

THE EMOTIONS OF LGBT RIGHTS AND REFORMS

REPAIRING LAW



SENTHORUN SUNIL RAJ

The Emotions of LGBT Rights and Reforms

For the queer feelers working to repair the world.

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Senthorun Sunil Raj

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Cover image: Amnic Atwal

Cover design: Stuart Dalziel

Edinburgh University Press Ltd
13 Infirmity Street
Edinburgh EH1 1LT

Typeset in 11/13pt Adobe Garamond Pro by
Cheshire Typesetting Ltd, Cuddington, Cheshire, and
printed and bound in Great Britain

A CIP record for this book is available from the British Library

ISBN 978 1 3995 3553 3 (hardback)
ISBN 978 1 3995 3555 7 (webready PDF)
ISBN 978 1 3995 3556 4 (epub)

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Acknowledgements

This book has been an emotional undertaking over the past few years. The thoughts, ideas, words and feelings that have spilled onto the pages have been made possible by the nourishing spaces I occupy and the loving humans who have supported me throughout this process. During the dreaming and writing of this book, I moved between Sydney (Australia) and Manchester (England). I was involved in activist organising through my networks in Amnesty International and Rainbow Noir. I have felt energised, challenged, affirmed, encouraged, exposed, questioned and inspired by so many people I have encountered on my journeys across cities and networks. There are too many people to name individually in the next couple of pages.

That said, a few people deserve specific recognition because of their care for, and contributions to, both me and this book. I want to begin by acknowledging the people who have read and engaged with this manuscript from proposal to production. Helena Heald at Edinburgh University Press expressed excitement over the idea of this book, and she provided timely support through the proposal development and peer review process. I want to thank the two anonymous reviewers who engaged generously and critically with the ideas I wanted to explore in the book and provided rich feedback on how I could better shape the overall arguments of the book. Laura Quinn took the finished manuscript and guided it carefully through the copyediting and production process. Amnic Atwal fashioned the concepts, feelings and inspirations underlying this book to design a beautifully affecting cover.

Manchester Law School has been a wonderfully enabling space to experiment with ideas, build relationships and write the monograph. I want to thank the Dean of Manchester Law School, Andrew Francis, for cheerleading and resourcing critical legal scholarship. Colleagues and friends (you all know who you are): whether we are gossiping over text or engaging in heartfelt critical conversations about legal issues in social spaces, I appreciate you all. I have to give sparkling mentions to Alex Sharpe, Kay Lalor, Ryan Thoreson, Beverley Clough and Peter Dunne for their friendship while also being critical readers of this manuscript. I am deeply grateful to you all for reading this

book to spot errors, refine my thinking and support my scholarship. I take responsibility for any mistakes I have made in this book, but you all have helped ensure I have made fewer of them. I have presented various chapters from this book to different academic audiences, including the Law & Society Association Conferences in Puerto Rico (2023) and Denver (2024), as well as a keynote at the University of Melbourne. Sydney Law School provided me with a generous visiting fellowship as I was finishing the manuscript. Thank you to the participants and audience members at my presentations for your helpful questions and comments.

As always, my family and friends have been the biggest fans of me and my work (including my mother who ‘likes’ literally every social media post I have made about this book). Thank you, Amma and Appa, for nurturing an unapologetically gay child. I draw energy from my niblings, Mia, Caspar, Isabella and Kaius, who keep me on my literal toes and help me find joy in trampolining. I cherish being your queer (g)uncle every day. To my friends, spread out across the world, you gift me belonging and always make me feel at home in our queer spaces.

Finally, thank you to my fabulous boyfriend, Laurie Fisher. You have laughed, cared, stared and comforted me throughout the writing of this book and life generally. Relegated to being a self-described ‘book widow’ during my intense writing periods, I am blessed to have a partner who knows when to leave me alone. Love you.

1

Reparative Conflicts: Desiring Rights and Feeling Reforms

Feeling the Scene . . .

Imagining justice for lesbian, gay, bisexual and transgender people involves getting entangled in various emotional histories and concepts. Perhaps the most familiar scene that exposes some of these emotional histories or concepts is what we now refer to colloquially as ‘Pride’, the annual march held in different parts of the world to commemorate the uprising at the Stonewall Inn in New York City in 1969. In the early hours of Saturday, 28 June 1969, the New York Police Department raided the Stonewall Inn in an attempt to permanently close a bar that served alcohol to homosexuals, which violated local licensing regulations. Police raids on Stonewall and other gay bars were routine at the time but, on this night, local patrons refused to disperse or allow their friends to be arrested. These ‘queers’ or ‘street hustlers’ (such as drag queens, sex workers, trans women, gay men, lesbian butches), who came from various parts of the city to hang out at the bar, sung, threw objects and used their bodies to resist the police invasion (Johnson and Wicker 2019, 135–40; White 2019, 154). The protests gathered momentum and continued throughout the week.

Much oral and written testimony has been collected about the various people involved in Stonewall, such as Marsha P. Johnson, Sylvia Rivera, Stormé DeLarverie and Mark Segal. These testimonies differ, sometimes wildly, in relation to the impetus, role, scale and nature of each person involved (see New York Public Library 2019). However, what does anchor these differing accounts is the way conflicts between patrons and police inspired a movement for justice and liberation. As Mark Segal (2019) recounts,

Stonewall was the fire in the belly of the equality movement. Even so, accounts of it are full of myth and misinformation, and much of that will inevitably remain so, since there are differing accounts from those active in the movement . . . Regardless of the diverging stories, and no matter how intense the fighting was, Stonewall represented, absolutely, the first

time that the LGBT community fought back and forged an organized movement and community. (129)

Stonewall does not have a single ‘hero’ and the historical veracity of any single account is less significant here than how the disparate accounts of people coming together, as part of the rebellion or riot, is what gives Stonewall its enduring legacy. Stonewall, as a legacy, does not contain a singular ‘truth’ of gay history. Instead, it materialises as an emotional constellation of queer expectations and experiences that affectively anchors our (Western) imaginings of LGBT freedom.¹ This emotional constellation captures the rage, pain, joy and hope of queer people engaging in conflict – both then and now – fighting to exist in a world that negates atypical pleasures, intimacies and identities through violent state repression (D’Emilio 2002, 78–98; Manford 2019 131; Raj 2019). In other words, Stonewall – as a movement led largely by Black trans women and lesbians – has come to represent the ‘fabulousness’ of people coming together in moments of coming up against a hostile state, people with the most to lose, to defend their communities against violent policing and moral persecution (moore 2018). Many of those involved in the rebellion were poor, many were homeless, many were physically hurt, and many were risking greater abuse for simply being there. Yet, they were still refusing to compromise on their identity or pleasures as they yearned for dignity, equality, rights, welfare and justice. Pride commemorates this annually, crystallising the various emotions of rage, frustration, shame and joy, and political aspirations for rights and pleasure, through both protests and parties that take place globally (Gevisser 2020, 125–7; Johnson 2023).

Writing about LGBT liberation – and Pride – is also an emotional undertaking on a personal level, as a queer individual, scholar and activist. In imagining LGBT freedom, I find myself oscillating between yearning and refusal, echoing some of the conflicted desires and frustrations of those who took part in the Stonewall Riots. I yearn for a future where homosexuality is no longer criminalised, as it continues to be in over sixty countries (Human Dignity Trust 2023). Yet, I am also wary of how the promises of ‘progressive’ law reforms occlude the continuing violence of the state in targeting minoritised groups who refuse to assimilate (Spade 2011). As publics of different scales engage in ‘culture wars’ that cultivate sexual and gender anxieties, as a means of refusing the dignity, visibility and well-being of LGBT people, I yearn for an end to the affective media and political loop that keeps LGBT

¹ It is beyond the scope of this chapter to provide a critical exploration of the historiography of Stonewall and activism after that event. For more detailed discussion on that point, see D’Emilio 2019, 45–63.

people in a perpetual state of anxious scrutiny (Fischel 2021; Hildebrand 2023; Stern 2019). To speak of being a 'queer' (as an individual or activist) or to write under the sign of 'queer theory' (as a scholar) is to risk media or political accusations of 'grooming children' for ideological purposes (Ellis 2022; Johnson 2018). As a gender non-conforming person, I find myself worrying about how the public rhetoric circulating in the 1980s and 1990s that described homosexuality as 'corruption' or 'contagion' is repurposed in anti-trans narratives that see trans and non-binary life as a symptom of ideological propaganda (Ryan 2023). I desire freedom (as an individual, scholar, activist) to express my identity without fearing such defamatory accusations or harassment. My individual desires are anchored in specific conflicts with the public discourses I encounter. I refuse to accept the terms of public debates that treat my existence as moral or political conflict, where I need to constantly justify my humanity to an invisible adjudicator (Smith 2019). Feeling through these personal conflicts about LGBT rights and reforms means navigating emotions that materialise for me as a queer individual, scholar and activist.

I offer a sketch of the emotional legacy of Stonewall and my affective state as I began writing this book as an entry point for thinking more broadly about how individual or interpersonal emotional conflicts about LGBT rights structure institutional aspirations of repair to end state violence against LGBT people. In doing so, I want to show how individual or interpersonal desires emerge in collective movements for social change. These desires are neither consigned to a radical past nor are they reducible to demands for greater legal recognition. More recent social movements against policing like Black Lives Matter, for example, have exposed the continuing ways in which Black people in the United States face disproportionate levels of policing, incarceration and death via state infrastructures despite the reparative promises of 'post-racial' law reform (Gilmore 2022, 132–54). Started by queer Black women Alicia Garza, Opal Tometi and Patrisse Cullors in 2013, Black Lives Matter began as an online response to the murder of Trayvon Martin in Florida and his killer's subsequent acquittal. Black Lives Matter gained greater global attention following the killing of George Floyd by a police officer in the US in 2020. This prompted worldwide protests about racist policing specifically and the need for social transformation more broadly. As Alicia Garza said in an interview:

In the midst of all the grief and rage and pain, there's a hopefulness. There is a longing for who we can be together. This movement crosses so many others, which shows that we can build new kinds of communities where everybody can belong, and where everyone can be valued and where everybody can be powerful. (Hartigan 2020)

For Garza, Black Lives Matter is not a movement about one person or one identity or one issue. Much like Stonewall, the movement to defend Black life is tied to hopeful politics aimed at ensuring reproductive healthcare, migrant safety, safe housing, quality education, etc. As the Black lesbian poet Audre Lorde (1984) once said, ‘there is no such thing as a single-issue struggle because we do not live single-issue lives’ (130). Black feminist activists like Garza and Lorde point to the problem with limiting political aspirations to one axis of identity or subscribing to law reform as the primary means of achieving justice for minoritised communities. They remind us that you cannot claim to be fighting for LGBT rights if you ignore the fact that LGBT people who seek asylum are being turned away at the border or sent back to places criminalising homosexuality. Stonewall and Black Lives Matter rhyme together as movements showcasing how freedoms or rights are intersectional and indivisible while cautioning us against embracing policing institutions as the basis of safety or protection.

State violence is not confined to punitive measures, like the policing that those in Stonewall and Black Lives Matter protested. State violence against minoritised populations also emerges in protective measures, such as the recent public health responses to COVID-19 that stigmatise LGBT people as sources of danger or contagion. In Uganda, authorities raided a shelter housing homeless LGBT people and beat a number of them under the anxious pretext they were violating public health orders and spreading COVID-19 (Ghoshal 2020). In South Korea, some media fuelled fears that gay bars were sites enabling the spread of COVID-19 (Thoreson 2020). In Hungary and Poland, the government has anxiously cited ‘gender ideology’ as a threat to children and leveraged the reach of government power during COVID-19 to block depictions of LGBT positive content, or has created ‘LGBT-free zones’ (Amnesty International 2021, 2022).² Russia has pursued legislative and bureaucratic infrastructures designed to prevent the ‘promotion of homosexuality’ and erode recognition of same-sex families to ‘protect’ the integrity of nuclear families (Kondakov 2022).

The above examples point to how the state can oscillate between punitive and protective registers to circumscribe the possibilities of LGBT existence. In fact, political anxieties towards LGBT communities are not confined to nations that legislatively criminalise or administratively police homosexuality. In the US, for example, the Trump Administration issued directives that would allow religious-affiliated healthcare providers to deny medical treatment to LGBT people in response to purported fears about

² Many of the ‘LGBT-free zones’ have since been repealed by the current Polish government.

how LGBT people's access to healthcare encroached on religious freedom (US Department of Health and Human Services 2020). In the UK, despite promises made years ago by the Conservative government, trans people lack a simple process to change their legal gender marker or access comprehensive healthcare due to concerns about 'unintended consequences' (Government Equalities Office 2018a). In Australia, intersex infants endure non-consensual medical and surgical procedures to 'normalise' their bodies (Carpenter 2016). These examples are not exhaustive. The pages of this book could be filled with examples across the world of how political interventions weaponise shame or anxiety and refract hostilities towards LGBT people.

What the above examples (Stonewall, Black Lives Matter, COVID-19) evince is that social or political conflicts about the rights of LGBT people produce and crystallise emotions such as fear, anxiety, hostility, optimism and anger which are related to state regulation of sex, gender and sexuality. In English-speaking countries such as Australia, the UK and the US, emotions have been central to repairing the stigma, discrimination and inequality faced by LGBT people. Pro-LGBT activists have harnessed anger to demand an end to gender policing and sexual conversion practices, challenged political disgust that sought to criminalise homosexuality and gender non-conformity, and promoted collective expressions of compassion, hope and love as a route towards greater social liberty, equality and dignity (Raj 2020b). States have responded to, and refracted, these emotions through reparative law reforms. State containment of social disgust towards gay sexuality underpinned the decriminalisation of homosexuality and criminalisation of anti-gay hate crime. State encouragement of compassion, empathy and love structured the emergence of anti-discrimination policies and marriage equality laws (Raj 2020b).

Increasing visibilities of LGBT people and recognition of LGBT rights, however, have prompted emotional backlash with material impacts. Reforms aimed at promoting same-sex relationship education in schools have triggered populist anxieties about 'indoctrinating children' and reforms to allow self-declaration of gender have triggered public hostilities about 'enforcing gender ideology' (Strudwick 2023; Szalai 2022). What is of unique relevance here is how these emotions – particularly feelings of anxiety, hostility and vulnerability – frame current LGBT rights law reform proposals as a 'conflict of rights' between different marginalised groups (as opposed to between a dominant and oppressed group described in the cases of Stonewall and Black Lives Matter). Conservative ethnic and religious minorities worry their 'freedom of religion' is undermined by LGBT education in schools or fear that expanding anti-discrimination laws limits their ability to pursue religious practices that resist sexual and gender diversity (BBC 2022; Millar and Schneiders 2021).

So-called ‘gender critical’ feminists anxiously proclaim that ‘women’s rights’, particularly in relation to single-sex spaces, are undermined by trans people being able to self-declare their legal gender (Lavery 2023; Sharpe 2021). Some migrants and feminist groups find themselves, somewhat queerly, allied to white supremacist and right-wing populists in their advocacy agendas against LGB and/or T rights (though such alliances are precarious and hostile as well) (SBS 2023).

I set the scenes above to illuminate disparate relationships of LGBT harm (as a systemic socio-legal deficiency in need of socio-legal correction) and repair (as legal or social correction that promises LGBT fulfilment). These relationships materialise through emotions that cohere the relationship between loss/deficiency/harm and gain/progress/repair in socio-legal conversations about LGBT rights. The dynamics of conflict and repair in these socio-legal contexts represent a distillation of emotions that materialise through our bodies: our queer bodies as people, our bodies of law and our bodies of critical scholarship. This book is an exercise in producing critical emotional scholarship concerned with justice by navigating how bodies (of people, law, scholarship) converge socio-legally to institute repair for LGBT people facing inequalities. I start by exploring how repair features in critical race, feminist, and queer theories and how these ideas of repair arrive in law and critical legal scholarship that seek to improve the lives of minoritised people. I then map out how critical race, feminist and queer reparative approaches enable us as critical legal scholars to conceptualise law reform and rights as affective texts or objects of repair. In doing this, I develop the concept of ‘emotional grammar’ and use it as an analytic framework for navigating the shape of law. This scholarly work involves attending to emotional dynamics that underpin individual, interpersonal and institutional conflicts over rights and law reforms that relate to LGBT people. I conclude the chapter with an outline of the key law reform case studies that form the basis of the book and how they will be discussed within each of the following chapters.

Conflicts over LGBT Rights

Much has been written about polarised conflicts over LGBT rights but critical legal scholarship has yet to carefully attend to the emotional register of these conflicts as they relate to differently positioned minoritised groups. Recent critical socio-legal scholarship has traced the affective forms of governance and the different articulations of ‘the state’ that emerge through conflicts over LGBT rights (see Cooper 2004, 2019b; Valverde 2015). Catherine J. Nash and Kath Browne (2020), for example, have explored emerging forms of ‘heteroactivist’ resistances to LGBT rights and how these resistances mobilise the

language of rights (freedom of speech, freedom of religion, parental rights) to limit LGBT equalities. Drawing on critical geographies' literatures with case studies in relation to LGBT inclusion in marriage, schools and public life from Canada, Ireland and the UK, these scholars chart the insidious transnational dimensions of resistance to LGBT lives. Odette Mazel (2023) has suggested that a reparative approach to LGBT rights in international law is useful in foregrounding how LGBT people engage creatively with legal institutions to secure conditions for their flourishing (81–2).

The Emotions of LGBT Rights and Reforms: Repairing Law builds on the scope of this critical and socio-legal scholarship by focusing on a range of legal texts that form the basis of law reform: legislative debates, law reform submissions and reports, case law, bills, regulations and media representations of reforms. This book also develops the theoretical contributions of scholars like Cooper, Nash and Browne when parsing rights conflicts, by using emotional grammar as an analytic lens to navigate the 'conflicts of rights' that emerge between different marginalised groups because of law reforms aimed at repairing inequalities and harms faced by LGBT people. These conflicts are framed by emotions like anxiety, fear, resentment, anger, hostility, pain and shame. This book attends to 'knowing how' rights and reforms materialise through 'negative' emotions as they are (em)bodied in law (Srinivasan 2021, 102). In doing so, I do not seek to advocate 'empathy' or 'good feelings' as antidotes to conflict, as if the cause of these conflicts are simply 'bad emotions' that can be repaired with more 'good emotions'. Empathy is limited as a critical or political strategy of social change because it functions largely as an individualised pedagogy of suffering, where to be 'in the shoes' of another involves an interpersonal mode of recognition that demands those who are marginalised perform pain and suffering for the recognition of those who seek to empathise (Davis 2023). Emotional grammar invites us to interrogate the different sets of power relations that structure conflicts over LGBT law reforms by attending to their emotional dynamics at institutional, as well as individual and interpersonal levels. That is, I argue in this book that the concept of emotional grammar as a reflexive analytic framework is more useful for scholars, activists, lawyers and policymakers seeking to map, analyse and think about the reparative possibilities of pro-LGBT law reforms while attending to the emotional conflicts these legal and political attempts at repair generate across individual, interpersonal and institutional dimensions of law (Valverde 2015, 118).

This book sets out to achieve this by:

1. Identifying emotions that structure reparative law reforms about LGBT rights.

2. Analysing how those emotions shape individual, interpersonal and institutional conflicts between marginalised groups in relation to reforms that advance LGBT rights.
3. Theorising the emotional grammar that structures conflicts of rights that emerge between marginalised groups in relation to LGBT rights and reforms.
4. Exploring how the emotional grammar of LGBT rights in law reform shapes the individual, interpersonal and institutional possibilities and limits of using law to repair LGBT harm and promote justice.

The Emotions of LGBT Rights and Reforms: Repairing Law takes repair as a methodological principle (to read conflict reparatively), scholarly object (law reform as repairing LGBT harms) and political claim (repairing law's failures to protect LGBT people). Affective engagement with repair has analytic significance for a range of disciplines (law, sociology, cultural studies) and descriptive power as LGBT people confront emotionally polarised debates about their recognition and rights. By thinking through how conflict over LGBT rights generates disparate ideas of 'harm' and 'repair', I invite scholars, lawyers, judges and politicians to feel through individual, interpersonal and institutional commitments to LGBT rights while critically exploring how those commitments are differentially realised in law. Specifically, I am interested in how notions of harm and repair are refracted between marginalised groups who use discourses of legal equality or tolerance of diversity to both enable and forestall LGBT rights (Brown 2006, 12; Cooper 2004, 6, 19). A reparative approach to these conflicts cannot easily privilege one claim over another, rather a reparative approach needs to take seriously how power shapes the articulation of conflict and the claims made by different groups. By doing this, this book offers conceptual provocations rather than prescriptions to think through possibilities of repair in rights and reforms that seek to sustain the dignity, humanity, safety, well-being and freedom of those involved.

Conflict need not always be equated with harm or inequality. In this book, I draw attention to how conflict can manifest as individual discomfort, interpersonal tensions and frictions of relation (Berlant 2022, 2; Schulman 2016, 17). As Davina Cooper (2019b) argues, socio-legal conflicts over the rights of sexual minorities and demands for repair materialise in affective terms that foreground questions of state responsibility and social justice. Specifically, she identifies how 'conflicts over withdrawal demonstrate how knowing governance bodies through touch, and what is felt, can supersede or clash with optic forms of knowledge' (Cooper 2019b, 99). In other words,

Cooper is attentive to how we come to understand state institutions through our emotional relationship to them rather than a formalistic or abstract conception of them. I wish to expand on this through this book to think about how pursuits of rights – as a form of repairing LGBT inequality or as a response against greater LGBT freedoms – materialise in the context of conflicts over law reforms involving LGBT people. These conflicts can be uncomfortable, inconvenient, disruptive, generative, abusive and impassable. I linger in these spaces of discomfort (and sometimes outright hostility) to read the emotional grammar of their articulation to think differently about what solidarities or alliances might emerge between individuals or groups who find themselves at odds with each other (Schulman 2016, 62).

Registers of Repair

The affective vignettes above and objectives that animate this book highlight some of the emotional entanglements that emerge when thinking about LGBT harm or inequality and the modes of legal or political repair they inspire. In doing so, the next part of this chapter sets out the descriptive and normative dimensions of conflict and repair by recounting pursuits of queer, gender and racial justice across individual, interpersonal and institutional vectors. In this section, I will draw out the methodological and critical aspects of reparative analysis before bringing them to bear on some recent conflicts over LGBT rights that form the case studies in the book. I outline some critical race, feminist and queer theories and their conflicted engagements with each other, as well as critical legal scholarship more generally, to trace how reparative scholarly approaches for pursuing rights and addressing social, economic and political inequalities involve attending to embodied (and emotional) experiences and relationships of power between individual and institutional actors.

Critical Race and Reparations

Reparations are an organising concept of critical race and decolonial scholarship. Reparation refers to the repair necessary to address racist harms or injustices. Reparations emerge as part of a broader political project that challenges legacies of racist dispossession (such as colonial theft of Indigenous lands) and racist inheritance (such as property derived from slave labour) (Harris 1993; Hartman 2019; Mbembe 2019). Ruth Wilson Gilmore (2022) characterises racism as the ‘state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerabilities to premature death, in distinct yet densely interconnected political geographies’ (122). In offering an institutional account of racism, Gilmore challenges the idea that race is a biological or fixed reality confined to a person’s skin colour. Rather, drawing

on broader critical sociological and geographical work, she and other scholars examine how race is a dynamic sociopolitical construction that ‘others’ bodies through invidious processes or contexts such as colonisation, slavery, eugenics, policing, prisons, labour extraction and forced migration (Fanon 2008; Gandhi 1998; Gilmore 2022; hooks 1990; Moreton-Robinson 2000). While a person’s skin colour might function as a specific social form of racial differentiation, racialisation is a socio-economic process or technique of governance, one which involves differentiating bodies in terms of language, educational capability, citizenship, religion, kinship structures and cultural consumption.

Reparations in response to these institutionalised forms of racism are concerned with much more than addressing individual harms or interpersonal conflicts. Yet legal rights can play an important role in addressing some of the structural racisms mentioned above. Mari Matsuda (1987) develops a legal strategy for reparations to advance the rights of racialised minorities. She develops a reparative scholarly approach by emphasising the need to move away from abstract imaginings or reconstructions of experience and focus instead on allying law with the narratives of (racial) minorities who are marked by oppression (324). Elaborating on the need for what she calls a ‘bottom-tilted legal phenomenology’, she characterises her methodology as a ‘critical realism’ that exposes both the transformative and limiting capacities of the legal system (Matsuda 1987, 324–5). This approach has been echoed by Patricia Williams (1991) who uses autoethnography as a vehicle for connecting individual or interpersonal experiences to broader sites of institutional subordination. In *The Alchemy of Race and Rights*, Patricia Williams uses a series of personal vignettes to offer accounts of teaching race/ism and property law in an elite American law school. What is significant about Williams’s autoethnography is that the use of experience and emotion does not serve a moralising or normative gesture, rather it is an analytic device that seeks to ‘fill’ or ‘connect’ gaps between ‘my psyche and the readers’, between lived experience and social perception, and between an encompassing historicity and a jurisprudence of generosity’ (Williams 1991, 8). Williams’s autoethnographic approach riffs alongside Matsuda’s approach to reparations in that her personal narrative is combined with doctrinal analysis to flesh out the material impacts of racism – alongside intersecting experiences of sexism and classism – across individual, interpersonal and institutional contexts (Williams 1988; Mirza 1999, 114).

