna Kapur, *A Love Song to Our Mongrel Selves: Hybridity, Sexuality and the Law*, 8 (3) SOC. LEGAL STUD. 353 (1999); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Ratna Kapur, *The Prurient Postcolonial: The Legal Regulation of Sexual Speech*, in THE PHOBIC AND THE EROTIC: THE POLITICS OF SEXUALITIES IN CONTEMPORARY INDIA 235, 235-54 (Brinda Bose & Subhabrata Bhattacharya eds., 2007).
2. RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 95-136 (2005).
3. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1991); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2008).

lesbians as well as sex workers, drew attention to the emergence of a diverse array of sexual subjects in India. The increased visibility of sexual subalterns challenged feminists on two fronts. The first was the equation of gender almost exclusively with the category of woman. Secondly, feminist scholars who addressed the issue of gender and sexuality in a more complicated way continued to do so within a heteronormative framework.⁴ The failure to address the question of lesbianism or homosexuality was often met with an apology thus staving off any critique of neglect or privilege.⁵ The issue of sexuality has continued to trouble feminists especially when it is addressed outside of the rather airtight compartments of gender categories and through the lens of violence, victimisation and sexual negativity. The challenges posed by the increased visibility and advocacy of diverse sexual subjects has forced a deeper interrogation of the ways in which both sexuality and gender have operated within the matrix of power arrangements that also implicate the positions of progressive scholars and advocates. It was in this moment that I began a mapping of the critical genealogies that informed the legal regulation of sexuality as well as gender.⁶

Such a move enabled me to excavate how issues of sexuality were taken up within postcolonial contexts. The literature reveals how issues of law reform and violence against women were integral to the colonial encounter in the late nineteenth century and the struggle for freedom. Historians have examined how issues of widow remarriage, rape and age of consent to marry were all taken up and understood within the context of the broader struggle over the assertions of autonomy for the subjugated native and efforts by the colonial power to extend the tentacles of power into the private domain in pursuit of its civilising mission.⁷ Locating issues of sexuality within these broader debates on tradition, nationalism, culture and the struggle for power provides the postcolonial scaffolding that frames these concerns.

4. See *A QUESTION OF SILENCE: THE SEXUAL ECONOMIES OF MODERN INDIA* (Mary John & Janaki Nair eds., 2000); *SOCIAL REFORM, SEXUALITY AND THE STATE* (Patricia Uberoi ed., 1996); GEETANJALI GANGOLI, *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA* 57-78 (2007); *BETWEEN TRADITION, COUNTER TRADITION AND HERESY: CONTRIBUTIONS IN HONOUR OF VINA MAZUMDAR* (Latika Sarkar et al. eds., 2002); *DE-EROTICISING ASSAULT: ESSAYS ON MODESTY, HONOUR AND POWER* 68-104 (Kalpana Kannabiran & Vasantha Kannabiran, 2005).

5. See John & Nair, at 36.

6. KAPUR, *supra* note 2, at 13-50.

7. See TANIKA SARKAR, *HINDU WIDOW, HINDU WIFE: COMMUNITY, RELIGION, AND CULTURAL NATIONALISM* (2001); MRINALINI SINHA, *THE MANLY ENGLISHMAN AND THE EFFEMINATE BENGALI* 138-180 (1995); Ania Loomba, *Dead Women Tell No Tales: Issues of Female Subjectivity, Subaltern Agency, and Tradition in Colonial and Postcolonial Writings of Widow Immolation in India*, 36 (1) *HISTORY WORKSHOP J.* 209, 212 (1993).

It is against this historical backdrop and for these reasons that issues of rape, sexual assault, sexual harassment, and sexual exploitation in the postcolonial present cannot be fully understood or explained within the terms of dominance feminism. Dominance feminism as articulated by Catharine MacKinnon posits that sexuality is constructed along the lines of female subordination and male domination.⁸ As Mackinnon states: “what [women] have in common is not that our conditions have particularity in ways that matter. But we are all measured by a male standard for women, a standard that is not ours.”⁹ In her analysis, sexuality and sexual relations remain central to women's oppression: “If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition.”¹⁰ In her view, all women experience oppression at the hands of patriarchal power and she argues that power is invariably male.¹¹ In law, it is expressed through 'male laws' and 'male' systems of justice. Rape, sexual harassment and other forms of sexual violence are used to generate gender and the distinction between men as superior and women as subordinate or inferior.¹² And heterosexuality has institutionalised the construction of male sexual dominance and female sexual submission. Thus sexuality becomes the lynchpin of gender inequality.

MacKinnon's work has had an unparalleled influence on the feminist agenda in the international legal arena as well as on domestic feminist (and non-feminist) agendas that focus on violence against women. In contemporary India, feminist engagements with law have focused on sexual violence as a condition of female subordination and male domination.¹³ While this is not to say that feminists have not been aware of the historical legacy that has framed understandings of sexual violence, in the arena of law particularly, sexuality continues to be framed within

8. Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 (3) *SIGNS* 515 (1982).

9. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 76 (1987).

10. *Id.* at 172.

11. Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 183-96 (Alexander Stiglmeier ed., 1994); Catharine MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 83-109 (Stephen Shute & Susan Hurley eds., 1993); Catharine MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* (Kathleen Mahoney & Paul Mahoney eds., 1992); See also Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICH. J. INT'L L.* 1 (2009).

12. Mackinnon, *supra* note 8, at 515.

13. Ratna Kapur, *Slutwalk Couture and Pink Chaddis: The Postcolonial Politics of Feminism Lite*, 20 (1) *FEMINIST LEGAL STUD.* 1 (2012).

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

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

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

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

14. *THIRD WAVE FEMINISM: A CRITICAL EXPLORATION* (Stacy Gillis et al. eds., 2007) (Third wave feminism in western scholarship has drawn specific attention to the issue of sexual agency and how female sexual pleasure found little or no space for articulation in a politics focused on sexual violence and victimisation.).

to be antithetical to the goals of feminism. For example, Saba Mahmood unpacks understandings of freedom and resistance within the context of the Islamic women who practice veiling in the mosque movement in Egypt. Her discussion indicates how feminism has remained blind to the different articulations of agency that may seek liberation through practices that are neither comprehensible nor envisaged by liberal understandings of freedom nor are they purely subversive or resistive.¹⁵ Similarly, Gayatri Spivak calls for a feminism that does not seek to usurp the voice of the subaltern or demand that the subaltern speak in the voice of Western feminism. She uses the example of *sati* not only to illustrate how colonialism was partly a mission by “white men to save brown women from brown men,” but also indicative of the complicity of the white, western woman in this endeavour. The move by feminists served to consolidate the sovereign notion of self within the liberal tradition. It constructed the sovereign subject it wanted, and its interventions as that of a benevolent saviour failed to attend to the claim of nativists that the women who commit the act of *sati* actually want to die.¹⁶ These critiques caution against articulations of agency that merely reproduce the atomised liberal subject as the antidote to a victim-centred politics.

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

15. SABA MAHMOOD, *THE POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 9 (2005) (As Mahmood states, “Does the category of resistance impose a teleology of progressive politics on the analytics of power – a teleology that makes it hard for us to see and understand forms of being and action that are not necessarily encapsulated by the narrative of subversion and inscription of norms?”).

16. Gayatri C. Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 308 (Cary Nelson & Lawrence Grossberg eds., 1988).

17. HALLEY, *supra* note 3; Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICH. J. INT'L. L.* 1 (2009); See also Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 335 (2006).

into the state and to harness institutional power. It seeks change from within mainstream institutions. The theoretical position of governance feminism is informed by dominance feminism. It operates against fixed anatomical categories of gender, a clear distinction between males and females, where female/ feminine invariably exists in a situation of coercive domination by male/ masculine in the area of sexuality. And it carries a brief for feminism. This brand of feminism has operated to marginalise other insights into the mechanics and operations of sexuality. While it may not be necessary to stage a break with feminism, Halley argues that it may be more productive to de-link from this particular strain of feminism that has become so prominent.¹⁹

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

18. See Halley, *supra* note 17, at 3 (While these muscular formations are generally in the form of non-governmental organisations, they are not exclusively so); See also HALLEY, *supra* note 3, at 20-22.

19. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990) (Both scholars have developed analyses of both gender and sexuality, which do not adhere to the strain of feminism critiqued by Halley.).

20. KAPUR, *supra* note 2, at 20-28.

21. Rosalind O'Hanlon, *Recovering the Subject: Subaltern Studies and Histories of Resistance in Colonial South Asia*, in *MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL* 72-115 (Vinayak Chaturvedi ed., 2000); Dipesh Chakrabarty, *Radical Histories and Questions of Enlightenment Rationalism: Some Recent Critique of Subaltern Studies*, in *MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL* 256-280 (Vinayak Chaturvedi ed., 2000) (The subaltern studies project was initially focused on capturing the nuances of agency of the colonised by foregrounding the spaces of resistance in the discourse of anti-colonialism. The project was initially grounded in historical materialism and a search for an essential peasant consciousness. The project ultimately bifurcated, with the emergence of subaltern critiques that sought to challenge all traditions and disciplines defined within the logic or rationale of the Enlightenment project. It moved away from a preoccupation with the idea of a peasant as an autonomous political subject who writes her own history and an economic analysis as the primary zone of power, to unpack the multiple sites and locations of power through a discursive and textual analysis. The sexual subaltern emerges from this tradition, that is, it regards subaltern as critique rather than as an identitarian category.).

