

ARTICLE

# ***PERRY V SCHWARZENEGGER: AN OPPORTUNITY TO “DO” LAW DIFFERENTLY***

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## INTRODUCTION

*For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.*

Audre Lorde<sup>1</sup>

HULK SUPPORT QUEER AND FEMINIST CHALLENGES TO MARRIAGE AS INSTITUTION. HULK ALSO CHAMPION SAME-SEX MARRIAGE. HULK VAST, CONTAIN MULTITUDES.

Feminist Hulk<sup>2</sup>

Written in response to the Supreme Court of the United States' hearings on same-sex marriage equality,<sup>3</sup> Feminist Hulk's tweet succinctly and with nuance captures the critical debates and discussions that progressives have about the subject.<sup>4</sup> In less than 140 characters, this tweet illustrates how language can be used differently. It can be viewed as an example of applying Lorde's assertion that true change requires moving beyond dominant approaches. With these ideas in mind, my aim in this paper is to uncover and apply alternative approaches to learning law. I use *Perry v Schwarzenegger* ("The Case")<sup>5</sup> as an entry point for exploring what is gained (and what may be lost) by "doing" law differently and by understanding law to go beyond simply legislation and jurisprudence. The following are questions that guide my inquiry: what happens when we put our bodies, minds, and souls into learning law? Can this different way of learning pave the way for change?

As a law student in the course Sexual Orientation and the Law, I had the opportunity to actively engage in various forms of embodied pedagogy.<sup>6</sup> The course was co-taught

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- 1 Audre Lorde, *Sister Outsider* (Trumansburg: The Crossing Press, 1984) at 112 [emphasis in original].
  - 2 Feminist Hulk, (26 March 2013), online: Twitter <<https://twitter.com/feministhulk/status/316565626359533569>>. As of 9 February 2014, this tweet had been retweeted (shared) 4,642 times and marked as a favourite 1,808 times. Feminist Hulk is a Twitter account that employs the voice and style of a comic book character (Hulk) to articulate feminist perspectives. The account writes in all capital letters to signify Hulk's voice. For instance, in response to the media controversy surrounding the response to the Steubenville rapists, Feminist Hulk wrote: "NO RAPIST IS TRAGIC HERO. HULK SMASH BULLSHIT MEDIA FOR THEIR COMPLICITY IN SEXISM AND RAPE CULTURE!" Feminist Hulk, (19 March 2013), online: Twitter <<https://twitter.com/feministhulk/status/314134202717192192>>.
  - 3 "Hollingsworth v Perry: Full Transcript of Oral Arguments on Gay Marriage Released (Audio)" *The Huffington Post* (26 March 2013), online: Huffington Post <[http://www.huffingtonpost.com/2013/03/26/hollingsworth-v-perry\\_n\\_2952605.html](http://www.huffingtonpost.com/2013/03/26/hollingsworth-v-perry_n_2952605.html)>.
  - 4 For examples in the Canadian academic context, see generally Susan Boyd & Claire Young, "Losing the Feminist Voice? Debates on Legal Recognition of Same-Sex Partnerships in Canada" (2006) 14 *Fem L S* 213; Suzanne J. Lenon, "Marrying Citizens! Raced Subjects? Rethinking the Terrain of Equal Marriage Discourse" (2005) 17 *CJWL* 405.
  - 5 *Perry v Schwarzenegger*, 704 F Supp (2d) 921 (ND Cal 2010). This is the lower court decision of the case that Feminist Hulk is referencing; see Feminist Hulk, *supra* note 2.
  - 6 In using the term "embodied", I am referring to the concept of using, engaging, and being aware of our bodies. Embodiment reflects a feminist methodology, which recognizes the complex lived experiences of oppression as inseparable from bodies. It requires moving beyond traditional approaches, which are oriented around text (either written or verbal) and, thus, disembodied. See Gillian Calder & Sharon Cowan, "Re-Imaging Equality: Meaning and Movement" (2008) 29 *A Fem LJ* 109 at 117; Elizabeth Adjin-Tettey et al, "Postcards from the Edge (of Empire)" (2008) 17 *Soc & Leg Stud* 5 [Postcards from the Edge]. Given this definition of "embodied", when I use the term "embodied pedagogy," I am referring to a teaching approach that requires students to employ and be conscious of their bodies. In contrast, I use the term traditional legal pedagogy to refer to a teaching approach that is text-oriented. In law schools, the traditional approach involves case law methodology, which is the process of learning the law by reading seminal cases, generally exclusively from the appellate level.

by Professors Gillian Calder and Sharon Cowan at the Faculty of Law, University of Victoria.<sup>7</sup> A central component of the embodied pedagogy in the course was Dustin Lance Black's play, "8" ("The Play").<sup>8</sup> The Play drew heavily on the transcripts of *The Case*, while weaving in the narratives of the gay and lesbian plaintiffs. These plaintiffs were challenging Proposition 8, which had removed California's recognition of same-sex marriage through a popular referendum.<sup>9</sup> As a class, we staged a reading of *The Play*, which was open to the public.<sup>10</sup> We did this in the largest lecture room of the law building and garnered an audience of over a hundred people, including individuals who were not directly connected with the law school.

While same-sex marriage equality is the primary issue in *The Case* and *The Play*, my focus is more on how we learn law. As such, my exploration necessarily implicates questions about the purpose of legal education.<sup>11</sup> I am struck by how often law students and the legal profession see substantive content as the *raison d'être* of legal education, as if mastery of a relevant section of legislation or a ratio of a case is all it takes to be a good legal advocate. I see embodied pedagogy as pushback against such an understanding of legal education. An embodied pedagogical approach makes learning the law a more fully human experience and brings to light questions regarding equality, justice, and lawyering that are often neglected or cannot be seen through traditional legal pedagogy. In particular, embodied pedagogy opens up the imaginary<sup>12</sup> of what is possible and forces us to think beyond our current limitations. I will present a case for how engaging in embodied legal pedagogy can help us learn important skills for lawyering, such as empathy and critical awareness of our positions in structures of power.

7 For an example of their collaborative work, see e.g. Calder & Cowan, *supra* note 6.

8 Dustin Lance Black, "8" (Burbank: Hungry Jackal Productions, 2012) [Playscript].

9 The Play is based on the trial level decision. The case was ultimately appealed to the Supreme Court of the United States with a decision rendered June 26, 2013. The 5-4 judgment was decided on the narrow grounds of standing instead of the bigger question of equal protection and the definition of marriage. See generally Bill Mears, "Supreme Court dismisses California's Proposition 8 Appeal" *CNN* (27 June 2013), online: CNN Politics <<http://www.cnn.com/2013/06/26/politics/scotus-prop-8/>>. Regardless, the majority decision dismissed the appeal, which ultimately means California is once again a state that permits same-sex marriage.