Critical race scholarship reveals that law is not contained by metaphysical principles but is a product specific to the historical and cultural circumstances of its articulation. Unlike the individual victim/perpetrator or plaintiff/defendant model common in adversarial civil disputes for compensation,

Matsuda and Williams broaden the ambit of reparations in these contexts to account for collective historical wrongs that inhere in the present (such as when Indigenous people make claims to recognise their custodianship over land or when Black communities collectively challenge disproportionate incarceration) (Matsuda 1987, 360; Williams 1998, 22). In other words, making room in the law for those ‘at the bottom’ involves understanding the connection between individual experiences of trauma and histories of social subordination. In doing so, this approach seeks to foreground knowledges which have been sidelined, ignored or repressed (Brah 2022, 15). Rights and reparations become a way of challenging both institutional inequalities and remedying individual legal claims of discrimination (Matsuda 1987, 376).

Matsuda’s and Williams’s interventions show us that to remedy socio-political imbalances, law cannot adopt a fictitious stance of ‘neutrality’ but must be (re)tilted from the privileged (*status quo*) towards the (marginalised) ‘bottom’ to elevate their experiences of harm and locate those traumas within a broader collective consciousness. In doing so, rights will become materially and symbolically meaningful to racialised (Black and Indigenous) subjects who have been treated as objects of others’ rights rather than subjects of rights themselves (Harris 1993, 1717–19). However, these interventions also invite us to ask who is doing the listening when those who are marginalised are speaking. What if the listener and speaker are marginalised (in different ways)? What are the conditions necessary to enable ethical engagement between differently positioned groups when addressing histories of inequality, violence, dispossession and discrimination (Stauffer 2015, 80)?

In foregrounding experiences of racism in political or legal arenas, scholars, activists, judges and politicians must also be attentive to how we stage them. Christina Sharpe (2023) reminds us that ‘spectacle is not repair’ (36). As Saidiya Hartman (2019) notes, attending to lives that have been violently marginalised without subsequently violently caricaturing them as a spectacle of analysis involves making room for wayward, unpolished and peripheral narratives (9). Sharpe’s reflections on repair focus on racist trauma in everyday Black life and public (white) desires to ameliorate that trauma while Hartman’s project is concerned with retrieving stories of Black life that have been occluded in historical archives. In exploring the dynamics of trauma and repair, however, both scholars caution against treating inequality or violence as a spectacular event, one that might be captured or contained by a specific frame of reference (Hartman 2019, 238; Sharpe 2023, 248). Rather, they invite us to engage in acts of ‘witnessing’ as an ethical mode of relating to structural/structuring inequalities. Witnessing, unlike spectacle, disrupts relationships of power between those who gaze (subjects who spectate) and those who are gazed at (objects of spectacles). To be a witness, then,

is to be willing to be emotionally entangled in the fissures, waywardness, occlusions, vulnerabilities, desires and contradictions of the object, person, event or experience encountered (Davis 2023, 14; Hartman 2019, 239; Hoppe 2023, 62; Sharpe 2023, 248; Srinivasan 2021, xvii). This book seeks to bear witness to the varied, and conflicting, harms and inequalities LGBT people experience. By drawing from critical race scholarship, I seek to explore the emotional entanglements that materialise across people, law, and critical theories that invest in, and contest, LGBT rights to better understand the terms of associated socio-legal conflicts and to think differently about the possibilities of repair they generate.

Feminist Concerns with Bodies and Experience

Making room to witness these emotional entanglements – to explore the individual, interpersonal and institutional aspects of harm or inequality – also relates to analytic questions about narrative, care and the body. Feminist scholarship engages critically with how bodies come to matter politically and how narratives of experience dislodge abstracted ideas of (in)equality. As Moira Gatens (1996) argues, bodies materialise through their social and historical locations, ones which are invested in specific histories of power and hierarchy (7). Bodies are not merely inert pieces of flesh. Gender and gendered inequalities, therefore, are not fixed features of a body. Rather, they are produced through social and spatial processes that circumscribe what bodies are capable of doing (Butler 1990, 30; Young 1990, 142–3). By taking stock of the gendered body through its material and political co-constitution, feminist scholars have been interested in mapping how the ‘personal is political’ by engaging with questions of sexual pleasure, reproduction, household labour, motherhood and sexual violence (Franklin, Lury and Stacey 1991; Rubin 1984; Snitow 2015; Valverde 2015). While the underpinnings of such feminist scholarship about the body vary considerably in terms of theoretical trajectories and political aspirations, they collectively name aspects of embodied experience and gendered inequalities that are typically unnoticed by political or legal institutions and political or legal scholarship (Grosz 1994; MacKinnon 1982).

In thinking further about the relationship of the personal as political, Sara Ahmed (2017) describes acts of noticing as a form of caring feminist pedagogy. She writes:

If a world can be what we learn not to notice, noticing becomes a form of political labour . . . Feminist and anti-racist consciousness involves not just finding the words, but through the words, how they point, realizing how violence is directed: violence is directed to some bodies more than others.

To give a problem a name can change not only how we register an event but whether we register an event. (Ahmed 2017, 33–4)

For Ahmed, a critical and caring feminist praxis is one that is willing to confront institutionalised (and invisibilised) forms of inequality and develop a vocabulary for describing that violence. While the vocabulary itself does not necessarily lead to challenging inequality, the acquisition of a (feminist) language is a starting point for navigating the problem (Ahmed 2017, 34). As Joan Scott (1991) notes, a feminist language for describing experiences of inequality or violence relies on ‘multiplying not only stories but subjects’ (776). However, in doing so, we need to be careful not to sacralise accounts of individual experience as an unmediated truth. Rather, she urges us to pay attention to how representations of experience are genealogically produced by discourses, norms and histories that disguise themselves (Scott 1991, 777). This point is elaborated by Cressida Heyes (2020) who explores how experiences that are trivialised or marginalised can be politically transformative if we take seriously our bodily encounters with the world by accounting for the discursive conditions of how these experiences are articulated (50).

By foregrounding methodologies of noticing or witnessing and narratives of experience, Ahmed’s, Scott’s and Heyes’s feminist scholarship echo Williams’s, Sharpe’s and Matsuda’s critical race interventions about reconstruction and repair. Taken together, they represent a reparative critical race feminist analytic that requires us to confront different relations of domination in order to ameliorate them. Racism and sexism, alongside attempts at reparation, must be scaled (individual, interpersonal and institutional) alongside other social differences. Black feminist scholars have highlighted that it is impossible to think about Blackness and racism without attending to gender, sexuality and class alongside patriarchy, sexism, heteronormativity, homophobia, capitalism and poverty. Black feminists refer to these analytic and political commitments as ‘intersectionality’ and ‘identity politics’. While these ideas took shape in the 1970s, they can be traced through a genealogy of Black women’s thinking, writing and activism dating back to slavery (Collins 2019; Taylor 2017). A group of Black feminist activists in the US crystallised a widely shared meaning of ‘intersectionality’ and ‘identity politics’ in a manifesto known as the Combahee River Collective Statement in the 1970s:

The most general statement of our politics at the present time would be that we are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking. The synthesis of these oppressions creates the conditions of our lives. As Black women we see Black feminism as the logical

political movement to combat the manifold and simultaneous oppressions that all women of color face. (Combahee River Collective 1977)

We can observe from the Combahee River Collective's articulation that thinking 'intersectionally' about identity was not just about adding together individual experiences of being Black, female, gay, poor, etc. Rather, embodied experiences (of racism, sexism, homophobia, classism, etc.) were a means to articulate a broader reparative framework for recognising different axes of social oppression and offering a political praxis to challenge those oppressive institutions. Barbara Smith, one of the women involved in the statement, emphasises that 'identity politics', as it was imagined by the group in the 1970s, was about situating individual experiences of subordination to cultivate a shared, coalitional political consciousness rather than dividing people into unique entities with no connection to each other (Taylor 2017, 95).

Kimberlé Crenshaw coined the concept of 'intersectionality' in response to some of the possibilities of positionality expressed by the Combahee River Collective. Crenshaw's specific interest in the concept emerged from her critique of anti-discrimination legal remedies that privileged a single, monolithic identity of subordination (women, Black, gay, etc.). For Crenshaw, anti-discrimination paradigms exclude the multidimensional forms of subordination experienced by those who are discriminated against (such as gay, Black women) (Crenshaw 1989, 165–7). Crenshaw uses the spatial metaphor of an intersection as a critical response to (white) feminist legal scholarship in the 1980s (see MacKinnon 1982) that tended to homogenise the experience of 'being a woman' at a fixed point and flattened other social differences by treating them as discrete or distinct from gender. Crenshaw's concern about feminist representations of experience is that feminist legal approaches that reduce women's experiences of subordination to just sex or gender obscure subordination manifested through other social categories of difference including age, race, sexuality, ability, class.

Crenshaw's framing of intersectionality as a reparative legal analysis derives from anti-discrimination law. Specifically, she argues that the hypothetical comparator used in discrimination jurisprudence (such as identifying how a person who does not share the specific protected characteristic would have been treated) confuses the social position of those who experience multidimensional forms of discrimination (Crenshaw 1989, 149). For example, when race and sex intersect, do Black women have their claims assessed against a hypothetical white woman or a Black man? Discrimination involving multiple social differences is interactive, not unidirectional or additive. The conceptual difficulties of addressing these interactive experiences of identity in law urged Crenshaw and others to develop new analytic methods

of conceiving discrimination, ones with reparative promises (Atrey 2018; Brah 2022, 103; Ahmed 2017, 230–4).

By bringing together critical race and feminist scholarship, we can observe how repair functions as a methodological strategy for political and legal transformation. Specifically, making room to account for individual embodied experiences of discrimination or inequality functions as an analytic lens to think through reparative legal approaches that might end structural forms of inequality. While critical race and feminist scholarship is critical of the legal system for being colonial and patriarchal, much of it also expresses a desire for repair through new forms of legal intervention or law reform while acknowledging the limits of law (Crenshaw 1989; MacKinnon 1982; Matsuda 1987; Williams 1991). In the final part of this section, I turn to queer theory as a means of critiquing the desire for legal rights and law reform as a means of repair. I take queer alongside critical race and feminist conversations about repair.

Queer Critiques of Repair

Individual (queer people) and institutional (government) desires for repairing systemic harms faced by LGBT people animate pursuits of LGBT rights, even though these desires for repair take different forms. From movements to decriminalise homosexuality to interventions aimed at eliminating hate crime to pursuits for greater legal gender affirmation to demands for marriage equality, law functions as a site in which LGBT people seek greater access and recognition (Adler 2018; Raj 2020b; Raj and Dunne 2020b). Queer theory, however, questions the reliance on rights and the legal system's capacity to repair homophobic or transphobic harm. I use queer in this book in both its descriptive and critical registers. They denote expressions of individual or collective identity and critical analytic strategies. Queer functions as a description of identity for those sexual and gender minorities who do not conform to social norms of heterosexual reproduction, compulsory (hetero)sexuality, and binary gender (Berlant and Warner 2000; Povinelli 2006; Spade 2011). Queer is also an analytic term that foregrounds non-normativity and queries the political and social organisation of life along lines of productivity, capacity, fidelity, family and nationhood (Balani 2023; Edelman 2004; Love 2007; Puar 2017). Across these different registers, queer points to the difficulties of relying on law reform to serve LGBT people. As Eric Stanley (2021) argues:

We are living in a time of LGBT inclusion. This is evidenced, at least in the United States, by the legal expansion of marriage, lesbian and gay military recruitment and the proliferation of LGBT characters in popular visual culture. Against the narrative arc of rainbow progress that proclaims

that these changes mark a radical shift in the social . . . inclusion, rather than a precondition of safety, most properly name's the state's violent expansion . . . rather than imagining the law as the mechanism through which relief from such harm might be offered, it is one of the methodologies of its proliferation. (5)

Building on a rich body of critical queer and trans scholarship, Stanley indicts the desire for LGBT rights as a means of repair because it expands state surveillance and governance that violently targets minoritised populations. Criminalisation of homo/transphobic violence reflects the state's desire to affirm respect, and ultimately 'repair' harm against, LGBTQ people. However, by focusing on homo/transphobia as a 'pathological problem' of 'bad people' rather than a pervasive social problem, punitive sanctions in the form of enhanced criminal punishment becomes a seductive cover (rather than a productive solution) to an invidious structural issue (Mogul, Ritchie and Whitlock 2011, 23). Even though criminal law generally operates by transforming an individual harm into a wrong against the state, hate crime laws intensify this by transposing an individual crime into a broader history of minority (such as racist or homophobic) violence (Aharonson 2010, 289). However, in this process of emotional intensification, the relations between individual and institutional violence are severed because hate crime law is directed at individual accountability, not accountability for state institutions or public cultures (Raj 2020b, 50–72).

As Angela Davis (2016) argues, when we mirror the 'retributive impulses of the state' (such as wanting to see hurt come to someone who hurts us) we undermine a broader political vision for transforming the state which is the primary site through which we (as LGBT people) experience violence (164). Treating homophobia or transphobia as interpersonal conflicts between private parties that the state can resolve obscures that the state itself is the source of institutionalised violence against queer people (such as in the misgendering and incarceration of queer people of colour, detention of LGBT people who seek asylum, denial of gender affirming healthcare for trans people, etc.) (Meyer 2015, 118; Spade and Willse 2000, 41). In seeking the remedial or inclusive promise of the law, hate crime interventions reflect the priorities of the criminal justice system, or a very privileged class of LGBT people, rather than the wide-ranging interests of LGBT communities that require inclusive education in schools, better healthcare, housing security, etc. (Haritaworn 2013, 47). A reparative intersectional analysis, to echo Matsuda, urges us to listen to the most marginalised of LGBT communities, and to think beyond punishment and prisons when pursuing law reform to repair social inequalities against LGBT people.

The above queer critiques, which are underpinned by critical race and feminist theory, point to the risks of desiring rights and law reform. However, this does not mean law ought to be abandoned as a means of repairing inequalities. A queer critical legal studies approach urges us to move beyond formal equality ideas of repair through law reform to consider and/or contest how law might make space for sexual dissidents or gender outsiders (Duggan 1994, 12; Fischel and Cossman 2024, 3; Zanghellini 2009, 2). This involves querying the persistence of 'LGBT equality' discourse and how it produces LGBT identities and shapes the (re)distribution of resources (Adler 2018, 6). Queer legal scholarship offers an important lens to reinterpret and reframe legal rights and reforms, especially when LGBT individuals seek out 'affirming' or 'supportive' outcomes in situations where the law renders their gender and sexuality salient (Gonzalez-Salzberg 2019, 185). Dianne Otto (2018) invites us to 'take a break' from demands for equal rights or sexual normativity and encourages us to pursue pleasure, diversity and fluidity that disrupt binary understandings of sex or sexuality in law (1). As Libby Adler (2018) notes, an LGBT law reform agenda that is invested in repair or reparation must prioritise the voices of the most marginalised queer populations (through an intersectional lens) and develop legal strategies that attend to their 'life-shaping encounters with law' (215). This approach is important because prevailing legal rights and law reform advocacy has masked the exclusions that make liberal rights possible while aligning demands for inclusion in terms of prevailing sexual, gender, racial and cultural norms (Kapur 2018, 133). Privacy, dignity and equality are critical for successful legal claims for LGBT people, which assimilate LGBT people into, rather than disrupt, heteronormative legal assumptions (Leckey 2015, 12). More critical conceptions of autonomy/agency, accessibility and liberty are yet to be fully realised (Fischel 2019, 147–9; Hathaway 2022, 5). Taking a critical approach to law reform, while centring repair for LGBT people who experience violence and inequality, involves recognising the legal conditions that affect local (queer) populations and pursuing (non-symbolic) law reforms that alleviate the pressures on people seeking safety, housing, work, education and healthcare (Adler 2018, 170).

Reading queer critiques of rights alongside critical race and feminist engagements of repair reveals the tensions between their theoretical foundations and political aspirations. Matsuda, Williams and Crenshaw share their hopes for reforming law to serve marginalised communities while Davis, Gilmore and Stanley expose their pessimism and frustration at 'inclusive' legal infrastructures that continue to perpetrate harm even, and sometimes especially, while purporting to repair it. Yet, despite their differing orientations towards the legal system, the critical tensions between these scholars are

generative. These critical approaches are generative in directing our analytic attention, and allowing us to ask questions about, the extent to which our desires for rights and law reform (in different areas of law) might be able to address the inequalities and violences that LGBT people face. For example, our desires are not always apparent or determinative of what forms repair or rights might take generally, let alone how these might materialise differently across different subdisciplines of law. As Amia Srinivasan (2021) writes, ‘desire can take us by surprise, leading us somewhere we hadn’t imagined we would ever go or towards someone we never thought we would lust after or love’ (91). In thinking with Srinivasan’s point, I am reminded that holding space for this surprise, in the space of desiring rights and reforms, is critical if we are hold on to the possibilities of using law as a means of repairing harm or inequality even as we remain critical of it.

A reparative reading is methodologically useful for such a praxis. Eve Sedgwick (2003) describes ‘reparative reading’ as an ethical relationship to a text which seeks surprise and possibility instead of certainty or closure (123–51). This readerly position sits in contrast to ‘paranoid readings’ where a reader of a text seeks to excavate truths that lie behind the text (Sedgwick 2003, 146; Cossman 2021, 189). She argues:

To read from a reparative position is to surrender the knowing, anxious paranoid determination that no horror, however apparently unthinkable, shall ever come to the reader as new; to a reparatively positioned reader, it can seem realistic and necessary to experience surprise . . . Because the reader has room to realise that the future may be different from the present, it is also possible for her to entertain such profoundly painful, profoundly relieving, ethically crucial possibilities as the past, in turn, could have happened differently to the way it actually did. (Sedgwick 2003, 146)

A reparative mode invites pleasure and surprise by suspending the belief that a text or experience is knowable in its entirety (Best 2016, 7). For critical legal scholars, a reparative reading relies on loosening our ‘paranoid’ disposition towards uncovering the foundational truths of an object and systems of power that generate the object (in law these objects might include legislation, case law, and regulation rendered knowable through a doctrinal study). This approach involves scanning texts for emotion and amplifying the affective encounters we have when reading those texts. We should not, however, romanticise strategies of surprise. A critical reparative approach need not mean abandoning altogether ‘paranoid’ impulses that seek to map out systems of domination and hierarchy (Bargetz 2015, 584). As Brigitte Bargetz (2015) argues, focusing ambivalently on affects in texts – without the need to celebrate or condemn them – enables us to ‘consider how emotions

are embedded within (heteronormative, racist and classed) power relations' (581). This approach resonates with my earlier discussions of critical race and feminist methodologies that foreground 'witnessing' (Sharpe 2023) and 'noticing' (Ahmed 2017) in order to describe the complexities of institutional injustices and the remedies needed to eliminate them. In critical race, feminist, and queer scholarship, we can note how the critical and normative registers of repair are co-constitutive even if they are not anchored by the same scholarly objects or political concerns.

Without prefiguring what counts as 'good' or 'bad' affects, while taking questions of power, difference and inequality seriously, I turn to connect the descriptive, normative and critical dimensions of LGBT rights and law reform by feeling through them as affectively constituted subjects/objects.

Emotional Grammars of LGBT Rights and Reforms

By threading critical race, feminist and queer engagements with emotion, I seek to develop a reparative theory of emotional analysis that attends to the emotional claims of institutions that seek to repair harms faced by LGBT people. This involves conceptualising the iterative relationship between emotions, LGBT rights and law reforms across different scales (individual, interpersonal, institutional). To understand the analytic and critical dimensions of emotions, it is necessary to begin by explaining more precisely how I conceptualise emotions for my argument, as I have described them in earlier parts of this chapter.

Emotions, affects, feelings and passions are objects of study that span disciplines including philosophy, sociology, cultural studies, neuroscience and behavioural economics and utilise varying methodologies to understand emotion within and across these fields (see Arkush 2008; Berlant 1997; Bondi 2005; Deleuze 1992; Gregg 2004; Hochschild 1983; Hunter 2015). While I cannot detail the rich histories of those ideas here, I do want to emphasise that these disciplines have intersected creatively with legal scholarship. Law and Emotion has emerged as an interdisciplinary field that engages with emotion across legal actors, doctrines and institutions.³ This field includes scholarship about how emotions materialise in norms of constitutional and international law that deal with human dignity (Nussbaum 2016; Stauffer 2015), processes of judging criminal guilt and issuing sentences (Weiner, Bornstein and Voss 2006), legal writing about justice (Temple 2019) and

³ The field of Law and Emotion in the United States took shape through seminal texts such as *Passions of Law* (Bandes 1999), 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (Maroney 2006), and 'Who's Afraid of Law and Emotions?' (Abrams and Keren 2010).

architectures of legal regulation that cultivate emotions to resolve disputes (Acorn 2004; Nussbaum 2004). These interventions take emotion as an object to describe in law, a mode of legal analysis and a technique of legal governance. Those who hold more positivist faith about law might describe these approaches – even recoil from them – as ‘queer’ because they challenge the prevailing myth that law is objective, ordered, dispassionate and neutral (Bandes 1999; Goodenough 2009; Maroney 2011).

In the context of rights and social movements, Kathryn Abrams’s (2005, 2011) scholarship has been instructive for shaping my interest in exploring the relationship between emotion, rights and law in this book. She writes, ‘the violation of rights and the effort to respond to that violation have potent affective dimensions’ (Abrams 2011, 570). Writing on the relationship between social movements, rights-claiming and law reform, Abrams observes that law is both mobilised by, and produces, emotions that materialise across individual, interpersonal and institutional scales. This Law and Emotion scholarship parses not only ‘reactive’ individual emotions (anger, indignation, pain, fear) that galvanise people to turn to law as a means of addressing rights violations, but it also makes apparent how forms of legal rights claiming have interpersonal and institutional affects. Litigation affectively connects claimants (such as LGBT people) together to ‘perceive shared patterns of injury’ (leading to the development of a collective consciousness, as evidenced by the critical race and feminist scholarship described above) while jurisprudence responds affectively to litigated rights (such as equality at work) violations by cultivating emotions (indignation, anger, shame) towards those who violate rights norms (Abrams 2011, 555, 568). I extend her line of critical inquiry in the book by following emotions as they materialise as a grammar of rights and reform in conflicts over LGBT rights.

Emotions have physiological, psychological, social and linguistic registers.⁴ Emotions are individually embodied and collectively expressed: emotions are the individual ‘gut reactions’ (affects) we have to interpersonal

⁴ Scholars also differentiate emotions from affects and feelings. Affect, within the philosophical tradition of Gilles Deleuze and Baruch Spinoza, is described as an ethology – moments of action, non-conscious experience or unstructured potentials. Affect is a kinetic concept – it captures a relationship between speed and duration (Deleuze 1992). Emotion is considered the narrative subtraction from affect. The former (emotion) is given social intelligibility, while the latter (affect) has an excess or remainder that resists representation (Clough 2007). Feeling, alternatively, is personalised recognition of our affective and emotional histories. Feelings come to embody a biographical reality because they represent the localised interpretation of our emotional histories and affective sensations (Shouse 2004). I focus on emotion in this book and do not pursue the epistemological nuances/distinctions between associated terms in this book.

encounters and the social expressions we give to describe those reactions to others (sadness, happiness, anger, disgust) (Shouse 2004). Emotions, then, are communicative. In my previous book, *Feeling Queer Jurisprudence*, I articulated a theory of law and emotion in linguistic and social terms (Raj 2020b, 8–12). Drawing from queer affect theories, I observed how emotions materialise through expressions that name senses of movement and feelings of attachment (Ahmed 2004; Berlant 1997; Cvetkovich 2003). Rather than attempt to define what emotions are psychologically or diagnose them as some kind of discrete state of being, following Sara Ahmed (2004), I was more interested in thinking about how emotions circulate spatially as encounters between bodies, objects and institutions and how these moments of contact or connection constitute what we name socially or culturally as emotion (5, 11). Emotions have spatialising effects: they make proximate certain bodies/objects/institutions while backgrounding or obscuring others (Ahmed 2006, 12). Emotions delimit, order and/or disrupt spaces. In this book, I define emotions as spatial and relational expressions of embodied states, which might be ascribed to individual bodies (internal feelings like sadness or shame), interpersonal interactions (experiences between individuals like shared grief or rage), and institutions (legal doctrines that cement pain or love). That is, emotions come into being across different scales by how we name them as such. In *Feeling Queer Jurisprudence*, I focused primarily on case law to think about this textuality and performativity of emotion. I expand on the scope of my earlier scholarship in this book to read emotions as performative enactments in law reforms about LGBT people. To grasp how emotions materialise as a connective social device with spatialising effects, I undertake what I described above as a ‘reparative reading’ of law tempered with the ‘paranoid’ impulse to not lose sight of the power dynamics in law reform (when reading Hansard, statutes, regulations and case law). I do this to show how if we selectively scan and amplify affect through our analysis of specific legal and legislative texts, we might be better able to parse the rights claims that underpin conflicts over LGBT reforms. This affective work is critical to pursue a novel framework to navigate deeply emotional conflicts over LGBT rights and reforms, one that does not assume the inevitability of intransigent polarisations that these conflicts present.

In this book, I explore how law also materialises as textual enactments which include doctrines, judgments, treaties, statutes and parliamentary debates (White 1985; West 1988). Whether it is through oral advocacy by litigators in courtrooms, politicians debating in parliament or judges making a declaration, we (as legal scholars) come to understand ‘law’ in terms of the formalised textual community (Hansard, judgment, briefs) through which certain people (lawyers, judges, politicians) speak. Like emotion, I am

interested in law's textual register, and how it formalises that which it names (Austin 1962).

