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Queer Phenomenology in Law: A Critical Theory of Orientation

Nick J. Sciullo*

Introduction

This Article argues for the application of phenomenology to legal understanding, specifically as a way to think about and through queer people's interactions with law as well as queer theory in law. There are both pragmatic and theoretical justifications for this project. The pragmatic justifications include the need to better address the legal issues and experiences of queer people, recent political and legal decisions and debates that affect queer people specifically, the need to better provide epistemological resources for queer lawyers, law scholars, law students, and their allies, and the need to better understand how law affects minoritarian populations regardless of specific identity characteristics. The theoretical justifications include the relative under-theorization of queer theory in law, the improvement of legal theory's interaction with related theories in the humanities and social sciences, and the development of a more robust theory of everyday interactions with law consistent with individuals' diverse experiences and identities. These justifications counsel for further study and attempts to account for diversity in law.

The first part of this Article¹ discusses phenomenology historically and theoretically, applying the insights of important continental philosophy scholars as well as modern day theorists from law, communication, women's studies, cultural studies,

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1. See *infra* notes 6–52.

queer studies, and related disciplines.

The second part of this Article² discusses Sara Ahmed's theories of orientation and disorientation. Firmly rooted in the writings of Edmund Husserl, Ahmed's theories are a way to both think about political possibility and the ways in which rights, identity, and action are all inhibited and empowered by disorientation. While scholars in many disciplines have applied these ideas to everything from academia to law, and communication to gender studies, legal scholarship on these ideas has been slim. This section considers (dis)orientation an everyday event impacted at every turn, from using the bathroom to appearing in court.

The third part of this Article³ discusses the difficulties of orientation and disorientation in law specifically. Although law is only one part of the broader social milieu, it affects us in seemingly innumerable ways. This section discusses the way law inhibits and enables various orientations and offers fruitful paths to (re)orient oneself in law.

The fourth part of this Article⁴ proposes Sara Ahmed's theory of hammering as a strategy for challenging heteronormative legal theory and practice as well as, by extension, other normative practices that can limit participation and advancement of minoritarians in law and society. Hammering's applicability to issues complex (court cases, social movements, etc.) and less so (colleagues' inappropriate language use, general confusion about queerness, etc.) makes it a fruitful praxis for challenging oppressive systems in law and elsewhere.

The conclusion⁵ emphasizes the importance of the body as a site of theorizing law. Absent the body, law risks material harm not only to queer people, but to other minoritarians who may be commodified and objectified through both overt discrimination as well as more subtle forms of ignoring and misperceiving. Without the body, law fails to inform a functioning society and assure protection for people under its jurisdiction.

2. See *infra* notes 53–68.

3. See *infra* notes 69–97.

4. See *infra* notes 98–130.

5. See *infra* notes 131–143.

On Phenomenology

Phenomenology is a not-so-old philosophical tradition concerned with what can be experienced.⁶ It is concerned not only with this ephemeral notion of experience, but also with living, knowing, and perceiving.⁷ Central to phenomenology is the idea of indeterminacy, which phenomenology scholars argue we must embrace to better understand how we think, act, and live in the world.⁸ As such, phenomenology is uniquely able to advance a queer theory of law that centers the complexity of gender and sexual orientation in the uniquely orienting world of law. That is, embracing fluidity, difference, and indeterminacy are necessary preconditions for a theory of any difference in law such that it does not recreate normative preferences for who or what is powerful.

Phenomenology was, in large part, a reaction to the focus on metaphysical questions that seemed to err toward the ephemeral.⁹ There was a sense that philosophy failed to

6. See generally EDMUND HUSSERL, *THE IDEA OF PHENOMENOLOGY* (Lee Hardy trans., Kluwer Academic Publishers 1st ed. 1999) (1952).

7. Mark P. Orbe, *Assessing the Civil Rights Health of Communities: Engaged Scholarship Through Dialogue*, in 1 COMMUNICATION ACTIVISM 133, 133, 142 (Lawrence R. Frey & Kevin M. Carragee eds., 2007).

8. Silvia Stoller best made this argument when she wrote: “In his phenomenology, Husserl introduced a positive conception of what is indeterminate in the experience of the world. This positive conceptualization of indeterminacy was more clearly articulated by the French phenomenologist Maurice Merleau-Ponty who in his *Phenomenology of Perception* claimed: ‘We must recognize the indeterminate as a positive phenomenon.’” Silvia Stoller, *The Indeterminable Gender: Ethics in Feminist Phenomenology and Poststructuralist Feminism*, 13 JANUS HEAD, no 1, 2013, at 17, 23 (quoting MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 7 (Colin Smith trans., Routledge Classics 2002) (1945)). For Merleau-Ponty, this means recognizing the indeterminate *as* indeterminate and not just as the negation of something else. This reorientation is essential. What Merleau-Ponty calls for is a rehabilitation of the indeterminate in our thinking. “In my opinion this rehabilitation of the indeterminate is a challenge we are still facing since it is still difficult, personally and philosophically, to allow the indeterminate to remain indeterminate and to accept indeterminacy as such.” *Id.*

9. Emiliano Trizio describes Edmund Husserl’s reaction this way: “We have enough elements to draw some conclusions concerning Husserl’s notion of metaphysics before the so-called transcendental turn. Husserl’s thought was motivated from the outset by the project of developing a philosophy

adequately account for people's experiences, that is, how they experienced philosophy as lived or, put differently, how philosophy translated into politics.¹⁰ Now, criticisms of philosophy and theory courses in the humanities¹¹ as well as of the theory courses that are increasingly absent in law school curricula are prominent.¹² This suggests that phenomenology may be a way to incorporate theory into law school in a way that supports a material understanding of legal practice.

Phenomenology benefits law because it blows the dust off of the covers of hornbooks, county plat maps, and leather covered legal pads. Law is fundamentally about people—people who experience the world in vastly different ways and for whom legal systems often poorly guarantee rights and basic respect. Phenomenology asks people to return to the body as a site of creation and contestation. As Sara Ahmed puts it: “[P]henomenology attends to the tactile, vestibular, kinaesthetic [sic] and visual character of embodied reality.”¹³ It asks us to

corresponding to the highest ambitions of the European tradition. In this programmatic framework, metaphysics presents itself as the crowning discipline, the one dealing with the fundamental questions concerning the totality of the real being of the world and of anything that might lie ‘beyond it.’ Within this approach, Husserl does not appear to be preoccupied by the complex historical evolution of the concept of metaphysics from Aristotle’s characterization up to its Kantian and post-Kantian developments. Rather, as is typical of his method, he appropriates a motive from the tradition and elaborates it in light of the theoretical developments and the resulting constraints characterizing his philosophical situation.” Emiliano Trizio, *Husserl’s Early Concept of Metaphysics as the Ultimate Science of Reality*, PHAINOMENON Oct. 2017, at 37, 63–64 (2017).

10. See Max Horkheimer, *The Social Function of Philosophy*, RADICAL PHIL., WINTER 1972, AT 10, 10–13.

11. *Id.*

12. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>; see also Jeff Schmitt & Tipping The Scales, *Here’s How Law School Grads Would Fix Law School*, FORTUNE (July 26, 2016), <http://fortune.com/2016/07/26/heres-how-law-school-grads-would-fix-law-school/>. See generally, William T. Vukowich, Comment, *The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change*, 23 CASE W. RES. L. REV. 140, 140–52 (1971) (arguing for more practical training of law students).

13. Sara Ahmed, *A Phenomenology of Whiteness*, 8 FEMINIST THEORY 149, 153 (2007).

measure our philosophical knowledge against the lived world. There are several reasons why this portends opportunity for law.

First, phenomenology orients legal thinkers and practitioners toward facts so that they remember why they are lawyers, judges, social workers, activists, and scholars. Facts matter in law; they were often a focus in early law school classes. Sometimes they seem obscured by theory or the parsing of precedent. Theory should not obscure facts, but rather should emphasize them because the material conditions of life demand theorization as much as the immaterial.¹⁴ This is not to argue for a material theorization of law that focuses solely on material conditions,¹⁵ but rather to argue from a materialist legal theory that appreciates the immaterial and material conditions of life at once—a materialism where facts matter to law and theory.¹⁶

One of the troubled framings of law that many people take up is the ethereal language of rights and liberties,¹⁷ denying the impact these struggles have for people and preventing an application to lives and lived experience. Grand rights discourses often discuss people as afterthoughts.¹⁸ It would be

14. Allison Assiter describes materialism as being fundamentally concerned with people's lives ("Before justifying Marx's materialism in this way I must begin describing it. The subject material of Marx's materialist conception of history is *material life*. What is this? An answer is: '[People], their activity, and the material conditions under which they live.'"). Alison Assiter, *Philosophical Materialism or the Materialist Conception of History*, RADICAL PHIL. Winter 1979 at 12, 16 (emphasis added) (citations omitted). See generally Bertrand Russell, *Introduction* to FRIEDRICH ALBERT LANGE, *THE HISTORY OF MATERIALISM, AND CRITICISM OF ITS PRESENT IMPORTANCE* v–xix (3d ed. 1925) (1881) (discussing the development of materialism in philosophy with an emphasis on the physical sciences).

15. Norman Levine, *The German Historical School of Law and the Origins of Historical Materialism*, 48 J. HIST. IDEAS 431, 437–45 (1987).

16. A project like this would follow the work of Ronald W. Greene's articulation of a materialist-communicative model of rhetorical agency. Ronald Walter Greene, *Rhetoric and Capitalism: Rhetorical Agency as Communicative Labor*, 37 PHIL. & RHETORIC 188, 198–203 (2004). As Greene writes, "[a]s such, rhetorical agency, in all its communicative dimensions, is at once an instrument, object, and medium for harnessing social cooperation and coordination as the life-affirming value of communicative labor." *Id.* at 203–04.

17. Fernanda Doz Costa, *Poverty and Human Rights: From Rhetoric to Legal Obligations: A Critical Account of Conceptual Frameworks*, 5 SUR - INT'L J. HUM. RTS. 81, 81–82 (2008).

18. Fernanda Doz Costa describes this as the result of intellectual navel-

theoretically significant if lawmakers increased restrictions on gun possession,¹⁹ but that in and of itself is not an *a priori* consideration despite vociferous advocacy. Likewise, arguments pushing for increased gun ownership or less restrictions would meet the same difficulty no matter how favored they were. Rather, it is people's lives that justify more stringent controls, or less stringent according to some. Gun rights are not metonymical²⁰ representations of liberty,²¹ but rather have the

gazing and bureaucratic machinations: "In today's world, the human rights movement is risking its credibility and moral strength if it fails to take account of the suffering of millions of people living in poverty and to name that suffering as a human rights violation. Intellectual obstacles cannot be used as an excuse anymore. The powerful human rights machinery needs to be put to the service of those who are still waiting to be invited to the banquet of this opulent world." *Id.* at 96.

19. Jennifer Agiesta, *CNN Poll: Seven in 10 Favor Tighter Gun Laws in Wake of Parkland Shooting*, CNN POLITICS (Feb. 25, 2018, 3:16 PM), <https://www.cnn.com/2018/02/25/politics/cnn-poll-gun-control-support-climbs/index.html>; Asma Khalid, *NPR Poll: After Parkland, Number of Americans Who Want Gun Restrictions Grows*, NPR (Mar. 2, 2018, 5:00 AM), <https://www.npr.org/2018/03/02/589849342/npr-poll-after-parkland-number-of-americans-who-want-gun-restrictions-grows>; Danielle Kurtzleben, *Poll: Majorities of Both Parties Favor Increased Gun Restrictions*, NPR (Oct. 13, 2017, 5:00 AM), <https://www.npr.org/2017/10/13/557433452/poll-majorities-of-both-parties-favor-increased-gun-restrictions>; Kari Paul, *The Vast Majority of Young Americans Favor Stricter Gun Control*, MARKETWATCH (Oct. 28, 2018, 9:19 AM), <https://www.marketwatch.com/story/the-vast-majority-of-millennials-favor-gun-control-2017-10-27>.