10 We advertised our staged reading on the campus radio station and in the City of Victoria's mainstream newspaper. See Amy Smart, "UVic Law School Sponsors Reading of Same-sex Marriage Play" *Times Colonist* (12 March 2013), online: Times Colonist <<http://www.timescolonist.com/entertainment/uvic-law-school-sponsors-reading-of-same-sex-marriage-play-1.90054>>. We also produced a video invite that we used to create awareness of *The Play*. BoxxerRebellion, "8 Video Invite" (2013), online: Youtube <<http://www.youtube.com/watch?v=vrfossflsM&feature=youtu.be>>.

11 I see this paper as contributing a student perspective to existing literature on legal pedagogy, specifically critical work that uses perspectives from feminism, queer theory, and intersectionality. See e.g. Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 *Harv Women's LJ* 89; Natasha Bakht et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall LJ* 668; Maneesha Deckha, "Teaching Posthumanist Ethics in Law School: The Race, Culture, and Gender Dimensions of Student Resistance" (2009-2010) 16 *Animal L* 287; Gillian Calder, "Guantánamo: Using a Play-Reading to Teach Law" (2010) 142 *Can Theatre Rev* 44 [Guantánamo].

12 By imaginary, I am referring to the creative space of what is possible. Hegemonic ideas generally form the boundaries of one's imaginary. In this way, it becomes impossible to even conceive of something different. The most effective way that existing power structures perpetuate themselves is through constraining the imaginary. As such, opening up the imaginary is integral to produce change. This understanding is informed by Rebecca Johnson's lectures on judicial dissent and the imaginary. See generally Rebecca Johnson & Ruth Buchanan, "Getting the Insider's Story Out: What Popular Film can tell us about Legal Method's Dirty Secrets" (2001) 20 *Windsor YB Access Just* 87; Suzi Adams, Jeremy C A Smith & Ingerid S Straume, "Political Imaginaries in Question" (2012) 13:1 *Critical Horizons* 5.

My overarching purpose in critically exploring this different pedagogical approach is both to articulate my thoughts for others but also to have space to reflect on my experiences for myself. With this in mind, I will first outline the context and methodology of this paper in Part I. I will then summarize how a traditional legal pedagogical approach would have addressed The Case in Part II. Then, I will explore the significance of embodiment and the role of theatre in relation to law in Part III. After this, I will consider the role of emotions and empathy, the creation of outsider spaces, relational politics, and mapping in Part IV. Once I have explored what can be gained through this pedagogy, I will reflect on doubt and the purpose of my paper in Part V. To conclude, I will note the shifts that may be important for future embodied legal pedagogical approaches.

## I. SETTING THE STAGE

### A. The Classroom Experience

Alongside *The Play*, in *Sexual Orientation and the Law* we engaged in collaborative discussions, utilized our bodies through various activities, and employed artistic tools to create representations. The collaborative discussions reflected some traditional seminar styles in that we all read mostly the same articles and engaged critically with them. However, we shifted that traditional approach by creating a congenial and respectful environment that focused on learning from each other. Rather than speaking with the intention of converting others to our own perspective, our starting point was that we each brought different and valuable perspectives. Moreover, we used our bodies, individually and collectively, to produce sculptures and representations of moments of oppression and counter-oppression. We also used art as part of our seminars and discussion. Lastly, we ended the course by mapping moments of queer legal history that each of us had chosen.<sup>13</sup>

Many of my classmates employed non-traditional methods to produce their final projects, such as scrapbooks and portraits. I am fortunate to have participated in some of these methods and they are an integral part of the experiences that I am analyzing in this paper. In particular, I am inspired by Siddharth Akali's "(I)dentify Burlesque," in which I acted the role of an "identity gatekeeper." In his piece, he beautifully and physically deconstructed the power and constraints of identity.<sup>14</sup> In light of the importance of collaboration in this class, I will often use "we" and related terminology in my discussion below. I do this acknowledging that the ideas that I express are reflective of my personal experience and may not necessarily reflect the experiences of my classmates.<sup>15</sup>

Significantly, our class was composed of mostly (perhaps entirely) outsider students who reflected a range of intersectional axes of oppression: gender; sexual orientation; race; nationality; language; single parenthood status; class; and likely many others that I cannot say for certain.<sup>16</sup> It should also be noted that we all have varying degrees of privilege, especially as law students, which interact in complex and nuanced ways with our intersecting oppressions. My particular self-identification is important to understand

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13 See Appendix A for a picture of our map.

14 Siddharth Akali, "(I)dentify Burlesque" (Performance delivered at the Faculty of Law, University of Victoria, 27 February 2013) [unpublished].

15 Further research to engage in the perspectives of the rest of the class may present important perspectives that are missing from this paper.

16 I have chosen to only list the ones that I am certain of to avoid essentialist assumptions about my classmates.

my engagement with the projects.<sup>17</sup> I am female-identifying, female-bodied, able-bodied, Indo-Canadian, brown, agnostic Sikh, and queer.<sup>18</sup> While these are not my only salient identity markers, they are the ones that I am most regularly reflecting on and were the ones I felt activated in my learning.

In addition to this course, I took courses during law school on feminist legal theories, Indigenous law, Inuit law and film, and administrative law. All except the last were outsider courses, and the last was taught using outsider pedagogy.<sup>19</sup> These courses have presented me with different methodologies and perspectives, including canvassing the broader contexts informing the law, unpacking power relations underlying law's purported neutrality, exploring alternative legal regimes, using law-and-film approaches, and learning collaboratively.<sup>20</sup> An example of applying these alternative methodologies is my video blog that engaged personal narratives with questions of law, identity, oppression, and feminism.<sup>21</sup> The overarching lesson for me is that law is more than statutes and cases; rather, it includes all of our daily interactions and societal norms.<sup>22</sup>

## B. Methodology

How do we assess what happens when we put our bodies into learning the law? I have lately become obsessed with questions of methodology. The 'how' and 'why' fascinate me more than the 'what.' In some ways, this paper is borne out of the desire to experiment