Law reform describes the threading of statute, case law, policy documents, regulations and/or Hansard to change an aspect of the law. By threading these various legal texts, law reform functions as an 'affective object' that is freighted with varying emotional dynamics. Writing about the struggle for LGBT rights in Africa, legal scholars have identified how law reform materialises as a kind of 'lawfare' where 'through court cases, constitutional amendments, proposed and adopted legislation, and "rights talk", pro- and anti-queer activists and governments have weaponised the law and used it as a central tool in struggles to advance their goals' (Gloppen et al. 2022, 1). To begin thinking about a specific area of law reform in terms of its 'weaponisation' (as a form of 'lawfare' between dominant and minoritised groups) is usually to think of emotion and to feel something about it. For example, the expanded criminalisation of homosexuality in Uganda might emerge from politicians and communities fearful at the spread of sexualised diseases such as HIV/AIDS while other politicians and communities might be appalled at such legal reform on the basis that it seeks to undermine the dignity, health and safety of LGBT people (see Jjuuko and Nyanzi 2022). In the context of domestic violence, the criminalisation of marital rape is pursued by politicians and activists who are disgusted that gendered violence remains a systemic problem while politicians and activists who oppose such reforms might sentimentalise marital relationships as a zone beyond the scrutiny of the legal system (see Suk 2009).

In each of the examples mentioned above, we are drawn to thinking about law reform in terms of the constellation of connective attachments, movements and desires they generate, as they form economies of emotion (Ahmed 2017, 13). While lawyers are often tempted to think of 'law' or 'reform' as isolated to specific legal texts (as a doctrinal approach would lead us towards), such an approach occludes the dynamic nature of both. There is no clear 'start' or 'end' point. To think of law reform as an affective object of attachments and (e)motions is to render it messy, difficult and evasive. As Lauren Berlant (2012) observes, 'the minute an object comes under analytic scrutiny, it bobs and weaves, becomes unstable, mysterious, and recalcitrant . . .' (18). In this book, I seek to place different kinds of law reform under affective analytic scrutiny and, in doing so, I acknowledge that it is impossible to render these objects conclusively or to capture their affective intensities entirely. However, riffing on Robyn Wiegman's (2012) work on object knowledges, I seek to understand the desires and impulses that animate law reform for LGBT people and explore how these performative emotions structure the possibilities of LGBT rights (4). For this kind of analysis, she writes that scholars need to

be mindful of the relationship between referent, description and critique in scholarship oriented towards justice. She argues:

The referent establishes the identity of the object of study as a distinct value; description discerns the object's legibility in a range of relations (historical, experiential, discursive, social structural, economic, etc.); and critique calculates the consequences of the analytic relations that ensue as a means and measure of inhabiting the field's self-defining goal: doing justice. (Wiegman 2012, 60)

While Wiegman writes about the 'scholarly grammars' of critical academic disciplines adjacent to social movements (like Critical Race Studies, Women's Studies and Queer Studies), the tripartite normative, descriptive and critical dimensions of object knowledges she discusses are relatable to critical legal scholarship. By taking law reform as my object of study, I coin the phrase, 'emotional grammar', to refer to the emotions that both underpin, and are produced by, linguistic referents and mechanisms (spoken words, written texts, concepts) that communicate ideas about law reform and make them understandable or 'readable' to others (Raj 2023b). This grammar is a means of organising, shaping, structuring modes of communication in institutional (cases, legislation, law reform, rights), interpersonal (litigation, dispute resolution), and individual (parties, judges, lawyers) forms. Emotional grammar is useful for revealing how 'LGBT law reform' is rendered an affective object and how rights are legally arranged within 'conflicts' over these law reforms. This theory has descriptive (what emotions do in LGBT rights law reform conflicts), methodological (how emotions structure LGBT rights law reform conflicts) and normative (why emotions matter to resolving LGBT rights law reform conflicts) dimensions. Each jurisdiction has unique legal norms and cultural vocabularies that shape their styles of litigation, law-making and jurisprudence. However, I argue that legal conflicts over LGBT rights – manifested through debates on free speech, religious freedom and non-discrimination – cross jurisdictional boundaries with shared emotional grammars. By focusing on each of these grammars of emotion, this book offers a conceptual lens to navigate the ways in which LGBT people affectively engage with law to survive even when legal systems might be hostile, ambivalent or unsupportive towards them.

Structuring the Book

This book takes as its objects of study a series of current LGBT law reform conflicts that traverse English-speaking common-law jurisdictions including Australia, the UK and US. Specifically, I will focus on the following case studies from those jurisdictions in this book:

1. State amendments to limit the scope of religious exceptions to anti-discrimination laws and how these limitations are framed as threats to freedom of religious belief and freedom of expression.
2. State insistence on inclusive relationships and sex (LGBT) education in schools and how these policies or programmes are imputed to undermine cultural and religious beliefs of ethnic minorities and the integrity of children.
3. State relaxation of legal gender recognition rules to allow for self-declaration and the extent to which these reforms are considered by some to pose a threat to women's rights and safety.
4. State demands to ban conversion practices that seek to cure or suppress sexual orientation and gender identity and how such prohibitions are considered by some to inhibit freedom of religious expression and personal autonomy.

Case studies from the US, the UK and Australia form the book's jurisdictional focus. First, as the book will explore the 'emotional grammar' that underpins LGBT rights and reforms across litigation, law reform consultation, parliamentary debate, legislation, statutory guidance, and jurisprudence – and the affective relationship between these registers – it is necessary to select countries where LGBT rights have been addressed across distinct legal registers. The UK lacks a codified constitution, but rights have been realised through regional human rights law, devolved legal systems, specific statutes and common law (Raj and Dunne 2020b). The US represents a federated legal structure with a codified bill of rights where most LGBT rights have been realised through constitutional litigation (Adler 2018). Australia is a federated legal structure with a written constitution but lacks constitutional rights protection, so LGBT rights have been mostly realised through federal and state statutory reforms (Millbank 2006). While comparable jurisdictions like Canada, New Zealand and Ireland might also be good examples for further research, for the purpose of focusing my case study analysis, I have confined my book to the three aforementioned jurisdictions.

Second, this book seeks to engage with jurisdictions that are presented in politico-legal terms as 'progressive' on LGBT rights in global fora while also struggling with intense conflicts about those rights within their respective domestic contexts. These domestic conflicts materialise as a consequence of 'progressive' law reforms on LGBT rights (Puar 2017; Raj 2020b; Stanley 2021). Australia (in the Asia-Pacific), the US (in the Americas) and the UK (in Europe) are three jurisdictions that exemplify these dynamics (on one hand being progressive globally while being conflicted locally on the other).

This book does not purport to be an exhaustive doctrinal account of each area of reform I select nor is it a comparative jurisdictional analysis. My scholarship is ‘partial’, methodologically, doctrinally and emotionally. I have selected particular legal texts to analyse their relationship to each other within specific case studies by: (1) theorising how emotional grammar structures conflicts of rights about LGBT law reform and (2) explaining why an analysis of emotional grammar is socially, politically and legally valuable to navigate seemingly intractable debates about repairing LGBT rights these conflicts inspire across different scales and registers of law.⁵ Each chapter follows a similar analytical structure to explicate the novelty of my reparative theoretical approach. I identify salient emotions in each case study to frame and construct my analysis rather than exhaustively detailing all emotions. I begin by noting how specific emotions become objects of legal concern in reforms designed to repair harms faced by LGBT people. I then read those emotions reparatively to render the emotional grammar of rights and reforms as they relate to those legal concerns. In doing so, I explore how specific emotional grammars underscore the ongoing tensions between, and within, different LGBT rights and reform claims. These grammars make possible the nature and reach of legal rights and reforms, alongside the conflicts they inspire, as they relate to LGBT people. I conclude each chapter by exploring what these emotional grammars reveal about the limits of existing legal modes of repair and other possibilities of using law as a means of repair. The final sections of each chapter are a call for the ‘loosening’ of the paranoid or reactive emotional attachments that are unthinkingly reified in law, even in situations where the law appears ‘caring’ or when LGBT people succeed in litigation. The conceptual scaffolding offered in each chapter is aimed at encouraging us (as lawyers, legislators, judges and activists) to appreciate the different ways emotions present in law reforms about LGBT rights and using those emotions think differently about how we might approach legal repair for LGBT people in both a critical and normative sense. This book expands my earlier scholarship on emotions in law to contribute new forms of scholarly navigation and critical politics about LGBT rights (see Raj 2020b).

The Emotions of LGBT Rights and Reforms is divided into four substantive case study chapters and a conclusion. Each chapter uses specific emotions as analytic lenses to articulate the emotional grammar of rights and reforms relevant to a law reform case study. While the focus of these chapters is on seemingly negative emotions, which are most salient in the conflicts of rights

⁵ The approach to analysing law as a text builds on Law and Literature scholarship, see White 1985 and West 1988.

generated by each case study, I am keen to illuminate the productive potential of these emotions when approaching questions of solidarity, dialogue and community in LGBT rights and reforms.

Chapter 2 uses resentment, hostility and anger as analytic lenses to explore conflicts about reforms to narrow religious exceptions to anti-discrimination laws. I explore the tensions between LGBT people's freedom to live without discrimination and others' freedom to express their religious beliefs. The chapter begins by outlining the hostilities and resentments that shape the lives of queer minorities. The second section draws out how resentment and hostility have structured the pursuit of anti-discrimination legislation for LGBT people as well as the affective 'backlash' these law reforms generate. In doing so, I trace emotions that shape social, political and legal development of anti-discrimination laws in relation to LGBT people and the emergence of religious exceptions/exemptions to these laws. I focus on how the conflict materialises between sexual minorities who seek equality in public life and religious individuals, organisations and communities who seek to maintain their orthodox religious beliefs and their right to express them. Building on the work of Wendy Brown, I outline the emotional grammar of resentment underpinning the elastic narrowing and expanding of statutory religious exceptions in jurisdictions like the US and the UK. In this section, I undertake a close examination of conflicts within and between equality jurisprudence including *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, *Bull and another v Hall and another* [2013] UKSC 73, *Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 584 US ____ (2018), *Lee v Ashers Baking Company Ltd and others (Northern Ireland)* [2018] UKSC 49, and *303 Creative LLC and Lorie Smith v Elenis and others*, 600 US ____ (2023). This section traces the emotional grammar of these cases by examining the relationship between the constitutional and statutory context, individual complaints, the legal briefs presented to the courts and the varied judgments issued by courts through the appeals process. The fourth section explains the critical and normative utility of using emotional grammar – with a focus on resentment and hostility – to navigate the individual, interpersonal and institutional dimensions of using law to pursue anti-discrimination protections to repair the inequalities faced by LGBT people in public life. I look at the reparative dimensions of foregrounding emotion in law as a way to describe and critique the various forms of discrimination the law generates while outlining possibilities of repair through the pursuit of greater substantive equality.

Chapter 3 reckons with resentments over trans rights by tracing anxiety and fear through conflicts over reforms aimed at making it easier for trans people to change their legal sex/gender. The first section contextualises

the ways distress, anxiety and dysphoria are embodied in trans and gender non-conforming people and associated bodies of scholarship that articulate conflicting understandings of sex/gender. The second section then tracks the emergence of ‘caring’ law reform that allows people to transition their legal sex and legal recognition of trans people through anti-discrimination laws. Here, I identify how state compassion towards the individual anxieties and distress trans people face gets expressed through shifting – and conflicting – institutionalised legal norms on sex and gender. In doing so, I examine the anxieties and fears of trans people who are unsure about the limited scope of available legal protection, as well as judicial anxieties that militate against forms of recognition that compromise governance of gender in binary terms. The third section details how these conflicts structure the articulation of rights and reforms related to legal gender recognition. Here, I detail the fears expressed by some women’s groups who argue that a model allowing for ‘self-declaration’ of sex/gender would undermine the integrity of single-sex spaces and sex-based exceptions to anti-discrimination laws as well as compromising vulnerable childhoods. I bring this out through an affective reading of the legislative consultation, parliamentary debates and associated litigation relating to the recently passed *Gender Recognition Bill 2022* in Scotland (though the British government’s current blocking of the law by invoking section 35 of the *Scotland Act 1998* means it has not been given effect as an Act). The fourth section outlines how anxieties and fears structure individual, interpersonal and institutional responses to legal gender recognition. I argue that focusing on these emotional grammars enables us to reparatively think through different articulations of harm, bodily autonomy and safety while loosening the hostile divisions ossifying between women’s rights and trans rights. I consider how shared anxieties over integrity, recognition and access expose the limits of law reform while offering reparative points of connection between minoritised groups through moves to decertify sex/gender and enable greater gender self-determination.

Chapter 4 responds to resentments over curtailing religious freedom and anxieties over law reform by navigating pain and shame in legal conflicts about banning ‘conversion therapy’. I begin the chapter by outlining how homosexuality and gender diversity are ‘problematished’ through institutionalised logics of shame and pain in religious, psychological, medical, social and legal discourses. The second section historicises different practices associated with ‘conversion therapy’ and how interpersonal encounters to change, suppress or erase someone’s sexual desire or gender identity inflict pain and shame on the (queer or trans) individual who is subjected to them. In response to this, the third section explains how political and legal attempts to prohibit conversion practices institutionalise pain and shame because they amount to torture or

other cruel, inhuman and degrading forms of treatment. By centring the pain and shame of survivors, I explore the scope of legal prohibitions and remedies to repair conversion harms, ranging from statutory criminalisation that relies on punitive sanctions through to regulatory or administrative infrastructures that enable civil remedies. I then contextualise these reforms in terms of the religious, professional and parental conflicts these reforms inspire. In this section, I detail pain and shame through a close reading of the consultation processes, parliamentary debates and associated statutory reform in Victoria, Australia in the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Victoria). Specifically, I consider how grammars of pain and shame consolidate rights relating to religious freedom, children accessing medical treatment, dignity, consent and identity. The fourth section draws together the individual, interpersonal and institutional grammars of pain and shame in law reforms that ban conversion practices. I argue that addressing the emotional grammar enables us to recognise the harms of ‘conversion therapy’ while attending to the limits of legal responses to repair the harms associated with it. Feeling pain and shame enable us to confront how we might use legal reforms to repair anti-LGBT stigma.

Chapter 5 brings together the emotions of resentment, anxiety, fear, pain and shame discussed in earlier chapters to confront concerns relating to inclusive ‘sex and relationship’ and/or ‘LGBT’ education in schools. The first section outlines the way public discourses of sex, childhood, gender and sexuality are structured by grammars of shame, anxiety, fear and resentment. The second section then frames the emotional contestation of sex education in schools. I start by outlining how grammars of pain, shame and anxiety shape institutionalised sexual censorship and individual interventions aimed at cultivating morality in schools in the mid to late twentieth century (as evidenced in ‘Section 28’ in the UK). I explore how these grammars are (re)articulated as LGBT content (alongside sexual health education more generally) is affirmed through social, pedagogic, political and legal interventions in schools. These interventions are concerned with individual and interpersonal risk management when it comes to students having sex and embrace an institutional focus on harm reduction. The third section explores how parental, social and political anxieties and resentments about queer sexuality, LGBT identities and ‘gender ideology’ are legally institutionalised in response to these inclusive LGBT education interventions (such as the ‘No Outsiders’ programme in England or recent book bans in US states). Specifically, I trace how the rights of young LGBT people to comprehensive sexuality education are contested and shamed by ethnic and religious oppositions who fear such content will ‘corrupt’ or undermine their cultural values. The fourth section tracks grammars of fear, anxiety, resentment and shame to detail how interpersonal

conflicts over making relationships and sex education more inclusive emerge institutionally across laws, policies and programmes in the US and UK. I do this through a close reading of *The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019* in England alongside the *HB 1557* ('Don't Say Gay') and *HB 1069* ('Don't Say They') statutes that now have effect in the US state of Florida. The final section uses emotional grammar to unpack emotional dynamics across jurisdictions while explaining how this analysis might be used to articulate reparative interventions invested in promoting the well-being of young LGBT people. In doing so, I consider how fear and shame of sexual marginalisation and anxieties and resentments over free speech or parental rights might open opportunities for legal repair with safety, well-being, identity and community.

Chapter 6 brings together the dynamics of harm and repair articulated in each 'conflict of rights' case study to articulate reparative, critical futures of LGBT legal rights and reform. In this chapter, I will draw together the 'negative' emotions that underscore the book (fear, worry, shame, pain, anxiety) to consider their analytic, normative and hopeful potential for a reparative legal politics. This is not about resolving each of the LGBT rights conflicts, even if such a task were possible or desirable. Rather, I am attentive to how we might better engage affectively with conflict across different scales (individual, interpersonal, institutional) and registers (social, academic, political, personal, legal) to make greater room for intersectionality, humility, solidarity and non-domination. I begin by articulating individual and collective hopes of legal rights and law reforms through a return to decolonial, critical race, feminist and queer legal studies that inspired the descriptive, critical and normative trajectories of repair that underscore the argument of this book. I also confront the disappointing failures and harms of legal rights and reforms by summarising persisting institutionalised objections to LGBT existence (in terms of free speech, religious freedom, parental authority, biological reality) and our institutionalised attachments to law as a mode of repair that sustain these disappointments (Berlant 2011a; Davis 2016; Gilmore 2022; Spade 2011; Stanley 2021). The final part takes these complementary hopes and disappointments of LGBT rights and reforms and affectively threads them through the descriptive, critical and normative tensions that emerge from each case study in the book. I use the framework of emotional grammar to illuminate points of connection and juxtaposition between each case study and then conceptualise possibilities of reparative rights claims to bodily autonomy, social belonging and accessibility, sexual liberty and identity fluidity.

2

Reckoning Resentments: Sexuality, Religion and Conflicts in Equalities Laws

Introduction

To visualise discrimination is to conjure images of inequality, stigma, unfair treatment, harassment and stereotyping. These images of discrimination typically materialise with specific feelings: the hostility or hatred of those who despise people because of a particular embodied characteristic alongside the shame, resentment, humiliation and anger faced by those denied opportunities or services because of who they are or who they are associated with. When I think about discrimination, I am reminded of a social encounter a few years ago where I was asked to explain how I could be Hindu and gay. My questioner at the time was a gay atheist lawyer who felt surprised that someone minoritised by their sexuality might genuinely feel connected to religion given the histories of major religious systems marginalising sexual differences. I do not doubt the good faith intention behind their question or sincerity of the assumptions underlying it. However, in the moment of being asked the question, I resented it. I felt frustrated and angry at the expectation they had for me to justify an aspect of my identity (it echoed how I had once been asked to describe a gay 'lifestyle choice'). I was also ashamed in that moment, as the encounter made my Hinduism a suspect part of my identity. I offer this example partly to detail the emotional labour that conflicts over religion and sexual orientation inspire at an individual level as a result of interpersonal interactions. I also share this example because it captures a range of emotions (hostility, anger, resentment) and anecdotally distils how, in debates about the conflict over religion and sexuality, the positions of religious sexual minorities are obscured from interpersonal and institutional viewpoints (see Anonymous 2022; Qureshi 2019).

This chapter seeks to think with hostility, anger and resentment when repairing conflicts of rights relating to religion and sexuality that manifest in anti-discrimination law. Rather than assume polarisations of rights are an inevitable outcome of how individual forms of anger and resentment feature in these socio-legal debates, I seek to map emotional grammars of resentment

to think differently about the reparative possibilities of law reform and how we navigate different sets of rights claims. I begin the chapter by contextualising histories of sexual policing, discrimination and injury with a focus on how this has adversely impacted upon gay, lesbian, bisexual and queer people. In doing so, I pay close attention to how hostilities function to minoritise this group of people and underpin the harms they face. I trace how homophobic hostility materialises across individual (personal prejudices), interpersonal (physical or verbal violence between individuals) and institutional (social stigma and legal criminalisation) encounters. I then outline forms of resistance to these homophobic hostilities by spotlighting the ways in which anger and resentment energise queer individual and collective responses to systemic discrimination.

In Part II, I explore how anger has played a reparative role in addressing the harms faced by sexual minorities. I follow how anti-discrimination law has responded to individual or interpersonal homophobic hostilities/injuries by channelling individual and collective (queer) anger in response to these hostilities/injuries. Building on critical race, feminist and queer legal scholarship discussed in Chapter 1, I outline how emotions (anger, hostility) are institutionalised, as legislation and jurisprudence angrily repudiate certain kinds of discrimination in an attempt to repair exclusions faced by sexual minorities. By using the example of *Romer v Evans* (1996) (a US case that constitutionally recognised anti-discrimination protection for lesbian, gay and bisexual people), I discuss how the architecture of anti-discrimination jurisprudence accommodates gay identities and relationships by chastising the ‘animus’ of legislative exclusions. Law (doctrines about the scope of discrimination protections) and emotions (feelings about the nature of discrimination) are co-constituted in the reasoning of the judgment. In doing so, I explain how this accommodation promotes tolerance and respect (which are distinct values) by codifying difference and diversity in law.

Reparative accommodations of sexual minorities in anti-discrimination law generate conflict between religious and sexual minorities. Specifically, religious freedom and free speech materialise in tension with sexuality non-discrimination. In Part III, I explore how these tensions materialise as resentments where religious groups refract the language of hostility to describe the inability to practise their faith freely or live according to their religious consciences. I focus on how these conflicts transpire within, and between, leading appellate judgments from the United Kingdom (UK) and United States (US). This includes *Ladele v London Borough of Islington* (2009) (a case involving a civil registrar’s religious objections to solemnising same-sex partnerships), *Bull and another v Hall and another* [2013] UKSC 73 (a case discussing equality protections for same-sex couples seeking accommodation

from religious-owned private accommodation), *Lee v Ashers Baking Co Ltd* (2015, 2016, 2018) (a case involving religious objections to baking a cake with a message supporting gay marriage), *Masterpiece Cakeshop v Colorado Civil Rights Commission* (2015, 2018) (a case involving a denial of a wedding cake for a same-sex couple) and *303 Creative LLC and Lorie Smith v Elenis and others* (2019, 2021, 2023) (a case involving a refusal to create a website for same-sex couples getting married). In reading these cases together, I track how rights of freedom of religion, freedom of speech and freedom from discrimination are co-constituted by individual, interpersonal and institutional expressions of resentment, hostility and anger. I do not offer an exhaustive analysis of the precedents involved and do not focus on the doctrinal correctness of these decisions. Rather, I use judgments as affective objects to illuminate how emotional grammars (of resentment, hostility and anger) structure anti-discrimination law reforms that respond to, and simultaneously construct, conflicts between rights of religious freedom, free speech and sexuality non-discrimination. I trace how individual and interpersonal resentments of parties are refracted through judgments and how judicial institutionalisation of hostilities or resentments shape freedom of religion, free speech and sexuality non-discrimination.

In Part IV, by mapping the dynamics of resentments in these cases, I argue resentment functions as an emotional grammar that connects, and conflicts, rights to religious freedom and sexuality non-discrimination. By reading resentment reparatively – attending to the emotional grammar of these conflicts – I outline new critical and normative ways to address law reform questions of repairing LGBT inequalities that these conflicts centre. From a critical lens, mapping individual and interpersonal resentments in anti-discrimination law highlights how emotion shapes understandings of, and protection against, discrimination. Building on the work of Davina Cooper, Sandra Fredman, Madhavi Menon and Eve Sedgwick, I argue this reparative approach allows scholars to probe the dynamics of public/private that structure the reach of anti-discrimination protections for sexual minorities as well as the attachments of judges, lawyers, scholars and activists to law as a means of remedying broader structural inequalities that affect queer people. From a normative lens, engaging with resentment makes space for queer voices that are minoritised through conflicts over discrimination while drawing out variations in structural vulnerability between religious and sexual minorities. My reparative approach foregrounds possibilities of adjudication that pursue substantive equality by responding to individual, interpersonal and institutional harms as well as addressing the conflicts within, and between, the case law over LGBT rights.

I – Sexual Hostilities in Law and Queer Anger

Debates about, and surveillance of, sexual minorities have rich histories that cross disciplines like medicine, psychology, sociology, theology and law (Foucault 1978). While much of this history is beyond the scope of this chapter, it is important to draw out the discursive contexts through which (homo)sexual identity is conceptualised. Some scientific literatures describe sexuality as an immutable characteristic of human identity (Herek 2010). Psychological literatures explain that whether someone is gay or heterosexual is determined by how their biological characteristics interact with social environments or familial dynamics, even if there is no clear causal explanation. Psychological explanations or definitions of sexuality are anchored by expressions of desire, with a particular focus on genitals (the sexed body) and their uses (the sexual activity) (Freud 1949). Critical sociological and cultural studies literatures expand on psychoanalytic theories of desire to understand sexual identities as a complex phenomenon that traverse cultural ideas, bodily behaviours, consumer logics, erotic practices, consumer kinship structures and emotional attachments (Ahmed 2004, 145–6; Eng 2010, 30; Povinelli 2006, 5).