Amongst those who have been at the forefront of producing such challenges in India is the sex workers movement. The sex worker has instantiated herself into the debates on sexuality trying to disinvest sexuality from its moral attachments, relational structures and gender binaries, to produce a social space for sexual alterity and sexual pleasure. While the movement is dispersed and heterogeneous, one position has challenged the very terms of sexual normativity in the course of the sex workers' agitation for sexual rights as a central obstacle to full legibility of the sexual subject.²² Framed within a postcolonial trajectory, this position also foregrounds the tensions produced between sexuality and culture and how sex workers have challenged this opposition by complicating the relationship between sexuality and culture while also deconstructing the terms on which each is grounded. The sex workers operate as sexual subalterns to produce counter-narratives about sexuality that are obscured by a dominance feminist lens as well as fossilised understandings of "Indian culture."²³

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

22. See for example Durbar Mahila Samanwaya Committee, www.durbar.org (last accessed July 15, 2012) (The Unstoppable Movement for Women's Equality is an initiative that emerged from the Sonagachi HIV/AIDS Intervention Project in Calcutta. It is a collective of men, women and transgendered sex workers and demands the decriminalisation of adult sex work, removal of stigma from non-normative sexual practices and performances and the right to form a trade union); See also KAMALA KEMPADOO, *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE AND REDEFINITION* (1998); JO DOEZEMA, *SEX SLAVES AND DISCOURSE MASTERS* (2010); PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* (2011).

23. KAPUR, *supra* note 2, at 132-34.

and public spaces within which queer agitation has occurred.²⁴ What are the limits and possibilities of 'queer' in law? Can law be queered? And what exactly does queering law mean: inclusion, dissidence, subversion, or normalisation?

I. EXHUMATION, RECOVERY AND RADICAL ALTERITY

Like the term sexual subaltern, the critical genealogies of the term queer are important to understand in order to comprehend the work that queer does or is capable of doing. The term queer has its origins primarily in western scholarship²⁵ and, at times, is used in a number of problematic ways.²⁶ The critical capacities of queer nevertheless have relevance within a postcolonial context as its critical guise is closely aligned with postcolonial theory.

While there has been a good deal of writing on homosexuality in the 1980s and 90s in India, most of it was in the form of anthologies, memoirs and fiction.²⁷ The primary impulse of this writing was to provide validation to the existence of lesbians and gays in Indian history and Indian culture.²⁸ The desire to ensure that homosexuality emerged as legitimate, familiar and respectable required excavation work and a tracing of this subject in some long-lost ancient Indian cultural past.

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24. Naz Foundation v. Government of the National Capital Territory of Delhi, (2010) CRIM. L. J. ("Del.") 94 (India) (where the court read down the scope of Section 377 of the Indian Penal Code, 1860, criminalising sodomy, holding that it only applied to non-consensual sexual conduct.).
 25. SEDGWICK, *supra* note 19; BUTLER, *supra* note 19; Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN & GAY STUDIES READER* 3 (Henry Abelove et al. eds., 1993).
 26. See Judith Butler, *Critically Queer*, 1 (1) GLQ: A JOURNAL OF LESBIAN & GAY STUD. 17 (1993) (For example, Judith Butler discusses how queer has historically been deployed as a homophobic expression for the purposes of shaming. She interrogates queer's capacity to be taken up and reclaimed and critiques the ways in which the term ends up enforcing overlapping divisions between who is entitled to use the term and with what meaning.).
 27. RAKESH RATI, *LOTUS OF ANOTHER COLOUR: UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE* (1993); Nayan Shah, *Sexuality, Identity and the Uses of History*, in *SOCIAL PERSPECTIVES IN LESBIAN AND GAY STUDIES: A READER* 119, 122-24 (Peter M. Nardi & Beth E. Schneider eds., 1998) (with the exception of Nayan Shah's article that challenges an excavation mode of engagement with the colonial archives as a way to legitimise the existence of homosexuality in India); RUTH VANITA & SALEEM KIDWAI, *SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY* (2001); See also RUTH VANITA, *Introduction*, in *QUEERING INDIA: SAME-SEX LOVE AND EROTICISM IN INDIAN CULTURE AND SOCIETY* 1-14 (2002); *FACING THE MIRROR: LESBIAN WRITING FROM INDIA* (Ashwini Sukthankar ed., 1999); DEVDUTT PATTANAİK, *THE MAN WHO WAS A WOMAN AND OTHER QUEER TALES OF HINDU LORE* (2002); See for example Queer-Ink, www.queer-ink.com (Access to a good deal of this material has now become available on various websites.).
 28. See for example GITI THADANI, *SAKHIYANI* (1996) (which seeks to illustrate the abundance of Hindu iconography and depictions of same-sex sexual behaviours.).