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- 17 This recognition of my subjectivity is resistance against treating myself as a neutral "colourless legal analyst." Brooks & Parkes, *supra* note 11 at 108, citing Kimberle Williams Crenshaw, "Foreword: Toward a Race-Conscious Pedagogy in Legal Education" (1994) 4 S Cal Rev L & Women's Stud 33.
- 18 I have slowly come to identify as queer. I hold the position that a person's genitals are not a relevant characteristic for determining whether I would love them or not. However, I am not sure if this requires "coming out," especially because I do not appreciate the current constraints of sexual orientation. I also do not accept gender dichotomies. As a result, I am settling on the term "queer" because its ambiguity is comforting and it does the job of questioning heteronormativity. This paper was the first time that I wrote out "I am queer" and found it a liberating experience. One of my first and only experiences of explicitly explaining this philosophy towards my own sexuality led to a complete breakdown in a friendship, which has made me apprehensive about openly articulating myself. On the other hand, I have over time found that most people close to me understand this identification and are very thoughtful.
- 19 My understanding of "outsider" is informed by the following definition that Bakht et al employ, which draws on Mari Matsuda's work: "We use the term outsider to describe those who are members of groups that have historically lacked power in society or have traditionally been outside the realms of fashioning, teaching, and adjudicating the law." Bakht, *supra* note 11 at 672. See also Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320 at 2323. I use the term "Othered" with similar understandings. The outsider methodology employed in administrative law involved critically analyzing the impact of legal doctrines on vulnerable groups and one of our assignments was a collaborative paper.
- 20 I am grateful for the bravery of the following professors who have exposed me to alternative pedagogies: Gillian Calder; Freya Kodar; Judith Sayers; Maneesha Deckha; Sharon Cowan; and Rebecca Johnson. They have taken on the risks and backlash that comes with challenging norms of legal education. I am struck by the time, energy, and constant reflection that each puts into their work. Many of them have produced work that illustrates alternative approaches to teaching and understanding law. See e.g. Postcards from the Edge, *supra* note 6; Deckha, *supra* note 11; Elizabeth Adjin-Tettey et al, "Using Film in the Classroom: The Call and the Responses" (2009) 21 CJWL 197 [Using Film]; Guantánamo, *supra* note 11; Judith Sayers, "First Nations in British Columbia," online: First Nations in British Columbia <<http://fnbc.info/blogs>>.
- 21 Jasreet Badyal, "Tumb(r)ling at the Edge of Empire," online: Tumblr <<http://edgeofempire.tumblr.com>>. An integral inspiration behind this project (and the title of the blog) was the work of feminist law professors at the University of Victoria, see Postcards from the Edge, *supra* note 6.
- 22 Julie Lassonde's work in particular has opened my mind to what can be considered law. She presents how different daily interactions are representative of the law and that all of our activities and ways of being represent legal interactions. See Julie Lassonde, *Performing Law* (LLM Thesis, University of Victoria Faculty of Law, 2006), online: UVic Faculty of Law <<http://law.uvic.ca/lassonde>>.

with a particular methodological approach. Along these lines, Brooks and Parkes discuss how a feminist approach of reflecting on methods can lead to a better overall understanding of what is being done and why: “Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved.”<sup>23</sup>

For this paper, I have decided to experiment with a range of critical theoretical tools. To this end, I have chosen academic articles that relate to the following aspects from legal perspectives:<sup>24</sup> narrative;<sup>25</sup> emotions; empathy;<sup>26</sup> affect;<sup>27</sup> embodiment;<sup>28</sup> mapping;<sup>29</sup> space;<sup>30</sup> performance;<sup>31</sup> theatre;<sup>32</sup> outsider and queer pedagogy; and epistemology.<sup>33</sup> I chose mostly recent articles that deal with these questions, as they are likely to draw on and summarize earlier scholarship. Furthermore, I chose a wider selection so that I would have many different ways of analyzing the embodied pedagogy of Sexual Orientation and the Law instead of focusing narrowly (but more in-depth) on fewer aspects. There are obvious trade-offs between these options.

I envision these articles as theoretical tools that I have gathered to build my own toolbox. My objective is to try these relatively new (for me) tools to lay the groundwork for deeper scholarship in the future. As they are brand-new and I have never used tools like them before, I find myself picking them gingerly, tentatively trying to figure out the ways that they work and the purposes for which they can be used. Therefore, I do not write this paper with a sense of reaching conclusive and overarching assertions. Instead, I see it as a process of reflecting and sharing one way of understanding alternative pedagogies.<sup>34</sup> In so doing, I will use the theoretical tools to analyze how embodied pedagogy permits space for a more fully human approach to learning and sheds light on questions that are otherwise left out.

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23 Brooks & Parkes, *supra* note 11 at 90, fn 6, citing Katherine T Bartlett, “Feminist Legal Methods” (1990) 103 Harv L Rev 829 at 831.

24 For the purposes of clarifying the perspectives that I am drawing, I have chosen to footnote the articles alongside words that capture key aspects the article. However, it should be noted that many of these articles cut across these different topics.

25 Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87:8 Mich L Rev 2411.

26 Susan A Bandes & Jeremy A Blumenthal, “Emotion and the Law” (2012) 8 Annu Rev Law Soc Sci 161.

27 Rebecca Johnson, “Living Deadwood: Imagination, Affect, and the Persistence of the Past” (2009) 42:4 Suffolk U L Rev 809 [Living Deadwood].

28 Gillian Calder & Sharon Cowan *supra* note 6; Ruth Fletcher, Marie Fox & Julie McCandless, “Legal Embodiment: Analysing the Body of Healthcare Law” (2008) 16 Med L Rev 321; Patrick Hannifan, “Voicing Embodiment, Relating Difference: Towards a Relational Legal Subjectivity” (2008) 29 Austl Feminist L J 77; Margrit Shildrick, “Transgressing the Law with Foucault and Derrida: Some Reflections on Anomalous Embodiment” (2005) 47:3 Crit Quarterly 30.

29 Bela Chatterjee, “Text and Terrain: Mapping Sexuality and Law” (2006) 17:3 Law and Crit 297.

30 Lolita Buckner Innis, “‘Other Spaces’ in Legal Pedagogy” (2012) 28 Harv J Racial & Ethnic Just 67.

31 Lassonde, *supra* note 22.

32 A G Boss, “(Un)Related Purposes: Theatre and Law” (2010) 142 Can Theatre Rev 30; Gillian Calder, “Embodied Law: Theatre of the Oppressed in the Law School Classroom” (2009) *Masks: Online Journal of Law and Theatre* 1 [Theatre of the Oppressed]; Guantánamo, *supra* note 11.

33 Using Film, *supra* note 20; Bakht et al, *supra* note 11; Brooks & Parkes, *supra* note 11.

34 In taking this approach, I am inspired by feminist process-oriented approaches: Postcards from the Edge, *supra* note 6; Calder & Cowan, *supra* note 6 at 111-112.

Throughout my analysis, I will employ narrative methodology.<sup>35</sup> This approach is inspired by critical race theory.<sup>36</sup> I have embedded my narrative within the text, as it forms the subject matter of my analysis. My narrative captures moments that I have experienced while attending law school. Each moment reflects some of the complex negotiations of privilege, power, and marginalization, which result from being an Othered law student. I deliberately chose moments that reflect my everyday experiences, so each should be understood as a common and frequent situation in my life. The purpose of this is to illustrate and centralize stories that are otherwise unheard or silenced in the legal environment. Moreover, it demonstrates how everyday situations can often be sites where systems of power are produced and reproduced, as opposed to sensationalized or heightened situations of overt oppression.<sup>37</sup> In so doing, I also want to present a fulsome picture of the process of studying law and how embodied pedagogy fits within it.