Sexuality discrimination, like sexual identities, is co-constituted through affective structures of power, language and regulation (Rubin 1984). Queer bodies or bodily acts (defined here as non-heterosexual, non-reproductive, non-monogamous) are reviled by social institutions (legal systems, religious scriptures, family dynamics) that minoritise and stigmatise them through rhetorics of disease, perversion and sinfulness (Lee 2022, 78; Tomsen 2009, 13; Ward 2020, 4). Queer theory challenges categorical formulations of homosexuality common in psychology and sociology that privilege coherence and fixity, embracing a term like ‘queer’ that holds together collisions of difference and violence and how they co-constitute experiences of sexual minoritisation (Butler 1990, 30; Love 2007, 2; Stanley 2021, 27). Broadly speaking, law is critical to the minoritisation of queer sexual behaviour by creating and enforcing moral stigmas. Non-procreative sex has been – and in many places still is – condemned as a threat to the social order resulting in legal prohibition and associated regulation (Mogul, Ritchie and Whitlock 2011, 2–6). While (heterosexual) marriage, reproduction and love are secured as the basis for ‘legitimate’ coupling, those acts or bodies that fail to subscribe to this norm are rendered deviant or social contaminants (Meyer 2015, 29; Mogul, Ritchie and Whitlock 2011, 36). In other words, law encourages certain behaviours or practices by affirming them through legal rights, such as marriage and marital procreation. Law also minoritises certain behaviours or practices by stigmatising them,

such as premarital sex, procreation outside of marriage, sex work and homosexuality.¹

Individual hostility towards queer individuals is made possible by the socio-legal elevation of heterosexuality and policing of homosexuality through institutions like law. In other words, the stigmas created by and through legal and social discourses create an atmosphere where individual hostilities are expressed through interpersonal encounters. Homophobic hostility typically describes individual aversion or fear of homosexuality (LaFont 2009, 106–8). While psychologising discourses describe homophobia as an individual pathology, I want to draw out how individual homophobic hostility is engendered by interpersonal and institutional encounters that stigmatise, shame, or otherwise disavow gay, lesbian, bisexual and queer people because they disturb a social order that values matrimonial coupling and reproductive sexuality (Mason 2002, 36–7). Homophobic hostility manifests in violent interpersonal encounters – colloquially described as ‘gay bashing’ – that include physical assault (unlawful imprisonment, domestic violence, rape and homicide) (Tomsen 2009, 75). Homophobic violence also materialises in discursive and symbolic ways that are not reducible to a physical act. We can observe institutionalised forms of homophobic hostility through the internalised fears of violence that make queer individuals manage their sexual visibility in public, the internalised shame that forces individuals to remain in the proverbial ‘closet’, and in the feelings of sadness that come with social exclusion and isolation (Ahmed 2004, 55–7; Mason 2007, 265; Raj 2020b, 52; Tomsen 2009, 30). Law plays a crucial role in producing and sustaining these hostilities through ‘violent atmospheres’ of policing, surveillance and criminalisation that dispossess, exclude, ostracise and discriminate against sexual minorities (Stanley 2021, 101). Sexual minorities who seek to mitigate the individual impacts of such institutional hostilities might seek to ‘cover’ aspects of their identity that disturb the social order (Yoshino 2002). Anti-queer hostilities directed at sexual minorities are co-constituted along individual, interpersonal and institutional scales of

¹ Homosexuality as an object of legal prohibition can be traced to figures such as Henry VIII. Henry VIII criminalised homosexual ‘buggery’ (anal penetration between men) in approximately 1533 in England and Wales. This was amended by the Criminal Law Amendment Act 1885 that removed the death penalty for gay sex but introduced the offence of ‘gross indecency’ which included other acts of sexual intimacy between men (see Moran 1996). The writer Oscar Wilde was one of the most famous individuals prosecuted under this law in 1895. Anti-buggery or gross indecency laws were also introduced to several countries in Asia, the Pacific, and Africa through colonialism (many of which are still in force today). These laws are subject to ongoing legal scrutiny and debate through litigation, judicial review, political advocacy, legislative intervention and social activism.

violence that are mutually reinforcing. The more ‘invisibilised’ forms of anti-queer violence, sustained by pervasive forms of social disgust and hostility, are necessary to uncover.

Homophobic hostilities frame the atmosphere through which queer resistance takes shape. In the first chapter, I described the Stonewall Riot and the ways the myth of the event crystallised emotions like pain, anger, shame, hope and pride. I now return to Stonewall to spotlight an account of conflict and resistance, and how this conflict/resistance evinces a response to the homophobic hostilities described above:

With the shattering of glass . . . it was a dramatic gesture of defiance. I think that defiant feeling was very amorphous . . . We had just been kicked and punched around symbolically by the police . . . But for me there was a slight lancing of the festering wound of anger at this kind of unfair harassment and prejudice. (Manford 2019, 131)

Anger gives expression to the acknowledgement of, and action in response to, hostile discrimination. Manford describes anger as a ‘festering wound’ that is ‘lanced’ in a moment of resistance. Feelings are not prediscursive or fixed but ‘take the “shape” of the contact we have with objects’ (Ahmed 2004, 5). Anger takes shape through an interpersonal contact between police and protestors. Anger acknowledges what aggrieves or injures the person (being ‘kicked and punched around symbolically by the police’) and energises them into action to remedy or address it (as Manford describes in his physical resistance at Stonewall). Importantly, though, anger is not confined to the individual (as a ‘festering wound’) but in the moment of its expression (through the ‘slight lancing’) it seeps out towards an institutional environment that sustains ‘unfair harassment and prejudice’ (Ahmed 2004, 38). As Sara Ahmed (2004) notes, anger is ‘a response to the injustice’ (policing of queer social space) which involves ‘being against’ objects (police) that cause pain (175). In a similar vein to Ahmed, Audre Lorde (1984) conceives of anger as a feminist affect, energising action – a movement from injury towards a remedy (127). While not always agreeing on the political potential of anger, other feminist scholars have noted how anger is a ‘heated expression’ registered through a relationship of pain and pleasure: pain in response to injury is matched by a desire for retribution to address it (Belleau, Johnson and Bouchard 2007, 41; Murphy 1999, 158; Nussbaum 2016, 17; Smith 2016, 22; Snitow 2015, 108; Watego 2018). Reading homophobic hostility and queer anger together demonstrates how homophobic discrimination and resistance to discrimination materialise through refractions of hostility and anger in individual, interpersonal and institutional scales.

II – Public Hostilities and Discrimination Law: Towards Tolerance and Diversity

State interventions at remedying sexuality discrimination and inequality rely on affective (and effective) management of individual hostilities. If prejudice or bigotry is vernacularised as individualised forms of ‘hatred’ or ‘hostility’ of people because they are (perceived as) queer, then those who face such discrete acts of hatred or hostility turn to the state as a means of alleviating the consequences (discrimination, harassment, victimisation, exclusion) that such hostilities generate in the public sphere (Meyer 2015; Stanley 2021; Thoreson 2022). Anti-discrimination law emerges as a core part of the political architecture aimed at promoting tolerance of individual differences even if tolerance is a broader social concept that is not reducible to law (Brown 2006, 12). State gestures of tolerance capture an emotional tension between individual and institutional ethics. As Wendy Brown (2006) observes, ‘tolerance is necessitated by something one would prefer did not exist . . . tolerance does not offer resolution or transcendence, but only a strategy for coping’ (25). Here, the individual must work to tolerate sexualities they find disgusting, disturbing or offensive while the state must ‘neutrally’ create the conditions that cultivate tolerance between normative and non-normative sexual identities. The state remains agnostic on an individual’s sexual differences. Yet, the bigoted individual who interacts with sexual minorities must engage in emotional labour to restrain their hostilities or disgust towards those who are different (Brown 2006, 88). Tolerance is idealised as affective (and effective) management of individual feelings in order to avoid interpersonal conflicts between groups. Yet, purported state ‘neutrality’ obscures the emotions that emerge in the pursuit of non-discrimination legislative objectives. In this section, I seek to articulate how individual and interpersonal resentments and hostilities take institutional shape through the legislative management of minoritised social differences like sexuality and religion. Following resentments and hostilities in the cases I discuss below exposes the limits of turning to, and relying on, anti-discrimination law reform as a mode of repair.

Anti-Discrimination Law and Social Difference

Anti-discrimination law aimed at protecting the rights of sexual minorities straddles between ‘tolerance’ (acknowledging and refusing to punish sexual difference without necessarily affirming that difference) and ‘acceptance’ (making explicit the state’s normative commitments to sexual equality and diversity). The latter ‘affirms the equal dignity of protected individuals and groups at the same time that it publicly disavows mistreatment of them’ (Thoreson 2022, 438). Much critical legal scholarship has foregrounded the

turn to anti-discrimination law as a means of channelling the anger and resentments of minoritised groups and critiqued its capacity to address individual, interpersonal and institutional inequalities in society (Ahmed 2012; Atrey 2020; Cooper 2004; Crenshaw 1988; Fraser 1995; MacKinnon and Crenshaw 2019; Stychin 2009; Thoreson 2022). Anti-discrimination laws might seek to ‘change hearts’ of potential perpetrators by cultivating the moral equivalence of minoritised individuals and communities (even if emotional revaluation is based on the idea that sexuality is immutable) while providing a/effective ‘reassurance’ to minoritised groups that the state will not tolerate their discrimination (Norrie 2019, 95; Redding 2006, 112; Trispiotis 2014, 47). As Iyiola Solanke (2016) argues, discrimination relies on social stigmatising of specific differences and the humiliating effects of such stigma can only be countered by law if law adopts a focus on changing social attitudes towards stigmatised groups (5). By drawing out the emotional causes and effects of discrimination, through the lens of stigma, Solanke reminds us of how anti-discrimination law can institutionalise the management of individual (bad) feelings to promote the dignity of minoritised individuals and enable respectful interpersonal interactions between groups. The cases that form the basis of this chapter speak to emotions like compassion, hurt, fear, shame and sympathy in addition to anger and resentment. In foregrounding the latter, I am not seeking to diminish the importance of former emotions as motivations for litigation or adjudication. However, by foregrounding anger and resentment, I seek to draw out specific feelings of grievance to spotlight how judges construe sexuality and religious harms and the forms of legal repair that could remedy those harms.

Before parsing the emotional grammars of anger and resentment at the heart of discrimination law, it is necessary to differentiate between legal formulations of equality and discrimination. Equality is foundational to human rights treaties that insist that everyone should be able to exercise their rights without discrimination (Carney and Welch 2012, 112; Hepple 2011, 1). Equality in law moves between ideas of equal opportunity, equality of results, equality of treatment, equality of power and equality in dignity (Cooper 2004, 77; Fredman 2011, 5–25). These conceptions of equality manifest through architectures of public and private law: constitutional amendments that guarantee equality, public accommodation statutes that enable equal participation, employment laws that prohibit discrimination and harassment, and judicial interpretations of international human rights norms (Fredman 2011, 109–42). Each of these legal architectures varies in terms of the prohibited grounds of discrimination (race, gender, sexuality, disability, religion), scope of discrimination (public agencies, commercial goods and services, workplaces, education, clubs and associations), and individuals who are

accountable (public bodies, companies, private individuals) (Fredman 2011, 143–52). Discrimination laws also have analytic differences: some rely strictly on hypothetical individual comparators to measure inequality or discrimination while others focus more on structural factors and consider (in)dignity and (un)fairness in capacious terms (Atrey 2018; Fredman 2011, 153–231; MacKinnon and Crenshaw 2019; Solanke 2016). While I do not pursue the jurisdictional differences in this chapter, I provide this context to illuminate how the architectures of anti-discrimination laws promote goals of inclusion, diversity and equality.

Resentments offin Legal Discrimination

In returning to hostility and anger, I return to Brown (1995) who describes resentment (or ‘ressentiment’) as a feeling associated with ‘wounded attachments’.² Brown observes that a ‘wounded attachment’ emerges from experiences of social suffering and political abandonment (the wounds) and our relationship to institutions responsible for those harms (the attachments). Resentment echoes with indignation and vengeance as an emotion that ‘underscores norm violation or wrongdoing, and points to the need for remediation’ (Abrams 2011, 573). In the examples canvassed in Part I, wounded attachments emerge through laws criminalising homosexuality, policing of sexual expression, and political rhetoric that stigmatises pleasure or non-reproductive intimacies. These wounds give rise to ‘ressentiment’ or a ‘slave morality’ – one that binds those who experience powerlessness to ‘returning’ (or revenging) that injury through the very power structures that have subordinated them (Brown 1995, 67). While not completely reducible to ‘ressentiment’, resentment is a more widely embraced term to capture the ‘anger stuck in a loop’ and the ‘hatred we suppress when forbidden to give voice to the ways we are hurt or humiliated or frustrated, a wound caused by our own dependency’ (Smith 2016, 217). In other words, resentment is what we feel when we experience hurt and realise we are unable to divest from the individual or relationship or institution that causes it. Recrimination is a consequence of resentment. The ability to ‘return’ injury to those who have caused it enables the individual to claim a political space as a rights-bearing subject, but in doing so, the attachment to the institution or relationship that causes the injury binds them to it (Abrams 2011, 576; Brown 1995, 66). Injury and resentment/ressentiment are central to anti-discrimination legal

² Brown’s argument of ‘ressentiment’ builds on Friedrich Nietzsche’s coining of the term and his discussion of how this ‘slave morality’ is bound up in discussions about revenge and retribution. It is beyond the scope of this chapter to detail the philosophical nuances of the concept of resentment as developed by Nietzsche. For more detail, see Nietzsche 1897.

interventions for sexual minorities – resentment/resentment is expressed through demands for compensatory measures (damages, apologies) for homo/bi/transphobia (discrimination, harassment, victimisation) such as being denied goods and services or being harassed in workplaces. In addition to producing an injured subject (gay person) and injuring subject (homo-phobe) bound to each other, resentment nurtures ‘hurt’ feelings (like pain) by providing space in law for the cultivation of anger and righteous indignation (Abrams 2011, 577; Brown 1995, 68).

The US case *Romer v Evans* (1996) illustrates how resentment and righteous anger feature in law reform acknowledgement of, and action in response to, homo/biphobic hostility. In this case, the Supreme Court in the US refused to validate a state constitutional amendment from Colorado that would strip the Colorado state legislature of the ability to create protections and programmes to protect lesbian, gay and bisexual people. In 1992, a petition was submitted to amend the Colorado Constitution to nullify sexual orientation anti-discrimination ordinances that had recently been introduced in Denver, Aspen and Boulder and to prevent the enactment of anything similar across the state. The measure was motivated by a feeling of indignation at the ‘special rights’ afforded to lesbian, gay and bisexual people. One witness described the measure as a ‘defensive reaction to fend off state-wide militant gay aggression’ (*Romer v Evans* 1993, 4). In doing so, the legislative measure institutionalised the individual resentments of ‘ordinary citizens’ who pushed against the injury of what they perceived as gay hostility towards them. Riffing from Brown, we might describe the legislative measure as a ‘wounded attachment’ in that it crystallised individuals’ feelings of resentment (attachment) towards their vulnerability to gay threats (wound). By objecting to this law reform and pursuing judicial intervention to nullify the measure, gay, lesbian and bisexual individuals highlighted their exclusion (wound) and channelled their resentments through litigation (attachment). The conflict this discrimination law reform generated – and the different wounded attachments – refracted anger and resentment between those individuals who supported the measure and those who opposed it. In responding to the conflict, the courts crystallised and expressed new dynamics of anger. Here, the hostility expressed through the constitutional amendment is rejected by the Supreme Court as irrational hostility. In repudiating the institutional hostility of the measure (‘bare animus’) – while recognising the legitimacy of individual prejudices towards homosexuality – the Supreme Court castigated the constitutional change for abrogating the rights of an ‘unpopular minority’ and removing the ability of sexual minorities to litigate their grievances (*Romer v Evans* 1996, 1629).

Expanding on Brown's articulation of resentment/ressentiment, we can observe how the injury of constitutional exclusion is 'returned' through a judicial declaration that the state measure constitutes federal unconstitutional animus. Legislative resentment in the form of the Colorado amendment (mobilised by individuals who resent the increasing visibility of lesbian, gay and bisexual people) was repudiated by judicial resentment (which crystallised the resentments of lesbian, gay and bisexual people over their lack of legal protections). These law reform conflicts produce, and are produced by, resentments. In co-constituting the legal harm (Colorado amendment) and legal repair (US Equal Protection), resentment bound resolution of conflict to the institution of constitutional law. Individual, interpersonal and institutional emotions of anger, hostility and resentment were not erased or flattened through anti-discrimination jurisprudence but were reproduced within a constitutional prism of resentment.³

While *Romer* is one case example of resolving conflicts through anti-discrimination law, anti-discrimination laws (whether in constitutional, statutory, judicial or regulatory forms) across common-law jurisdictions have had to grapple with the accommodation of identities, differences and resentments of sexual minorities. From an interpersonal or collective perspective, anti-discrimination law must navigate the construction of social or biological characteristics that are deemed universal or immutable to a particular subject position in order to protect a marginalised group (women, migrants, Hindus, gay people) and recognise the discrimination they face (Cooper 2004, 19; Crenshaw 1988, 1344; Fredman 2011, 11). As Kenji Yoshino (1998) notes, there is an 'assimilationist bias' in equality jurisprudence that transforms sexuality differences into universal 'immutable' and 'visible' characteristics of individuals that are shared by the class to which the individual belongs (487, 491). Some individuals might welcome such assimilation because they do not seek to challenge the social system that subordinates sexual difference, rather they seek to be affirmed by that system. While anger and resentment have materialised demands for equality law, as evident in *Romer*, courts seek to channel and contain the 'excesses' of anger in the 'fight for justice' (Belleau, Johnson and Bouchard 2007, 3). Yet, in recognising the individual or interpersonal anger that forms the basis of conflicts between parties, Marie-Claire Belleau, Rebecca Johnson and Valérie Bouchard (2007) remind us of the fact that courts express anger when responding to injustices, violations or harms (24). I take their

³ For a more in-depth exploration of the articulations of anger in this case, see Raj 2020b, 83–5.

reminder as instructive when looking at the materialisation of anger and resentment in courts asked to adjudicate conflicts over rights.

III – Resentments in Religious Freedom, Free Speech and Sexuality Non-Discrimination

The turn to anti-discrimination norms as a means of protecting diversity and promoting tolerance for sexual minorities has generated what some commentators have described as a ‘backlash’ (Donald 2013, 55; Endsjø 2020, 1686; Keck 2009, 176). Liberal narratives about limiting sexual orientation discrimination are counterposed to demands about respecting freedom of religion (Martin 2019). Balancing these rights involves an evaluation of harm: individual freedom to live according to a particular faith or to express one’s sexuality is permissible to the extent it does not harm another individual (Wintemute 2014, 241). In recent years, public debates about the legalisation of same-sex marriage and civil partnerships have brought to the fore the tensions between (homo)sexuality, religion and harm.⁴ In this section, I seek to confront these tensions affectively by paying closer attention to the emotional grammars of hostility and resentment that sustain these socio-legal conflicts in order to understand how they shape the scope of, and relationship between, rights relating to religious freedom, freedom of speech and non-discrimination. I account for the emotional grammars that underpin conflicts between these rights and outline how this accounting opens conceptual space for navigating the frictions and convergences that emerge from articulations of resentment between different groups (gay people accessing services, religious business owners, state agencies). This would enable lawyers, legislators and judges to think more productively about how they might use law to repair the discrimination harms faced by LGBT people in the public sphere.

Curbing Sexuality Hostilities and Religious Discrimination

The British case of *Bull v Hall* (2013) crystallises tensions between recognising same-sex relationships and religious freedom. In this case, Steven Preddy and Martyn Hall were in a civil partnership. In September 2008, the couple sought to check into the Chymorvah Private Hotel and their request for a double-bedded room was denied as the hotel had a policy that refused ‘unmar-

⁴ Debates about religion and sexuality – and the conflicts about balancing rights of religious freedom and expression with non-discrimination based on sexual orientation – persist across a range of jurisdictions. This chapter uses case law selectively as illustrative examples, and my analysis is not meant to be representative of all cases in the area which span different areas of law and different countries. For more detail on this, see de Búrca 2023, Gray 2022, and Whitaker 2018.

ried' couples the option to share a bed. The occupiers, Peter and Hazelmary Bull, asserted that this policy was founded upon their Christian convictions. In seeking judicial review, Hall and Preddy asserted that their exclusion from the accommodation contravened English regulations prohibiting sexual orientation discrimination in the provision of goods and services, along with broader *European Convention on Human Rights* (ECHR) prohibitions on discrimination and guarantee for respect of one's private life. The Bulls rebutted the claim that they had discriminated against Hall and Preddy on the basis of sexual orientation (as their policy applied to unmarried heterosexual couples) and, even if they had, they had a right to the free expression of religion that could not be limited by countervailing equality legislation.

In resolving the conflict, the Supreme Court in the UK addressed the hostilities faced by same-sex couples. Lady Hale took account of the history of invidious discrimination against sexual minorities and anchored her repudiation of the Bulls' policy to refuse Preddy and Hall a double-bedded room within that history. She observed that lesbian, gay and bisexual people were 'denied the possibility of fulfilling themselves through relationships with others' (*Bull v Hall* 2013, 53). By resenting the historical marginalisation of same-sex relationships specifically, Lady Hale urged caution: we should be 'slow' to accommodate conscientious objections to the accommodation of sexual minorities in public spaces (such as hotels). Here, the majority recognised that institutional hostilities towards sexual minorities operated asymmetrically (privileging heterosexuality over homosexuality) and acknowledged the historical consequences of that hostility on individual people (denying material resources like shelter for minoritised groups) (*ibid.*). While pushing for inclusion (much further than *Romer*), however, Hale LJ's judgment implicitly reinforces a conflict between religion and sexuality. The judicial declaration serves to condemn religious hostility towards same-sex couples and this declaration serves to restrain religious expression. Such repudiation generates new forms of backlash and outrage: Christians become an 'oppressed' minority (Cornides 2012, 541). While a characterisation of Hale LJ's judgment as 'oppressive' to religious groups obscures the way non-heterosexual and non-matrimonial sexuality has been maligned by religious influence (through both stigma and shame), Hale LJ's 'progressive' repudiation of religion in the judgment does sideline the intersections between religion and sexuality. Same-sex couples, after all, can be religious. Instead of assuming a frictional relationship, by attending to the emotional grammars present in this case, I would argue that the Court could have pressed a dialogue that considered the elements of the religious freedom objection itself and whether non-normative sexuality could fit within the terms of their religious beliefs, rather than assuming one had to prevail over another. While not

necessarily adjudicating on the sincerity of their religious beliefs, the Court could have probed the defendants' framing of their religion and the extent to which it connected to their commercial activity and the extent to which any religious ethos underpinning that commercial activity was incompatible with the right to sexuality non-discrimination. That would have yielded more nuanced analysis.

Reasserting Religious Freedom and Resentment

In response to statutory reforms and legal judgments like *Bull* that advance the rights of LGBT people, religious groups have pursued litigation to 'reassert heteronormative understandings of home, family, and society' (Nash and Browne 2020, 8). In doing so, these groups speak to the anti-religious bias or hostility that they feel in the public sphere, including within the legal system. This hostility, as they perceive it, makes it difficult for people to express their religious beliefs openly without retribution (Donald 2013, 52; Gibson 2013, 585). Some legal scholars have endorsed this characterisation in the context of anti-discrimination law (Cornides 2012; Sandberg 2011). Yet, when articulating their feelings of alienation and vulnerability, religious groups take care to eschew explicit homophobic or transphobic narratives of hostility. For example, even those who vigorously demand exceptions to anti-discrimination law acknowledge that the provision of many commercial goods and services (like serving coffee to a gay customer) should continue to be done on a non-discriminatory basis (Browne and Nash 2014, 327; Johnson and Vanderbeck 2014, 112). In competing rights claims, however, scholars have observed a conflation of harm with 'irritation, offence, alarm and distress . . . [which] promotes a general fear of difference and dissent' (Chakrabarti 2014, 484–485). Such debates continue and are presented by scholars, policymakers, and activists in intractable terms (Johnson and Vanderbeck 2014; Westwood 2022).

Writing about the majoritarian appropriation of rights discourse, Davina Cooper (2004) writes, 'what has been evident in more recent years is the collective self-interpellation of seemingly powerful groups through discourses of vulnerability' (6). In other words, those groups with greater social or political power (men, heterosexuals, Christians, able-bodied people, etc.) feel a sense of alienation and precarity for being held to account through anti-discrimination norms that prohibit unfair treatment, harassment and stereotyping. They argue that the operation of the law makes their religious positionality unspeakable. *Masterpiece Cakeshop Inc. v Colorado Civil Rights Commission* (2015, 2018) is instructive here. In this case, a same-sex couple (Charlie Craig and David Mullins) visited Masterpiece Cakeshop (owned and run by Jack Phillips) who, upon learning the nature of their relationship, refused to bake them a wedding

cake on the basis that his religious beliefs did not endorse same-sex marriage (*Craig v Masterpiece Cakeshop, Inc.* 2015, 276). Mullins and Craig complained to the Colorado Civil Rights Commission that Phillips's conduct in refusing to bake them a wedding cake was in breach of the Colorado's relevant 'public accommodations' law that prohibited sexual orientation discrimination in the provision of goods and services. The Commission agreed and insisted Phillips comply with the law. This precipitated a legal conflict between Phillips, Craig and Mullins, Colorado state, and federal constitutional law about the scope of free speech, religious freedom and sexuality non-discrimination rights. This conflict materialised through differing expressions of hostility, alienation, vulnerability, resentment and anger.