20. Shenli Song, *Metaphor and Metonymy—A Tentative Research into Modern Cognitive Linguistics*, 1 THEORY & PRAC. LANGUAGE STUDS. 68, 69 (2011) (stating "[m]etonymy is a type of figurative language in which the name of one thing is replaced with another commonly associated with it."). See generally Jialing Guan, *The Cognitive Nature of Metonymy and Its Implications for English Vocabulary Teaching*, ENG. LANGUAGE TEACHING, Dec. 2009, at 179, 179–83 (providing multiple definitions of metonymy).

21. John Louis Lucaites and Maurice Charland Explain liberty as ideography (written as <Liberty> or [Liberty]) thusly:

Our theoretical starting point is Michael Calvin McGee's analysis of [liberty] in the Whig/liberal ideology. According to McGee, [liberty] is not a thing, but an "ideograph," a term or sign that must be used by public officials as a warrant for the uses of state power within Whig/liberal societies. More to the point, McGee claims that as a necessary commitment to community, [liberty] lacks any fixed meaning. Rather, he

very real effect of deciding who can own and use guns,²² which then impacts the protection of law. The protection of lives is an *a priori* consideration.²³ One does not need a set of warrants to arrive at this conclusion, one just knows it to be true. Opponents of gun control will utter the phrase *gun control* at a rate far greater than they will utter the phrase *protect people's lives* because the regulation or law ultimately is more important than people's lives due to some abstract notion of *a posteriori* knowledge about rights discourse.²⁴ The problem with *a posteriori* claims is that we assume they are *a priori* without

suggests that at particular historical moments, those seeking to exercise power in the name of the state deploy the community's generalized commitment to [liberty] as an argumentative warrant for their actions, and then justify their use of the term on the basis of a proffered interpretation of the community's collective tradition. Political practice is thus based in a public, rhetorical production of history and tradition that seeks to appropriate [liberty] to one's ends.

John Louis Lucaites & Maurice Charland, *The Legacy of [Liberty]: Rhetoric, Ideology, and Aesthetics in the Postmodern Condition*, 13 CANADIAN J. POL. & SOC. THEORY 31, 33 (1989).

22. For an explanation of a materialist account of gun ownership, see SimilarFreedom, *A Leftist Defense of Gun Ownership: Dialectical Materialist Edition*, MEDIUM (Mar. 2, 2018), <https://medium.com/@similarfreedom/a-leftist-defense-of-gun-ownership-dialectical-materialist-edition-bfa0d9a89d23>.

23. Without going through an extensive discussion of *a priori* and *a posteriori* knowledge, I take *a priori* knowledge to be that knowledge which can be known without experience. It seems, then, that one need not have experienced people to know that their lives matter. One might conclude that absent interactions with people, one would not develop the necessary social bonds needed to regard another's life as worth saving, yet it seems that when one understands that one is human, relying on the necessary language to express *a priori* knowledge, because such understanding of language does not destroy a claim that knowledge is *a priori*. See Jason S. Baehr, *A Priori and A Posteriori*, INTERNET ENCYCLOPEDIA PHIL., <https://www.iep.utm.edu/apriori/> (last visited February 11, 2019); Bruce Russell, *A Priori*, STANFORD ENCYC. PHILOSOPHY

(May 19, 2014), <https://plato.stanford.edu/entries/apriori/>.

24. For an excellent discussion of the memes of gun control, specifically those used by the political right, see Kelly McParland, *Gun Control Shouldn't Be As Hard As Our Politicians Make It*, NAT'L POST (Nov. 15, 2018, 6:30 AM), <https://nationalpost.com/opinion/kelly-mcparland-gun-control-shouldnt-be-as-hard-as-our-politicians-make-it>.

investigating the *a priori* knowledge that underlies them.

Second, phenomenology places the people affected by legal decisions at its center. It asks scholars and practitioners to be people and think as people. Gone are the ideas of serving a profession or serving the law, which are of course well-intentioned, but insert the vagaries of philosophy into the miasma of people's lives. This allows scholars to reason up from people rather than reason down from the law's totality. That offers opportunity for a people-centered jurisprudence that underlies many of the critical projects law has to offer.

Third, phenomenology reminds us that, despite the memorization of rules for legal reasoning and writing, what legal professionals work toward is people, not even just clients, but a much broader array of people present and not in courtrooms and legal offices. Law affects much more than the litigants of a specific case. Here, it seems phenomenology is uniquely positioned to do the work that Kwame Anthony Appiah has done about difference.²⁵ He writes in his book, *Cosmopolitanism*, that we no longer live in a world of strangers, but are now rather neighbors to more people than our ancestors could ever have imagined.²⁶ The ease of travel and access to technology, for some of us, orients us toward so many people that we need an ethical stance which takes difference into account.²⁷ For Appiah, that is cosmopolitanism; it is structured by a profound sense of

25. Appiah argues that we should let people be if their practices uphold basic human dignity:

A liberal cosmopolitanism of the sort I am defending might put its point like this: we value the variety of human forms of social and cultural life; we do not want everybody to become part of a homogeneous global culture; and we know that this means that there will be local differences (both within and between states) in moral climate as well. As long as these differences meet certain general ethical constraints—as long, in particular, as political institutions respect basic human rights—we are happy to let them be.

Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 CRITICAL INQUIRY 617, 621 (1997).

26. KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* xvi–xvii, 94–99 (2006).

27. *Id.* at 72–81.

people's importance—of their lived experiences.²⁸ So, phenomenology helps legal practitioners and scholars in a world of difference, a world queer theory certainly understands, by valuing people, their stories, their experiences, and the way they all come to the law²⁹ with different backgrounds. Because if lawyers, judges, activists, and the rest of the legal *dispositif*³⁰ are going to make law not only supportive of the rule of law,³¹ but responsive to people's needs as well, then practitioners and scholars will have to not only acknowledge, but also embrace difference.

I focus on orientation because orienting oneself is what we do on a daily basis. We orient the car in the driveway so it does not hit the garage door, we orient ourselves in bed so as not to wake a light sleeping partner, and we orient ourselves to new students, new ways of teaching, and new job opportunities. All of these orientations paint a picture of constant motion, of being in space, but not in place. The distinction between space and place has significance in legal analysis. Place defines. "Where were you on the night of the crime?" "I'll meet you at my law

28. *Id.* at xi–xii.

29. Nick J. Sciullo, *Conversations with the Law: Irony, Hyperbole, and Identity Politics or Sake Pase? Wyclef Jean, Shottas, and Haitian Jack: A Hip-Hop Creole Fusion of Rhetorical Resistance to the Law*, 34 OKLA. CITY U. L. REV. 455, 495–96 (2009).

30. Michel Foucault writes:

What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements.

Michel Foucault, *The Confession of the Flesh*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977*, at 194 (Colin Gordon ed., Gordon, et al. trans. 1980).

31. Hilary Lim, *Mapping Equity's Place: Here Be Dragons*, in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW* 125, 126–27 (Anne Bottomley ed., 1996).

office at 9:00 a.m.” “The clerk’s office is on the second floor of the county court building.” Space describes. One goes to a baseball game because the game is a constructed space of movement, not because of the reinforced concrete structure of the stadium itself. Dave Matthews writes of “the space between” two people in a complex relationship as that great unknowable gap in communication that allows us to fail to ever fully describe that which we attempt to describe.³² Space appreciates uncertainty and angst whereas place seeks to illuminate both.

This distinction is one that does not readily occur in legal analysis. Occasionally, the dismissive language used to condemn critical legal studies as relativistic³³ hints at this idea of motion, but rarely is there an appreciation for the constant change of law and legal teaching. To be sure, it can be difficult to appreciate change in the weeds of teaching. Likewise, in one’s first year of law school, or even during bar review or application to another graduate program, it can be difficult to appreciate law

32. Dave Matthews Band sings:

The space between
Where you smile and hide
Is where you’ll find me if I get to go
The space between
The bullets in our firefight
Is where I’ll be hiding, waiting for you
The rain that falls
Splashed in your heart
Ran like sadness down the window into your room
The space between
Our wicked lies is
The hope to keep safe from pain

DAVE MATTHEWS BAND, *The Space Between*, on EVERYDAY (RCA 2001).

33. See Terence Kane, *David Brooks: Relativist, or Just a Critical Legal Studies Theorist?*, HILL (May 29, 2009, 12:14 PM), <https://thehill.com/blogs/pundits-blog/media/30776-david-brooks-relativist-or-just-a-critical-legal-studies-theorist>. Robin West summarizes this position: “[R]elativism, according to modern objectivists, is politically objectionable in its tendency toward ‘quietism’: its pacific acceptance of whatever social structures have produced the interests, projects, goals, and ‘personal economies’ on which all value is contingent.” Robin L. West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1476–77 (1990).

as a spatial phenomenon when it seems to be an orderly progression from place to place. These are competing notions of law—law as stable and more or less orderly, and law as radically complicated and changing, albeit quite slowly. It is at that shutter, the collapsing of stability, in which we find orientation and disorientation.

From there, practitioners and scholars can theorize what their position means in relation to law. Disorientation can be a site of power and repression.³⁴ If one feels disoriented by a legal system that continues to misgender people,³⁵ or if people refuse to sell things or provide services to someone claiming First Amendment protection,³⁶ then disorientation can be quite debilitating. One literally loses the ability to be the person one is. Yet, one might read Sara Ahmed's work to emphasize the productive capacity of disorientation as a time where, despite

34. Niall Martin & Mireille Rosello, *Disorientation: An Introduction*, 57 CULTURE, THEORY & CRITIQUE 1, 3 (2016).

35. Sade Kondelin, *Dis/Orientations of Gender and Sexuality in Transgender Embodiment*, 8 SUOMEN QUEER-TUTKIMUKSEN SEURAN LEHTI 32, 36 (2014) (noting that "[b]eing misgendered, or failing to pass as or to blend in with our intended gender, as a continuously repeating experience that it can be in the lives of transgender bodies, is easy to perceive as such a crisis"); Kevin Allen, *Queer Mirror: Transitory Pronoun Disorientation*, BEATROUTE (Sept. 9, 2014, 3:23 PM), <http://beatroute.ca/2014/09/09/queer-mirror-transitory-pronoun-disorientation/> ("Mason explains that it is not the end of the world to misgender someone but that people should endeavor to work on their pronoun use to not make the same mistakes repeatedly. 'For trans people it is not a one-off occurrence – they do not get misgendered that one time only – eventually there is a cumulative effect,' he adds."); CN Lester, *On Misgendering and Authenticity*, A GENTLEMAN AND A SCHOLAR (Sept. 26, 2013), <https://cnlester.wordpress.com/2013/09/26/on-misgendering-and-authenticity/> (stating "[t]here feels like an assumption that misgendering is far less serious when it's done to someone who isn't (or isn't straight forwardly/exclusively) a woman or man – that it's to be expected, that it won't hurt so much. Yes, there are genderqueer people who aren't bothered by pronouns/descriptors – but, for many of us, it hurts a great deal"); Meg Zulch, *7 Things Genderqueer People Want You To Know*, BUSTLE (Dec. 3, 2015), <https://www.bustle.com/articles/124009-7-things-genderqueer-people-want-you-to-know> (Zulch explains: "I am consistently invalidated through misgendering, with the constant use of 'girl,' 'woman,' and 'miss' when referring to me (even after I correct people). It's disorienting, frustrating, and often makes me feel invisible").

36. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

the odds, one can feel the intellectual commitment all the more to one's self and one's issues, producing affirmation by others in the witnessed struggle of one's life.

Disorientation happens differently for different people. Just as everything from graduate or law school to the common cold affect people in different ways despite being substantially similar things, processes, or conditions, disorientation can happen differently based on people's identity markers, social mores, legal systems, and many other contextual factors. For these reasons, theorizing disorientation as a discrete process of alienation³⁷ from one's self³⁸ or one's relations³⁹ would describe disorientation in a way that neither appreciates its debilitating nor empowering attributes.⁴⁰

Orientation is central to the ways we discuss law, the ways judges, practitioners, clients, and scholars write and speak about it, and the ways we always seem to have a relationship to it.⁴¹ Law seems to be a prepositional affair. *Under* law, this or that happens.⁴² In this way, law seems to be an umbrella of sorts

37. Ryan C. Parrey, *Being Disoriented: Uncertain Encounters with Disability*, 36 DISABILITY STUD. Q. (2016), <http://dsq-sds.org/article/view/4555/4299>.

38. *Id.*

39. *Id.*

40. Martin & Rosello, *supra* note 34, at 1–4.

41. This relationship is often discussed with specific reference to minoritarian populations relationship to law as distinct from whatever might be normal in a legal system, which in the United States is often a white, Christian, middle-class, cisgendered, moderately educated, able-bodied man. These discussions occur across legal practice areas and legal theories. *See generally* Gordon Christie, *Law, Theory and Aboriginal Peoples*, 2 INDIGENOUS L. J. 68–115 (2003) (discussing aboriginal peoples' relationship to law); Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1 U. CHI. LEGAL F. 9 (1989) (discussing women's relationship to law); Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207 (2006) (discussing the relationship of Black persons to law).

42. The use of this preposition in describing a relationship with law dates to Antiquity:

Secondly, in the hunt for a better - and more substantial - awareness of the "law", we intend to revisit the different

under which one hides to avoid the rain of illegality. “[A]s an accord and satisfaction is grounded *in* contract law, there must be consideration and a meeting of the minds with the intent to compromise.”⁴³ This orientation considers law a discrete field that is limited by some constructed constraints. It always implies an out. So, whereas contract law might tell us something, if we are outside of contract law, then this orientation radically changes what contract law can do for us. When we write about *the* law, instead of law, we assume a unified and monolithic structure of law; however, we know that legal actors in their fetishistic desire for stability, often misrepresent law. The law is muddled, confusing, consistent in its inconsistency, and legal actors are prone to irresponsible, unethical, and biased behavior. Judges let in their personal beliefs, and we thankfully have Sonia Sotomayor who finally disavowed us of the sophomoric belief that people magically

notions related to the “rule of law”. Although it is true that they are neither equivalent nor unequivocal, they might shed some light into our discussion, from the classical distinction between the “government of/under men” (“passion”) and the “government of/under laws” (“reason”) in Socrates, Plato and Aristotle, and the principles of “equality before/under law” (identified with the Greek word *isonomia*), or “freedom before/under law” in Marcus Tullius Cicero and in Edward Coke to the contemporary distinctions between the “adjudicative/judicial or legislative rule of law” and the “constitutional or institutional rule of law”, including the tensions between the *ragione di Stato* (i.e. reason of State) and the *Stato della ragione* (i.e. State of reason); the *Machtstaat* (i.e. State of power/force) and *rechtsstaat* (i.e. State of law); *derecho de Estado* (i.e. law of State) and *Estado de derecho* (i.e. State of law or even State-law); and, law’s empire - the expression popularized by Ronald Dworkin – or even empire of law.

Imer B. Flores, *Law, Liberty and the Rule of Law (in a Constitutional Democracy)*, in *LAW, LIBERTY, AND THE RULE OF LAW* 77, 78 (Imer B. Flores & Kenneth E. Hemma eds., Springer Netherlands 2013). See generally A.B.A., *Law Day 2015 Magna Carta: Symbol of Freedom Under Law*, AM. BAR ASS’N DIV. PUB. EDUC., https://www.americanbar.org/content/dam/aba/images/public_education/LawDay2015/LawDayGuide2015.pdf (using “under law” to structure modern legal understanding).

43. *Emrick v. First Nat’l Bank of Jonesboro*, 756 N.E.2d 914, 919 (Ill. App. Ct. 2001) (emphasis added).

waived away their phenomenological life when they decided or argued a case.⁴⁴ Yes, the use of the definite article implies a relationship, a homogeneity, that using the indefinite article or the plural does not. *The law*, *a law*, and *laws* all perform different functions and express a set of constraints that structure our orientation to law. *Above the law* carries with it its own set of syntactical orientations.⁴⁵ If one is above the law or acting as though they are above the law, they are orienting themselves as more important than law or as though they do not have an orientation to law because it does not apply to them, which is of course also an orientation.

The point is that we are always oriented toward law. We are under it, above it, in it, and so on. So, one's orientation in society is moderated constantly by legal orientation. This double move, or rather complexity of orientation, means people are always oriented in law even as they orient without it. That is, one cannot refuse legal orientation. However, one can act in ways that advance an orientation contra law. Thus, legal orientation does not prevent our resistance; rather, it can be a source of it.⁴⁶

Belgian painter Erik Pevernagie describes the disease in orientation work in his description of his oil painting "Everybody his story:"

44. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see."); Justice Sonia Sotomayor & Robert A. Stein, *The 2016 Stein Lecture: A Conversation Between U.S. Supreme Court Justice Sonia Sotomayor and Professor Robert A. Stein*, 101 MINN. L. REV. 2139, 2152–53, 2159–60 (2017).

45. Most legal commentators will be familiar with *Above the Law*, which "takes a behind-the-scenes look at the world of law. The site provides news and insights about the profession's most colorful personalities and powerful institutions, as well as original commentary on breaking legal developments," quite often reporting on and criticizing those who think they are better than the legal system, legal education, professional responsibility, etc. *Breaking Media, About, ABOVE THE LAW* (Mar. 8, 2010, 8:37 PM), <https://abovethelaw.com/about/>.

46. See Martin & Rosello, *supra* note 34, at 7 (noting "[d]isorientation equalises, that is, works against hierarchy and perhaps against injustices, be they social or physical").

We want life to make sense. If we don't find meaning or orientation, we are bound to fabricate a living and invent an inspiring life story. When we write out a chosen script, we'll have to make time to hunker down into attuning it to the hitches of the roadmap, time and again, with fractious patience.⁴⁷

For Pevernagie, our quest is to orient or risk the unknowing oscillation of disorientation. The hunkering down to the hitches of the road is the important "wake work"⁴⁸ of queerness. Christina Sharpe's wake work is the necessary self-care of riding the wake of the ship for Black folks who must grapple with slavery's haunting.⁴⁹ Sharpe discusses wake as both a riding of the wake in forced diasporic dispersal as well as the wake of being with the dead, and the notion of waking up or coming into a consciousness.⁵⁰ Although this wake work is situated in an affirmation of Blackness in the face of systemic violence, Sharpe's analysis provides meaningful paths for the furtherance of a queer phenomenology. She centers the experience of slavery in Blackness being the same ways the homophobic⁵¹ and transphobic⁵² laws of the last several centuries might be centered in queerness. Because queerness is always modified by law, not because one cannot be queer, although perhaps modern political violence from the current conservative administration

47. Erik Pevernagie, *Everybody His Story*, WIKIMEDIA COMMONS (2000), https://commons.wikimedia.org/wiki/File:Everybody_his_story.jpg (last visited Apr. 5, 2019).

48. Mackala Lacy, *Wake Work – Self Care for the Black Community*, OUT OF NOWHERE, (Feb. 18, 2015), <https://outofnowhereblog.wordpress.com/2015/02/18/wake-work-self-care-for-the-black-community/>.

49. See generally CHRISTINA SHARPE, *IN THE WAKE: ON BLACKNESS AND BEING* (2016).

50. *Id.*

51. See generally WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003* (2008); DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017).

52. See Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law*, 20 BERKELEY J. GENDER, L. & JUST. 150, 153–55 (2005).

might suggest otherwise, law exists in a complex net that we have trouble escaping.

Law is experience. Rather than imagine queerness as solely a theoretical project divorced from material conditions, queer theory should be considered a materialist discourse in that it connects both high theory and materialism. It then mirrors Sharpe's wake work because it is historically indebted, theoretically rich, and materially oriented. This then makes queerness, queer theory, or queer theorizing ideal for analyzing law because law does not exist beyond us, but rather is intimately bound up in all we do. It is something we do and we work with and against. It is our drive to work and our lease. It is what and how we watch and do things. This understanding forces scholars to think about law in the present, instead of thinking of law's immanence. By considering law in this way, scholars only risk improving their interactions with and theorizing of minoritarian populations, connecting more meaningfully to diverse theoretical perspectives, and orienting law toward change.

On Orientation

Edmund Husserl is often considered the founder of phenomenological inquiry.⁵³ Phenomenology centered experience while eschewing metaphysical commitments.⁵⁴ This

53. See generally JAMES M. EDIE, *EDMUND HUSSERL'S PHENOMENOLOGY: A CRITICAL COMMENTARY* (1987) (discussing Husserl's phenomenology in depth); JOSEPH J. KOCKELMANS, *EDMUND HUSSERL'S PHENOMENOLOGY* (1994) (discussing the importance of Husserl to phenomenology and broader relevance to continental philosophy).

54. One approach to describing the distinct nature of phenomenology relative to other foundational philosophical perspectives is:

Philosophers have sometimes argued that one of these fields is "first philosophy", the most fundamental discipline, on which all philosophy or all knowledge or wisdom rests. Historically (it may be argued), Socrates and Plato put ethics first, then Aristotle put metaphysics or ontology first, then Descartes put epistemology first, then Russell put logic first, and then Husserl (in his later transcendental phase) put phenomenology first.

was an important change in the rather dense and seemingly disconnected-from-life philosophy that dominated much philosophical work from the Renaissance to Husserl's time. Now, phenomenology often takes the form of evoking personal experiences while checking one's philosophical bags at the door. Yet, it is not so much that we cannot discuss metaphysical issues, but rather that we must include experience. The inclusion of experience radically reshaped philosophy leading to or otherwise informing standpoint theory,⁵⁵ ethnography,⁵⁶ and autoethnography.⁵⁷ For Husserl, it was all about the table, a

David Woodruff Smith, *Phenomenology*, STANFORD ENCYC. PHILOSOPHY (Dec. 16, 2013), <https://plato.stanford.edu/entries/phenomenology/>; see also Denis Seron, *Phenomenology in the Present-Day Philosophy*, HUSSERL ARCHIVE, <https://www.newschool.edu/nssr/husserl/Future/Part%20Three/Seron.html> (last visited Jan. 3, 2019) ("That phenomenology somehow opposes meta physics is clear, but this should not mislead us into supposing that it makes all metaphysics impossible.").

55. See Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 93–99 (1993). See generally Sandra Harding, *Introduction: Standpoint Theory as a Site of Political, Philosophic, and Scientific Debate*, in THE FEMINIST STANDPOINT THEORY READER 1–15 (Sandra Harding ed., 2004) (arguing for standpoint theory's centrality to feminist theory); Susan Hekman, *Truth and Method: Feminist Standpoint Theory Revisited*, 22 SIGNS: J. WOMEN & CULTURE SOC'Y 341, 341–65 (1997) (arguing that writing off standpoint theory is a premature conclusion and that standpoint theory addresses fundamental questions about women's experience with and in the world); Maksim Kokushkin, *Standpoint Theory is Dead, Long Live Standpoint Theory! Why Standpoint Thinking Should be Embraced by Scholars Who Do Not Identify as Feminists?*, J. ARTS & HUMAN., July 2014, at 8, 8–20 (arguing that standpoint theory enables new knowledges and focuses on disempowered groups).