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

In the introduction to the text, Kidwai and Vanita state their conscious decision not to use the term queer in their work. They understand the term as encompassing “unconventional” or “strange” sexual behaviour and argue that in the texts they deal with, the behaviours and people are “not only not represented as strange or deviant, but are upheld by the texts as admirable.”²⁹ Somewhat contradictorily, they go on to state that the term queer is “too wide” for their purposes as it includes all sorts of behaviour “from fetishism to exhibitionism,” which are not included in their study. While the authors acknowledge that some of the work included in their book that refers to sex change could be read as being about transgender, transsexual or intersexed subjects, they insist that their focus is on the “homoerotic” dimensions of sexuality. There is a clear desire to distance their work from what they regard as the more edgy practices associated with the term queer. Same-sex love is confined primarily to viewing gender in binary terms and homoeroticism as equated with gay and lesbian sexual practices. It exhumes the homosexual body and seeks to place same-sex practices on equal terms with heterosexual love and thus continues to operate along a hetero/homo binary. Kidwai and Vanita's work is indicative of the reluctance to use the term queer partly out of a concern that its ostensible association with more extreme and deviant sexuality as well as confusion of gender identities will deflect attention from the more well-defined categories of same-sex relationships.

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

29. RUTH VANITA & SALEEM KIDWAI, *SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY* xxi (2001).

activists working in the field of sexuality and sexuality studies. And the meaning ascribed to queer has multiplied and taken on a number of hues. Arvind Narrain and Alok Gupta develop an argument in favour of a queer perspective on law where queer is intended to engage in multitasking.³⁰ They present an argument for recovering queer voices from a putatively more tolerant pre-colonial era when it was ostensibly not subject to official disciplinary regulation. They argue in favour of performing queer intersections where queer aligns with other excluded subaltern voices. In both instances, the authors are in search of a subject who can speak, without contemplating the impossibility of such a position.³¹

Sometimes they use the term as simply a substitute for LGBT. For example, the authors state that the *Naz* decision marked the beginning of the process when “queer people” became the subjects of rights.³² The term “queer people” is used repeatedly as an identity category. It is a somewhat nostalgic turn where queer remains structured along fixed notions of identity and operates as an umbrella term that embraces diversity. At other moments, the term queer is clearly intended by the authors to also perform a more critical function.

Queer politics does not speak only of the issues of these communities (lesbian, gay, bisexual, transgender) as 'minority issues,' but instead it speaks of larger understandings of gender and sexuality in our society that affect all of us, regardless of our sexual orientation. It speaks of sexuality as a politics intrinsically and inevitably connected with the politics of class, gender, caste, religion and so on, thereby acknowledging other movements and also demanding inclusion within them.³³

30. ARVIND NARRAIN & ALOK GUPTA, *Introduction*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* (2011).

31. Gayatri Spivak, *Can the Subaltern Speak?*, in *THE POST-COLONIAL STUDIES READER 24-34* (Bill Ashcroft et al. eds., 1995); ANJALI ARONDEKAR, *FOR THE RECORD: ON SEXUALITY AND THE COLONIAL ARCHIVE IN INDIA* (2009) (In contrast to Narrain and Gupta who attempt to excavate the voice of the sexual subject in the sodomy case of the Queen Empress v. Khairati, I.L.R. 6 (ALL.) 204 (India) Arondekar argues that such a retrieval is impossible. She proposes a reading of the archives that does not simply serve as a repository of missing voices, but also represents how the archive itself is an exercise of power/ knowledge production, where the absence of the sexual subject itself is one of the effects. Arondekar warns against the possibility of recovering the lost or submerged contents of the colonial archive. It may be that there are only traces that remain and hence only a fictionalised account of the subject that can be produced. She argues in favour of a “thicker” reading of such traces, which is multilayered and interdisciplinary. For Arondekar, the queering process involves a need to move beyond the content of the exercise of fact-finding, to address the particular form and context of the material.); *See also* GAYATRI SPIVAK, *THE RANI OF SIRMUR: AN ESSAY IN READING THE ARCHIVES* (1985).

32. NARRAIN & GUPTA, *supra* note 30, at xii.

33. *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 3* (Gautam Bhan & Arvind Narrain eds., 2005).