In petitioning his resentment to the courts, Phillips described explicitly the hostility he faced because of how he chose to express his religious beliefs. Following the request to comply with Colorado's anti-discrimination law, Phillips went to other bakers in the area and requested cakes that displayed messages opposing homosexuality. These bakeries refused his request because of the message he requested on the cakes. Phillips filed a subsequent complaint with the Colorado Civil Rights Commission alleging he was subjected to religious discrimination. The Commission dismissed his complaint by differentiating between his act of refusal (as an objection to a constitutionally protected class of person) and the refusals of other bakers (as an objection to a specific message). He argued that the Commission's differentiated treatment was an act of hostility. At the state appeal, the Colorado Supreme Court agreed with the Commission's differentiation noting the act of baking a wedding cake for a same-sex couple was 'indissociable' from the sexual orientation of the people while refusing to bake a cake with anti-gay messaging was dissociable from a person's religion (*Craig v Masterpiece Cakeshop, Inc.* 2015, 283). The Court dismissed Phillips's appeal on the substantive points, noting that baking a wedding cake does not infringe free speech rights (*Craig v Masterpiece Cakeshop, Inc.* 2015, 287).

Phillips appealed and in his brief to the Supreme Court of the US emphasised, 'the only explanation for this disparate treatment is the Commission's disapproval of Phillips' religious beliefs about same-sex marriage. Such hostility was apparent during the proceedings . . .' (Petition in *Masterpiece Cakeshop v Colorado Civil Rights Commission* 2017, 29). During his hearing before the Colorado Civil Rights Commission, one commissioner made the comment:

Religion has been used to justify all kinds of discrimination throughout history . . . it is one of the most despicable pieces of rhetoric that people can use – to use their religion to hurt others. (Petition in *Masterpiece Cakeshop v Colorado Civil Rights Commission* 2017, 29)

Unlike the circumstances preceding *Romer*, here the petitioner was a religious person who objected to their individual experience of hostility (being caricatured as a bigot through institutional statements). The statutory authority expresses hostility and resentment toward ‘despicable pieces of rhetoric’ (not necessarily to Phillips) used to harm minoritised groups. Phillips echoed claims that he (and religious individuals similarly situated) were the new targets of social and state actors who wished to ‘persecute’ people who adhered to more ‘traditional’ ways of living (Búrca 2023, 215). In this sense, his arguments about religious freedom were intimately tied to arguments about free speech, as some religious individuals argue that laws that require them to act in a certain way (like baking a wedding cake for a same-sex couple) are compelling them to ‘speak’ in a way that violates the dignity of their religious conscience (Gray 2022, 199; Nejaime 2009, 309). Phillips spent much of his litigation before the Supreme Court detailing the artistic nature of making wedding cakes and the care that goes into crafting each one (Petition in *Masterpiece Cakeshop v Colorado Civil Rights Commission* 2017, 4).

Writing for the majority, Justice Kennedy set the scene for adjudicating this conflict in emotional terms:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. (*Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 2018, 9)

Respect featured as the frame to approach this conflict, as opposed to hostility. Yet, holding the right to free exercise of religion and associated forms of speech alongside the right for gay people to live free from discrimination left little jurisprudential room for evaluating the differentiated hostilities and resentments presented in the case. Justice Kennedy recognised the stigma, indignity and hostility sexual minorities have collectively faced from the denial of their civil rights and the need to restrain companies or individuals from citing their moral or religious objections to gay people as a means of denying them goods or services (*Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 2018, 10). Yet, in saying that, Justice Kennedy condemned the ‘clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips’s] objection’ (*Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 2018, 12). Referencing the statements

made by a commissioner in an earlier hearing, the Court acknowledged and crystallised Phillips's individual sense of wounding (being caricatured along with religious zealotry) and struck back against such institutional hostility (conflating religion with oppression). Justice Kennedy went on to note the commissioner's hyperbolic comparison of religion with the Holocaust and slavery was an 'inappropriate' sentiment that compromised the neutrality or fairness of a hearing (*Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 2018, 14). Phillips's resentment to the procedural hostility he faced from the Colorado Civil Rights Commission succeeded on appeal.

What is instructive about how the Court managed the emotional dynamics (hostility, resentment) in *Masterpiece Cakeshop* is that it highlights how exceptions to anti-discrimination law were legally characterised as necessary to preserve a 'balance' between the rights of sexual minorities to live free from discrimination and the rights of religious groups to exercise their faith without undue state burden (Dabrowski 2014, 1973; Johnson and Vanderbeck 2014, 114). For Justice Kennedy, the Colorado Supreme Court erred in elevating the hurt feelings of those bakers who objected to homophobia while 'disapproving' of the hurt feelings of religious individuals like Phillips who feel compelled to act against their conscience (*Masterpiece Cakeshop, Inc. v Colorado Civil Rights Commission* 2018, 16). As critical scholars observe, religious groups foreground their vulnerability to an 'aggressive gay agenda' (echoing *Romer*) and reposition their resentment to a state's equality agenda as an objection towards an ideology (LGBT equality) rather than an objection to an individual (LGBT people) (Cobb 2009, 338; Nash and Browne 2020, 169; Wiener 2017, 263). In doing so, these groups tactically and passionately frame the conflict over LGBT rights as a 'matter of freedom in liberal democratic society' for burdened religious groups to successfully contest these claims. Such strategic litigation choices are freighted with emotions that courts must navigate. *Masterpiece Cakeshop* exemplified this through the Court's repudiation of the Colorado Civil Rights Commission's 'animus' towards Phillips's religious beliefs (when they stated that religion underpins much of the anti-minority social persecution throughout history). For the majority, this statement represented a procedural failure because of the hostility it cultivated against Phillips and the hostility it institutionalised through adjudicating complaints of anti-gay religious discrimination (Gray 2022, 210).

Balancing Religious Rights

Cases like *Masterpiece Cakeshop* speak to how legal interventions that seek to evaluate competing rights claims must attend to issues of 'proportionality' and 'accommodation'. Laws that burden religious freedom or free speech

in pursuits of non-discrimination goals must be ‘proportionate’. They must demonstrate a legitimate aim, be sufficiently tailored to that aim, necessary, and appropriately balance competing rights (Bowers 2021, 284). These evaluative exercises rely on recognising the harms and hostilities faced by each party and weighing them against policy goals. Like *Masterpiece Cakeshop, Ladele v London Borough of Islington* (2009) is indicative of the emotionality in undertaking such an exercise and how affective recognition of wounded attachments directs outcomes of cases. In this case, a registrar (Lillian Ladele) working at a London council objected to a policy that required her to solemnise same-sex civil partnerships because she felt that would conflict with her ‘orthodox Christian view’ of marriage (*Ladele v London Borough of Islington* 2009, [7]). At various stages, the Council had attempted to accommodate her beliefs by assigning her to different tasks, but other staff members objected that this contravened the Council’s ‘Dignity for All’ policy. The Council requested she undertake all her duties, which included registering same-sex civil partnerships. Ladele initiated proceedings at the Employment Tribunal on the basis she would not be able to do what was requested of her and, in a similar vein to Phillips in *Masterpiece Cakeshop*, complained of discrimination, harassment and victimisation because of her religious beliefs.

At first hearing, the Employment Tribunal affirmed Ladele’s claims by centring how disciplinary action against her, colleagues’ characterisations of her as homophobic, and failing to take her religious beliefs seriously contributed to direct discrimination against her and created a hostile work environment for Ladele’s religious beliefs (*Ladele v London Borough of Islington* 2009, [19]). Yet, the English Court of Appeal took a different view, placing great emphasis on the Council’s goal of ‘fighting discrimination’ which was a ‘laudable aim’ (*Ladele v London Borough of Islington* 2009, [52]). Ladele’s role as a public servant was critical here. And her conduct in refusing to perform a secular task (registering civil partnerships) was ‘causing offence to at least two of her gay colleagues’ (ibid.). While the term ‘offence’ might be elusive to define, read in context of the rest of the decision anchored around policy goals of combatting discrimination, we can observe how the indignity of Ladele’s refusal was not merely about customers (those who seek civil partnerships) but also about colleagues (gay people at work who feel demeaned working with her). While recognising Ladele’s genuine beliefs, the Court refused to elevate Ladele’s individual ‘suffering [of] discrimination’ and feeling of being ‘picked on for her views’ (as the Employment Tribunal did) as it elevated the individual and interpersonal resentments of colleagues who felt injured by Ladele’s refusal to conduct same-sex civil partnerships and abide by the Council’s non-discrimination policy (*Ladele v London Borough of Islington* 2009, [10], [11]). While the procedural history of the case reveals different

outcomes in relation to whose/which rights were violated, what is clear is that the judicial recognition and crystallisation of the parties' respective hostilities and resentments (over having to perform a same-sex civil partnership or refusing to perform same-sex civil partnerships) shaped the legal evaluation of competing rights claims.

Ladele has generated considerable scholarly controversy in the past decade over its legal correctness. Some scholars argue that a more capacious understanding of proportionality would have led to a solution that accommodated Ladele's religious objections to solemnising same-sex civil partnerships, such as by requiring her not to perform any civil partnership duties and assigning her to other work (Bowers 2021, 291; Sandberg 2011, 172). Yet, other scholars dispute the characterisation of the respective discrimination claims as 'equally worthy'. For example, the indirect discrimination faced by Ladele by having to comply with a Dignity for All policy that requires non-discriminatory service provision is a less weighty concern than the direct discrimination faced by same-sex couples excluded from service (Wintemute 2014, 249). My purpose in undertaking an affective analysis here is not to adjudicate which approach is legally correct. Rather, by drawing out the resentments and hostilities that underpinned the reasoning in decisions like *Ladele* and *Masterpiece Cakeshop*, I point out how emotions not only circumscribe the individual and interpersonal conflicts between parties that give rise to legal adjudication but are institutionalised as grammars that shape the judgment itself. These emotions produce the judicial balancing of religious freedom and freedom from discrimination.

In contrast to *Ladele* and *Bull*, *Lee v Ashers Baking Co Ltd* (2015, 2016, 2018) points to how courts are willing to protect a vulnerable religious conscience in a hostile commercial sphere. In this case, a gay man (Gareth Lee) living in Northern Ireland went to Ashers Baking and requested a cake with the graphics 'Support Gay Marriage'. After initially accepting the order, one of the owners of Ashers Baking (Daniel McArthur) called Lee and cancelled his order claiming it could not be fulfilled as 'they are a Christian business' (*Lee v Ashers Baking Co Ltd and others* 2015, [9]). In an email to Ashers Baking following the call, Lee described his 'shock' and 'bewilderment' at the refusal, writing that 'it is not right that I should have to consider every time I go into a shop whether the business can choose to serve me depending on its views of my sexual orientation, religion or politics' (*Lee v Ashers Baking Co Ltd and others* 2015, [11]). In response, one of the owners of the bakery described her anxieties, 'if we provided the cake in these terms, I would feel that I was betraying my faith and failing to live in accordance with what God expects of me' (*Lee v Ashers Baking Co Ltd and others* 2015, [17]). The interpersonal conflict between Lee and McArthur set out the individual

emotional dispositions of the parties: Lee felt humiliated and ‘bewildered’ by the refusal to serve him while McArthur expressed her pain over the ‘betrayal’ of having to bake a cake that undermined her religious conscience. At judicial review, Lee called on the Northern Irish courts to resolve this conflict with reference to local regulations prohibiting discrimination on the basis of sexual orientation and political opinion.

Drawing from the earlier precedent set in *Bull*, the County Court in Northern Ireland described Ashers Baking as a ‘business for profit notwithstanding their genuine religious beliefs’ and same-sex marriage as ‘inextricably linked to sexual relations between same-sex couples’ (*Lee v Ashers Baking Co Ltd and others* 2015, [35], [43]). The Court of Appeal affirmed this distinction, holding Ashers Baking were ‘caught by the legislation because they are providing discriminatory services’ (*Lee v McArthur, McArthur and Ashers Baking Co Ltd and others* 2016, 31). What is striking about these decisions is how they institutionalised specific emotional claims about hostility and resentment. The courts began by recognising the sincerity of both parties’ perspectives and the need to address the conflict sensitively. In approaching the adjudication, the Court of Appeal set an affective context for the decision by first detailing the ‘considerable discrimination’ against LGBT people which involved ‘diminish[ing] the participation of gay people in community life . . . blackmail and other intimidation’ (*Lee v McArthur, McArthur and Ashers Baking Co Ltd and others* 2016, 16). The Court described the ‘unfortunately long’ debate about LGBT rights, particularly the opposition to gay relationships from religious communities, and the desires of LGBT people to ‘feel able to participate in the commercial life of this community freely and transparently’ (ibid.). In affectively framing the context of the adjudication of conflict, the Court made room for the resentments of gay and lesbian people who have experienced hostility in public and commercial life from religious bodies (ibid.). Parsing the resentments of individuals like Lee, and crystallising them through its context setting, enabled the Court to differentiate the religious and commercial character of Ashers Baking as part of its substantive analysis of anti-discrimination law. For both the County Court in Northern Ireland and the Court of Appeal in Northern Ireland, this analytic separation, made possible by the emotional grammar, resulted in the success of Lee’s claims that he was subjected to, among other things, unlawful sexual orientation discrimination.

The Supreme Court in the UK took a different approach to analysis focusing instead on the absence of association between the purported discriminatory act and the identity of the person who experienced that discrimination. The Court did acknowledge that ‘it [was] deeply humiliating, and an affront to human dignity’ to deny someone a service based on a protected

characteristic (*Lee v Ashers Baking Co Ltd and others (Northern Ireland)* 2018, [35]). Yet, the Court then moved away from this affective context and took great care to explain how Ashers Baking ‘employed and served gay people and treated them in a non-discriminatory way’ and that their refusal was based on ‘their religious objection to gay marriage’ (*Lee v Ashers Baking Co Ltd and others (Northern Ireland)* 2018, [28]). By backgrounding Lee’s resentment at being refused service and the broader hostilities affecting gay and lesbian people (as the earlier courts had done), Lady Hale delivered the opinion of the Court and concluded that ‘support for gay marriage [was] not a proxy for any particular sexual orientation’ (*Lee v Ashers Baking Co Ltd and others (Northern Ireland)* 2018, [27]). Unlike *Bull*, Hale LJ’s inability to connect sexuality hostility (expressed through disapproval of same-sex marriage) to Ashers Baking’s act of refusing to bake the cake enabled her to dismiss Lee’s claims of discrimination. Instead, the Court elevated the resentments of the McArthurs as owners of the bakery who ‘were being required to express a message with which they deeply disagreed’ on ‘pain of liability in damages’ (*Lee v Ashers Baking Co Ltd and others (Northern Ireland)* 2018, [54]). The Court recognised the wounded position of the McArthurs and sought to repair it by affirming the Article 9 (ECHR) protection of their religious conscience. By qualifying their position in *Bull*, the Court in *Ashers* institutionalised judicial concern about interpreting law in a way that might compel religious individuals to act in a way hostile to their conscience.

Individual resentments of parties in *Ashers Baking* over discrimination (refusing to supply a cake saying ‘support gay marriage’) and accommodation (allowing individuals the freedom not to endorse gay marriage) evince how judicial recognition of resentment shapes the reach of legal rights. Despite different outcomes throughout the various stages of judicial appeals, the extent to which ‘indissociable’ beliefs and identities are referable to their manifestation in public life hinge on the types of hostility and injury the courts are willing to feel and express through judgment (Ibarra 2020, 200; Johnson 2022, 47). In *Ashers Baking*, adjudicating in favour of the religious bakers was about giving ‘leeway . . . to the Christian family who owned the bakery not to be required to associate with a message of which they fundamentally disagreed on religious grounds’ (Bowers 2021, 292). Their religious beliefs found expression through their refusal to bake a cake that said ‘support gay marriage’ and the Supreme Court made space for their resentment over having to act in a way that ‘betrayed’ their conscience. Citing *Masterpiece Cakeshop* in a postscript, the Supreme Court decision instructs courts (in the UK) to consider the extent to which a regulated activity in question involves conveying a substantial message, as this will be critical to determining whether an individual activity involves ‘compelled speech’.

Yet, in discussing both *Ashers Baking* and *Masterpiece Cakeshop*, legal scholars have expressed confusion as to why either the act of baking itself or the object of a cake providing a platform for a particular message involves compelled speech/endorsement on the part of the person who provides the service or goods (Gray 2022, 212; Norrie 2019, 93; Wintemute 2014, 250). A focus on individuals' hostilities and resentments, and their legal institutionalisation, explain why this is the case.

Defending Free Speech

The hostile tensions between religious freedom, compelled speech and sexual orientation non-discrimination culminated in the recent case, *303 Creative LLC and Lorie Smith v Elenis and others* (2019, 2021, 2023). This case takes us back to Colorado and to the state's public accommodations statute (considered in *Masterpiece Cakeshop*). Here, a website designer (Lorie Smith) made a pre-emptive challenge, noting that she should not be required to make wedding websites for same-sex couples as this would compromise her religious beliefs. In her brief to the court, Smith claimed same-sex marriage 'violates God's will . . . [and] harms society and children because marriage between one man and one woman is a fundamental building block of society and the ideal arrangement for the rearing of children' (Petition in *303 Creative LLC and Lorie Smith v Elenis and others* 2016, [139]). Throughout the petition, Smith detailed how the public accommodations statute suppressed her manifestation of that religious belief and how she 'suffer[ed] ongoing harm of self-censorship' (Petition in *303 Creative LLC and Lorie Smith v Elenis and others* 2016, [283]). She expressed her resentment over how businesses were permitted (even encouraged) to celebrate same-sex marriages while she was punished with a 'gross stigma' for disapproving of them (Petition in *303 Creative LLC and Lorie Smith v Elenis and others* 2016, [395]). Smith channelled her resentment through litigation and sought repair, 'to restore [her] to an equal footing with other expressive business owners . . . consistent with their beliefs' (Petition in *303 Creative LLC and Lorie Smith v Elenis and others* 2016, [199]). I detail Smith's petition in some depth because it exposes her 'wounded attachments' to law, expressed in feelings of pain, resentment, fear and anger at the existence of Colorado's statute. Here, the purported hostility Smith experienced, and the resentment she felt in response, materialises through her perception of an injurious state institution (Colorado's public accommodation's law) and her desire for recrimination by returning that injury through a constitutional declaration.

At the US Court of Appeals, Smith's claims were dismissed by the majority. The Court detailed the invidious discrimination LGBT people faced and how excepting Smith from the public accommodations law would 'relegate

LGBT consumers to an inferior marketplace' (*303 Creative LLC and Lorie Smith v Elenis and others* 2021, 29). In assessing the proportionality of the Colorado anti-discrimination law with respect to how it might burden religious expression, the Court paid careful attention to anti-gay stigma and people 'feeling unwelcome' if companies denied them services on the basis of a same-sex relationship (and publicly saying as such), even if the religious belief behind refusal was not intended to be offensive (*303 Creative LLC and Lorie Smith v Elenis and others* 2021, 48). In concluding, the Court refused the 'damaging' consequences of Smith's position by elevating the vulnerability and hurt of same-sex couples.

The Supreme Court in the US, however, reversed this holding.⁵ Writing for the majority, Justice Gorsuch sympathetically detailed Smith's 'worries' over having to act inconsistently with her faith and her vulnerability to 'sanctions' if she adhered to her religious beliefs (*303 Creative LLC and Lorie Smith v Elenis and others* 2023, 11). The majority gave short shrift to the state's compelling interest to prohibit anti-gay discrimination and ignored the systemic hostilities faced by gay people historically. Instead, it elevated and crystallised Smith's resentment at being coerced to speak in a way that injured her conscience. The majority judgment in *303 Creative* caricatured overbroad public accommodations laws as an aggressor (injuring party) that limited the exercise of individual faith in the public sphere (injured party). In doing so, the Court in *303 Creative* institutionalised a resentment towards a state law that entrenched a hierarchy between religious expression and sexuality non-discrimination, where religious conscience and its expression were subordinated to (homo)sexual freedom.⁶ The constitutional analysis of the right to 'expressive association' and the resentment towards the coercive infringement of such a right were co-constituted by this emotional grammar. For the majority, 'tolerance, not coercion, is our Nation's answer' to resolving conflicts relating to the rights of sexual minorities and religious individuals (*303 Creative LLC and Lorie Smith v Elenis and others* 2023, 26).

Writing in dissent, Justice Sotomayor detailed the institutional and interpersonal hostilities that have denied LGBT people full participation in civic life. She observed:

⁵ This book does not engage with the individual biases or politics of judges. Rather, I am interested in examining how institutional articulations of emotions shape the scope of legal rights and how they are 'balanced'.

⁶ In arriving at their decision, the majority draw from precedents about 'expressive associations' set in earlier cases, including *Dale v Boy Scouts of America*, 120 S Ct 2446 (2000) and *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S Ct 2338 (1995). See also Raj 2020b, 80–3.

For most of American history, there were laws criminalizing same-sex intimacy . . . State sponsored discrimination was compounded by discrimination in public accommodations, though the two often went hand in hand . . . rates of LGBT victimization are still significantly higher for LGBT people, with transgender persons particularly vulnerable to attack. (*303 Creative LLC and Lorie Smith v Elenis and others* 2023, 15)

Sotomayor's analysis, unlike the majority, elevated the hostilities and resentments experienced by LGBT people and this became an anchor for a discussion of public accommodations laws. By exploring the history of anti-gay discrimination alongside the purpose of public accommodations laws to repair such discrimination, the dissent finds the anti-discrimination statute in question is appropriately tailored to achieve that legitimate reparative aim. The dissent spoke of the 'grave error' in granting an exception to religious business owners who wished to deny services to same-sex couples as the 'decision is to mark gay and lesbians for second class status' (*303 Creative LLC and Lorie Smith v Elenis and others* 2023, 35). The dissent described this as a 'sad day' because the majority's decision institutionalised hostility towards LGBT people by inflicting a 'stigmatic harm' on them (*ibid.*). Justice Sotomayor connected the individual pain a queer person might experience having been denied a service with the institutional pain of being denied their rights because of the Court's decision to protect those service denials. By doing so, the dissenting judgment recognised the 'distress' and 'painful feeling' of individual LGBT people and institutionalised its resentment of the majority's reasoning through the recognition of LGBT people's individual pain arising from interpersonal acts of exclusion (*303 Creative LLC and Lorie Smith v Elenis and others* 2023, 36). The dissent's affective critique resonates with the work of critical legal scholars who note how decisions framed around 'tolerance' are insidious because they occlude ways in which majoritarian religions (Christianity) frame public discussion about, and public hostilities towards, sexual minorities (Cobb 2009, 348–9; Stychin 2009, 34; Vickers 2010, 302). Hila Keren (2024) adds to this by noting how the effective mobilisation of 'free speech' as a means of legally protecting 'Christian conscience' and LGBT exclusion effects a 'market humiliation' of LGBT people, as legal exceptions to anti-discrimination law designed to limit LGBT people's participation in commercial activity stigmatises, shames and demeans them. Extending Kathryn Abrams's (2011) argument, we can note here how religious resentments materialise in interpersonal encounters (accessing/providing services) where a historically entrenched individual and institutional entitlement to behave a particular way (such as businesses not having to recognise let alone serve same-sex couples) gets suddenly undermined by anti-discrimination

statutes that disrupt these accrued historical entitlements (578). The dissent's resentments rebutted the majority's 'tolerancing' of constitutional rights to free expression against statutory rights of non-discrimination. By following resentments, we can understand how the majority judgment obscured the stigmatic messaging implicit in religious 'intolerance' claims. This allows us to also query the extent to which the public sphere should 'tolerate' beliefs about homosexuality that are stigmatic or hostile in nature (Fredman 2020b, 323; Nejaime 2009, 347).

IV – Rethinking Repair: Emotional Grammars of Resentment and Rights

In each of the cases discussed above, we can see how judicial attempts to address individual resentments arising from interpersonal conflicts about rights produce institutionalised resentments that limit the scope for addressing the harm, stigma and inequality faced by sexual minorities. As Brown (1995) reminds us, we need to rethink our (wounded) attachments and (resentful) sentiments and how these shape sexual minorities' rights claims for belonging, equality and inclusion. Rather than entrenching resentments and identities by causally relating them to specific forms of injury as each of the cases of the above do, or embracing tolerance more broadly, we should be open to 'loosening' the resentments these cases generate (134). She writes:

Tolerance discourse masks the role of the state in reproducing the dominance of certain groups and norms, and it does so at a historical moment when popular sensitivity to this role and this dominance is high, when those who have been historically excluded by norms of sex, race, ethnicity, and religion are vocal about such exclusion. State tolerance talk both softens and deflects these tensions. (Brown 2006, 84)

Individual resentments risk obscuring the differential ways minoritised groups confront interpersonal violence and institutionalised discrimination, and the scale of such abuses (Meyer 2015, 188; Solanke 2016, 31). In cases like *Bull*, *Ladele* and *Romer*, the denial of goods or services on the basis of sexual orientation was not only demeaning as a matter of identity (as religious individuals might counter if they were forced to do something that went against their conscience), but this was also materially harmful by excluding gay, lesbian, bisexual and queer people from public life. An encounter involving a denial of service is not simply hurtful at an individual level, rather the exclusion reinforces broader social hostilities and prejudices about non-normative sexual identities in a way that religious groups in cases like *Masterpiece Cakeshop*, *Ashers Baking* and *303 Creative* do not demonstrate (Gray 2022, 200; Fredman 2020b, 315). This point was made acutely in

Sotomayor's dissent in *303 Creative* where she critiqued how the Court's hostile framing of the Colorado public accommodations statute elevated the resentment of a religious individual while backgrounding the indignities, hostilities and harms faced collectively by sexual minorities in various areas of public life. Contrastingly, lower courts in *Masterpiece Cakeshop* and *303 Creative* were attentive to these issues, and by making space for consideration and contextualisation of such affecting inequalities, were able to discern the vulnerabilities of gay, lesbian, bisexual and queer people more clearly.