56. See generally Jack Katz & Thomas J. Csordas, *Phenomenological Ethnography in Sociology and Anthropology*, 4 ETHNOGRAPHY 275, 275–88 (2003) (discussing the relationship between ethnography and phenomenology in sociology and anthropology); Alexander Kozin, *On Making Legal Emergency: Law Office as Most Expeditious*, F. QUALITATIVE SOC. RES., Jan. 2007, at 1, <http://www.qualitative-research.net/index.php/fqs/article/view/202/> 447 (discussing the role of ethnography in a law office as informing phenomenology); Sarah S. Willen, *Toward a Critical Phenomenology of "Illegality": State Power, Criminalization, and Abjectivity among Undocumented Migrant Workers in Tel Aviv, Israel*, INT'L MIGRATION, July 2007, at 8, 8–38 (discussing the role of phenomenological ethnography in understanding illegal migration).

57. Andrew C. Sparkes argues that autoethnographies "are highly personalized accounts that draw upon the experience of the author/researcher

metaphor deeply significant to philosophy.

This table was central in Husserl's phenomenology. This metaphor helped explain place and space, the relationship one has to both, and also the site of life from eating to work. The table was a point at which phenomenology began. The table is in many ways an interesting choice for Husserl, indebted as he was to Karl Marx's description of the dancing table in *Capital*, Vol. 1.⁵⁸ For Husserl, the table is both the focal point and anchor to orientation.⁵⁹ His extensive description of the table provides much of what one needs to know to appreciate the complexities of orientation and its central role in subject creation. Marx described a dancing table, one animated by commodity fetishism. This dancing was of course figurative, but describes the world of the commodity when it is infused with exchange value, masking over the labor and laborers who made it. The table dances as a commodity as if it were not created as a table. Marx describes this table:

The form of wood, for instance, is altered if a table is made out of it. Nevertheless the table continues to be wood, an ordinary, sensuous thing. But as soon as it emerges as a commodity, it changes into a thing which transcends sensuousness. It not only stands with its feet on that ground, but in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than if it were to begin dancing on its own free will.⁶⁰

for the purposes of extending sociological understanding." Andrew C. Sparkes, *Autoethnography and Narratives of Self: Reflections on Criteria in Action*, 17 SOC. SPORT J. 21, 21 (2000). See generally Sally Denshire, *On Auto-Ethnography*, 62 CURRENT SOC. REV. 831 (2014) (discussing some of the difficulties in writing about one's experiences in an autoethnography).

58. KARL MARX, 1 CAPITAL (Penguin Publ'g Grp. 1992) (1867).

59. SARA AHMED, QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS 35–37 (2006).

60. MARX, *supra* note 58, at 163–64.

This animated table is an expression of orientation—one deeply engrained, pun intended, in our relationship to the object(ive) world. Husserl draws on this sense of orientation, the relationship of the table to the chain of signifiers that makes up capitalism, the relationship between the table and the floor and the table to itself, in order to theorize a philosophy of objects, of sensory experiences that does not pause to contemplate the table dancing, but rather focuses on our relationship to the table. It is this relationship with objects that creates the subject. Such a theory encourages individuals to theorize their own relationship to the objects of law (statutes, the Constitution, etc.), the actors of law (law enforcement, lawyers, etc.), the producers of law (judges, elected officials, etc.), and the process of law (court proceedings, legislative processes, etc.). This would, holistically, help individuals better understand and relate to legal systems.

Husserl brings this to bear on the writing desk. For many legal scholars this will seem familiar—writing as life-affirming labor.⁶¹ In *Ideas I*,⁶² Husserl argues that the writer is oriented toward the writing table, but also that one's experience is that such claims naturally arise that one cannot experience.⁶³ We may claim that the coffee cup is on the coffee table, yet perceptually we cannot perceive what is under the coffee cup. Likewise, while the writer is often oriented toward the writing table, the writer may in fact only express an orientation toward the computer or the piece of paper. So too might we orient ourselves toward the orientation, a second-order orientation so that rather than be a writer at a writer's desk, we might imagine ourselves a thinker, an artist, or a theorist. Orientation plays a central role in identity formation and interactions with the world.

Then, to put all of one's cards on the table carries with it a deeper meaning that from Marx through Husserl seems to be akin to wearing oneself on one's sleeve. The phenomenological experience of being becomes intimately tied to one's relationship to the table.

61. See Greene, *supra* note 16 at 204.

62. EDMUND HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (W. R. Boyce Gibson trans., Routledge 2012) (1931).

63. Wolfgang Huemer, *Husserl and Haugeland on Constitution*, 137 *SYNTHESE* 345–68 (2003).

Understanding orientation as something so fundamental to our being helps explain why the phrase sexual orientation is so important. Quite simply it is about being. When we think about law, then, I would challenge us to think about the queer body. To some extent, legal scholars are doing great work on race, gender, and religion, but we have yet to bring forth the experiences of queer folks with the same intellectual rigor and phenomenological passion that we have brought to other identities and other critical legal theories. To be sure, Dean Spade⁶⁴ and Devon Carbado⁶⁵ have completed much of this work, but legal practitioners and scholars still need theories to help think through the world as cause and effect of queerness. Yet, they struggle to think about the queer body, both because law struggles to come to grips with new understandings of the body and because law struggles to understand queerness. So, then, legal scholars, lawyers, and law students are doubly deficient in writing, speaking, and thinking about the queer body.

Queer bodies defy the heteronormative codes of appropriate conduct, of what it means to go swimming,⁶⁶ of what it means to

64. See generally Dean Spade, *Compliance is Gendered: Transgender Survival and Social Welfare*, in TRANSGENDER RIGHTS: HISTORY, POLITICS AND LAW 217 (Paisley Currah et. al eds., 2006); Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL'Y 53 (2008); Dean Spade, *Introduction: Transgender Issues and the Law*, 8 SEATTLE J. SOC. JUST. 445 (2010); Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497 (2010); Dean Spade & Sel Wahng, *Transecting the Academy*, 10 GLQ: J. LESBIAN & GAY STUDS. 240 (2004); Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288 (2009); Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353 (2009).

65. See generally Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Devon W. Carbado, *Privilege*, in BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY 190 (E. Patrick Johnson & Mae G. Henderson eds., 2005); Devon W. Carbado, *Straight Out of the Closet*, 15 BERKLEY WOMEN'S L.J. 76 (2000).

66. Michelle O'Toole, *I Am Scared of Cisgender People: My Time at a Transgender Swimming Club*, PINK NEWS (Dec. 22, 2015, 7:20PM), <https://www.pinknews.co.uk/2015/12/22/i-am-scared-of-cisgender-people-my-time-at-a-transgender-swimming-club/>; David Rieder, *Transgender Swimmers: The Rules for Inclusion and Fairness*, SWIMMING WORLD (Dec. 19, 2017, 7:00 AM), <https://www.swimmingworldmagazine.com/news/transgender>

dress,⁶⁷ excrete,⁶⁸ and be. These codes are of course present in courtrooms and law offices, both formally and informally. They exist even when one takes the Bar Exam and must wear supposedly gender-specific business clothing. Of all the skills necessary to practice law or think meaningfully about law, wearing prescribed professional clothes cannot possibly be one of them. Furthermore, the argument that professional dress builds confidence in the profession or academic discipline seems to neglect every 1L's experience of constantly being asked by one's friends and family about the legality of actual and hypothetical actions after learning of one's participation in legal education. That is, once friends become aware of one's legal education, they regularly inquire about legal matters, both within the scope of law classes and so far outside of most people's experience in law, and pose questions that even the best-rated lawyer in town could not answer without hours of research. One's clothing choice seems not to matter at these times.

Swimming seems simple enough. Enjoy a nice day at the pool or at the beach. Swim competitively, for fitness, or just to play. However, swimming is not so simple for transgender people, who must rightly critique and are critiqued by people with simple assumptions about whether they can swim and where. Bathrooms, changing rooms, and locker rooms all become sites of contestation over who counts as a person. Each space, each stall door is an opportunity for new thinking about body, relationships, and being. Swimming becomes not just a material repositioning of gendered space, but also a metaphor

-swimmers-the-rules-for-inclusion-and-fairness/.

67. See generally CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO* (2014) (arguing laws against cross dressing expressed a fascination with behaviors far outside typical legal regulation); Morag Curtis & Karen Morris, *Cross-Dressing as a Meaningful Occupation: A Single Case Study*, 78 *BRITISH J. OCCUPATIONAL THERAPY* 706 (2015) (discussing the role of cross-dressing in identity formation).

68. See generally Allison Bader, *Whose Bathroom Is It, Anyway?: The Legal Status of Transgender Bathroom Access Under Federal Employment Law*, 91 *S. CAL. L. REV.* 711 (2018); Marka B. Fleming & Gwendolyn McFadden-Wade, *The Legal Implications Under Federal Law When States Enact Biology-Based Transgender Bathroom Laws for Students and Employees*, 29 *HASTINGS WOMEN'S L.J.* 157 (2018); Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 *FORDHAM L. REV.* 1 (2017).

for movements against the gender current of not so postmodernist society.

Modern workplace dress codes may be changing, but not as quickly or as thoroughly as transgender people may like. What counts as acceptable workplace attire still exists in a gendered matrix. Read Internet message boards about the last time a heterosexual cisgender female wore a tie to a Hollywood opening, and if one digs deep enough into the online comments, one is sure to come across heteronormative, vitriolic hate. Dress has long been associated with acceptability. Baggy jeans, hats, ties, dress length, and other clothing markers all signify who a person is, reinforcing certain scripts in normative evaluations of appropriate dress. The workplace is no different. The cool or apathetic professor wears sandals or, like one of my law school professors, the same tie every day because he is forced to wear a tie to teach. The intern always wears “edgy” outfits. Casual Fridays mean polo shirts or flats. Obviously, these distinctions are arbitrary. At no point does skirt length mean anything other than the wearer has selected that skirt length to wear.

These issues matter to law because they highlight how important the body is, its presentation, and its relationship to other bodies and social and professional norms. Queer and transgender people, because of their non-normative status, are frequently positioned in difficult situations—always out of place. As such, a phenomenological inquiry into law asks that practitioners and scholars appreciate how important the body is to law.

On Accommodation

Sara Ahmed reminds us, “We learn about worlds when they do not accommodate us. Not being accommodated can be pedagogy.”⁶⁹ So, then, rather than confine our identities in law to specific interactions like when one is admitted to law school, wins their first CALI award,⁷⁰ or passes the Bar Exam, what

69. Sara Ahmed, *An Affinity of Hammers*, 3 TRANSSEXUAL STUD. Q. 22, 22 (2016).

70. CALI is an acronym for Center for Computer Assisted Legal Instruction. A CALI Award is often given out for the highest grade in a class.

Ahmed suggests is that we learn when we are not accepted. Rather than house our knowledge in an intellectual space of accommodation and inclusion, hoping that traditional liberalism is the cure to our ills, we need a more radical orientation toward our disorientation or all those times when we do not fit in or are not accommodated. Such an orientation underscores the fundamental inequality at the root of our legal system, a system built on indigenous genocide, slavery, police brutality, the denial of people's right to vote, and trans exclusion.