## II. TRADITIONAL LEGAL PEDAGOGY

With the above methodological approach in mind, I will summarize and apply a traditional legal pedagogical approach to the study of *The Case*.<sup>38</sup> Brooks and Parkes note that despite years of talk of reform, North American law students have been educated roughly the same way for over a hundred years.<sup>39</sup> This approach is focused simply on gleaning the relevant facts, issues, and reasoning from any case. Legal thinking continues to be stuck in this framework of case law methodology. I even encountered a recent article that suggested under “Radical Solutions” using case law to engage questions of ethics and inject soul into learning.<sup>40</sup>

I will outline a traditional pedagogical approach to provide background and context for understanding how the embodied approach is different. A traditional approach would likely leave us only with the understanding that Proposition 8 was unconstitutional, under any standard of review, on the grounds that “it denies [the] plaintiffs a fundamental right without a legitimate (much less compelling) reason.”<sup>41</sup> We may have explored the question of due process and the Fourteenth Amendment. In so doing, we may have inquired into the historical trajectory of the jurisprudence in this area. We could have gone in-depth into questions of evidence and witness credibility, as much of Justice Walker’s decision discussed these issues.<sup>42</sup> An interesting aspect of Sexual Orientation and the Law was reading the decision after performing in *The Play*. Done in this order, the judgement echoed many of the memorable lines from *The Play*, which seemed to

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35 Delgado, *supra* note 25.

36 In particular the following pieces have inspired my understanding of the purpose of narrative methodology and how to apply it: Delgado, *supra* note 25; Lassonde, *supra* note 22; Postcards from the Edge, *supra* note 6; Patricia J Williams, “The Death of the Profane” in *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 44-51; Patricia Williams, “On Being the Object of Property” in *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 216-230; Patricia A Monture, “Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah” (1986) 2 CJWL 159; Rebecca Johnson, “Law and the Leaky Woman: the Saloon, the Liquor License, and Narratives of Containment” (2005) 19:2 J of Media & Cultural Stud 181; Ruthann Robson, “Beginning from (My) Experience: The Paradoxes of Narrative” in *Sappho Goes to Law School* (New York: Columbia University Press, 1997) at 87-103.

37 Lassonde, *supra* note 22 at “Spider 1, What is Performing Law?: Performing the Law”. Her analysis draws on Judith Butler’s concept of performativity. See generally Judith Butler, “Gender as Performance: An Interview with Judith Butler” (1994) 67 *Radical Philosophy* 32; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

38 *Perry v Schwarzenegger*, *supra* note 5.

39 Brooks & Parkes, *supra* note 11

40 Steve Sheppard, “Teach Justice” (2008) 43 *Harv CR-CL L Rev* 599 at 603.

41 *Perry v Schwarzenegger*, *supra* note 5 at 994.

42 *Ibid* at 935-946.

attempt to provide depth and recognition to the voices in *The Case*, particularly the gay and lesbian plaintiffs.<sup>43</sup> I elaborate more on this below when I inquire into the usefulness of theatre in understanding law.

### III. LAW, EMBODIMENT, AND THEATRE

In comparison to traditional pedagogical approaches, by using our bodies, we learn more about the law and ourselves than we may have otherwise, especially as outsider students. To this end, I will first explore the importance of embodiment for learning law. I will then reflect on the significance of theatre in this context. In some ways, these sections are artificial divisions as much under this section relates to Part IV of this paper as well. They are useful, however, to frame my analysis.

#### A. Embodiment and Law

During our first-year moots, all of us eagerly put on our “lawyer clothes.” In some sense, it was one of our first exercises in performing the identity of “lawyers.” I, too, put on my suit and fondly remembered how my cousins and aunts had helped me pick it out. As I walked the halls of the law building, I saw my white male colleagues and thought to myself “wow, they truly look like lawyers.” I felt a sinking feeling as it dawned on me that when I looked in the mirror, I saw myself as a “receptionist” or “secretary.” I did not see a lawyer.

This realization very aptly captures that regardless of how cerebral we conceive of our profession, we are embodied as lawyers. In this sense, an embodied engagement with learning the law is necessary as it makes us aware of ourselves, as legal professionals, and the ways that we produce law in our daily interactions. Furthermore, embodied understandings of law can help create more just and equitable legal regimes.

Calder discusses the difference between teaching rock climbing and teaching law. She notes that while both involve “making complex and often dangerous ideas accessible to students,”<sup>44</sup> teaching the former involves embodiment whereas the latter does not. Furthermore, she points out that “[m]uch of law involves embodied concepts, yet we rarely ask our students to put their bodies into the learning of law.”<sup>45</sup> Thus, she explores the need for teaching law in an embodied manner. What precisely do we get by learning with our bodies? My contention is that using our bodies makes us aware of our powers, oppressions, and the ways that we create law through our interactions.

In the first few weeks of law school, I was regularly introducing myself to everyone in my immediate vicinity. As I went to sit down in the lounge, I saw an older white male sitting near me. I reached out my hand and told him my name. He responded: “oh, I’m not anyone important. I’m not a law student, just a groundskeeper.” I was surprised. How could a couple of weeks in law school leave people feeling so insignificant near me?

These moments illustrate aptly how much of our power and oppression is expressed in embodied ways. Furthermore, they demonstrate how our bodies are integral to being lawyers. In some ways, I have experienced privilege that legal education creates, which alters the way that I interact with others and the ways that my body is perceived. However, as a racialized woman, I sense that mine is not a body that produces legal knowledge or

43 For instance, Justice Walker shared Zarrillo & Katami’s story about going to the bank and facing the difficulty of conveying that they were a couple and Perry describing Stier as “maybe the sparkliest person I ever met.” *Perry v Schwarzenegger*, *supra* note 5 at 933, 939. These lines mirrored *The Play*, see *Playscript*, *supra* note 8 at 7.

44 Theatre of the Oppressed, *supra* note 32 at 2.

45 *Ibid* at 3.



has that sort of power. I was especially struck at the deference that this older white male gave me simply because of my being a law student. While my race and gender mark me as an outsider in legal contexts, my able-bodied self makes me an insider and, thus, easier for me to negotiate the space of the law school both physically and metaphorically. I was able to be in the law school lounge, while students with mobility concerns may have a more difficult time simply entering that space. I have heard expressed by some that it is challenging to navigate with a wheelchair, especially as able-bodied students often unintentionally leave tables and chairs astray that create various obstacles. Another complicating aspect is my sexual orientation. I am often assumed to be heterosexual and, as such, do not face the immediate or direct status of outsider due to that identity. Nevertheless, this means it is a constant negotiation as to when to voice my status as queer and how to respond to heteronormative assumptions. Embodied pedagogy can be a tool to more fully understand these complex interactions of power and oppression because it requires us to recognize ourselves and our positionality.

Embodied pedagogy may also be a way of combatting oppression, especially internalized forms of oppression. Delgado argues that outsiders use stories as forms of survival from and resistance to subordination.<sup>46</sup> He also discusses how counter-stories aid members of the dominant group to become aware of their power and interrogate perceived neutrality.<sup>47</sup> Similarly, perhaps we can use our bodies to learn law, to help us counter the sensation that our bodies are not worthy of legal education. As Boal has stated, “the whole body thinks.”<sup>48</sup> In this sense, we need to use our bodies to think that we have power. We can use these techniques to also become aware of privilege.