Mapping resentment in these judicial decisions exposes the shared minoritisation of sexual freedom and religious liberty, and in doing so, problematises the law's characterisation of 'worthy' expressions of both sexuality and religion. In *Bull* and *Ladele*, same-sex relationships were dignified through judicial resentments which repudiated the discriminatory religious objections of individuals. The courts did not deem such objections worthy of protection in the public sector or marketplace for the stigmas they stain on same-sex couples. In contradistinction, in *303 Creative* and *Ashers Baking*, religious objections to 'compelled speech' which violated the consciences of those who disapproved of same-sex relationships were made worthy of protection by the courts. In these cases, judgments emotionally rendered the indissociable connection between religious identities (Christianity) and religious expression (disapproval of same-sex relationships) by elevating the resentments of religious owners who were 'compelled' to speak against their conscience. In doing so, they cleaved apart the relationship between sexual identities (being gay) from the expression of that sexual identity (supporting gay marriage or wanting to get married). Whether curbing sexual intimacies that offend, disturb or shock the conscience of religious individuals or negating religious beliefs that do the same, law reform plays a crucial role in affectively managing these conflicts by resolving the 'worthiness' of non-discrimination protections (Chakrabarti 2014, 514; Hathaway 2022, 7; Hurford 2022, 333; Stychin 2009, 24). Resentments about sexual identity-based discrimination (gay people accessing a service) privatise expressions of hostile religious beliefs (in *Bull* and *Ladele*) while resentments about sexual expressions (getting married) privatise hostile encroachments upon religious (and expressive) identities and freedoms (in *Ashers Baking* and *303 Creative*). In order to move beyond determinations of emotional 'sincerity' or 'worthiness' when adjudicating these complaints about discrimination, courts need to grapple more carefully with the consequences of power, responsibility and access that emotions like resentment make manifest. Reading the emotional grammar of rights and reforms opens conceptual space to undertake this form of judicial grappling.

Evaluating Legal Resentments

Tracking individual resentment as a means of repairing harm ‘demands a more evaluative process in determining what the proper action should be’ in terms of which resentments to take note of and which resentments to dismiss (Cooper 2004, 66). This evaluation might involve weighing the consequences of restricting either right or examining social dynamics associated with the expression of each (Endsjø 2020, 1692). In doing so, we can unmask how demands for tolerance or accommodation ‘inevitably disguises a hierarchy of values’ (Fredman 2020b, 306). Turning to emotional grammars of resentment and hostility opens analytic space for such a normative task. In *Bull and Ladele*, the institutionalised resentment towards religious refusals to provide services (civil partnerships, hotel accommodation) to same-sex couples illuminated how refusals were connected to a social context of marginalising sexual minorities. In contrast, the institutionalised resentment in *303 Creative* as a ‘coercion’ to speak against one’s religious conscience does not connect into a broader history of religious marginalisation (though the symbolic implication of the majority’s analysis is that shifting social and legal norms place people of faith at risk of persecution in a way they might have been in the past). *Ashers Baking* and *Masterpiece Cakeshop*, similarly fail to reckon with such a broader context, instead elevating the pain and resentment/harm an individual might feel if they were asked to act against their religious conscience (McArthur) or elevating the resentment/harm a person might feel at being caricatured in terms of religious bigotry (Phillips). These articulations of resentment enabled the courts in *303 Creative*, *Masterpiece Cakeshop* and *Ashers Baking* to except a religious company from providing a commercial service. Resentment was an emotional grammar that cut across these cases. It communicated ideas about individual, interpersonal and institutional harms and set the terms by which rights to religious freedom and sexuality non-discrimination were adjudicated in relation to those harms. Paying attention to the grammars of resentment is critical not only if we are to pursue rights to religious freedom or non-discrimination but also if we are to contextualise how these rights might be navigated to pursue egalitarian commitments.

Critical race, feminist, queer and legal scholars have detailed out how frameworks of anti-discrimination laws are ill-equipped to resolving disputes about social plurality and egalitarianism without reproducing hierarchies of identities (Donald 2013, 66; Etherton 2014, 276; Lee 2022, 89). This was apparent in the fact cases like *Ladele*, *Ashers Baking*, *Masterpiece Cakeshop* and *303 Creative* were decided differently by different courts as part of the appellate process, some with powerful dissenting views. In each of these cases, the outcome of these interpersonal conflicts hinged on the extent to which

institutionalised (judicial) resentments crystallised the vulnerability of either minority sexual identities or religious identities – or where both are recognised as vulnerable identities, one can be prioritised over the other for the purpose of repair. We might describe this current state of anti-discrimination jurisprudence as exemplifying ‘failures of regimes of identity’ because these cases are unable to express indifference to either (Menon 2015, 3). As Madhavi Menon (2015) cautions, we should be slow to characterise differences of identity as ‘good’ or ‘bad’ (2). In response to identity-based characterisations of difference and discrimination, substantive equality offers an alternative vision for the development of anti-discrimination law by threading recognition, redistributive, participative and transformative aspects of equalities work. Building on the work of feminist and critical race legal scholars, Sandra Fredman (2016) describes substantive equality as a framework that involves redressing disadvantage, countering stigma, prejudice, stereotyping and humiliation, enhancing political voice and social participation, and accommodating differences. These principles may come into conflict. As such, her conception of substantive equality is dynamic with each of the elements circumscribing the other (Fredman 2016, 713).

Towards Substantive Equality

Building on Menon’s critical invitation to avoid ossifying identities as either good or bad and Fredman’s normative invitation to anchor disputes about discrimination in terms of substantive equality, I argue that attending to emotional grammars of resentment enable us to undertake these critical and normative tasks. Rather than exhaustively categorise sexual or religious groups in conflict, following resentment and hostility points to processes of minoritisation that are not universal. In *Masterpiece Cakeshop*, the Court’s resentment was directed at a public institution’s hostility towards a class of religious people, and the Court rebuked this hostility because it risked stigmatising religious people as bigots and disallowed them a chance at a fair hearing over a discrimination complaint. In *303 Creative*, Sotomayor’s dissent identified the minoritising and stigmatising consequences of denials of service and coupled this with a resentful critique of the Court’s entrenchment of stigma towards sexual minorities by characterising such denial of service as lawful. My reading of resentment in these conflicting positions, across different cases, adopts an ‘indifferent’ attitude to the authenticity of both parties’ identities. This is important as individual resentments expose the ‘indissociability’ of religious and sexual identities from their expressions, as both groups in *Masterpiece Cakeshop* and *Ashers Baking* highlighted how speaking support for gay marriage either violated their religious conscience or affirmed their sexuality. Instead, examining the grammars of resentment

through their institutionalisation in these cases is important in order to better understand how these institutional resentments contribute to disadvantage, the way they facilitate social stigmas, how they negate cultural differences and how they limit participation of minorities. Cases like *Ashers Baking* and *303 Creative* institutionalised resentments that failed to recognise how religious exceptions materially deny resources to sexual minorities, cultivate stigma by enabling the hostilities of those who disparage same-sex relationships, limit the voices of sexual minorities while enhancing the voices of businesses with religious owners and accommodate majoritarian religious beliefs while backgrounding sexuality differences.

Reading the grammars of resentment in *Bull*, *Ladele*, *Ashers Baking* and *303 Creative* illuminates the tensions between participative, redistributive, recognition and transformative aspects of pursuing substantive equality in the context of religious freedom and sexuality non-discrimination rights claims. The facilitation of individual religious resentments in *Ashers Baking* and *303 Creative* came at the expense of hearing (and feeling) the voices of sexual minorities who were subsequently stigmatised by the lawful denials of service and experience ongoing disadvantage from being denied basic commercial goods or services. Alternatively, in *Bull* and *Ladele*, the recognition of pervasive stigmas against same-sex couples provided the affective context in which their resentments were given voice through judgment. Their humiliations were countered through judicial prohibitions of religious hostility in commercial or community contexts – prohibitions which also improved their access to public life. As I demonstrated above, thinking through the dynamics of resentment allows us to parse individual and interpersonal conflicts through a substantive equality framework concerned with structural harms and inequalities. In other words, emotional tensions between individual and interpersonal conflicts of rights point to the limits, as well as the possibilities, of using anti-discrimination law to adjudicate disputes over, and address, the institutional realities of disadvantage, exclusion, stigma and harm (Fredman 2011; MacKinnon and Crenshaw 2019; Robinson 2007; Solanke 2016). As Cooper (2019b) notes, ‘conflicts over withdrawal demonstrate how knowing governance bodies through touch, and what is felt, can supersede or clash with optic forms of knowledge’ (99). Engaging with conflicts over rights necessitates a greater focus on individual and interpersonal emotions, and how these emotions shape legal institutions or law reforms in the process of resolving conflicts. As my reading of resentment in cases like *Bull*, *Ladele*, *Ashers Baking*, *Masterpiece Cakeshop* and *303 Creative* demonstrate, attending to emotional grammar opens analytic space for critiquing the consequences of resentment while also holding room for normative adjudications that conflicts of rights inspire.

In taking this analysis further, I want to revisit cases like *Ashers Baking* and *303 Creative* to see how such an analytic approach to resentment might have led to a different normative outcome. The courts could have recognised the competing individual resentments of both parties and then tracked how giving expression to those resentments would contribute to furthering the rights of those parties. For Smith and McArthur, their resentment at being compelled (by a law) to act in contradistinction to their faith could be recognised by the courts (and was by the respective Supreme Courts) as deeply hurtful and a violation of their free speech rights. For Lee and other gay and lesbian people, the resentment at being denied a service or good could be recognised by the courts as deeply hurtful and affront to the right to non-discrimination (also implied by the respective Supreme Courts). Moving further, the courts could have better addressed how this resentment exposes gay, lesbian, bisexual and queer people to dignitary harms of being stigmatised socially and material harms of limiting their access to the marketplace in a way that would not be true of Smith and McArthur or people similarly situated to them. In making room for these different resentments, the courts could weigh the differing individual resentments alongside the individual rights in question, while also being mindful of how the weighting of individual resentments might reproduce resentment at an institutional level. If the majority in both cases had critically approached resentments and hostilities through this analysis – taking in turn the individual, interpersonal and institutional scales of harm and anchored them within a substantive equality framework – the sexuality minority claimants in both cases would likely have succeeded. Neither the analytic approach nor the normative exercise I undertake is about uncritically replacing one set of individual resentments with another. Rather, I think affectively with conflict – and the resentments conflicts institutionalise – to foreground remedies that might better achieve goals of substantive equality.

My theorisation of emotional grammar extends critical legal scholarship to hold space to both critique law while utilising it reparatively in pursuits of rights. Liberal equality preoccupations with fixed and fungible identities, as evidenced in the majority opinions in *Masterpiece Cakeshop* and *303 Creative*, erase the structural conditions of racialisation, gendering and sexualisation that co-constitute individual discrimination and individual identities. Catharine MacKinnon and Kimberlé Crenshaw (2019) explain this in terms of how judicial review operates in the US, where a focus on intention and formal classifications of ‘suspect classes’ reproduces, rather than dismantles, the patriarchal, white supremacist social order (350).⁷

⁷ For detailed analysis of their scholarship, see Chapter 1.

This argument echoes what critical race scholars critique about US anti-discrimination law frameworks: discrimination is not exceptionally suspect but ordinary and banal. I read this tension between exception and banality in emotional terms. In *303 Creative*, *Masterpiece Cakeshop* and *Ashers Baking*, the courts foregrounded the resentments of the religious parties and recognised those resentments by drawing out the hostile or coercive impacts of laws or institutional statements that would compel them to violate their religious conscience. The emotional grammar of resentment rendered these injuries exceptional in terms of harm and subsequently excepts/exempts these religious parties from complying with anti-discrimination law. In doing so, the institutionalised discrimination that same-sex couples face were backgrounded and the individual or interpersonal exclusions they faced (such as through their inability get a wedding cake at their chosen bakery) were subordinated to the exceptional sense of hurt that would befall a religious person whose conscience would be violated by having to serve them in a manner they did not approve. Emotional foregrounding/backgrounding was also apparent in the dissent in *303 Creative*, which took exception to the majority's characterisation of free speech, and expressed resentment over everyday forms of discrimination and stigma that LGBT people faced. But, in doing so, still foregrounded interpersonal forms of discrimination that emerge in the marketplace.

My critical reading draws attention to these affective manoeuvres and riffs alongside more general critiques of 'colour blindness' of equal opportunity legislation in the US. Much critical race scholarship notes that the reparative scope of anti-discrimination law is individual in character (responding to an individual and an interpersonal act of discrimination) and moves between a 'perpetrator-oriented' perspective (intentions to discriminate) and a 'victim-centred' perspective (consequences of discrimination) (Freeman 1989, 1420–4). Each of these individuated approaches ignores the institutionalised articulation of (racist) discrimination harms. In 'perpetrator-oriented' analysis the emphasis is on individual wrongdoing. Discriminatory intent or malice specific to the impugned individual is necessary to prove discrimination. It does not matter whether the person is Black or white. Embracing formal equality renders all racial identities fungible – all 'equally' worthy of protection without acknowledging the social and historical differences between racialised categories. Correspondingly, the 'victim-centred' analysis locates injury in individual terms and seeks to remedy the concrete harm done to a specific individual. Since American law is prohibitory (unlike Matsuda's reparations model discussed in Chapter 1), it does not encourage positive duties to promote inclusion. In doing so, the act of remedying discrimination in this model transforms an act of legal discrimination into

an exemplary situation – one that is not ‘normal’. My emotional analysis of *303 Creative* and *Masterpiece Cakeshop* challenges formal legal analysis because it confronts the law’s complicity in rendering the banal forms of discrimination invisible (Freeman 1989, 1418). The emotional grammar of resentment in jurisprudence makes visible certain harms (denial of service, acting against one’s religious conscience) and makes possible the modes of legal repair (enforcing anti-discrimination obligations against conscientious objectors, excepting religious groups from anti-discrimination laws). Mapping grammars of resentment illustrates how legal institutionalisation of resentment eclipses a consideration of structural inequalities that face lesbian, gay, bisexual and queer people.

Disrupting Public/Private Divides

My theorisation of resentment builds on Cooper’s (2004) invitation to focus on the analytic relationship between organising principles (sexuality, religion) and social dynamics (capitalism, private/public) (55). *Bull*, *Ladele*, *Masterpiece Cakeshop*, *Ashers Baking* and *303 Creative* took religion and sexuality as organising principles for rights to free speech (religion) and non-discrimination (sexuality). Each of these rights were framed through competing ideas of public/private. Taking resentment as a grammar of judicial enunciation, we can observe how in *303 Creative* and *Ashers Baking* the parties’ resentments towards being ‘compelled’ to speak in a way that violated their religious conscience warranted public protection in the marketplace as the courts institutionalised resentments towards laws that would abrogate their free speech rights. In doing so, the resentments of Lee and other sexual minorities were privatised as they were invited to seek alternative venues to contract their business. Alternatively, in *Bull* and *Ladele*, the Bulls’ and Ladele’s religious beliefs were privatised by courts who publicly recognised the resentments of same-sex couples in order to safeguard their access to public or commercial activities.

While the outcomes differ between each of the cases, what is clear is that conflicts over sexuality and religion emotionally entangle to produce ideas of public/private and who are enabled access to (protection in) such spaces (Bamforth 2012, 488; Cobb 2009, 342). Analysing the grammar of this entanglement draws attention to how conflicts that arise within the terms of religious exceptions to anti-discrimination law are productive: withdrawal or denial of services which the law permits in *Ashers Baking* or *303 Creative* or the withdrawal or denial of services which the law prohibits in *Bull* and *Ladele* (re)draws boundaries between inclusion/exclusion and belonging/non-belonging within public space (Lalor and Browne 2018, 211). Resentment is the grammar that (re)draws the boundaries between what is considered

public or private and the extent to which sexual minorities and religious individuals are cabined in each of these spaces.

Foregrounding Intersectionalities

Mapping the emotional grammar of resentment enables us to understand intersectionalities of discrimination between and across religion and sexuality. As discussed in Chapter 1, intersectionality describes how institutions (like law) intersect to produce experiences of subordination and how individuals represent their identities through intersections of oppression (race, gender, class, sexuality, religion). Recent scholarship about intersectionality as a ‘critical social theory’ has, to varying degrees, explained the utility of undertaking intersectional analysis that foregrounds social dynamics of capitalism, public/private and poverty in pursuits for social change (Atrey 2020; Collins 2019; Cooper 2004). As a reparative praxis, reading emotional grammar deepens this critical scholarship by holding together failure and possibility (Sedgwick 2003). To read the majority decisions in *303 Creative* and *Ashers Baking* reparatively is to recognise the depth of resentments that inhere in religious individuals who feel persecuted by laws that require them to act in a non-discriminatory way even if this recognition subsequently discriminates against same-sex couples. Such a reading might be described as a failure for failing to account for homophobic politics and institutionalised hostilities (as discussed in Part II). Alternatively, making room for competing resentments without pre-determining which resentment is ‘worthier’ might result in a failure to adjudicate between competing rights claims over religion and sexual freedom. Yet, in this failure, there is possibility. As my reading of the emotional grammar in Sotomayor’s dissent in *303 Creative* and my reading of the court’s resentment in *Ladele* make apparent, institutional resentments that focus on individual dignitary harms can occlude institutional economic harms. Whether about civil partnerships or wedding cakes or websites, these cases hold resentment and harm in relation to privileged forms of commercial or public activity. This is unsurprising as the capacity to bring litigation in relation to sexuality discrimination or religious freedom of expression relies on economic resources which are unavailable to most people, particularly racialised and working-class queer people who are not contesting discrimination in relation to consumer services but in areas of housing, healthcare, social security and immigration (Adler 2018, 4). Individual or interpersonal resentments adjudicated through these anti-discrimination judicial decisions background institutional and intrafamilial harms of homo/bi/transphobic discrimination that are endemic to those who are vulnerable due to lack of citizenship, housing, employment or who experience violence and abuse in the home (Cobb 2009, 345; Stanley 2021, 5).

Failing to subscribe to the circulation of resentment and instead critiquing the attachments they generate in law open possibilities to address various forms of subordination and rights that get obscured when LGBT people seek access to public or commercial services. Mapping the resentments that structure socio-legal conflicts over access to goods or services (wedding websites, wedding cakes, hotel rooms) expose the ‘invisibilising’ of queer religious minorities (such as gay Christians). Courts take an individual resentment (either over a denial of service or being compelled to act against one’s religious conscience) and transform it into an institutionalised resentment towards either a (homophobic) religious group or (aggressive) non-discrimination law (see Mascord 2017; Peroni 2014). In doing so, they erase the position of those (religious sexual minorities) who see their right to religious freedom or free speech as coextensive with their right to sexuality non-discrimination. Pursuing repair in these circumstances involves thinking with, and being critical of, the messy individual, interpersonal and institutional resentments present in anti-discrimination law and how they are co-constituted through affective adjudications of freedom of religion, free speech, and sexuality non-discrimination.

Conclusion

I opened the chapter with an anecdote expressing my resentments at having to defend being gay and Hindu. In closing the chapter, I return to that anecdote as a reminder of how resentments underscore individual, interpersonal and institutional conflicts about religion and sexuality. Law reform debates about religion and sexuality are not confined to abstract, doctrinal or technical considerations. They recognise, circulate, express and entrench resentments. Such resentments have material impacts on the lives of sexual minorities, particularly religious queer people, who are caught within legal conflicts that erase their existence.

Taking resentments seriously, alongside anger and hostility, is important for describing, critiquing and recommending legal interventions invested in repairing inequalities affecting LGBT people. Building on critical race, feminist and queer scholarship, emotional grammar provides a critical framework for pursuing substantive equality analysis without pre-determining the ‘rightness’ of the resentments such analysis reveals or exhausting law as the means of securing substantive equality.

In Part I, I contextualised the hostilities and stigmas that shape the socio-legal regulation of queer lives. I considered how resistance to these hostilities materialised through the anger and resentment of queer minorities. Part II expanded on this affective terrain to outline how such resentment, anger and hostility found expression in and through anti-discrimination law.

Taken together, these two sections detailed how hostility and resentment circulate between those who police and minoritise queer people and those queers who refuse the terms of this policing and minoritisation.

Part III built on Wendy Brown's scholarship on resentment and tolerance to theorise the wounded attachments that keep sexual and religious groups looped in legal conflict. In this section, I followed resentments in cases like *Bull*, *Ladele*, *Masterpiece Cakeshop*, *Ashers Baking* and *303 Creative* to understand how rights to religious expression and freedom from sexual orientation discrimination are circumscribed by this emotion. In *Bull* and *Ladele*, recognising the hostilities present in individual religious objections to the provision of public or commercial services functioned to institutionalise resentment towards those individuals who discriminated against same-sex couples. In cases like *303 Creative* and *Ashers Baking*, however, judicial resentments functioned to curb the mobility of sexual minorities in commercial spaces even while purporting to take non-discrimination seriously.

In Part IV, I used emotional grammar as a critical framework to think reparatively about 'resolving' conflicts between religious freedom and sexual non-discrimination. This affective theorisation built on important scholarly interventions in critical race, feminist and queer scholarship about identity, difference, inequality and conflict as evidenced in the work of Davina Cooper, Sandra Fredman, Eve Sedgwick and Madhavi Menon. Rather than claim we should reassess (or reverse) adverse decisions like *303 Creative* and *Ashers Baking* by elevating the resentments of sexual minorities, I suggested instead that we might use emotions to think differently about conflict and repair – to loosen our attachments to resentment as a means of progressing law reform or articulating our rights. Pursuing an analytic 'indifference' to identities creates space for recognising and critiquing resentments in/about religious freedom and sexuality non-discrimination – and the conflicts these resentments inspire – without embodying one at the expense of the other (Menon 2015, 14; Snitow 2015, 53; Thoreson 2022, 468). Emotional grammar illuminates individual, interpersonal and institutional harms and how these harms are co-constituted through grammars of resentment and hostility. Reading the emotional grammar in these cases demonstrates how legal interventions invest in individual redirections of resentment and hostility and bind resolution of interpersonal conflicts to punitive judicial measures at the expense of cultivating institutionalised forms of care and accountability (Búrca 2023, 221; Mogul, Ritchie and Whitlock 2011, 123; Stanley 2021, 101; Thoreson 2022, 462). Individual, interpersonal and institutional resentments expressed in all the cases discussed throughout the chapter can obscure structural conditions of anti-LGBT subordination even when they draw attention to stigmatic or dignitary harms. To think capaciously about

repairing inequalities facing sexual minorities in conflicts over sexuality non-discrimination and religious freedom, then, demands that we follow, frame and critique expressions of hostilities and resentments in law by loosening (without necessarily letting go of) our attachments to them.

The next chapter elaborates my critical approach by reckoning with emotions like fear and anxiety that underpin law reform debates over the recognition of trans people. I use emotional grammar in the next chapter to explore how conflicts over gender, safety, privacy and dignity materialise in reforms to allow people to self-declare their gender.

3

Addressing Anxieties: Debates over Legal (Trans) Gender Recognition

Introduction

The pursuit of LGBT rights and well-being is characterised by anxiety and fear. During the first lockdowns for COVID-19 in 2020, I remember speculating about the harms that would befall LGBT people who were suddenly forced to isolate in homes with inhospitable family members (parents, siblings, partners). I worried about those who were denied access to recreational spaces (clubs, bars, Prides, community centres) and could no longer find the refuge and freedom to be ‘out’ (even temporarily as a respite from their closeting home environments). As I read news stories about overburdened medical systems struggling to support those affected by COVID-19, I imagined the trauma of those who now had to wait indefinitely to access medical or surgical interventions to affirm their gender and those living with HIV who would find it even harder to access appropriate testing and treatment. I fretted thinking about how many people might self-harm or become suicidal in these lockdowns. In thinking with these fears, I began to visualise threats that portended individual forms of physical harm (violence, harassment, suicide) and emotional distress (loneliness, shame, depression, suicidal ideation) alongside interpersonal injuries like the erosion of queer communal life. This echoes what Sara Ahmed (2006) describes as the emotional currency of fear. As she notes, ‘fear involves an anticipation of hurt or injury . . . fear projects us from the present into a future’ (65). My fixations on the impacts of COVID-19 lockdowns on queer and trans communities were characterised through an anticipatory imagining of hurts (homo/transphobic abuse at home, social isolation, denial of medical care) that might occur in the future. The hurts I imagined were not distant or abstract ones but seemed eerily close and intensely personal. Fear drew my attention to social negation and its ‘againstness’ I was visualising (Scarry 1985, 52). I shuddered at the thought of being in a home, as LGBT people often are, where I had to hide my sexual and gender identity or face domestic violence. I was distressed thinking vicariously about being unable to access social safety or medical support.