Queer emerges in its critical guise as a normatively disruptive concept. The authors argue that the challenge to Section 377 not only generated concerns over the legitimising of non-procreative sex, but also about “forms of intimacy which the social order finds disturbing.”³⁴ Such transgressions are regarded as having a relational affinity to other forms of transgression. The authors thus locate the queer struggle within larger struggles against social subordination. As the authors argue, “what links queer people to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process, disrupting existing lines of social authority.”³⁵

While there are constant slippages back into aligning queer with an identity category, which at times renders its usage confused and awkward,³⁶ it is the critical features of queer that inscribe it with disruptive and transformative possibilities. It is in the recognition of the politics of love as transgressing social norms and dominant heteronormative practices where the analysis is strongest. The authors refer to the killings that take place to avenge the ostensible “loss of honour” when lovers transgress the boundaries of caste, religion as well as sexuality.³⁷ It is this defiance of norms and practices and the formation of radical alternative alliances that provides queer in this text with a more robust, critical impulse. Perhaps a central underlying tension that exists over the use of the term queer is the desire to disassociate or de-link homosexuality from its western moorings and to situate it within the national and historical consciousness of postcolonial India.³⁸ Such a recovery of tradition has the potential to refute allegations that homosexuality is a western contaminant and that the phobias associated with homosexuality are

34. NARRAIN & GUPTA, *supra* note 30, at xiv (Section 377 of the Indian Penal Code, 1860 criminalises carnal intercourse against the order of nature, and has been used to target men engaging in sodomy as well as to harass homosexuals.).

35. *See Id.*

36. NARRAIN & GUPTA, *supra* note 30, at xxix and xxx; *See also* Arvind Narrain, *A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 253-77 (2011) (where the author uses the term LGBT persons throughout his discussion of the *Naz* decision and other cases, implying that the term queer and LGBT are interchangeable. In the same collection, Narrain develops queer through the notion of intersectionality as well as through the politics of radical kinship with other subordinated and marginalised groups, fugitives and outsiders.); *See also*, ARVIND NARRAIN, *Queering Democracy: The Politics of Erotic Love*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 3-23 (2011).

37. NARRAIN & GUPTA, *supra* note 30, at xxxiv.

38. JYOTI PURI, *WOMEN, BODY, DESIRE IN POST-COLONIAL INDIA: NARRATIVES OF GENDER AND SEXUALITY* 176-83 (1999) (Jyoti Puri examines how queer narratives within postcolonial India have been imbricated in discourses of nationalisms. She argues that in the process of securing sexual rights claims, gays and lesbians have often done so in ways that also affirm their nationalist credentials. These include moves to appropriate the past as a means for establishing belonging and interiority.).

western imports, introduced through legal codes and medical texts as well as a Victorian sensibility.³⁹ While securing legitimacy becomes an important political end goal, in the process sexuality becomes an important site for state regulation to protect national interests.⁴⁰ Such regulation includes enabling “good” homosexuals who are regarded as respectable and encouraged to behave through state prescriptions of normality and penalising “bad” homosexuality which continues to be cast as deviant.⁴¹

While there is an internal move to establish legitimacy for same-sex desire, there is at the same time an equally intense desire to counter hegemonic Euro-American signifiers for same-sex love/non-heterosexual desire, which are fast becoming the prescribed blueprint across the world.⁴² The prescriptive gay subject is based on specific assumptions including the idea that this subject exists in opposition to heterosexuality and that the fulfilment of same-sex desire and identity can be found through public visibility and a departure from heteronormative structures and the patriarchal institutions of the family. This powerful articulation of the end goals of same-sex desire marginalises and de-legitimises other articulations and subjectivities in non-Euro American contexts.⁴³ The ultimate performance of this identity rests in an “out of the closet” LGBT identity that is prescribed as the antidote for all Third World settings. A strategy based on the recovery of queer voices or same-sex desire is not up to the task of countering the newly emerging hegemonic, colonising queer.

There is a proliferation of scholarship that rejects the mode of recovery as it does not engage the complexities of nationalism as well as neo-colonising moves that enact the erasure of same-sex desire in the postcolonial context. Gayatri Gopinath dislodges fixed, prescriptive understandings of same-sex desire, using a “queer diaspora” framework and her specific focus is on queer female diasporic subjectivity.⁴⁴ In order to understand the relationship between the diaspora, nationalism and the processes of transnational capitalism and globalisation, Gopinath argues that it is critical to recognise how these linkages are mediated through

39. *Id.* at 184.

40. JYOTI PURI, *ENCOUNTERING NATIONALISMS* 164 (2004).

41. *Id.* at 166.

42. Joseph Massad, *Re-orienting Desire: The Gay International in the Arab World*, 14 *PUB. CULTURE* 361 (2002) (He refers to this move as the production of the “gay international.”).

43. Rahul Rao, *Queer in the Time of Terror*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 43-66 (Arvind Narrain & Alok Gupta eds., 2011).

44. GAYATRI GOPINATH, *IMPOSSIBLE DESIRES: QUEER DIASPORAS AND SOUTH ASIAN PUBLIC CULTURES* 6-7 (2005).

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

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

45. *Id.* at 21.

46. GOPINATH, *supra* note 44, at 94; See also for example SHOHINI GHOSH, *FIRE: A QUEER CLASSIC* (2010) (who discusses the implications of Deepa Mehta's film *Fire* as well as the debates on sexuality, representation and rights that were triggered by the film both in India and globally.).