The operative question in law is: how do we orient ourselves in the world given that we are often not the only ones working on our orientation? Compulsory heterosexism structures bodies, bodies that "enable some action only insofar as they restrict the capacity for other kinds of action."⁷¹ Whatever one's sexual orientation, how one expresses that orientation, or how one attempts to orient themselves to the world, orientations can restrict action. Yet, they are also generative; that is, orientations can create relationships to others and the world. That orientations both serve a restrictive and generative function underscores their foundational importance as a site of power, and, as well, expresses the need to be responsive about the ways in which orientations may be placed on us by legal systems, teachers, relatives, and even friends. It is not that we should do away with orientations, but rather that we must be mindful of how orientation enables and hinders, empowers and disempowers.

We know, following the work of Michel Foucault⁷² and

The point is, rather than define oneself by various one-off events, it makes more sense to think holistically about one's identity rather than confine identity to a certain grade point average or award.

71. AHMED, *supra* note 59, at 91.

72. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 32–57 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); *see also* Maria A. Dixon, *Transforming Power: Expanding the Inheritance of Michel Foucault in Organizational Studies*, 20 MGMT. COMM. Q. 283, 289 (2007) ("Foucault added the idea that a central conduit for this power is the human network of relationships (a basis he subsequently revisited in other conceptions of power) in which power is fluid and constantly moving"). Furthermore, we know that this is not simply an esoteric philosophical matter, but rather that the fluidity of power affects legal practice. *See, e.g.*, William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client*

Judith Butler,⁷³ to whom Ahmed is much in debt,⁷⁴ that power is fluid, and that being powerful in one instance may produce disempowerment in the next. This is why the work of law is so difficult. In the balance of equitably distributing rights, one must move around, squirm, slide, and slip through power space. Taking charge of one's orientation can steady one's body in disorientation, enabling one to better meet the challenges of the day and address the day's challenges.

Obviously, it can be difficult to do this given the way law treats its most vulnerable. It is dangerous to be queer, and that is why so many people struggle to find a position in law. Yet, phenomenology is a self-affirming experience that opens doors for being. Still, one might ask, "Can I be in law, and what does that mean for me and others?"

This question of being rests on the appreciation of the body-as-such. That is, the body must be recognized as human and not as an object. Understanding the body-as-such undermines, if not ameliorates, the alienating power of law. The most dramatic alienation in law was slavery.⁷⁵ Slave owners regard Black

Interactions, 77 CORNELL L. REV. 1447, 1497 (1992).

73. Much of Judith Butler's work has revolved around divorcing gender from sex and, in turn, describing how gender is fluid. Judith Butler & Cristan Williams, *Judith Butler on Gender and the Trans Experience: "One Should Be Free to Determine the Course of One's Gendered Life,"* VERSO (May 26, 2015), <https://www.versobooks.com/blogs/2009-judith-butler-on-gender-and-the-trans-experience-one-should-be-free-to-determine-the-course-of-one-s-gendered-life>.

74. Carolyn Pedwell & Anne Whitehead, *Affecting Feminism: Questions of Feeling in Feminist Theory*, 13 FEMINIST THEORY 115, 116 (2012). For example, comparing quotations from Ahmed, Butler, and Foucault reveals a concern with the body, power, identity, and orientation linking the authors. Aaron Bady, *7 Days of Queer Theory*, NEW INQUIRY (June 25, 2012), <https://thenewinquiry.com/blog/7-days-of-queer-theory/>.

75. Vincent Brown writes:

By making men, women, and children into commodities, enslavement destroyed lineages, tethering people to owners rather than families, and in this way it "annulled lives, transforming men and women into dead matter, and then resuscitated them for servitude." Admittedly, the enslaved "lived and breathed, but they were dead in the social world of men." As it turns out, this kind of alienation is also part of what it presently means to be African American.

people as not bodies-as-such, but rather as objects.⁷⁶ This commodification, the systematic annihilation of the body as subjective in favor of an objective understanding produced the disempowering logic that allowed for white slave owners to deny Black life, rights, and respect.⁷⁷ There was no body in this logic

Vincent Brown, *Social Death and Political Life in the Study of Slavery*, 114 AM. HIST. REV. 1231, 1237–38 (2009). See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 35–76 (1982) (discussing the trauma of alienation); Sarah Demetris Turner, *African Americans' Experiences of Estrangement and Alienation: A Comparative Analysis of Georg Simmel's Essay "The Stranger"* 12–16 (August 2002) (unpublished M.A. thesis, Texas Tech University) (on file with the Texas Tech Library) (discussing the long history of African Americans' alienation in the United States).

76. Steven C. Tracy offers the analysis bluntly: "[T]he slave was an object, a problem." Steven C. Tracy, *Introduction: Hughes in Our Time*, in *A HISTORICAL GUIDE TO LANGSTON HUGHES* 8 (Steven C. Tracy ed., 2004). Take for example:

[T]he 1926 League of Nations' definition of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," a definition which focuses on the master's ownership of the slave and hence implicitly stresses that the slave was an object of property.

Ann-Marie Sharon Forg  t, *The Roman Captive: An Iconographical and Cultural Study* 19 (1996) (unpublished M.A. thesis, University of Victoria) (on file with the National Library of Canada).

77. Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883, 892–93 (2004). Even if one does not accept the denial of humanity, the language games of ascriptive identity put Black humanity in question. As Laurent Dubois argues:

The history of slavery and colonialism constituted the term "Black" as the name "of the slave: *man-of-metal*, *man-merchandise*, *man-of-money*" The word "designated not human beings *like all others* but rather a *distinct* humanity—one whose very humanity was (and still is) in question." Blackness came to "represent *difference in its raw manifestation*—somatic, affective, aesthetic, imaginary." Symbiotically, Whiteness "became the mark of a certain mode of Western presence in the world, a certain figure of brutality and cruelty, a singular form of predation with an unequalled capacity for the subjection and exploitation of

for which slave owners were accountable.⁷⁸ Yet, there are other failures of the law to account for bodies, failures that denied the body-as-such. Some examples include prohibitions on sex between members of the same sex,⁷⁹ international prohibitions on extramarital sex,⁸⁰ and prohibitions on sex work.⁸¹

It is, then, difficult to be in law, especially if one exhibits the bodily comportment⁸² or engages in the body practices that resist normative legal discourses.⁸³ Of course, as many have

foreign peoples” . . . Mbembe explores the structural drivers and consequences for this process but also its affective and psychological dimensions, the ways it constituted subjects the world over. To be Black, he writes, was to become “the prototype of a poisoned, burnt subject” and “a being whose life is made of ashes.”

Laurent Dubois, *Introduction to* ACHILLE MBEMBE, *CRITIQUE OF BLACK REASON* xi (Laurent Dubois trans., Duke Univ. Press Books 2017).

78. Kevin Bales, *Slavery and the Human Right to Evil*, 3 J. HUM. RTS. 53, 58 (2004).

79. Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51, 55–56 (1998) (suggesting that natural law may not support bans on same sex marriage); Sara Querbes, *The Supreme Court, Sodomy Laws and the Impact of the LGBT Movement in America*, TRANSCENDING SILENCE <https://www.albany.edu/womensstudies/journal/2004/querbes.htm> (2004) (describing the impact of sodomy laws on same-sex sexual intercourse).

80. Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and Their Effects on Women*, 41 FORDHAM INT'L. L.J. 425, 427–36 (2018).

81. Gail M. Dedy, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry*, 17 WASH. & LEE J. CIV. RTS. & SOC. JUST. 515, 522–25 (2011).

82. See generally David Allen Larson, *Access to Justice for Persons with Disabilities: An Emerging Strategy*, 3 LAWS 220 (2014) (centering access to justice as a need for improved training in law); Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L. & COMP. L. 281 (2011) (discussing barriers to disabled persons' access to law).

83. For lawyers, the matter of clothing seems one of the most restrictive sites of normative legal theory. I remember working as a summer associate and learning from a supervising attorney that some judges in the courts of Virginia preferred women wear dresses and not pantsuits. This wisdom was proffered in the mid-2000s, not 40 years ago. See Lynda K. Hopewell, *Appropriate Attire and Conduct for an Attorney in the Court Room*, 12 J. LEGAL PROF. 177 (1987); Spencer Allen, *The Unimaginably Silly Resistance to*

experienced, even if one is cisgendered and able-bodied, the complexity of laws, the difficulty one might have in finding them or understanding them, and their differential enforcement mean that being in law is always fraught with difficulty. Law's complexity can, in fact, make it difficult to be in law.⁸⁴

This is to argue that understanding law as the cure for what ails the body may be too optimistic when indeed pessimism is likely to be a preferable position.⁸⁵ The problem is not that law cannot be helpful, empowering, or at the very least well-intentioned, but rather that in order to assure law is at its best, scholars, students, and practitioners must be attuned to its limitations, problems, and inevitable failures.⁸⁶ The sorts of euphoria that often result from "legal victories"⁸⁷ often mean relatively little to the person suffering the micro-⁸⁸ and macro-

Inseams in Women's Clothing: The Battle for Pants in the Courtroom, BLOG POSTS: RICHMOND JOURNAL LAW & TECH. (Apr. 4, 2018), <https://jolt.richmond.edu/2018/04/04/the-unimaginably-silly-resistance-to-inseams-in-womens-clothing-the-battle-for-pants-in-the-courtroom/>; Amanda Hess, *Female Lawyers Who Dress Too "Sexy" Are Apparently a "Huge Problem" in the Courtroom*, SLATE.COM (Mar. 21, 2014, 9:38 AM), <https://slate.com/human-interest/2014/03/female-lawyers-still-must-dress-conservatively-to-impress-judges.html>.

84. Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403, 404, 406–14 (1997).

85. Yet, we know that pessimism might actually be helpful in the study and practice of law. Emily Zimmerman & Casey LaDuke, *Every Silver Lining Has a Cloud: Defensive Pessimism in Legal Education*, 66 CATH. U. L. REV. 823 (2017); Debra Cassens Weiss, *Pessimistic Law Students More Successful, Study Finds*, ABA JOURNAL (Nov. 9, 2007, 12:18 PM), http://www.abajournal.com/news/article/pessimistic_lawyers_more_successful_study_finds/.

86. See generally Nick J. Sciullo, *Zizek/Questions/Failing*, 47 WILLAMETTE L. REV. 287 (2011) (describing failure's centrality to law).

87. Ratna Kapur, *There's a Problem with the LGBT Rights Movement – It's Limiting Freedom*, CONVERSATION (Sept. 17, 2018, 5:25 AM), <http://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>.

88. Microaggressions "are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." Chester M. Pierce et al., *Introduction Television and Education to AN EXPERIMENT IN RACISM: TV COMMERCIALS*, 10 EDUC. & URB. SOC'Y 3 (1977). See generally Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (describing law as a microaggression for Black persons because of pervasive bias); Kevin L. Nadal

aggressions⁸⁹ of a violent world. Rather than rest assured that change is good, or even happening, the more critical approach to legal thinking is one that is attuned to violence, drama, and inadequacy. Instead of thinking about the way law protects the most vulnerable, one must focus on the way law does not do this in order to prevent a tendency to be too thankful, too subdued, or too forgetful of the everyday struggles of people.⁹⁰

Queer phenomenology is attuned to these struggles, recognizing the difficulties of everyday life. It understands microaggressions and the way queer bodies are pushed and pulled into disorientation both by law and by individuals who simply fail to think about queer people⁹¹ or who actively accost them.⁹² Without the body, the ephemeral queer person lacks urgency.⁹³ In the same ways that people often struggle with

et al., *Microaggressions Toward Lesbian, Gay, Bisexual, Transgender, Queer, and Genderqueer People: A Review of the Literature*, 53 J. SEX RES. 488 (2016) (describing microaggressions against LGBTQ + persons); Daniel G. Solórzano, *Critical Race Theory, Race and Gender, Microaggressions, and the Experience of Chicana and Chicano Scholars*, 11 QUALITATIVE STUDS. EDUC. 121 (1998) (describing the experience of Latinx scholars with microaggressions); Derald Wing Sue et al., *Racial Microaggressions and the Asian American Experience*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 72 (2007) (describing microaggressions against Asian Americans).