My fears projected me into an imagined time (a future of indefinite lockdown) and space (lockdown homes, overwhelmed medical systems) and this made me anxious. Anxieties materialised here as a mode of sustained attention, and subsequent attachment, to the interaction of bodies (queers, homo/transphobes), objects (stay-at-home and closure orders) and spaces (homes) that generated my fears (Ahmed 2006, 66). My anxieties, however, were not reducible to a single object. Instead, they emerged as effects of splits, inconsistencies, antagonisms and possibilities of loss in society. These connected across the objects I visualised, kept in constant circulation (Ahmed 2006, 66; Salecl 2004, 15). In other words, even if/when an object that generated fear passed by without causing the harm or injury I anticipated, the continued existence of that object (and what other negative associations I made with that object) meant that anxiety remained. In worrying about the position of queer people stuck in abusive homes, I continued to worry about homo/transphobic domestic violence even though the lockdown did not materialise the harm exactly in the ways I had imagined once we 'returned to normal'. I could still feel anxious because homo/transphobic attitudes, abusive individuals, fractured familial and social relationships, burdened healthcare systems and eroded community spaces persisted. Anxiety made present traumas or losses which I associated with certain objects, bodies and spaces, and this reminded me of the potential of trauma to exist in a state of continued deferral (Ahmed 2006, 67; Salecl 2004, 120).

In thinking with these emotional grammars of fear and anxiety, this chapter turns to explore how conflicts relating to the legal recognition of LGBT rights are not simply characterised by anger, hostility and resentment discussed in the previous chapter. Emotions like fear, anxiety and distress materialise institutionally to crystallise ideas of risk and harm that connect with individual and interpersonal expressions of these emotions. By following how emotional grammars thread the individual, interpersonal and institutional together, this chapter examines how anxiety and fear circumscribe the scope of legal recognition for trans people. In recent years, these grammars have been palpable in debates over legal gender transition for trans and non-binary people. Individual fears and anxieties over greater social and legal acceptance of gender fluidity have foregrounded a series of 'dangerous consequences' that threaten the integrity of traditional societies and sex-segregated spaces. The notion that a person can and should be legally enabled to change their sex has been contested as 'neocolonial globalization threatening . . . the cultural sovereignty and traditional values of nations' located in the Global South (Gevisser 2020, 236). In the Global North, publics sustain anxieties over trans people using bathrooms (particularly trans women) by foregrounding the (phantasmatic) figure of the predatory man who enters the

women's bathroom with the malicious intent of sexually abusing women (Briggs 2018). Fears and anxieties over trans people gaining new forms of legal recognition stitch together concerns about young trans people accessing medical interventions before they are competent, trans people competing unfairly against women in sports, trans people 'colonising' women's spaces like prisons and refuges which place vulnerable women at increased risk of violence, and erasing the integrity and experiences of biological sex (and anatomically fixed ideas of 'same-sex attraction') (Beattie 2022; Gill-Peterson 2021b; Lindsey 2020; Mulready 2020; Taylor 2019).

In Part I, I explore how trauma, anxiety and fear shape the governance, embodiment and critical analysis of sex and gender in society. I begin by detailing how anxiety and fear shape gendered bodies and the individual, interpersonal and institutional policing that entrenches gender norms and prevents gender transgression. I then detail a few individual accounts of trans people to describe how gender dysphoria functions to shape the lives of those who seek social, medical and legal transition for the sex/gender assigned to them at birth and how anxieties shape the institutional (medical, legal, social) environments that respond to experiences of gender dysphoria.

In Part II, I explore how the turn to affirm legal rights for trans and non-binary people functions as a means of alleviating the anxieties described above and cultivates new modes of care. Therapeutic legal interventions take shape in legislative and judicial interventions that begin by recognising the distress and anxiety trans people endure because of misaligned legal recognition. These legal interventions seek to address trans people's anxieties by compassionately institutionalising rights to non-discrimination, privacy and dignity as long as they do not threaten the coherence of gendered governance. By turning to legislative and judicial examples from the United Kingdom (UK), I consider the differential ways trans people are affirmed (or not) within a legal system that values certainty, comfort and closure as a means of foreclosing anxieties about gender fluidity.

In Part III, I explore how newer modes of caring legal recognition for trans people, as exemplified in the depathologised move to self-declared gender, have generated conflicts over the well-being of cis women and girls. Returning to earlier feminist tensions around theorising the relationship between sex and gender, I detail how some women's rights groups have come to perceive self-declaration of gender as the erasure of 'sex-based rights'.¹ By focusing on the recent reforms in Scotland (UK) to make legal gender

¹ The term 'sex-based rights' has no explicit articulation in English law, given exemptions in relation to equalities law are limited to service providers and do not extend to cis women at large.

transition easier through statutory self-declaration, I argue that the emotional grammars of fear and anxiety shape the purpose, content and scope of legislation to enact this form of legal gender recognition and rights to autonomy, privacy and safety underpinning such recognition. Through an affective analysis of parliamentary debates relating to these particular statutory reforms, I map how individual and interpersonal fears and anxieties institutionalise law reform conflicts over legal rights relating to safety, bodily autonomy, non-discrimination as they relate to childhood, access to single-sex spaces, and fraud.

In Part IV, I discuss the normative and political utility of thinking reparatively about the emotional grammars of anxiety and fear in trans law reform. Specifically, I explore how loosening modes of anxious attachments to legal conflicts opens up possibilities to both recognise the limits of law reform and the desirability of new modes of gender self-determination. For example, I argue that the anxieties present in the conflict about 'sex-based rights' and 'self-declared gender' might lead us to 'DIY law' where we decertify sex/gender altogether for the purposes of law (Cooper and Renz 2023). Rather than seeking comfort or closure, I argue that holding analytic space to explore the emotional grammars of anxiety enables scholars, lawyers, legislators, judges and activists to confront individual gendered inequalities and interpersonal concerns about patriarchal violence that detrimentally harm both women and trans people. Navigating individual, interpersonal and institutional anxieties also draws attention to differential risks that affect women, trans and non-binary people alongside their intersectional forms of vulnerability to sexual, state, economic and stigmatic harm. Thinking these fears and anxieties together, without collapsing them or covering over them, might lead to new forms of solidarity between minoritised groups. In other words, as scholars, legislators, lawyers and activists who are emotionally invested in these debates, we might follow the emotional grammars of legal gender recognition to repair individual and interpersonal relationships between cis women and trans people while rethinking institutional possibilities of law.

I – Gendered Traumas and Social Anxieties in Trans Embodiments

Fear and trauma are central to the ways cis women, trans and gender non-conforming people embody sex/gender. Feminist scholars have written extensively about how the phenomenology of being a woman is spatially situated and the embodiment of femininity as private, passive, inhibited, frail, weak, demure are linked to fears women experience in a patriarchal society that subjects them to violence and limits their mobility in social spaces (Ahmed 2006, 59; MacKinnon et al. 2023; Young 1990). The trope of vulnerability is

so culturally embedded in what it means to be (and perceive) a woman. We might think of 'becoming a woman' as 'a loop, tightening' that materialises in response to cultural vulnerabilities (Ahmed 2017, 25). Psychoanalytic approaches to being a woman focus on psychic traumas associated with sexuality and how these traumas shape gendered subjectivity: risks of vaginal penetration, stigmas from menstrual abjection and the objectifications that arise from men's masochistic desires to use women's bodies (Cvetkovich 2003, 56; Irigaray 1985, 30). Bodily processes (menstruation, pregnancy, vaginal intercourse) are materially significant to the experience of, and subordination that comes with, being a woman. Those experiences cannot be appropriated or shared with those who lack such bodily functioning (Cooper 2019a, 16; Raymond 1979).²

These spatial and psychoanalytic conceptions of sex/gender as material – framed through risk and harm – have an institutionalised character. As Judith Butler (2004) observes, being oppressed produces the experience of 'being intelligible' as a gendered subject (30). Living a sex/gender means existing in a language that is not your own and being compelled to present yourself in a way that might be recognisable to others while risking violent social reprobation or state policing if you fail to conform to expected sex/gender standards. The anxieties subtending binary sex differentiation are also features of colonial governance, as colonial states insisted on gendering racialised populations in ways that did not conform to Indigenous knowledges or pre-colonial cultural practices (Hines 2020, 701; Pearce et al. 2020a, 688; O'Sullivan 2021, 7; Snorton 2017, 166; Stabile 2020, 860). The spatial, psychoanalytic and performative aspects of being a woman are anchored in vulnerabilities made visible by individual fears (of rape, pregnancy, social exclusion) and interpersonal anxieties (towards those who threaten binary sex differentiation).

The above discussion uses the conflation of sex/gender deliberately to expose the ways these ideas have been theorised together, even as they pull us in different epistemological and ontological directions. Spatial and performative theories of sex/gender emphasise the cultural markers (sex classifications, social occupations, reproductive roles) and expressions (gender performatives, dress, mannerisms) that delineate men from women (Ahmed 2017; Butler 2004; Hines 2020). Psychoanalytic and biological accounts of sex/gender

² This chapter does not detail the rich and fraught histories that subtend feminist theorising of sex and gender. For more detail on these debates, see Ahmed 2017, Butler 2004, Fausto-Sterling 2000, Fine 2010, Grosz 1994, 2005 and Hines 2020. This chapter also does not deal with the experiences of intersex people, which warrants separate (though overlapping) analysis; see Carpenter 2016 and Greenberg 2006.

tend to emphasise natural forms of existence (reproductive capacities, chromosomal markers, bodily chemistries) as the primary means of distinguishing between men and women (Fausto-Sterling 2000; Fine 2010). Even while 'nature vs culture' debates about defining women remain enduring, we can draw out a shared focus on how individual, interpersonal and institutional anxieties and fears are central to the production and/or experience of being a woman. We can conclude that 'vulnerability is not an inherent characteristic of women's bodies; rather, it is an effect that works to secure femininity as a delimitation of movement in the public' (Ahmed 2006, 70).

These emotions are also present in how trans people embody sex/gender. Expressions of discomfort, trauma and anxiety characterise the clinical diagnosis of 'gender dysphoria'. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision* defines gender dysphoria as a 'marked incongruence between one's experienced/expressed gender and their assigned gender' which results in 'clinically significant distress or impairment in social, occupational, or other important areas of functioning' (American Psychiatric Association 2022).³ Gender dysphoria is often described as a 'sense of estrangement' from, or 'conflict' with, or 'ambiguity' in, one's body as it is gendered from birth (Butler 2004, 5; Green 2021; Giordano 2013, 24; Stone 1992, 10).⁴ In writing about his experience of gender dysphoria, Jamison Green (2004) describes it as a 'struggle consciously with what I called a lie in my existence' where the risk of being perceived as a woman threatened the integrity of his self-image as a man (21). Anxiety and pain materialise in his account of living a dysphoric existence. Juliet Jacques (2015) writes that to be recognised as trans is to experience constant anxiety with people 'telling [her] when [her] posture was too slouched or [her] skirts were too short . . . this made [her] . . . anxious' and 'worr[ied] about how visible [her] facial hair

³ Prior to the adoption of 'gender dysphoria' as a clinical term, trans people who sought treatment were classified as having 'gender identity disorder' (Butler 2004, 76). Many trans activists contested such labelling because it stigmatised gender variance as deviant and positioned their 'wrong' bodies as objects that need to be corrected (Valentine 2007, 274–5). The move towards 'gender dysphoria' in DSM-IV (in 2013) was partially welcomed by trans people because it sought to position the alienation and mental distress trans people faced about their bodies in terms of the way society and others perceived them, rather than as a problem inherent to them (Global Action for Transgender Equality 2017; Rowland 2022, 832). In 2020, the International Classifications of Disease depathologised trans existence as a mental illness (Merelli 2022). Some argue that gender affirming healthcare should not be conditional on dysphoria (Gill-Peterson 2018; Rowland 2022).

⁴ It is important to note that not all trans and non-binary people describe their lives using the model of gender dysphoria. For discussion on gender euphoria, pleasure and transition, see Faye 2022; Global Action for Transgender Equality 2017; Preciado 2018.

was' (167). Green and Jacques describe transition as means of alleviating both pain and anxiety by noting the 'sense of freedom in . . . being recognised at last as a member of the gender category in which we feel most comfortable, and the sense of doing something for ourselves rather than always trying to please others' (Green 2004, 207).

Trans life is shaped by gendered violence and vulnerability at individual, interpersonal and institutional scales. Suicidality and self-harm disproportionately impact trans people who experience misgendering, stigma, vilification, social isolation while internalising desires to 'pass' in societies that refuse to countenance their existence (Ahmed 2017, 120; Butler 2004, 30; Rowland 2022). Trans people endure interpersonal violence in the forms of domestic abuse, sexual assault and hate crime (Goodmark 2013; Spade 2011, 89–90; Stanley 2021, 25–40). Such violence also has an institutional depth as trans people face systemic exclusions and erasures through a denial of appropriate legal documentation, obstructed healthcare, objectification through research, policing in communal spaces or movements, and social stereotypes about gender perversion (Valentine 2007, 204–30; Serano 2013; Spade 2011; Stanley 2021). Such violence is also shaped by racialising logics that 'other' gender non-conformity as a threat to Western social orders and 'pathologise' gender variance as a sickness that differentiates them from 'normal' people (Garza 2019; Gill-Peterson 2021b; Puar 2017; Snorton 2017). These logics especially injure Black, poor and disabled trans people (West 2014). Each of these scales of violence and vulnerability are co-constituted by trans people's fears and anxieties over how they are recognised, and the fears and anxieties of anti-trans people and institutions confronted by that recognition. Trans people fear individual (suicide), interpersonal (hate crime) and institutional violence (denial of healthcare) for failing to 'pass' as their identified gender in ways that shore up normative gender regimes. These fears are refracted against individual (fears about one's own gender fluidity), interpersonal (fears about desiring trans bodies) and institutional (fears about disruptions to normative orders of sex/gender) emotions. Thinking fear and anxiety together demonstrates how they are central to the production of transgender embodiment.

While gender transition is presented by trans people as a means of alleviating some of the fears and anxieties they face at individual, interpersonal and institutional levels, anxieties about medical treatment (particularly in relation to children and young people) militate against enabling transition. While beyond the scope of this chapter, clinical protocols used to treat gender dysphoria have been subjected to anxious scrutiny as opponents of care argue that puberty blockers have unforeseen consequences (due to the absence of longitudinal data on the efficacy of such treatment), cross-sex hormones risk irreversible changes to young people who might later regret transition,

and surgical interventions leave people vulnerable to infection and comorbidities (What We Know Project, 2018).⁵ Responding to the anxieties that trans children are a new social phenomenon and are rapidly changing sex in unforeseen ways, Jules Gill-Peterson (2018) notes ‘sex change’ protocols for young people have existed since the early twentieth century (3). These protocols rely on conceptualising trans identification as a problem while noting the plasticity of a child’s body to medical intervention as a solution for their ‘normalisation’ (Gill-Peterson 2018, 149, 184).⁶ The medicalisation of trans existence evinces how trans bodies become sources of anxiety at both individual (the person who feels at odds with their body) and institutional (a medical establishment that worries about sex/gender transgression) levels. These anxieties are addressed by medical interventions that alleviate the sense of discomfort trans people feel while also soothing the anxieties of a medical establishment as these bodies are transformed into bodies that can ‘pass’ into heterosexual, reproductive and capitalist norms (Butler 2004; Denny 2006, 179; Gill-Peterson 2018; Puar 2015; Serano 2020).

II – Caring Interventions for Trans Rights

Scholarly approaches to gender and medical approaches to gender dysphoria crystallise the relationship between institutional anxieties and institutional forms. Specifically, sex/gender (as they relate to cis women and trans people function affectively as concepts to frame fears of harm in public spaces that operate alongside and serve to heighten anxieties associated with trauma, alienation, intrusion and inequality. These embodied fears and anxieties are core to theorising the forms sex/gender take in spatial, psychoanalytic and performative theories.

I now shift my analytic focus to the register of law to explore how responding to sex/gendered anxieties is critical to the shape of law reform that allows trans people to change their legal sex/gender. As the main case study of this chapter is legal gender recognition debates in Scotland, I focus on British case law to tease out how grammars of fear and anxiety shape the judicial forms of legal gender recognition, which subsequently trigger legislative enactments.⁷ The most widely cited English case concerning the impossibility

⁵ There are ethical and practical difficulties associated with such studies, see Giordano 2013.

⁶ Gill-Peterson’s analysis carefully excavates the racialised relationship between the medicalisation of trans lives and childhood. While it is beyond the scope of the chapter, the analysis of fear and anxiety in relation to trans lives emerge alongside racialised anxieties about bodily purity and kinship.

⁷ In looking between these jurisdictions, I do not mean to conflate them. Scotland is a separate legal system with its own case law and is also a hybrid system with one foot

of changing sex is *Corbett v Corbett* (1971). The case concerned April Ashley (a trans woman) whose partner (John Corbett) sought a decree to void their marriage on the basis it was never legally formalised (as Ashley was registered male at birth and same-sex marriage at the time was not permissible). Justice Ormrod delivered the opinion of the Court, drawing on medical testimony, to hold 'that the biological sexual constitution of an individual is fixed at birth . . . and cannot be changed' (*Corbett* 1971, 104). Despite Ashley's social and medical transition which meant she could be read as a woman in public (she was a celebrated model), this was insufficient to change the 'heterosexual character' of marriage as Ashley could not reproduce biologically (*Corbett* 1971, 106). Social (and medicalised) gender was trumped by the primacy of biological sex for the purpose of marriage. Justice Ormrod fixated on biological characteristics as a means of containing legal fears about inadvertently recognising 'same sex' sexual intimacy which are anticipated throughout his judgment. In *Corbett*, the certainty of biological markers of sex and marriage function as a legal fantasy of 'consistency' to ease judicial anxieties about the risks associated with affirming psychological identifications and social expressions of gender (Salecl 2004, 23; Sharpe 2002, 80). Subsequent case law in the 1980s and 1990s, while sympathetic to the 'distress' of trans people, continued to make anxious reference to 'complicating' the work of government bureaucracies if sex/gender were capable of being registered as something other than what was fixed at birth (*Rees* 1986, [43], *Cossey* 1990, [36]).⁸

In *Corbett*, judicial anxieties about recognising same-sex marriage functioned to eliminate the prospect of legal gender recognition. Cases in recent decades, however, have sought to contest bio-logic of legal sex/gender by drawing attention to the fears and anxieties of trans people who are denied recognition. In *Goodwin v The United Kingdom* (2002), Christine Goodwin explained the individual 'dangers' of being outed as a trans person in a workplace that is hostile towards gender transition (*Goodwin* 2002, [61]). In recognising the precarity of Goodwin's position, the European Court of Human Rights redirected the gravity of risk away from the state (as evident in *Corbett*,

in Roman law. Rather, I read these jurisdictions together to draw out the varying ways emotional grammars of anxiety shape the contours of legal gender recognition.

⁸ *Rees* and *Cossey* are cases involving appeals from trans people in the UK to the European Court of Human Rights. The applicants in these cases argued that, despite medically transitioning, they were still regarded as the sex assigned to them at birth for the purpose of marriage. In their view, this constituted a violation of Article 8 (respect for private and family life) and Article 12 (right to marriage). While the majority in each case dismissed the application, it is noteworthy how both the majority and dissent express considerable sympathy towards the 'plight' and 'anguish' of trans people.

Rees and Cossey) and towards the trans person without legal recognition. The Court held:

The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety. (*Goodwin* 2002, [77])

The judgment foregrounded 'stress' and 'alienation' as traumas that reoccur and, in doing so, fixated the Court's attention on the inadequacy of law. The 'conflict between social reality and law' placed the trans person in an 'anomalous position', and this anomaly was rendered troubling because it exposed trans people to workplace harassment and improper pension/retirement eligibility. The Court drew out individual feelings of 'vulnerability, humiliation and anxiety' to weigh the risks associated with a lack of legal recognition, concluding it was more than a 'minor inconvenience'. Foregrounding the anxieties of trans people, however, was only made possible by the Court's fixation on the 'painful interventions' of surgical transition which evinced 'commitment and conviction required to achieve a change in social gender role' (*Goodwin* 2002, [81]). Trauma materialised individually (from surgery), interpersonally (from workplace harassment) and institutionally (being denied material benefits because of improper legal recognition). Contrastingly, the UK state is unable to trigger the Court's categorical sex/gender anxieties as it failed to demonstrate 'substantial hardship or detriment to the public interest' that might flow from allowing trans people to change their legal sex. These expressions of injury were made visible by judicial grammars of anxiety that stitched harms together (*Goodwin* 2002, [92]). In doing so, these grammars enabled the Court to conclude that Goodwin's Article 8 (private and family life) and 12 (marriage) rights under the *European Convention on Human Rights* (ECHR) had been violated by a lack of legal process to change her sex/gender. We might describe such an intervention as 'caring' because the Court embraced contextualisation over abstraction (treating sex/gender as a material part of identity rather than an abstract biological fact) and relation over separation (focusing on Goodwin's desire to live a dignified life in public rather than remaining isolated) (Clement 1996, 11).

These emotional grammars were also present in *Bellinger v Bellinger* (2003). Much like the earlier English case law, this case involved a trans woman (who had undergone medical transition) unable to marry as she was legally recognised as male. Lord Nicholls detailed the 'misfortune', 'suffering'

and ‘acute psychological distress’ that faced people who are born with physical characteristics that are not ‘congruent’ with their gendered ‘self-belief’ and who undertake ‘painful surgery’ to resolve their ‘turmoil’ (*Bellinger* 2003, 472, 478). Like *Goodwin*, individual traumas drew attention to the consequences of absent legal recognition (being unable to live authentically) and the Court recognised these incoherences as violations of Articles 8 and 12. Yet, the Court’s anxieties about the form of legal recognition related to gender reassignment are also palpable as it discussed the ‘adequate degree of certainty’ needed to prevent the law from entering ‘a state of complete confusion’ (*Bellinger* 2003, 479). Lord Craig added that ‘problems of great complexity’ would arise by inadvertently recognising same-sex marriage as marriage law threaded into areas of taxation, immigration and social security (*Bellinger* 2003, 487). Thus, the Court was unable to construe English marriage law in way that would be compatible with ECHR’s privacy (Article 8) and equality (Article 14) obligations. Judicial anxieties about sexuality and institutional competence were implicated in the Court’s refusal to grant *Bellinger* the relief she sought. Instead, the Court issued a declaration of incompatibility and invited parliament to resolve these anxieties by specifying the appropriate legislative form for legal gender recognition.

Following *Goodwin* and *Bellinger*, the Westminster and Scottish governments legislated the *Gender Recognition Act 2004* (GRA). In the UK, a person can now obtain a change of legal sex through a Gender Recognition Certificate (GRC) if they can demonstrate they have a diagnosis of gender dysphoria and evidence their application with appropriate medical testimony, though they do not need to demonstrate any medical or surgical changes (GRA, Section 3).⁹ Such recognition is conditional on a diagnosis of gender

⁹ This approach to reform is not uniform across the world. Legal gender recognition for trans people in Australia, for example, varies between states. In NSW, the state adopted a surgical model for a change of sex, noting that a person must have undergone a ‘sex affirmation procedure’ (*Births, Deaths and Marriages Act 1995*, Section 32B). In Malta, a change of legal sex can be obtained through a statutory declaration without the need for medical diagnosis while also proscribing forced treatments to ‘correct’ sex/gender (*Gender Identity, Gender Expression and Sex Characteristics Act 2015*, Section 3). Other jurisdictions like Pakistan offer a much broader conception of legal gender recognition by connecting it to the protection of welfare, education, housing and employment rights (*Transgender Persons (Protection of Rights) Act 2018*). However, such reforms should not be romanticised. For example, a recent judgment in Pakistan held parts of the *Transgender Persons (Protection of Rights) Act 2018*, the sections relating to a person’s ability to self-declare their gender, contravened Islamic principles that determine gender through physical or medical characteristics (see Amnesty International 2023). While the statutory differences between, and judicial contestations within, jurisdictions evince a lack of uniformity in approach to legal gender recognition, legal scholars and trans activists emphasise an emerging trend towards

dysphoria with the applicant being an adult who has demonstrated they have lived in their gender for at least two years, prior to the date of application, and intend to remain in that gender for the rest of their life. Thus, this legislative enactment took form through the grammars of anxiety articulated in *Goodwin* and *Bellinger*. Change of legal sex is permissible only where a person can satisfy an independent body (Gender Recognition Panel) that they are suffering (or have suffered) from a recognised medical condition, and they have demonstrated an enduring commitment to present in relation to their ‘acquired’ gender. Obtaining coherence between one’s gender identity and legal documentation manifests to alleviate the anxiety of the trans individual, which then better enables their participation in public life. The presentation of gendered coherence (having lived as the gender for two years and wishing to remain in that gender permanently) also alleviates institutional anxieties that gender might be fleeting or in flux which were concerns in *Goodwin* and *Bellinger*.

Despite the existence of these statutory and bureaucratic mechanisms to change legal sex/gender, sex and gender remain conflated and contested across different areas of English law (marriage, taxation, criminal, parenting, immigration, equalities). For example, trans people who have changed their legal sex are unable to have their prospective parentage recognised in those terms. In *McConnell v Registrar for England & Wales* (2020), the English Court of Appeal decoupled legal sex from the biological experience of mothering to ‘maintain a clear and coherent scheme of birth registration’ and recognise the interests of the child in knowing their biological parentage (*McConnell* 2020, [58]).¹⁰ By holding there was no incompatibility with Article 8 or the *GRA*, the Court held that Freddy McConnell had to be regarded on the birth certificate as a ‘mother’ even though he was a legal male at the time of giving birth.

The position is similar for non-binary people in the UK. In *Elan-Cane v Secretary of State for the Home Department* (2018), Christie Elan-Cane sought to obtain a passport from the UK Home Office which did not specify Elan-Cane’s gender and argued that denying this request was a breach of their Article 8 (ECHR) right to respect for their private (non-gendered) life.

states respecting self-declared gender (including non-binary gender) as compliant with their human rights obligations under international law (Dunne 2015; Faye 2022; Renz 2020; Sharpe 2020; Spade 2006).