47. GOPINATH, *supra* note 44, at 100-101; See for example Monika Mehta, *What is Behind Film Censorship? The Khalnayak Debates* 5 (3) JOUVERT: J. POSTCOLONIAL STUD. (2001), available at <http://english.chass.ncsu.edu/jouvert/v5i3/mehta.htm> (last visited July 15, 2012); Shohini Ghosh, *Queer Pleasures for Queer People: Film, Television, and Queer Sexuality in India*, in *QUEERING INDIA, SAME-SEX LOVE AND EROTICISM IN INDIAN CULTURE AND SOCIETY*, 209-21 (Ruth Vanita ed., 2002).

48. GOPINATH, *supra* note 44, at 120.

49. *Id.* at 125.

50. SUMITA CHAKRAVARTHY, *NATIONAL IDENTITY AND INDIAN POPULAR CINEMA, 1947-1987* (1993).

Gopinath offers a postcolonial, queer reading that stands in sharp contrast to the ideological grain of progressive, liberal, feminist and first world signifiers of non-heterosexual sexualities. Tracing a “lesbian” in Hindi cinema would simply reproduce the logic of visibility dominant in Euro-American constructions of gay and lesbian identity.⁵¹ Gopinath resists any effort to resurrect a third world, authentic lesbian subject as a counter to the franchise on the 'gay international' emerging from within a Euro-American context which is going viral as well as global. Queer is deployed by Gopinath to disrupt homonormative imaginings and prescriptions of same-sex desire or the 'Rainbow Flag' world view which erase such possibilities. Her position is not to eulogise the formation of a postcolonial, queer, female subject within Indian popular culture, but to illustrate how such formations are both capable of migrating and pollinating other cultural spaces in ways that do not fit within a homosexual/heterosexual, male/female binary. Echoing the analyses Mahmood and Spivak offer, she clearly states that these translations are not always progressive or liberating.

Gopinath centres queer female sexual subjectivity not through the excavation of some long-lost, submerged lesbian existence, but rather in spaces where the initial impression implies the near impossibility of the existence of such desire and subjectivity. She deploys what she describes as a “scavenger” methodology to unearth “evidence of queer diasporic lives and cultures, and the oppositional strategies they enact in the most unlikely places.”⁵²

Jasbir Puar's work has also complicated the deployment of queer that moves beyond the “recovery” mode of analysis and also the “gay international,” both of which work with fixed categories. She deploys queer in relation to assemblages as opposed to binaries or excavations. Puar tracks how queer can be deployed in ways that are complicit with dominant formations of sexuality.⁵³ Queer assemblages consist of US sexual exceptionalism which relates to the successful management of life in regard to people that is both heteronormative and homonormative. This exceptionalism operates to include some homosexuals, that is those who conform or assimilate, but not others. Part of the assimilative project is the indoctrination of the sexual subject into a belief in the superiority and exceptionalism of the US as a nation and a culture.

51. *Id.* at 103.

52. CHAKRAVARTHY, *supra* note 50, at 22.

53. JASBIR PUAR, TERROIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 121-122 (2010).

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

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

Queering Naz

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

meaning that the decision acquired in public discourse transcended this narrow position.

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

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

Narrain locates the queering of law explicitly in terms of the idea of sex without conception which had been viewed historically as a perversion and abhorrent crime. Yet he then lapses into talking about gays and lesbians as an identity category and does not develop the more provocative and challenging call to queer the law. In Narrain and Gupta's reading of the *Naz* decision, the victory is perceived purely in terms of formal rights and juridical entitlements rather than as a discursive space where the meanings associated with sexuality and sexual subjectivity are continuously contested and refashioned.⁵⁴ They declare the *Naz* judgment as heralding a shift from the discourse of

54. NARRAIN & GUPTA, *supra* note 30, at xxviii.

criminality to the discourse of dignity, privacy and inclusiveness. While the decision rescues the sexual subject from the postcolonial closet, it also operates to subjugate the sexual subject to the regulatory apparatus of the state. The end result is not necessarily a liberated sexual subject, but one who is regulated and sequestered in and through the liberal discourse of tolerance.⁵⁵

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

Naz Foundation as well as a host of interveners seeking the validation of the Delhi High Court decision relied on fixed categories of homosexuality and heterosexuality to counter the narrow view of Indian culture put forward by the appellants. They argued that India's sexual past, cast primarily in Hindu terms, was open, inclusive, diverse and non-judgemental. The near glorification of India's sexual past was contrasted against the colonial imposition of Section 377 of the Indian Penal Code of 1860 that criminalised same-sex as well non-procreative sexual activities and was driven by extremely conservative and puritanical Victorian cultural and sexual norms. The work of Vanita and Kidwai, as well as references from the *Manusmriti*, *Kama Sutra*, and *Arthashastra* were all submitted to the Court in a bid primarily to validate the existence of homosexuality as an identitarian category in some long-lost, ancient Indian (read Hindu) past.⁵⁶ While the full implications of such a strategy remain to be seen only after the Court delivers its judgement,

55. Ratna Kapur, *Out of the Postcolonial Closet and into the Liberal Box*, in *QUEER THEORY: LAW CULTURE AND EMPIRE* 37, 42-48 (Kim Brooks & Robert Leckey eds., 2010).