89. See generally KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (2d ed., N.Y.U. Press 2008) (describing Black fear of law enforcement using macroaggression as a theory).

90. Brentin Mock, *Are States Actually Protecting the Most Vulnerable with Their Justice Policies?*, GRIST (Apr. 10, 2015), <https://grist.org/politics/are-states-actually-protecting-the-most-vulnerable-with-their-justice-policies/>; Julie Moreau, *Federal Civil Rights Law Doesn't Protect Transgender Workers, Justice Department Says*, NBC NEWS (Oct. 5, 2017, 4:30 PM), <https://www.nbcnews.com/feature/nbc-out/federal-civil-rights-law-doesn-t-protect-transgender-workers-justice-n808126>.

91. An increasingly popular way to refer to this notion of ignoring queer people or their oppression is queerblindness. Alexandra Martin, *Challenging Corrections: Empowering LGBTQ Folx* 43 (May 7, 2018) (unpublished Honors Thesis, University of Iowa).

92. John Bowden, *Anti-LGBT Violence Surged in 2017*, HILL (Jan. 23, 2018, 9:36 AM), <https://thehill.com/blogs/blog-briefing-room/news/370236-report-anti-lgbt-violence-surged-in-2017>.

93. Here, I am reminded of Adrienne Rich's body politics and her belief that the body was a site of contestation and power:

caring about international violence⁹⁴ or human rights abuses⁹⁵ because they do not know the victims and cannot perceive the violence, so too is it easy to offer the palliative thought, *well, things seem to be getting better for the LGBTQ+ community*.⁹⁶ Regardless of how true that is, or even what it means with respect to access to healthcare, employment benefits, and safety, it eschews the responsibility we have for bodies in favor of grand narratives of progress.⁹⁷ Such a practice can never fully account

The moment when a feeling enters the body—is political. This touch is political. By which I mean, that *politics* is the effort to find ways of humanely dealing with each other—as groups or as individuals—politics being simply process, the breaking down of barriers of oppression, tradition, culture, ignorance, fear, self-protectiveness.

ADRIENNE RICH, *WHAT IS FOUND THERE: NOTEBOOKS ON POETRY AND POLITICS* 24 (1993); see Jacek Kornak, *Queer as a Political Concept* 1–15 (Feb. 4, 2015) (unpublished Ph.D. dissertation, University of Helsinki) (on file with author).

94. Gil Laroya, *Why Don't People Care When It Doesn't Affect Them?*, HUFFPOST (Nov. 26, 2014), https://www.huffingtonpost.com/gil-laroya/why-dont-people-care-when_b_5888686.html.

95. See generally Doug Bandow, *The Price of Ignoring Human Rights: Lost Credibility, Brutal Allies and New Enemies*, FORBES (June 19, 2017, 6:00 AM), <https://www.forbes.com/sites/dougbandow/2017/06/19/the-price-of-ignoring-human-rights-lost-credibility-brutal-allies-and-new-enemies/#4252ff30629e>; David Ropeik, *Statistical Numbing: Why Millions Can Die and We Don't Care*, PSYCHOLOGY TODAY: HOW RISKY IS IT, REALLY? (Aug. 15, 2011), <https://www.psychologytoday.com/us/blog/how-risky-is-it-really/201108/statistical-numbing-why-millions-can-die-and-we-don-t-care>; Sara Silverstein, *The Price of America's Withdrawal from the U.N. Human Rights Council*, WASH. POST: MADE BY HISTORY (July 19, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/19/the-price-of-americas-withdrawal-from-the-u-n-human-rights-council/?utm_term=.09a6d5d6b07f.

96. That is, things are not nearly as good or getting better as quickly as one might believe. See generally Reynaldo Leanos, Jr., *When It Comes to School Safety for LGBTQ Kids, Progress Has Slowed, Survey Finds*, NBC NEWS (Oct. 19, 2018, 4:32 PM), <https://www.nbcnews.com/feature/nbc-out/when-it-comes-school-safety-lgbtq-kids-progress-has-slowed-n922126>; Julie Moreau, *Global LGBTQ Acceptance More Polarized, New Research Finds*, NBC NEWS (May 3, 2018, 2:50 PM), <https://www.nbcnews.com/feature/nbc-out/global-lgbtq-acceptance-more-polarized-new-research-finds-n871106>.

97. Robin Linde & Mikaila Mariel Lemonik Arthur, *Teaching Progress: A Critique of the Grand Narrative of Human Rights as Pedagogy for Marginalized Students*, 103 RADICAL TCHR. 26, 28, 33–34 (2015).

for the body.

Hammering at Law

In our daily lives we need to follow Ahmed's "affinity of hammers," that embraces the ways we can chip away at oppressive systems and practices.⁹⁸ An affinity of hammers is Ahmed's insistence on the importance of the little work we do every day that may not seem significant or may easily be cast aside by those more interested in mergers and acquisitions. These actions do not always highlight a clear path to success. It may not seem like much just as it is difficult to envision oneself a lawyer or writing one's first law review article. One may not envision a shift to social democracy or radical equality in the style of Ernesto Laclau or Chantal Mouffe⁹⁹ from every time they refuse the socially condoned laughter at a racist joke or when they refuse to read the 100th sexist tweet from one's family member, but it is these hammerings that, when taken collectively, reshape the world. These hammerings create more than they deconstruct. They allow us to feel collective pride in the little things.

What is most interesting and perhaps least explored is this idea of an affinity *of* and not an affinity *for* hammers. Again, Ahmed has us playing with orientation. An affinity *for* hammers would mean we like hammers, but not necessarily *appreciate* what they do. An affinity *of* hammers expresses a relationship to the hammers. *Of* means the affinity is constructed of what hammers do,¹⁰⁰ namely chip away at the oppressive systems that make many of our lives atrocious. This rhetorical move is very much central to her politics. If we orient ourselves toward the work hammers do and not to the hammers themselves, then we

98. Ahmed, *supra* note 69, at 33.

99. See generally ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS (Winston Moore & Paul Cammack trans., Verso 2d ed. 2001) (1985) (focusing on hegemony as an analytical tool in analyzing oppression and social action).

100. That is, the affinity is constituted of hammers. *Of* means *the substance constituting something*, so then the affinity is constituted of hammers, expressing the centrality of hammers and all that they do to Ahmed's praxis.

center the work bodies can do.

Ahmed's centering of hammering answers the exclusionary politics of trans-exclusionary radical feminists¹⁰¹ by arguing that we are all at once hammering away at the system when we recognize the centrality of trans politics to the world. We need the collective struggles of anti-fascist, anti-racist, anti-capitalist, and other movements if we are going to make progress in the world. Sometimes it is the hammering rather than the ideology that we need to focus on in order to form meaningful coalitions. As such, Ahmed has often been described as an anti-ideological thinker because she is intimately concerned with the material effects of her theories.¹⁰² Yet, one need not focus on material concerns at the expense of ideology. In this light, Ahmed provides legal scholars with the theory needed to come together despite ideological differences.¹⁰³

So, while lawyers may disagree about politics or theories of government, they can come together about better transportation funding because it will improve the community by making travel safer, making it easier to go to work, and encouraging businesses to locate in a location. For Ahmed, the same is true in queer

101. Cursed E, *10 TERF 'Arguments' That Need to Stop*, MEDIUM (Feb. 5, 2018), <https://medium.com/@notCursedE/10-terf-arguments-that-need-to-stop-80e34d07dae4>; Kelsie Brynn Jones, *Trans-Exclusionary Radical Feminism: What Exactly Is it, and Why Does it Hurt?*, HUFFPOST (Feb. 2, 2016), https://www.huffingtonpost.com/kelsie-brynn-jones/transexclusionary-radical-terf_b_5632332.html; Cristan Williams, *You Might Be a TERF If . . .*, TRANS ADVOCATE (Sept. 24, 2013), https://www.transadvocate.com/you-might-be-a-terf-if_n_10226.htm. But see Sarah Ditum, *What Is a Terf? How an Internet Buzzword Became a Mainstream Slur*, NEW STATESMAN AM. (Sept. 29, 2017), <https://www.newstatesman.com/politics/feminism/2017/09/what-terf-how-internet-buzzword-became-mainstream-slur> (arguing that "TERF" is a slur); Meghan Murphy, *'TERF' Isn't Just a Slur, It's Hate Speech*, FEMINIST CURRENT (Sept. 21, 2017), <https://www.feministcurrent.com/2017/09/21/terf-isnt-slur-hate-speech/> (using a traditional liberal feminist paradigm to accuse people who use the acronym "TERF" of hate speech).

102. See generally Cari Hovanec, *A Critique of Affect Theory*, CARI HOVANEC (Mar. 31, 2018), <http://www.carihovanec.com/blog/a-critique-of-affect-theory/> (making an oblique critique of Ahmed's work).

103. Nishta J. Mehra, *Sara Ahmed: Notes from a Feminist Killjoy*, GUERNICA (July 17, 2017), <https://www.guernicamag.com/sara-ahmed-the-personal-is-institutional/> (describing how her work bridges divides and requires revision).

politics.¹⁰⁴ This group, the trans-exclusionary radical feminists (TERFs),¹⁰⁵ is a real issue because instead of having an affinity of hammers, their members have an affinity for narrow-minded, anti-progressive, patriarchal backsliding.¹⁰⁶ Because the TERFs are part of the system against which the hammering is done, they represent not a challenge to politics as usual to the patriarchy and hierarchical, gendered thinking, but rather the sort of politics against which queer politics positions itself. They focus on a monolithic understanding of feminism that serves the patriarchal and heteronormative system that disadvantages them. There are always those that may in some ways be broadly helpful to a cause (feminism), but hurtful to specific causes (transgender rights). However, if we follow Ahmed by focusing on the action—the hammering—then whatever disagreements we have about identity might seem a little less important, as hammering empowers and emboldens individuals to have better daily experiences.

Queer phenomenology leads Ahmed in this direction, of course. If we center the body, the material reality of being queer, or even the materiality of being Black, disabled, or tall, we would be better able to advocate together for improved material conditions because the body would be our focus.

A queer phenomenology harnesses the tremendous diversity of lived experiences of queer folks and can be an affinity of hammers, an appreciation for collective work that does not always seem meaningful, but when lifted up, raised up, its

104. SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 165 (2d ed. 2014) (stating “[t]he hope of queer politics is that bringing us closer to others, from whom we have been barred, might also bring us to different ways of living with others”).

105. Jones, *supra* note 101; see also Michelle Goldberg, *What Is A Woman?*, *NEW YORKER: AM. CHRONICLES* (July 28, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2>; Danelle Wylder & Corrie Westing, *TERFs Have No Place on The Left*, *SOCIALIST WORKER* (Aug. 21, 2018), <https://socialistworker.org/2018/08/21/terfs-have-no-place-on-the-left>.

106. A good example of this is a well-debated article where someone espousing TERF beliefs insists that they are not a TERF in a popular feminist space, *Feminist Current*. Penny White, *Why I No Longer Hate ‘TERFs,’* *FEMINIST CURRENT* (Nov. 10, 2015), <https://www.feministcurrent.com/2015/11/10/why-i-no-longer-hate-terfs/>. The explanation of why this article is in fact exclusionary is evident in the comments section which features multiple criticisms of the article. *Id.*

combined force can chip away at the pathological tropes of a damaged country.