In addition to the ways our bodies are important in becoming aware of privilege and oppression, we can learn how we create law through our body. Lassonde articulates the idea that daily actions involving our bodies are a form of law.<sup>49</sup> For instance, she uses the example of coming out as queer in a hockey change room. This space is defined by certain norms or invisible societal rules, which vary depending on a person’s positionality. As a queer femme,<sup>50</sup> the expectations of her based on appearance do not align with her self-identification. Her femme identity lends herself to be read as heterosexual when she is not. Moreover, she discusses how difficult it is to unlearn these daily norms as she finds herself repeating rituals that make her feel uncomfortable, reflecting their daily coercive power. In this way, they function as laws by regulating behaviour.

The ways that our bodies create law are important to learning it and are integral to opening up our imaginary. This opening up can be conceptualized as “a politics of experimentation and imagining otherwise.”<sup>51</sup> To this end, Calder and Cowan discuss how focusing primarily on cerebral understandings of equality fail to capture the complexity of the embodied experience of inequality.<sup>52</sup> They discuss how feminists have challenged the dichotomy between mind and body, and the ways this dichotomy has

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46 Delgado, *supra* note 25 at 2436.

47 *Ibid* at 2417-2418.

48 Living Deadwood, *supra* note 27 at 816, citing Augusto Boal & Adrian Jackson, *Games for Actors and Non-Actors*, 2d ed (London: Routledge, 1992) at 62.

49 Lassonde, *supra* note 22 at 22 at “Spider 1, What is Performing Law?: Performing the Law”.

50 Queer femme refers to an expression of identity that appears normatively feminine, but is not heterosexual. Therefore, people who identify as queer femme are frequently assumed to be heterosexual due to stereotyping and heteronormativity. For discussions on gender performance and sexual orientation, see Heidi M Levitt & Sharon G Horne, “Explorations of Lesbian Queer Gender: Butch, Femme, Androgynous or ‘Other’” (2002) 6:2 *J of Lesbian Stud* 25; Lisa Walker, “The Future of Femme: Notes on Femininity, Aging and Gender Theory” (2012) 15:7 *Sexualities* 795.

51 Living Deadwood, *supra* note 27 at 815.

52 Calder & Cowan, *supra* note 6 at 115.

been employed to marginalize Othered individuals, especially women.<sup>53</sup> However, they note that participation in academic conventions may reproduce those dichotomies. As a result, embodiment is seen to be a way of disrupting the dichotomy. They also argue that using our bodies helps us understand inequality as a dynamic and changing process instead of a static concept.<sup>54</sup>

Furthermore, the law explicitly and implicitly regulates bodies. Thus, awareness of bodies is necessary to fully learn law. Fletcher, Fox, and McCandless have presented how an embodied perspective towards healthcare law would better uncover the way that law regulates and (de)values bodies.<sup>55</sup> They suggest that we should employ approaches that consistently recognize people as embodied and to not shy away from addressing difficult embodied experiences, such as pain and sex.<sup>56</sup> In particular, the fact that laws regulate bodies suggests that we should learn to engage with our own bodies. In these ways, we may be more aware of the bodily implications of our work as legal professionals and able to relate to the lived experiences of our clients.

To counter some of my own internalized oppressions, I deliberately took an “affirmative action” approach and chose courses taught by professors who I think are female-identifying (it also helped that the subjects that I was interested in were taught by these professors). These professors have offered me role models of legal professionals. Also, by using my body to learn, I am gradually embracing my racialized female self as having power and value. Recently, I was preparing for an interview and put on my “lawyer clothes.” As I stood in front of the mirror, I thought to myself “you look like a lawyer. One who actively reflects on her power and privilege and aims to be empathetic. Basically, you look like a lawyer who wants to do law differently.”

## B. What Does Theatre Give Us?

Considering the importance of embodiment to the law and learning the law, the question of theatre’s value in this context remains. Arguably, embodiment could be practiced in other ways and, indeed, I have engaged in these alternative ways as well, such as a video blog.<sup>57</sup> However, theatre can offer a different way of thinking about justice. I will explore one element of this by extending White’s analysis of justice as translation to theatre.<sup>58</sup>

Calder discusses how using a play-reading provokes future legal advocates to rethink what constitutes law, and how narratives influence our understanding of law.<sup>59</sup> Through embodied engagement in theatre, we are exposed to more complex narratives and nuances. In this way, we are better able to effectively apply “a postmodern lens that prefers specific and local analyses to grand theories of how oppression occurs.”<sup>60</sup> Thus, theatre offers a new way of understanding power relations permeating throughout our legal system.

With this theoretical lens in mind, did this happen when we staged *The Play*? In many ways *The Play* perhaps fell short of a truly embodied experience. We performed it

53 Calder & Cowan, *supra* note 6 at 117.

54 *Ibid* at 128.

55 Fletcher, Fox & McCandless, *supra* note 28 at 321.

56 *Ibid* at 322, citing Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997) at 6.

57 Badyal, *supra* note 21.

58 James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990).

59 Guantánamo, *supra* note 11 at 48.

60 Brooks & Parkes, *supra* note 11 at 115, citing Banu Ramachandran, “Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem With Speaking from Experience” (1998) 98:7 *Colum L Rev* 1757 at 1786.

through a staged reading in the largest lecture room of the law building. The set-up of the room involved Justice Walker in the center and the other characters seated on both sides. Individuals rose when it was a scene involving their characters. Therefore, we did not engage in much movement or use of our bodies. The Play itself is very text heavy. However, our bodies were present and we had to use them to project our voices and animate our lines with integrity. Nevertheless, in comparison to our other embodied exercises of forming sculptures and Akali's performance,<sup>61</sup> The Play seemed to lack a deeper engagement with our bodies. In some sense, we could fall back to our comfort zone of text, particularly text set in a legal context.

Furthermore, The Play focused exclusively on the experiences of privileged white queer people. We are asked by The Play to sympathize with the plight of the plaintiffs on such normative grounds as the fact that they pay their taxes. On the other hand, our embodiment as characters in The Play presented an interesting challenge. In most of the cases, we acted parts that did not align with our racialized and gendered bodies. This presents the question of how our audience may have perceived these differences. Our circumstances could be contrasted to an all-star Hollywood cast, which performed "8" and showcased it online.<sup>62</sup> In their performance, the actors' visible presentation aligned with the people that they were playing whereas ours did not. Perhaps the whiteness presented in the narrative became more apparent because of our visibly Othered bodies. In a different context, Calder and Cowan discuss how their metaphorical representation of inequality did not lead many people to reflect on questions of race and ethnicity, which may have been a product of their white bodies.<sup>63</sup> Thus, perhaps our embodiment was present in The Play and made apparent who it privileged.

To a certain extent, "8" represents a piece of theatre that was not as transgressive as it could have been. The Play is designed to appeal broadly and aims to fundraise for advancing same-sex marriage equality. In some sense, this play mirrors the "strategic litigant."<sup>64</sup> I wonder what would have happened if we had done a different piece of theatre that represented more women and bodies of colour. Thus, while the potential for learning through theatre is clear, perhaps this piece did not give us the opportunity to more fully explore this potential.