56. PATRICK OLIVELLE, *MANU'S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MANAVA DHARMASTRA* (2005); R.P. KANGLE, *THE KAUTILYA ARTHASASTRA* (2010); VATSAYANA, *KAMA SUTRA* (Richard Burton trans.) available at: <http://www.holybooks.com/theokama-sutra-vatsayana> (last visited July 15, 2012) (Examples of some of the works cited).

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

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

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

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

57. Brooks & Leckey, *supra* note 55.

space, homosexuals continue to claim space and are visible in ways that are transgressing the borders of heteronormativity in academic scholarship and debate,⁵⁸ in cinema,⁵⁹ on the streets and in theatre.

II. HOMOSEXUAL DISSIDENCE

The discussion brings us back to Puar's analysis. Are gays and lesbians being included into the fabric of a nation-state on terms that reinforce its regulatory authority? The High Court decision rejects exclusion from the state, but directs inclusion on terms that are consistent with the nationalist agenda of the Indian state as well as with sexual normativity. It is precisely these moments that remind us of Foucault's interrogation of the revolutionary potential of homosexual sex. The law may not be a site where a breach in what is imaginable or possible can be inaugurated. It can, however, serve as a site where a queer politics can be partly forged and radical kinships formed.⁶⁰

The move towards radical kinship requires a move away from normative relationships such as marriage, monogamy, or homosexual exceptionalism.⁶¹ According to Foucault, what is required is a "queering" of community, kinship, and sociality.⁶² This queering can be produced by imagining homosexuality as a third position that takes us away from the binary categories of woman/man, male/female, masculine/feminine which sustain the heteronormative paradigm. This call holds within it the possibility of an open coalition with a range of fugitives, "an open assemblage that permits of multiple convergences and divergences."⁶³ It is this opposition to binary thought that needs to be foregrounded rather than the focus on sexual acts and identities which is what the *Naz* decision does as it concerns the criminalisation of a specific sexual act – sodomy.

58. SHAKUNTALA DEVI, *THE WORLD OF HOMOSEXUALS* (1977); VANITA & KIDWAI, *supra* note 29; RUTH VANITA, *LOVE'S RITE: SAME-SEX MARRIAGE IN INDIA AND THE WEST* (2005); VANITA, *supra* note 27; GOPINATH, *supra* note 45; PUAR, *supra* note 53; Bhan & Narrain, *supra* note 33.

59. Sonali Gulati, <http://www.sonalifilm.com/I-AM.html> (last visited July 15, 2012) (In the documentary film *I Am* (2011), gays and lesbians in India speak about their struggles and acceptance within the family, claiming their presence within the familial sphere in a very public way.).

60. LEELA GANDHI, *AFFECTIVE COMMUNITIES: ANTI-COLONIAL THOUGHT AND THE POLITICS OF FRIENDSHIP* (2006).

61. *Id.* at 50.

62. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOL. I: AN INTRODUCTION* 96 (Robert Hurley trans., 1978).

63. Judith Butler, *Subjects of Sex/Gender/Desire*, in *THE CULTURAL STUDIES READER* 353 (Simon During ed., 1993).

Leela Gandhi provides an innovative argument as to how rupture can be produced as well as how affective communities can emerge. Drawing on the historical context of Empire which introduced a virulent strain of homosexual anxiety or homophobia within the domestic space as well as within the colonies, Gandhi reveals how such moves simultaneously produced dissidence and introduced the possibility for wide-ranging political and epistemological transformation.⁶⁴ Her discussion builds on the work of Monique Wittig who argues that heteronormativity is a closed, masculine economy where the feminine is banished, repressed or effaced from the modes of production and signification.⁶⁵ Wittig posits homosexuality as a third position operating outside of the binary of sex and securing a utopian space for the activity of homosexual identification.⁶⁶ Gandhi brings this analysis to the postcolonial context arguing that Empire and the anti-colonial nation were both profoundly heteronormative projects. While the Empire privileged masculinity, it simultaneously cast the native as 'effeminate'. The native struggled to recuperate his lost masculinity, heralding the onset of "postcolonial heteronormativity" and simultaneously producing an aggressive and internalised homophobia.⁶⁷ Gandhi makes the case that a homosexual dissidence emerged as a utopian space that refused the polarities of gender and withheld its consent from both the nationalist and imperial social contract.