There is a tendency to think about law in a monumental historical sense—*Lawrence v. Texas*¹⁰⁷ and *Obergefell v. Hodges*,¹⁰⁸ or even Stonewall¹⁰⁹ and Caitlyn Jenner.¹¹⁰ In the context of queer rights, specifically transgender rights, this has negative consequences.¹¹¹ *G.G. v. Gloucester County School Board*,¹¹² as styled by the Fourth Circuit Court of Appeals, represents precisely the danger of relying too much on a single event, plaintiff, or idea because this case, set to be the first case on transgender rights heard by the United States Supreme Court, was remanded to the Fourth Circuit with a one-sentence order vacating the judgment.¹¹³ Gavin Grimm (G.G.) proceeded

107. 539 U.S. 558 (2003).

108. 135 S. Ct. 2584 (2015).

109. Jarrett Earnest, *Does NYC's 'Gay Liberation' Monument Whitewash Stonewall? The New Museum Proposes Replacements.*, VULTURE (Nov. 28, 2018), <https://www.vulture.com/2018/11/is-nycs-gay-liberation-monument-too-white.html> (discussing the ways in which “Gay Liberation,” the monument to the Stonewall riots, might whitewash history); Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, ATLANTIC (Jan. 24, 2013), <https://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/> (expressing the drawbacks of putting too much faith in Stonewall).

110. See generally Joey DiGuglielmo, *Caitlyn Jenner: American Hero or 'Arrogant' Dilettante?*, WASH. BLADE (Aug. 19, 2015, 4:59 PM), <https://www.washingtonblade.com/2015/08/19/caitlyn-jenner-american-hero-or-arrogant-dilettante/> (arguing that Caitlyn Jenner represents a problematic transgender rights advocate at best); Marco Margaritoff, *Caitlyn Jenner on Backlash from LGBTQ Community: 'I Get the Criticism That I Don't Get It.'*, COMPLEX (May 22, 2018), <https://www.complex.com/pop-culture/2018/05/caitlyn-jenner-backlash-lgbtq-community> (discussing backlash against Caitlyn Jenner for her problematic political views and public statements).

111. See generally Samantha Allen, *Gavin Grimm Is Transgender: His Legal Fight to Go to the Bathroom Is Endless*, DAILY BEAST (May 24, 2018, 3:55 PM), <https://www.thedailybeast.com/gavin-grimm-is-transgender-his-legal-fight-to-go-to-the-bathroom-is-endless> (describing the lengthy and complex legal maneuvering of transgender rights in *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), as producing strain, confusion, frustration, and other related emotions).

112. 822 F.3d 709.

113. Caitlin Emma, *High Court Sidesteps Ruling on Transgender Rights*, POLITICO (Mar. 6, 2017, 3:53 PM), <https://www.politico.com/story/2017/03/supreme-court-scraps-transgender-bathroom-rights-235712>.

to graduate high school without ever resolving the legal issue his case presented.¹¹⁴ Thus, those who eagerly tracked this case were left with tremendous disappointment that the Supreme Court failed to act on the important and divisive issue of transgender rights.¹¹⁵ The impact of such inaction is not an ephemeral understanding of fundamental rights, but rather the physical danger posed to transgender persons who are denied legal rights.¹¹⁶ That is, the denial should be understood phenomenologically as a denial of the threat to one's life, as another attempt to end queer experience.

This monumental reading of history was dispelled by Friedrich Nietzsche, and his critique remains relevant.¹¹⁷ There are several problems with monumental approaches to history or to narrative. The first is that it often ignores many of the important people and actions that made an event possible. For example, one might discuss slave revolts¹¹⁸ with reference to

114. *G.G. v. Gloucester County School Board*, ACLU (Mar. 26, 2019), <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>.

115. Elliott Kozuch, *BREAKING: U.S. Supreme Court Remands and Vacates Gavin Grimm Case*, HUM. RTS. CAMPAIGN (Mar. 6, 2017), <https://www.hrc.org/blog/breaking-united-states-supreme-court-remands-and-vacates-gavin-grimm-case>.

116. *Id.*

117. FRIEDRICH NIETZSCHE, *ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE* 14–23 (Peter Preuss trans., Hackett Publ'g Co. 1980) (1874).

118. See generally Brian Gabriel, *From Haiti to Nat Turner: Racial Panic Discourse During the Nineteenth Century Partisan Press Era*, 30 AM. JOURNALISM 336 (2013) (discussing press coverage and racial panic discourse surrounding slave revolts); see also JOHANNES POSTMA, *SLAVE REVOLTS* (2008) (discussing slave revolts in encyclopedic fashion).

Gabriel Prosser,¹¹⁹ Denmark Vesey,¹²⁰ and Nat Turner,¹²¹ but ignore Boston King.¹²² This flattens history and reduces our interest in the complex narratives that shape social change. The argument is not that we should reject discussing people and events, but rather that we must tell a complete story. Telling the story of queer people as a string of discrete events misses the important everyday instances of queer politics. It is also common to romantically remember these monuments as better or more successful than they were. For example, one might remember the team that won the World Series, even though that team had worse statistics, won less games, and had less all-stars than another year's edition of that team or even another team that year.

However, that sort of understanding fails to capture the hammering work that led to change. It is synchronic, failing to understand the long, multifaceted history of our historical monuments. What we need is not the Badiouian evental

119. See generally DOUGLAS R. EGERTON, *GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802* (1993); MICHAEL L. NICHOLLS, *WHISPERS OF REBELLION: NARRATING GABRIEL'S CONSPIRACY* (2013); Douglas R. Egerton, *Gabriel's Conspiracy and the Election of 1800*, 56 J. SOUTHERN HIST. 191 (1990) (describing the impact Vesey's rebellion had ideologically and politically).

120. See generally ETHAN J. KYTLE & BLAIN ROBERTS, *DENMARK VESEY'S GARDEN: SLAVERY AND MEMORY IN THE CRADLE OF THE CONFEDERACY* (2018); JOHN LOFTON, *DENMARK VESEY'S REVOLT: THE SLAVE PLOT THAT LIT A FUSE TO FORT SUMTER* (John David Smith ed., Kent State Univ. Press 2013) (1983); DAVID ROBERTSON, *DENMARK VESEY: THE BURIED STORY OF AMERICA'S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT* (2000).

121. See generally PATRICK H. BREEN, *THE LAND SHALL BE DELUGED IN BLOOD: A NEW HISTORY OF THE NAT TURNER REVOLT* (2016); STEPHEN B. OATES, *THE FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION* (2014); NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY (Kenneth Greenberg ed. 2004) (discussing the broad significance of Nat Turner in his time through today's popular culture); Philip J. Schwarz, *Gabriel's Challenge: Slaves and Crime in Late Eighteenth-Century Virginia*, 90 VA. MAG. HIST. & BIOGRAPHY 283 (1982).

122. Boston King, *Memoirs of the Life of Boston King, A Black Preacher*, METHODIST MAG., Mar.–June 1798, at 105; see also Adam Christian Smith, *Boston King (c. 1760-1802)*, BLACKPAST (Sept. 22, 2010), <https://blackpast.org/gah/boston-king-c-1760-1802>; James W. St. G. Walker, *King, Boston*, DICTIONARY CANADIAN BIOGRAPHY, http://www.biographi.ca/en/bio.php?id_nbr=2489 (last visited Apr. 5, 2019).

politics¹²³ which, while helpful in assessing the significance of discrete events, still has a tendency to deny the contextual *longue durée* of evental politics. One need not do away with the Event to resist the Event as historical lens. Reading the Event and monumental history as similar will no doubt cause Badiou and Nietzsche scholars to bristle, but the idea here is not to over-determine the present.¹²⁴ Indeed, it denies the work of

123. Andrew Robinson summarizes Badiou's theory of the Event:

An Event is something akin to a rip in the fabric of being, and/or of the social order. It is traumatic for the mainstream, and exhilaratingly transformative for participants. Events are so radical as to even escape Badiou's own ontology. A lot of Badiou's discussions of the Event are negative. An Event is depicted as being other than "being as being", or the normal, mathematically integrated structure of reality. Since there is no general situation or History, something only has 'being' if it belongs to a situation. Events do not belong to situations, events occur outside being-as-being. This means that set theory and the resultant ontology cannot conceptualise Events.

Andrew Robinson, *Alain Badiou: The Event*, CEASEFIRE: AN A TO Z OF THEORY (Dec. 15, 2014, 11:13 PM), <https://ceasefiremagazine.co.uk/alain-badiou-event/>. Robinson's description gives conceptual clarity to Alain Badiou's description: "A truth is solely constituted by rupturing with the order which supports it, never as an effect of that order. I have named this type of rupture which opens up truths 'the event.'" ALAIN BADIOU, BEING AND EVENT xii (Oliver Feltham trans., 2007) (1988).

124. Although Badiou contrasts these two concepts, the fetishization of the Event pushes it toward its monumental specter. ALAIN BADIOU, METAPOLITICS 97 (Jason Barker trans., Verso 2005) (1998). Yet, David Wild writes in a way suggesting the two ideas are more similar than even Wild lets on:

Thus, Badiou's first move is to divide history: on the one hand, there is the monumental history of the state (of the victors); on the other, there are the rare, often brief, instances of politics that are connected to the truth of the collective While all political sequences are necessarily "singular", in as much as they trace no destiny (there is no determinism in the aleatory trajectory of a political event), the task of philosophy is to extract the "infinite" aspects of political sequences from the relativizing effects of "statist" history.

hammering.¹²⁵ In this sense then, it is important not to stop hammering, not to lay down one's hammer.

One will always be dissatisfied if one only measures progress by Supreme Court decisions.¹²⁶ The legal system is built that way, to be slow and theoretically well-reasoned. It is

David Wild, *Alain Badiou's Politics and the Problem of Social History*, 10 CRITICAL HORIZONS: J. PHIL. 391, 397 (2009).

125. Sara Ahmed describes the complexity of hammering and the need to constantly practice and refine hammering:

Stones might be willing; or not. At one level, stones appear as willful, insofar as willfulness is often related to being obstinate and unyielding. But of course its hardness, its tendencies, allows us to do certain things. We might assume the stone as a willing participant if we use the stone as a hammer: our hammering might depend on the stone; our will might be distributed across a field of action that includes the stone. But we should not find agency only in agreement. That is an-all-too human tendency that I have been grappling with throughout this book: to assume "yes" as a sign of being willing, a sign that is taken up as the giving of permission to proceed. This is one way we tend to go wrong. It is not that from the point of view of the hammer, everything is nail, but that the hammer is already a human point of view. The hammer is stone given the form of human intention. Perhaps stones are willing inasmuch as what they do not let us do; in how they resist our intentions. They can be checking powers; reminders that the world is not waiting to receive our shape. Perhaps then, they grab our attention. We might need to lose the hammer to find the stone.

Sara Ahmed, *Willful Stones*, FEMINISTKILLJOYS (Jan. 29, 2016), <https://feministkilljoys.com/2016/01/29/willful-stones/>.

126. See Gerald N. Rosenberg, *Ideological Preferences and Hollow Hopes: Responding to Criticism*, UNIV. CHI. PRESS, <https://www.press.uchicago.edu/books/rosenberg/index.html> (last visited Apr. 5, 2019); see also Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 901 (2013). See generally Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WISC. L. REV. 171 (2013) (providing a framework for analysis of the courts' ability to address and affect social change). But see Adam Deming, *Comment: Backlash Blunders: Obergefell and the Efficacy of Litigation to Achieve Social Change*, 19 J. CONST. L. 271 (2016) (arguing that backlash to Supreme Court decisions is possible, but that the *Obergefell* decision was not subject to significant backlash).

plodding, it makes gradual changes, and it moves at “all deliberate speed.”¹²⁷ This deliberate system makes the legal system predictable and allows people to reasonably assess the likelihood they will prevail in a case,¹²⁸ but it does not necessarily assure that rights are distributed evenly and defended vigorously.¹²⁹ That is why the real work of law is at the body. Our bodies grow weary as we wait for law, as if law had a cape and a utility belt.¹³⁰ So rather than waiting, Ahmed

127. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955); see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 112 (1987).