An interesting angle to view theatre that represents jurisprudence is through the idea of translation. White presents the idea of treating justice as translation; he posits that the job of a lawyer is to translate the story of their client into the language of the law.<sup>65</sup> In The Play, we did the reverse, translating the language of the law into a story. As law students, we kept questioning the representation as it seemed "too one-sided," and some members of our audience had a similar critique during discussions after the performance. The desire seemed to be for a play that better represented more convincing arguments from both sides. This may have reflected the fact that we were doing this piece in a law school. However, having read The Case as the original text before translation,<sup>66</sup> I am

61 Akali, *supra* note 14.

62 American Foundation for Equal Rights, "8": A Play about the Fight for Marriage Equality" (2012), online: YouTube <<http://www.youtube.com/watch?v=qlUG8F9uVgM>>.

63 Calder & Cowan, *supra* note 6 at 127.

64 In using the term "strategic litigant," I am referring to how judges may be more responsive to certain individuals over others. Specifically, they will respond better to people who are closer to the norm, which is white, male, able-bodied, and so forth. Crenshaw exposed this concept in her initial work on intersectionality in the context of antidiscrimination doctrines and how Black women are excluded due to their intersecting experiences of race and gender. Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti Racist Politics" (1989) U Chi Legal F 139.

65 White, *supra* note 58 at 260-261.

66 Perry v Schwarzenegger, *supra* note 5.

struck by how the discourse in *The Case* was in many ways similar to the one presented in the court scenes of *The Play*. In our class, we had not read the case prior to performing *The Play*. Perhaps if we had, that may have altered how we perceived *The Play* as being too “one-sided.” It also would have provided an interesting backdrop for analyzing the process of translation and how it applies to law.

In short, embodiment is integral to learning to be a lawyer. It makes us aware of our bodies, privileges, and oppressions. Furthermore, we create law through our bodies and the law regulates bodies. In this way, our work as lawyers require us to be intimately aware of bodies. One avenue through which to learn about embodiment is theatre. Through plays and acting, we can view the law with different lenses.

#### IV. EMPATHY, OUTSIDER SPACE, RELATIONAL POLITICS, AND MAPPING

Along with these aspects of embodiment and theatre, we gained other insights that made this experience more human and we learned more than we would have through traditional legal pedagogy. In particular, the importance of emotion and empathy came to light, as they are tools for combatting oppression and for better lawyering. Furthermore, we created outsider space and practiced relational politics, which in particular made our experiences in the classroom more human. Lastly, we engaged in mapping, which offers another way of expanding our imaginary of what can be done with and through the law.

##### A. Importance of Emotion and Empathy

While working on this paper, I made some flippant remark on Facebook about how I kept wondering what “white male privilege” would think about outsider pedagogy and perspectives. The partner of a friend, an older white male, took it upon himself to tell me that he found the term “white male privilege” offensive and equated it with the n-word and a derogatory term for women. I was deeply shaken and upset. I am struck by how we do not think through oppression. I did not pause, think in the abstract about what happened, and conclude that “yes, this is a circumstance of being oppressed.” I felt it.

It is through emotions that we experience oppression, so should emotions not also be integral to overcoming oppression? Johnson captures this idea in the legal context: “Justice is not simply ‘an idea.’ It is something felt deeply.”<sup>67</sup> Similarly, Bandes and Blumenthal discuss how legal doctrine is deeply implicated in implicit and explicit ways with emotions. However, they note that the law prefers to conceive of a baseline that is neutral and emotionless.<sup>68</sup> In this way, the law falls short of grappling with the complexity of emotions.

The role of empathy in particular has been debated, especially in the context of judging.<sup>69</sup> Empathy has some competing definitions and, thus, it is important to figure out what it is before debating its role. Bandes and Blumenthal posit one perspective: “if empathy consists of understanding the thoughts and feelings of another, then it is, arguably, an essential capacity for judges.”<sup>70</sup> I would go further and say this understanding of empathy should be an essential capacity for all legal actors, particularly lawyers. Strangely, the

67 Living Deadwood, *supra* note 27 at 817.

68 Bandes & Blumenthal, *supra* note 26 at 165, citing Susan Bandes, “Empathy, Narrative, and Victim Impact Statements” (1996) 63:2 Univ Chic Law Rev 361 at 370.

69 Bandes & Blumenthal, *supra* note 26 at 170.

70 *Ibid.*

question remains open as to whether empathy is an important skill for lawyers.<sup>71</sup> In our work, we have great power in relation to individual clients but also in defining broader societal norms, especially as future legislators and leaders in our communities. For us to do our work with sufficient understanding of those who will potentially feel its impacts, we need to be able to relate to them and see more than just our own perspectives. As such, empathy should be integral to legal education.

Empathy can be engaged and learned through embodied pedagogy, especially theatre. In the different context of narrative, Delgado describes how “one acquires the ability to see the world through others’ eyes.”<sup>72</sup> Similarly, Brooks and Parkes discuss how storytelling produces empathy, especially providing an avenue to relate to the marginalization that the law produces.<sup>73</sup> Applying these understandings in narrative to theatre, we can see that theatre gives us even more space to take on ideas that may not align with our own. To present a character with integrity, we are required to “see the world through others’ eyes,” perhaps even more so in acting than in narrative. Along these lines, Calder discusses how a play-reading on Guantánamo helped students develop “a more empathetic understanding of both the privileges and the challenges of being a *Charter* society.”<sup>74</sup> Moreover, in using our bodies to play the parts of characters in *The Play*, we become more intimately aware of the sensations and emotions that a different character must be feeling. For myself, as I played Elliot, I found myself understanding that he was a good kid, but he could not understand why his mothers would make the decision to disrupt their lives by putting themselves in the center of media and legal scrutiny through the legal case against Proposition 8. While this realization may not help me directly understand what the relevant legal arguments are, it does help me understand what is at stake and makes me aware of the significance that legal work would have in this context. In this sense, empathy is a legal skill and embodied learning through theatre is a useful way of practicing it.

## B. Outsider Space and Relational Politics

Along with learning empathy as a legal skill, we also learned to create empathy in our classroom and, in so doing, disrupted the usual law school environment. Drawing on lived experiences of queer students and faculty, Brooks and Parkes discuss how marginalized members of law schools are left with a sense of isolation, alienation, and subjectification.<sup>75</sup> In contrast to this, the space in *Sexual Orientation and the Law* was very much an outsider space because of who we were and what we were doing. This fostered a sense of community and coalition.

One particular activity that aptly illustrates this is how we signed play programs for each other in a “yearbook” fashion. The messages that I received from my classmates have left me feeling cared for and sensing that we truly shared something. In particular, I think pushing ourselves out of our comfort zone by staging a reading in front of a large audience was a visceral experience that brought us all together. We recognized the ways in which we all need to grow and learn. This reflects the idea of how critical courses can be seen as an “oasis within or respite from the traditional law school classroom.”<sup>76</sup> Furthermore, I found myself carrying this energy to my other classes and in my daily living. This is not to say that our space was perfect. We had moments where the conversations that we

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71 Sarah E Wilson, Julie Prescott & Gordon Becket, “Empathy Levels in First- and Third-Year Students in Health and Non-Health Disciplines” (2012) 76:2 *Am J Pharm Ed* 1 at 2.