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

64. Leela Gandhi, *A Case of Radical Kinship: Edward Carpenter and the Politics of Anti-Colonial Sexual Dissidence*, in *THE PHOBIC AND THE EROTIC: THE POLITICS OF SEXUALITIES IN CONTEMPORARY INDIA* 91-92 (Brinda Bose & Subhabrata Bhattacharyya eds., 2007).

65. MONIQUE WITTIG, *THE STRAIGHT MIND AND OTHER ESSAYS* 6 (1992) (Wittig argues that masculine should not be homologised with men.).

66. Gandhi, *supra* note 64, at 92.

67. *Id.*

Being excluded from the space of the civilised community and a privileged circle of certain kinds of human beings and human alliances, the homosexual is denied inclusion and legitimacy. This subject belongs to the crowd of outcasts, including the colonial subject. This location compels the homosexual to reject the elite and exclusive space of the civilised community and argue for a radical alternative kinship and alliances. Gandhi's arguments present homosexual politics as not based on sex acts or sexuality, but on a critique of Empire.⁶⁸ While it may be argued that such a position represents a form of sexual evasiveness, Gandhi is not simply providing a justification for Carpenter's sexual equivocation. While homosexual sex acts may demand visibility and an aggressive strategy of "show and tell" in a homophobic world, such a focus obscures that which is queer about Gandhi's work— the productive possibilities of homosexuality in relation to anti-colonial nationalism.⁶⁹

Gandhi's focus on Carpenter's anti-colonial stand reads queer not in terms of a sex act nor sex as the repository of sexual insurrection. Queer politics is to be located in the unconventional alliances or radical relationships that may be regarded as intolerable or that are not normalising. Gandhi's position provides a serious challenge to the "sex *qua* sex (or homosexuality-only-for-the-sake-of-homosexual-sex) as a viable or effective form of autonomy or resistance."⁷⁰ Sex no longer becomes the basis of a claim but rather we are encouraged to seek out homosexual exceptionalism that transforms not only the conditions under which sex takes places but also simultaneously all the attending relationships and alliances implicated in the process of normalisation.

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

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

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

70. Gandhi, *supra* note 64, at 101 (Gandhi's work can be aligned to an emerging theoretical position that articulates failure as a political position that dismantles the logic of success and its obsessive focus on how to be in the world in a very specific way. The measures of success which have been brought into question in light of the collapse of the financial market, bad mortgages, and spiralling divorce rates, compels a turn towards understanding the productive possibilities of failure.); JUDITH HALBERSTAM, *THE QUEER ART OF FAILURE* (2011) (Judith Halberstam examines how failure is something that queers have done and do exceptionally well and examines how this experience can be used to examine the gross inequalities of everyday life in the United States.).

status. Foucault argues that such an argument enables the state to legislate the particular part of the body or organ that is marked as sexual, such as the vagina or penis, differentiating it from the hand, hair or eyes.⁷¹ In the process, the regulatory power of the state is brought into direct contact with the sexual organ and imbues it with a specific meaning. In Foucauldian terms, sex is not simply something one has or a “static description of what one is.”⁷² It is the effect of the regulatory norm. And in terms of legal engagements, those who are not produced as fully formed subjects, who are abject beings, inhabit the zone outside of the circumscribed domain of the legitimate or legible subject.⁷³ The legitimate subject comes into being partly through the repudiation of the abject subject. Queering lies in this repudiation and the subsequent emergence of the abject subject. The alliance between these abject subjects, the very possibilities of affectional kinship that Narrain and Gupta touch upon, but do not fully develop, become the recipe for a queer politics that is no longer limited by the physical, the form, or sex act.

III. CONCLUSION

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

71. MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 200-02 (Lawrence D. Dritzman, trans., 1988).

72. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 2* (1993).

73. *Id.* at 3.

74. FOUCAULT, *supra* note 62, at 49.

75. *Id.* at 18.

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

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

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

76. Gandhi, *supra* note 64, at 99.

77. Brooks & Leckey, *supra* note 55, at 37-52.

78. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 19 (1999).

into full, legible subjectivity, where the skin of alterity has been shed. Whether this experience is carried into the space of legitimate subjectivity, thereby questioning the terms on which legitimacy is acquired, remains uncertain. In other words, whether queer losses its queerness is never fully certain. And hence the insurrectional possibilities of queerness remain.⁷⁹



79. *Id.* at xxxvi (The more radical reading of queer is initiated through a discussion of the campaign of the “Consortium of Loose Forward and Pub-Going Women” who countered protests by the Hindu Right to their celebration of Valentine’s Day by sending pink underwear to the local head of the right wing organisation.); *See also* ARVIND NARRAIN, *Queering Democracy*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* (2011) (where Narrain develops this perspective with greater clarity.).