128. Jeremy Waldron makes this argument in the context of *stare decisis*:

There is a cluster of considerations commonly cited in support of the system of precedent that seems to invoke rule-of-law values. These include the importance of certainty, predictability, and respect for established expectations. By commanding that judges follow previous decisions, *stare decisis* is supposed to make it easier for people facing a new situation to predict how the courts will deal with it: they will deal with it in the way that they have dealt with similar situations in the past, rather than striking out unpredictably with a new approach of their own.

Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9 (2012).

129. See generally Cass R. Sunstein, *The Problem with Predictability*, AM. PROSPECT (July 7, 2005), <https://prospect.org/article/problem-predictability> (describing how predictability in law and a justice’s rulings does not necessarily produce the best decisions).

130. This is a reference to the DC Comics character Batman who wears a cape and a utility belt where he stores various gadgets to fight evil. The idea of “waiting for Batman” has come to represent the idea of waiting for a superhero to come along and right wrongs or solve problems, often characterizing the people waiting as hopeful, idealistic, and perhaps out of touch with political and social realities. See JAMES KAKALIOS, *THE PHYSICS OF THE SUPERHEROES* 159 (2005) (describing Batman’s utility belt, and other attributes of comic book heroes, as a way to discuss topics in physics). See generally Spencer Ackerman, *Batman Confronts Police Racism in Latest Comic Book*, GUARDIAN (Sept. 15, 2015, 10:31 PM), <https://www.theguardian.com/books/2015/sep/15/batman-confronts-police-brutality-in-latest-comic-book> (discussing Batman as a politico-legal commentary on police violence); Matt Sturtevant, *Waiting for Batman*, FIRST BAPTIST LAWRENCE (June 4, 2017), <https://firstbaptistlawrence.com/waiting-for-batman/> (using “waiting for Batman” as a message to encourage salvation and reconceptualizing one’s relationship with self and Christianity); Patrik Walker, *Rookie CB Duke*

would have us pick up our hammers.

It is hammering every day to make a less exclusionary, less transphobic, less homophobic world that appreciates the intrinsic value of the body. Until we do that, and slavery proves this in its disregard for the Black body, we will struggle because absent an appreciation for the body, what it does, does not do, and what it enables and prevents, then a meaningful queer theory in law will be difficult.

Conclusion

What I have argued is that we must come back to the body as a site of law. From the prison bed to health care laws, we experience law bodily. A critical theory of orientation asks us to focus on the body and the ways in which it interacts with law such that when we engage in its prepositional logic we understand exactly what that means about our relationship to it. Law without the body comes dangerously close to the erasure of bodies in monarchical politics highlighted by Ernst Kantorowicz's 1997 book, *The King's Two Bodies*.¹³¹ Kantorowicz troubled over the ways in which monarchs fabricated a body that existed beyond death.¹³² This political

Thomas a Dark Horse to Make Cowboys' Final Roster, 247SPORTS (Aug. 21, 2017), <https://247sports.com/nfl/dallas-cowboys/Bolt/Rookie-CB-Duke-Thomas-a-dark-horse-to-make-Dallas-Cowboys-final-roster-106358501/> (describing "waiting for Batman" as a sort of hopelessness felt for, and called by, a veteran athlete hoping to take a more prominent role in the upcoming season).

131. ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1997).

132. Perhaps most revealing of the grammar of Kantorowicz's theory, Alain Boureau summarizes it as such:

This organized grammar took on a more specific, more 'Western' aspect in Ernst Kantorowicz's version. For him, political transcendence constituted a true discourse in Western Europe, which gave birth to an idea of statehood that has scarcely any cultural equivalent. To fully grasp this trend, it is necessary to start from the central principle underlying the concept of *The King's Two Bodies*: '*dignitas non moritur*' [dignity does not die]. This formula undeniably contains an element of the metaphorical, with a literal term (*dignity*, *function*) and a figurative term (represented by the

arrangement denied the body so much so that an absent body began to control the physical body of others in the Middle Ages. It is concerning that if we ignore the body we will have a political structure built on the body's absence,¹³³ which may be an accurate description of our current political system. The body's absence brings to mind Julia Kristeva's theory of abjection.¹³⁴ For Kristeva, abjection was the state of being utterly annihilated in a sort of noncorporeal position.¹³⁵ One might think of the body

verb *to die*). Bearing in mind that the metaphorical process basically turns on the predicate, what we have here is a well-worn metaphor: in the fourteenth century Lucas of Penna glossed 'does not die' as 'lasts forever' [*quod semper est*]. The statement seems commonplace, extending to the secular institution a principle established in the domain of religion: the Church, the Apostolic See, does not die. Hence, institutional history indicates a displacement, a shift. Kantorowicz's brilliant idea was to reveal a new metaphor by placing the emphasis on the subject and not on the predicate. If dignity does not die, that is because it is compared to a living being, a person. The predicate *non moritur* thus creates a paradigm of living, immortal subjects that combines institutions (dead metaphors), divine subjects (theological predication) and mythological beings (allegories) or fictional ones (living metaphors): Empire, Mystical Body, Angel, Christ, Treasury, King, Phoenix.

Alain Boureau, *How Christian Was the Sacralization of Monarchy in Western Europe (Twelfth-Fifteenth Centuries)?*, in *MYSTIFYING THE MONARCH: STUDIES ON DISCOURSE, POWER, AND HISTORY* 25, 27 (Jeroen Deploige & Gita Deneckere eds., 2006) (citation omitted).

133. See generally DREW LEDER, *THE ABSENT BODY* (1990) (discussing the absence of the body in political discourse and arguing for a phenomenological rejoinder).

134. See generally JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* (Leon S. Roudiez trans., Columbia Univ. Press 1982) (1980) (discussing Kristeva's theory of abjection).

135. Kristeva describes the abject in this way:

When I am beset by abjection, the twisted braid of affects and thoughts I call by such a name does not have, properly speaking, a definable *object*. The abject is not an ob-ject facing me, which I name or imagine. Nor is it an ob-jest, an otherness ceaselessly fleeing in a systematic quest of desire. What is abject is not my correlative, which, providing me with someone or something else as support, would allow me to be

of the slave that was denied; for rather than accept slaves as corporeal entities, the United States understood slaves as objects, not subjects.¹³⁶ This made sense in the perverse logic of capitalist white supremacy¹³⁷ because it was far easier to dispose of objects than bodies. Bodies are messy—they sweat, demand care, leak, break, secrete, defecate, and rot.¹³⁸ Who would want

more or less detached and autonomous. The object has only one quality of the object—that of being opposed to I. If the object, however, through its opposition, settles me within the fragile texture of a desire for meaning, which, as a matter of fact, makes me ceaselessly and infinitely homologous to it, what is *object*, on the contrary, the jettisoned object, is radically excluded and draws me toward the place where meaning collapses. A certain “ego” that merged with its master, a superego, has flatly driven it away. It lies outside, beyond the set, and does not seem to agree to the latter’s rules of the game. And yet, from its place of banishment, the object does not cease challenging its master.

Id. at 1–2.

136. The slave’s existence as object was foundational to the United States’ slave system, enabling the entire enterprise:

The slave is objectified in such a way that they are legally made an object (a commodity) to be used and exchanged. It is not just their labor-power that is commodified—as with the worker—but their very *being*. As such, they are not recognized as a social subject and are thus precluded from the category of “human”—inclusion in humanity being predicated on social recognition, volition, subjecthood, and the valuation of life.

Editors’ Introduction to AFRO-PESSIMISM: AN INTRODUCTION 8 (Racked & Dispatched, eds., 2017); SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 62 (1997) (“The slave is the object or the ground that makes possible the existence of the bourgeois subject and, by negation or contradistinction, defines liberty, citizenship, and the enclosures of the social body.”); Lynn Stewart, *Louisiana Subjects: Power, Space and the Slave Body*, 2 ECUMENE 227, 227 (1995) (“The slave body was crucial to slave-owners as a unit of labour, a vector of disease, an object of desire, and, always, as a locus of potentially violent resistance.”). See generally PAGE DUBOIS, SLAVES AND OTHER OBJECTS (2003) (discussing the slave as object in Ancient Greece).

137. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).

138. See JEAN-FRANCOIS LYOTARD, LIBIDINAL ECONOMY 1–3 (1993); Anke

to deal with them? The object, thus, has no body.

A queer phenomenology takes this on directly and with the verve necessary to establish the centrality of queer bodies in law. Queer bodies are even messier,¹³⁹ but not in the transphobic and homophobic ways that various segments of the population demonize queer sexual relations and other interactions.¹⁴⁰ Aimee Carrillo Rowe and Francesca T. Royster describe queerness as “the messy affects of political living,” which resist normative scripts of appropriate appearance, action, sexuality, gender, and political engagement.¹⁴¹ Queer phenomenology appreciates the messiness of bodies.

Messiness is a condition of possibility.¹⁴² Queering space means resisting the formal language of bodies. It is a ruthless reclaiming of the power of bodies to articulate identities. The way to rescue the queer body’s push toward non-being, toward abjection, is to become that much more concerned with the body

Bernau, *Bodies of Knowledge*, 25 FLORILEGIUM 75, 79–82 (2008); Imogen Tyler, *Against Abjection*, 10 FEMINIST THEORY 77, 79–80 (2009) (“Kristeva theorises abjection in distinctly phenomenological terms, associating the abject with all that is repulsive and fascinating about bodies and, in particular, those aspects of bodily experience which unsettle singular bodily integrity: death, decay, fluids, orifices, sex, defecation, vomiting, illness, menstruation, pregnancy and childbirth”).

139. Deborah R. Vargas, *Ruminations on Lo Sucio as a Latino Queer Analytic*, 66 AM. Q. 715, 718, 724 (2014).

140. Martin F. Manalansan IV, *The Messy Itineraries of Queerness*, SOC. CULTURAL ANTHROPOLOGY, (July 21, 2015), <https://culanth.org/fieldsights/the-messy-itineraries-of-queerness>.

141. Aimee Carrillo Rowe & Francesca T. Royster, *Loving Transgressions: Queer of Color Bodies, Affective Ties, Transformative Community*, 21 J. LESBIAN STUDS. 243, 245 (2016).

142. Martin F. Manalansan IV describes the messiness of queer bodies this way:

Queer as mess refers to material and affective conditions of impossible subjects as well as an analytical stance that negates, deflects, if not resists the “cleaning up” function of the normative. Queerness, then, is not just about off-kilter sex or nonnormative desires, but is about the potentials and possibilities behind quotidian practices and struggles of peripheral lives.

Manalansan, *supra* note 140.

and exhibit the necessary ethic of care¹⁴³ to accept and advocate for queer bodies. Queer phenomenology should be messy because only in the messiness of ontological appreciation will queer people be able to exist in law.

This should be a goal of a just legal theory and a just legal system.

143. Rather than the essentialist notion promoted by Carol Gilligan, I take to heart Malan & Cilliers reframing of Gilligan's ethic of care as "concerned with humane, non-violative relationships between human beings." Yvonne Malan & Paul Cilliers, *Gilligan and Complexity: Reinterpreting the "Ethic of Care"*, 36 ACTA ACADEMIA, no. 3, 2004, at 1, 17. This in turn means "that considering the relationships between people and the context in which they find themselves are as important as the abstract rights and principles at stake." *Id.* at 16. That is, a phenomenological theory of queerness values people in time and space as opposed to abstraction and universalism.