72 Delgado, *supra* note 25 at 2439.

73 Brooks & Parkes, *supra* note 11 at 112.

74 Guantánamo, *supra* note 11 at 45.

75 Brooks & Parkes, *supra* note 11 at 106-107.

76 Innis, *supra* note 30 at 83.

were having and the complicated questions of oppression that we were addressing led to challenges and discomfort. Nevertheless, the space was unique and created a remarkable opportunity to learn.

We had in-depth conversations to collaboratively make decisions about the way we were going to conduct elements of our course. In particular, we cast ourselves for roles in *The Play*. This was a difficult process as we had conflicting ideas of the roles that would best suit others and ourselves. Moreover, we became anxious about this process and the impact that it would have on our staged reading. Partially this reflected how the process disrupted the usual top-down decision-making that characterizes classroom spaces. Our anxiety also may have been a response to the bigger picture of law that we are accustomed to seeing. We are taught and we see law conducted in a hierarchal model, where judges and politicians construct law. In creating this outsider space, we were forced to think differently about how law can be created.

Moreover, by staging the reading in the largest lecture room in the law building, we disrupted the rituals of that space and the building itself. This disruption is particularly important when we consider the way that rituals build and reinforce power relations. Pertti Alasuutari captures this precisely as follows: “In various ways rituals contribute to legitimizing and routinizing social hierarchies and power relations. It must also be remembered that practically no power relations are ‘put to use’ without the support of rituals.”<sup>77</sup> Hence, disruption of space is integral to creating change.

### C. Mapping

The last activity we did together was mapping queer legal history.<sup>78</sup> Over the term, we began each class with someone presenting a moment that they considered important to queer legal history. Most of these were from the Canadian context, but some were from other jurisdictions such as India, New Zealand, and Norway. We chose explicitly queer moments, such as Stonewall,<sup>79</sup> but also less obvious moments, such as the creation of national healthcare.<sup>80</sup> These decisions show the ways that we learned to think beyond a narrow understanding of what constitutes law and what counts as “queer experience.”<sup>81</sup> Furthermore, in our mapping we resisted the urge to follow narrow techniques of mapping, such as a timeline. Instead, we chose to see how all these moments are connected in a myriad of ways. Moreover, we understood them as being interlinked and

77 Boss, *supra* note 32 at 31, citing Pertti Alasuutari, *Social Theory & Human Reality* (London: Sage, 2004) at 103.

78 See Appendix A for a picture of our end result.

79 The Stonewall riots took place at the Stonewall Inn in New York City in June 1969. They were spontaneous demonstrations by queer people and mark a significant point in the queer rights movement. For an intersectional and contextual discussion on the Stonewall riots, see Elvia R Arriola, “Faeries, Marimachas, Queens and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots” (1995-1996) 5 *Colum J Gender & L* 33.

80 The creation of a national healthcare system is a queer experience in the sense that it has a significant impact on the lives of queer individuals. The idea of viewing this as a moment of queer legal history acknowledges that even universal programs are relevant to queer people. As queer people are often financially disadvantaged because of their Othered status, a publicly funded universal system may provide access to healthcare that would otherwise not be available. Moreover, queer people have different experiences with regards to access and needs, both in comparison to other queer people and heterosexual people. For instance, trans people still face many barriers in accessing healthcare. See Lane R Mandis, “Human Rights, Transsexed Bodies, and Health Care in Canada: What Counts as Legal Protection?” (2011) 26:3 *CJLS* 509; Marianne LeBreton, “The Erasure of Sex and Gender Minorities in the Healthcare System” (2013) 2 *Bioéthique* 17; Andrea Daley, “Lesbian and Gay Health Issues: OUTside of Canada’s Health Policy” (2006) 26:4 *Critical Social Policy* 794.

81 This reflects concepts of queer legal pedagogy that Brooks & Parkes have articulated. See Brooks & Parkes, *supra* note 11 at 120.

ourselves as being implicated in these events in complicated ways. An example that best captures this process of locating the self within the bigger context is that one student included his own picture as part of his representation of a moment. He incorporated a photocopy of his healthcare card, which had his picture on it but also illustrated the moment of the creation of a national healthcare system.

Chatterjee's discussion on mapping, sexuality, and the law is helpful to theoretically conceptualize what we did through this project.<sup>82</sup> She argues that the law is characterized by mapping. The law functions to render certain bodies and practices (in)visible.<sup>83</sup> Both maps and the law are not neutral.<sup>84</sup> She demonstrates how mapping requires an awareness of the distortions and the inherent constraints of never being able to accurately represent reality.<sup>85</sup> She argues that the law similarly should "recognise where the distortions, scales and projections lie, and accept that true reflection is impossible."<sup>86</sup> Moreover, she discusses how queer identities provide alternative mappings and destabilize the privileged state of heteronormativity.<sup>87</sup> In this way, mapping may open up new possibilities for the law.<sup>88</sup> She goes on to say rather eloquently that "[a]fter all, sexual *orientation* speaks fundamentally of the *direction* of desire, and its position within society: this is the very language of cartography."<sup>89</sup> Beyond the value of reconceptualising the law in a broader sense, mapping also relates to lawyer-client relationships. Chatterjee references Emily Grabham to discuss how the way lawyers map their client's experiences into something legally intelligible can leave clients feeling "disauthenticated."<sup>90</sup> Our mapping activity reflects these theoretical concerns. Furthermore, by placing our map in a main hallway of the law school, we disrupted the broader space.<sup>91</sup>

To summarize, empathy is an important legal skill and we have learned ways to exercise it through our embodied engagement with theatre. In *Sexual Orientation and the Law*, we created a unique outsider space that made learning the law a more human experience. Furthermore, we engaged in a mapping of queer legal history that opened up new ways of thinking about the law and the way that it regulates bodies.

## V. SOME REFLECTIONS AND DOUBTS

With all of the above valuable experiences and analysis in mind, I will explore some doubts and reservations about this embodied pedagogical approach. In particular, I am concerned about doubt, the difficulty of explaining what we did and why, and reflecting on those concerns as they relate to this paper.

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82 Chatterjee, *supra* note 29.

83 *Ibid* at 310.

84 *Ibid* at 298-299.

85 *Ibid* at 312.

86 *Ibid*.

87 *Ibid* at 311-312.

88 *Ibid* at 302.

89 *Ibid* at 319.

90 *Ibid* at 300, citing Emily Grabham, "Taxonomies of Inequality: Lawyers, Maps and the Challenge of Hybridity" (2006) 15:1 *Social and Legal Stud* 5 at 7.

91 This parallels the disruption created by holding the staged readings in a law lecture hall. See Part IV-B, above. In many ways the course was characterized with various forms of unsettling the norms of the law school. Another activity that we engaged in was to place signs that challenged the need for gendering over the bathroom door symbols. For instance, one of the signs placed over the gendered symbols was "this is a room full of toilets." For an in-depth discussion on bathrooms, sexuality, and transgender lived experiences, see Sheila L Cavanagh, *Queering Bathrooms: Gender, Sexuality, and the Hygienic Imagination* (Toronto: University of Toronto Press, 2010).

I was having coffee with two white male friends and classmates on campus. As I broke a piece of my chocolate bar, I excitedly told them about the latest Inuit film that I had watched and how the preparation for *The Play* was going. One of them gave me a bemused look and said that “your law classes are, well, something else...” I sensed his scepticism and intuitively jumped to an enthusiastic defense of what we were doing: “It’s amazing. I’ve learned more than I ever have before in such a short time. And we employ a number of skills that will definitely be helpful for being a lawyer. In some sense, lawyers are actors. I’m practicing my advocacy skills!” As I walked home afterwards, I wondered to myself if I was making a mistake. What if I am not learning the “right” kind of law? What if I never become a lawyer? I paused. And it struck me, “wait, a second, I have a summer law job. I’ll be fine. And, perhaps, not becoming a lawyer wouldn’t be too great of a loss, if being a lawyer means giving up on what I believe.”

A remarkable aspect of engaging in non-traditional or radical pedagogy is the reflexivity and self-doubt that these processes produce. This stands in stark contrast to traditional legal pedagogies. We are constantly questioning whether what we are doing is achieving our goals, whether it is worthwhile, and how to frame it in ways that will be perceived by the broader legal community as legitimate.<sup>92</sup> This self-doubt parallels the lived experiences of marginalized people in relation to the dominant society. In this way, our self-doubt is compounded by both our pedagogical choices and our experiences as Othered individuals. Calder and Cowan discuss this sense of discomfort, as they were concerned their embodied contribution was seen to be just a moment of entertainment or lightness, not to be taken seriously.<sup>93</sup>

An integral component of this doubt is the difficulty in explaining what we are doing and why we are doing it. To this end, my purpose in writing this paper has been to answer for myself and to have something to say when people ask “but, why?” At first I was afraid of writing this paper. I questioned whether it reflected the academic rigor of a paper that was more doctrinally focused and used extensive case law. However, I felt I had to push myself and write this, especially to use narrative methodology.<sup>94</sup> Furthermore, I needed to write to sort out my thoughts on the value of embodied pedagogy. Most of the time I feel dehumanized when I write papers. I find myself feeling like I am chopping off bits of myself with the hopes of sounding somewhat articulate and veiling the whole thing with a cover of objectivity or neutrality, to essentially produce a privileged white male voice. In writing this paper, I felt whole and I felt present as myself. This experience parallels the value of embodied pedagogy discussed above.

## LOOKING FORWARD

In some sense, this project of embodied pedagogy faces the real constraint of being conducted in a context where legal education continues to be taught in the same way in which it has always been taught. Brooks and Parkes confront this in their attempts to create a queer legal pedagogy. They choose to sidestep the question of broader reform of legal education, so as to begin the project of a shift.<sup>95</sup> What we did in *Sexual Orientation*

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92 Lassonde reflects on her experience of doing a graduate thesis that combined law and theatre. She writes that “[t]he most difficult part of my work this year has been to explain what I was doing. Despite this difficulty and although many people expressed their resistance to my thesis, these same people did not ignore it. They seem insistent on trying to understand it.” Lassonde, *supra* note 22 at “Spider 3, Conclusion: Justification and Resistance”.

93 Calder & Cowan, *supra* note 6 at 126.

94 Delgado, *supra* note 25.

95 Brooks & Parkes, *supra* note 11 at 117.



and the Law pushed the boundaries of how we learn law. However, as discussed above, *The Play* felt very normative. It did not question the purpose of marriage. While we had those conversations in our classroom, I wonder if our staged reading would have been more powerful if we could have questioned the focus on marriage itself.<sup>96</sup> Moreover, the question remains as to whether legal education and law even has the potential to create change, or if it is too inherently constrained to reproducing the existing system.

As we cannot completely overhaul legal education overnight (although it would be amazing if we could), it is valuable to continue taking these steps, which make learning law a more fully human experience and draw attention to questions regarding equality and justice that are missed in traditional legal pedagogy. I wish that we had more of the theoretical tools to express to our colleagues and the broader community what we were doing. Although, as I reflect on this paper and the semester, it strikes me that perhaps we had been learning how to articulate what we were learning all along and this paper is a final manifestation of that for me. To a certain extent, I just want some privileged elite white male academics to name drop, so that we can easily end questions about our credibility and legitimacy. However, reaching a point where that is not required would be the aim of true equality. Moreover, I am aware that legal education has increased my credibility and legitimacy. As Calder captures it, “[l]earning law is a privilege. The more conscious and active law students are with that privilege and its potential, the more open the possibilities are for the active use of law as a transformative tool of social change.”<sup>97</sup>

I was inspired by the legal scholarship cited in this paper that challenged the boundaries of normative ways of knowing and learning.<sup>98</sup> We have to take risks, critically reflect on what is gained, and learn what can be done differently for the future. I have employed this process in my paper to reflect on embodied pedagogy and to reflect on the paper itself. While some aspects of embodiment simply cannot be translated onto paper, my aim has been to articulate what we did and try to explain what happened as a result of doing law differently. I wanted to attempt to put into words my experiences.

Ultimately our engagement with embodied pedagogy in *Sexual Orientation and the Law* did many things for us. We learned law in a more fully human way and opened up our imaginaries to the different understandings of what equality can entail. In using our bodies to learn, we became more aware of our privileges and oppressions. It has empowered me to unlearn and combat my own internalized oppression. Furthermore, the use of theatre as an embodied exercise expanded what we think is possible through the law and what counts as law. It also was a useful tool to explore the way in which judicial decisions are constructed in contrast to playwriting. We practiced the important legal skill of empathy. In so doing, we created a unique outsider space in our class, which was integral to the process. While I have expressed doubts about learning the law differently, the whole process of engaging in embodied pedagogy in *Sexual Orientation and the Law* has been invaluable to my legal education and has left me feeling more whole.

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96 Calder and Cowan’s work can be seen in contrast as an example of using embodiment to question the purpose of marriage itself. See Calder & Cowan, *supra* note 6.

97 Theatre of the Oppressed, *supra* note 32 at 26.

98 In particular, I value the following work: Lassonde, *supra* note 22; Postcards from the Edge, *supra* note 6; Calder & Cowan, *supra* note 6. Lassonde explicitly questions what is conceptualized as rigor in the following: “In other words, organizing text differently does not necessarily result in a reduced amount of text. Neither does it result in less rigorous analysis.” Lassonde, *supra* note 22 at “Spider 1, Question of Form: Thesis Format”.

## APPENDIX A

### Mapping our Queer Legal History



A collaborative media project created by the students in Sexual Orientation and the Law (Spring 2013). Photograph courtesy of Jasreet Badyal.