¹⁰ This case affirmed the High Court’s earlier holding that being a mother refers to the specific experience of giving birth, ‘as the attribution of motherhood is a consequence of the individual’s unique role in the biological processes of pregnancy and birth’ (*TT* 2019, [135]). In doing so, the Court decoupled mothering from gender.

The English High Court acknowledged the ‘strong personal interest’ Elan-Cane had ‘in gaining full legal recognition’ with a passport that listed their gender with an ‘X’ marker (*Elan-Cane* 2018, [113]). However, Elan-Cane’s ‘strong emotions’ did not counterbalance the ‘good governance’ of having consistency across law and policy with respect to sex/gender (male/female) categories (*Elan-Cane* 2018, [119]). The Court found no violation of this right.¹¹ By characterising Elan-Cane’s feelings as individually significant but not institutionally relevant, the Court diminishes the value of Elan-Cane’s gendered autonomy. It figured Elan-Cane’s experience of not having an ‘X’ on the passport as an alienating personal slight rather than a systematic undermining of one’s private life. This point was tightened on appeal to the Court of Appeal where they held that, unlike *Goodwin*, the denial of an ‘X’ gender marker on their passport did not amount to a far-reaching intrusion into Elan-Cane’s personal life. Instead, the Court noted worrying implications for policy ‘coherence’ across other areas of law, and current ‘lack of consensus’ among European states on this issue, which taken together militated against obliging the state to grant non-binary recognition (*Elan-Cane* 2020, [105, 108]). On a final appeal within the domestic context, the UK Supreme Court noted that it was ‘difficult to accept that a particularly important facet of the appellant’s existence or identity [was] at stake’ because passports, in their view, were not foundational to a person’s existence (*Elan-Cane* 2021, [57]). The Court embraced caution to avoid entering into ‘policy-making’ that could disrupt a ‘coherent approach across government’ to the registration of sex/gender in areas like security and immigration (*Elan-Cane* 2021, [62]).

Judicial anxieties over compromising the integrity of the birth registration system or the coherence of state bureaucracies functioned to sustain a ‘proportionality’ analysis that gave a wide margin of appreciation to the UK in justifying its refusal to properly recognise trans parents and non-binary people. Unlike *Bellinger*, the courts here made no declarations of incompatibility. In *McConnell* and *Elan-Cane*, trans people’s individual anxieties over how improper legal recognition invalidates their existence were subordinated by institutional anxieties about maintaining a coherent gendered system of governance.

Despite the anxious judicial and policy desire for institutional gender coherence in *Elan-Cane* and *McConnell*, these cases make clear that coherence is fictive. There is no consistent or uniform definition of binary sex or

¹¹ The case also raised issues relating to Article 14 (ECHR) but these were subordinated to the primary Article 8 claim, and as such, no violation with respect to this article was found (*Elan-Cane* 2020, 2021). At the time of the appeals, the British government was also considering options on non-binary legal gender recognition. This work has stalled.

gender in English law (Cowan et al. 2021, 77). As Sharpe (2002) observes, early forms of law reform directed at affirming legal gender transition were ‘dysphoric’ to the extent there were gaps, fissures and misalignments across different areas of law (4). On one hand, the ‘biologic’ focus of marriage jurisprudence (which focused on chromosomes and genitals to determine sex) as evident in *Corbett*, *Cossey* and *Rees* limited more fluid conceptions of sex/gender and how they map onto to the physical body. On the other hand, a ‘psychologising focus’ on addressing bodily anxieties and changing anatomical features to bring them into ‘harmony’ with one’s gendered subjectivity was evident in *Goodwin* and *Bellinger*. These latter cases disestablished the assumption of an inherent biological gender identity by substituting what was assigned at birth with the transition one undergoes (Sharpe 2002, 80). This was done without necessarily presuming that biological sex and legal sex were the same. What connects these ‘dysphoric’ legal approaches to legal recognition is the emphasis on the need to harmonise the consequences of legal and bureaucratic systems as they relate to gender transition. This means rendering gender/sex coherent and consistent regardless of whether a biologic or psychological focus is adopted. Gender harmonisation does not countenance bodies that transgress normative categories of parenthood or binary gender/sex, as evident in *McConnell* and *Elan-Cane*.

While medical norms came to dominate the treatment and recognition of transsexuality from the 1950s, ‘transgender’ emerged as a term in the 1990s to organise a politics of gender variance that resisted medical categorisation and to create space to recognise bodies based on their expressions or identities rather than diagnoses (Currah 2006, 21; Valentine 2007, 33). Law reforms that focus on ‘performativities’ of trans life (examining the aesthetics and behaviours of trans bodies) reproduce anxieties about gender expressions (clothes, speech, mannerisms) where trans people are forced to overperform their gender expressions to alleviate the anxieties of decision-makers who might otherwise question the authenticity or veracity of their presented gender (Humphrey 2023, 267; Sharpe 2002, 159; Yuracko 2016, 103).¹² As we can see from the *GRA*, even a mode of legal recognition that attenuates the relevance of anatomy or surgery relies on grammars of anxiety: individual trans people must anxiously justify the ‘truth’ of their gender identities and ‘authenticity’ of their gender expressions in response to the anxious

¹² The resolution of transgender discrimination claims relies on judicial registrations of trans pain in relation to their gender status. As Kimberly Yuracko (2016) argues, the pain burden on trans people complying with a grooming standard related to a sex assigned at birth is seen as distinctive to the (allegedly more trivial) pain of cis persons having to comply with assigned gender stereotypes (98).

scrutiny of adjudicators, in ways not expected of cis people who are assumed to be the gender they present to the world (Camminga 2020, 828, Mitchell 2023, 323). Even where claimants justify their individual gender anxieties clearly, as evident in *McConnell* (trans man who gave birth) and *Elan-Cane* (non-gendered person), gender disruptive subjects remain outside the zone of legal protection because they place institutional categories (parenthood, data binaries) at risk of confusion (Baars 2019, 47; Grabham 2010, 120; Yuracko 2016, 6).¹³

Transgender jurisprudence varies across jurisdictions, but the key trans law reform cases discussed above materialise judicial anxieties and fears that can only be subdued by legal coherence.¹⁴ For example, the form of legal recognition considered in cases like *Goodwin* and *Bellinger* privileged an ontological inquiry (examining the relationship between psychological and anatomical features of specific bodies). In doing so, these cases sustained anxieties about sexing/gendering bodies by insisting ‘authentic’ trans people change their body morphologies to harmonise them within a logic of heterosexual desire/reproduction (*Bellinger* did this while caveating that it required parliamentary reform). Recognising these bodies in terms of their medical transition was key to alleviating judicial anxieties about threats to the institutional coherence of binary sex. This emotional grammar of anxiety shaped the judicial form of subsequent cases like *Elan-Cane* and *McConnell* where anxieties over maintaining the coherence and integrity of state governance systems subordinated the anxiety and integrity of trans individuals who had forms of legal recognition that were inconsistent with their bodily and psychological realities.

Anxieties about fraught conceptualisations of sex/gender materialise in critical trans legal scholarship and critical feminist engagements with sex discrimination law. Feminist and trans legal scholars note that sex-stereotyping and gendered forms of harassment do not depend on the possession of specific genital or chromosomal attributes, but rather these types of discrimination take shape through criteria, norms and practices that sexualise,

¹³ Binary distinctions of legal sex and fixed ideas of parenthood can cause enormous discomfort to trans individuals. The insistence that a person uncomfortable in their assigned gender must ‘transition’ to an opposite one or accept unchangeable biological facts of their sex assigned at birth risks reproducing binary ideas of biological sex that further the suffering trans people experience in the first place (Cooper 2019a, 21; Giordano 2013, 110).

¹⁴ The analysis of case law in this chapter focuses on key precedents/doctrines of English law, so it is important to acknowledge the existence of emerging English case law in relation to trans healthcare, discrimination and data collection that evince different perspectives and anxieties. I am grateful to Peter Dunne for noting this point.

objectify, degrade, inhibit and punish those (cis women, trans, non-binary, queer people) who do not meet white heteropatriarchal capitalist standards of gender (Case 1995; Cowan et al. 2021; MacKinnon et al. 2023; Olufemi 2020; Renz and Cooper 2022; Sharpe 2002; Spade 2003). In doing so, such critical scholars query the extent to which a person needs to belong to a formal (and unchanging) legal class of sex for law to remedy the gendered inequalities they face at home, work and in other areas of social life (Cooper and Renz 2023, 3; Grabham 2023, 71; MacKinnon et al. 2023). This has prompted legal interventions to loosen state formalisation of gender and to allow greater recognition of gender fluidity, a topic that has been the subject of recent conversations to allow people to transition and self-declare their gender.

III – Feeling the Risks and Harms of Legal Gender Recognition

Drawing on evolving jurisprudence and international human rights norms, trans activists and legal scholars emphasise the legal responsibility of states to provide clear, accessible mechanisms to change gender on legal documents to better enable social/economic participation and provide individual validation (Dunne 2015; Global Action for Transgender Equality 2017; Gevisser 2020, 386–404; Smith et al. 2023). Self-declaration is a model that achieves dignity, clarity and simplicity. Yet, debating proposals for this reform (re)circulates the fears and anxieties described above, as institutions grapple with the imagined risks and harms associated with demedicalising the process of gender transition. Most vocally, some feminist and several right-wing groups claim that ‘trans ideologies’ risk harming cis women and girls who will be forced to share their intimate spaces (changing facilities, toilets, refuges) with ‘men’ (Cooper and Emmerton 2020, 15–16; Nash and Browne 2020, 137–43). The proliferation of anti-trans legislation, such as the numerous conservative bills to define sex in biological terms and restrict young people’s access to gender affirming healthcare in various states of the United States (US), exemplify legislative attempts to alleviate social anxieties about trans existence (irrespective of reform proposals to self-declare gender) by erasing trans people from public life (Grant 2020; Gill-Peterson 2022).¹⁵

While noting how fears underpin debates between communities, reform to enable self-declaration of gender is characterised as a hopeful and ‘positive

¹⁵ It is worth noting, as recent ‘gender critical’ litigation in England makes clear, some people view sex as an unchanging biological characteristic irrespective of legal sex and this ‘belief’ is capable of being protected under s10, *Equality Act 2010* (see *Forstater* 2021). However, the protection of this belief does not extend to its manifestation in ways that constitute harassment (see *Mackereith* 2022).

step' within the transgender community itself (Global Action for Transgender Equality 2017; McCormack 2022). However, moving to depathologise legal recognition for trans people is also contentious for some trans people. To speak of 'transgender communities' is to articulate a set of cultural practices and labours of bodily transformation, as well as differently gendered people, who cannot be homogenised (Azhar 2017; Denny 2006, 184–5; Valentine 2007, 104). Some who identify as 'transsexual' embrace narrow diagnostic criteria and seek to comfortably 'pass' as either a man or woman or as a culturally specific 'third gender' (Azhar 2017; Denny 2006, 179). Others who identify with the sign of 'trans' and its evolving identity variations (genderqueer, genderfuck, non-binary, agender, pangender) embrace an 'impure politics' and (re)imagine recognition and citizenship in terms that do not conform to binary sex/gender or cultural expectations of the state (West 2014, 35). Alternatively, some who embrace gender self-determination are wary of legal proposals that decouple the body from trans rights, or that reinforce binary sex categories, as these interventions risk obscuring the diversities of trans lives and the need for material support (medical, social, economic, psychological) to enable trans lives to thrive (Dietz 2018, 194).

I take these contestations as a departure point, and now turn to explore how emotional grammars of anxiety and fear shape the contours of statutory gender recognition reform in Scotland by following conceptual anchors of debate. These anchors included childhood, single-sex services and spaces, healthcare, reflection periods (and detransition), data collection, fraud and speech. While the reforms have been stalled by intervention from the UK government, the statutory reform process illuminates how anxieties and fears, particularly over children, single-sex spaces and fraud (the focus of this chapter) contour possibilities of legal recognition.

Following the release of the National LGBT+ Action Plan in 2018, the British government committed to update the *GRA* with a view to allowing people to self-declare their gender (UK GEO 2018).¹⁶ While consultation on the reform was received largely positively by the public (with over

¹⁶ Reform to self-declare gender was recommended as part of earlier policy work on improving transgender equality, see UK House of Commons Women and Equalities Committee 2015. While the original proposal for consultation would allow people to self-declare a gender, the only genders capable of being declared were those of male or female. No scope existed in the original proposal for the recognition of non-binary identities (so this would not have resolved the issue raised in *Elan-Cane*). However, it is worth noting that there has been some limited movement in other areas of law in the UK to recognise the discrimination facing non-binary people and the need to address it (see *Taylor* 2020). For jurisprudence that affirms the registration of non-binary gender (in New South Wales, Australia), see *Norrie* 2014.

60 per cent of respondents supporting the change), the intensity of the legislative consultation debate led to reform proposals being withdrawn in England and Wales.¹⁷ Scotland, however, persisted with a self-declaration legislative proposal as gender recognition remained a devolved matter. The Scottish government, represented by Shona Robinson MSP, introduced legislation in March 2022.¹⁸ During the Scottish consultation, most respondents identified ‘the case for change as being clear and pressing, with the current system in desperate need of reform’ (SPICe 2022, i). When introducing the bill to reform the process, the Scottish government referenced these consultation responses alongside their commitment to ‘improve the process’ of gender recognition as the ‘current system can have an adverse impact on applicants, due to . . . [its] intrusive and lengthy process’ (Scottish Government 2022b, 12). It is a process that causes ‘unnecessary anxiety and pain’ and risks ‘re-traumatising’ those who have to share their trauma with others to be recognised (Cole-Hamilton MSP, Adam MSP SP OR 27 October 2022, col 85, 94). The Scottish government presented gender identity as a privatised individual experience (which a person can self-declare) while recognising the state must take public responsibility to recognise, protect and defend this individual identity in the name of state equality objectives (institutionalised through gender recognition reform) (Cooper 2020a; Scottish Government 2022b; Robinson MSP, SP OR 27 October 2022, col 69).

In the analysis that follows, I examine the legislative contestation and amendments to the Scottish proposal to depathologise gender recognition. Unlike jurisdictions like the US or UK mentioned previously, this sub-national jurisdiction is perceived as being the ‘best place to be trans’ and such reforms are a purportedly inevitable consequence of such a trans affirming society (Cowan 2020). In its original form, the bill sought to remove the need for a diagnosis of gender dysphoria, reduce the age of eligibility from eighteen to sixteen, reduce the period of ‘living in acquired gender’ from two years to three months, introduce a three-month ‘reflection period’ after making an application, and placed a duty on the Registrar General to report on issued GRCs (*GRR (Scotland) Bill 2022* (Stage 1)). The bill was subject to parliamentary hearings and review by the Equalities, Human Rights, and Civil

¹⁷ Registrations and changes of sex vary across different legal documents. For example, jurisdictions like England and Scotland already permit changes to sex markers (subject to different sets of conditions) on passports, driving licences and other government documents without formally changing one’s birth certificate (see also Pearce et al. 2020a, 679).

¹⁸ She was the then Cabinet Secretary for Social Justice, Housing and Local Government in Scotland who had portfolio responsibility for the GRR.

Justice Committee (EHRCJC) which resulted in a majority of the Committee recommending the bill to parliament in October 2022. The bill was subject to intense debate and hundreds of amendments were tabled during its Second and Third Stage phases, between October and December 2022.¹⁹ By tracing the emotional grammar of anxiety and fear in these debates, I explore how these emotions contour the ultimate shape of gender recognition legislation which is anchored by fears over its ‘unintended consequences’. The introduction of over 100 amendments was designed to alleviate the ‘unpredictability’ of reform for children, and address concerns regarding single-sex spaces/services, healthcare, detransition, data collection, fraud and speech (Gosal MSP, SP OR 27 October 2022, col 81; Hamilton MSP SP OR EHRC 22 November 2022, col 29; Scotland EHRCJC 2022, 112; Scottish Parliament 2022a, 2022b, 2022c).²⁰ In doing so, the legislative debates and statutory amendment processes function as a kind of ‘paranoid reading’ (discussed in Chapter 1), which seeks to unmask, and make ‘knowable’, dynamics of gendered power and sexualised risk. I illustrate this by following the legislative debate’s conceptual anchors as they related to children, single-sex spaces and fraud.²¹

Children

Children (who may or may not be trans) materialise in legislative debates as conceptual figures that generate anxieties for non-trans adults. When the GRR was introduced, it only allowed those age sixteen and over to seek a change of legal sex (Scottish Government 2022b; GRR Bill 2022). In seeking to pause legislation in relation to young people, MSPs described the need to ‘reflect on emerging evidence on services’ and ‘consider the reasons behind the high proportion of young women [*sic*] who apply’ for this ‘profound change’ (Baker MSP, Reagan MSP SP OR 20 December 2022, col 48, 64). Roddick MSP claimed that ‘for some young people, this [was] a transient phase’ and suggested caution as ‘the number of children who believe themselves to be in the wrong body rises exponentially’ (SP OR 20 December 2022, col 54–5). This echoed concerns raised in the

¹⁹ Debate on the legislation did not reproduce partisan lines, as each ‘side’ in bill debate were drawn from across the political spectrum of Scotland.

²⁰ The GRR debate also captured anxieties in relation to the position of people seeking asylum who might not ordinarily be resident in Scotland, the impact of waiting periods for those with terminal illnesses, interim GRCs issued to those who are in marriages or civil partnerships, and regulatory powers under the Act. However, as these are not significantly contested during the debate, I do not analyse conversations and amendments to these.

²¹ While the bill was passed by an 86–39 majority, it was blocked by the British Government.

first stages of debate, where reform ‘risk[ed] removing the safeguards and clinical support’ available to children (White MSP SP OR 27 October 2022, col 103).

In this debate, figurative children are legislatively produced through grammars of anxiety that construct them as confused, vulnerable, strange and prone to contagion. For example, the emergence of ‘rapid onset gender dysphoria’ in some outlying clinical circles describes the rise in teenagers seeking to transition.²² This diagnosis, which is gestured to when debating the inclusion of young people in the legislation, functions by projecting clinical anxieties about children’s vulnerability onto trans teenagers (particularly those assigned female at birth) claiming they are experiencing unwanted sexualisation and exposure to internet sources encouraging them to transition (Ashley 2020, 780; Gibson MSP SP OR 20 December 2022, col 54; Scotland EHRCJC 2022, 41). ROGD is also associated anecdotally with fears that young lesbians are transitioning ‘straight’ to overcome the disgust or dissatisfaction they have with their queer desires. Yet, as Florence Ashley (2020) observes, such anecdotal worries do not evidence widespread lesbophobia contributing to transition (787). Others note how some ‘gender critical’ feminists argue that gender affirming healthcare is, regardless of age, a form of ‘conversion therapy’ for lesbian and gay people (Carrera-Fernández and DePalma 2020, 752).²³ Within the GRR debate, these projections about ROGD functioned as an anxious mode of attachment to the figure of a child who sought to transition (socially, medically, legally), and these children were figured queer to an institutional order that valued careful reflection, maturity and ‘growing up straight’ (Stockton 2009, 6).²⁴ MSPs who supported reform sought to alleviate these anxieties by drawing out how ‘changing one’s legal gender is not something one does on a whim’ and claimed that setting the appropriate age at sixteen ‘align[ed] with comparable rights and responsibilities’ they have under Scots Law as they can already make decisions to get married, enlist in the army, etc. (Chapman MSP SP, Robinson MSP OR 20 December 2022, col 62, 69).

These anxieties directed at risky and harmful decisions resulted in a change to the original bill to create special eligibility rules for minors.

²² During the debate, some MSPs draw attention to the lack of clinical care available to young trans people who are waiting years for treatment (Cole-Hamilton MSP SP OR 20 December 2022, col 46).

²³ I take up broader arguments over the various forms and harms of ‘conversion therapy’ in the next chapter.

²⁴ Judicial anxieties over childhood, gender transition and the capacity to make ‘irreversible’ decisions have formed the basis of recent contested decisions in England about young trans people’s access to puberty blockers and cross-sex hormones (see *Bell* 2020, *Bell* 2021).

Enforced reflection periods became an institutional (legislative) container for individual anxieties that deemed young trans people incapable of making informed (or, at the very least, patient) decisions.²⁵ MSPs persistently articulated their anxieties about the (lack of) maturity and capacity of sixteen- and seventeen-year-olds to legally transition gender. This resulted in the Scottish government amending the original bill to include a specific waiting period of six months for young people who wish to make an application and required them to disclose that they have sought advice from an appropriate adult prior to making an application for a GRC (*GRR (Scotland) Bill 2022* (Stage 2), section 3A).

Waiting periods are closely linked to the fears that young people might wish to 'detransition'. Even though detransition rates are low, significant legislative space was made to 'change your mind' by figuring the hypothetical young person who regretted the choice to transition and then feared potential criminalisation because they 'chang[ed] [their] mind' as the bill makes it an offence to fraudulently obtain a GRC (Scotland EHRCJC 2022, 56; *GRR (Scotland) Bill 2022* (Stage 1), Section 22A). However, while noting the fact detransition is not commonplace, detransition need not always be conceptualised in terms of 'regret' or 'risk' as it encapsulates different journeys of gender identity which do not always follow a linear path (Hildebrand-Chupp 2020, 806, 812). These legislative restrictions are 'condescending' to young trans people because the temporal obstacle (waiting period) functions to institutionalise legislative anxieties of young people (and adults) who might change their mind about being trans (Scotland EHRCJC 2022, 32). Permanence is core to the norm of legal gendered subjectivity advanced here, as it refuses fluidity, flux and evolution (Grabham 2016, 135; 2010, 109). In doing so, institutional anxieties about preventing the harm (of a regretted gender transition) were contained by legislation that mandated young people wait.

²⁵ In some jurisdictions, anxieties about gender uncertainty and fantasies of child sexual violence result in legislative proposals to altogether eliminate gender affirming healthcare for minors (see Gill-Peterson 2021a). In contrast, courts in Australia have come to recognise that medical interventions can support the welfare of children and acknowledge that young people are capable of making informed decisions about such interventions (see Kelly 2014a, 2014b, 2016). In the case of medical transition, fears over childhood regret persist which is why psychologists are invited to present evidence not only of the enduring character of a child's trans identification but also the ease by which they might detransition if they change their mind (for example, when using puberty blockers) (Mitchell 2023, 330; Raj 2020a).

Single-Sex Services and Spaces

Much of the debate centralised questions of risk and harm through a fearful figuration of violent men who would use ‘loopholes’ created by statutory self-declaration to insidiously use single-sex services or enter spaces reserved for women. This was apparently the case even though, under existing law, trans people did not require GRCs to gain entry into single-sex spaces like women’s bathrooms or women’s refuges (though this has been made uncertain with recent Scottish cases discussed below). The Scottish government made explicit their commitment to leave single-sex rules under the *Equality Act 2010* (EA) unchanged (Robinson MSP SP OR 27 October 2022, col 114). Yet, fears about the integrity of single spaces organised the debate, which were typically expressed in vague terms, where ‘unintended consequences for women and girls, vulnerable young people and the trans people [were] deeply alarming’ and cis women would respond by ‘avoiding or removing themselves from danger’ (Hamilton MSP, Marra MSP SP OR 27 October 2022, col 81, 105). This framing echoes the cultural norms discussed earlier in the chapter that render women perpetually as figures of vulnerability.

MSPs opposing the reform described how it was a ‘safeguarding nightmare’ and would ‘open to biological males a whole range of services’ (Gibson MSP SP OR 21 December 2022, col 164; Whittle MSP SP OR 27 October 2022, col 70). This risked ‘bad faith actors’ or ‘predatory men’ who might seek to obtain a GRC and ‘insist on using or getting access to female-only changing rooms, rape shelters, healthcare services and women’s prisons’ (Hamilton MSP SP OR 27 October 2022, col 79–80; Hamilton MSP SP OR EHRC 22 November 2022, col 43). The result would ‘increasingly blur the distinction between men and women’ and be a ‘breach of the sanctity of single-sex spaces’ (Mason MSP, Gosal MSP SP OR 27 October 2022, col 99, 113).

Trans presence in single-sex spaces is sexualised by legislative grammars of fear that connect trans women’s bodies (as perpetrating injury) to cis women’s bodies (as experiencing injury). Exceptions to the EA that allow single-sex services or spaces evoke these grammars by seeking to displace the (threat of a) trans body by elevating the (fears of a) cis female body.²⁶

²⁶ Schedules 3 (26–8) and 23 (3) of the EA make it permissible to exclude a trans person (with or without a GRC) from a single-sex service or communal accommodation where the exclusion could be justified as a ‘proportionate means of achieving a legitimate aim’. Most providers of single-sex services already operate on a self-declared basis (Sharpe 2020, 546). See also Cowan et al. (2021) for corroborating analysis while Foran (2022) disputes the correctness of this argument.

Even MSPs who supported reform recognised the ‘inherent fear and anxiety that many women so often feel about their personal safety in society’ and ‘fears’ directed to ‘predatory and abusive men’ (Cole-Hamilton MSP, Robinson MSP SP OR 27 October 2022, col 86, 116). As Cooper and Robyn Emmerton (2020) note in their interviews with people who are anxious about ungendered spaces, ‘separation through physical barriers reflects, and so normalises, social and cultural anxieties about contact (haptic, but also optic and sometimes aural) that is cross-sex, between strangers, and intergenerational’ (14). MSPs like Hamilton, Gosal, Marra and Whittle who opposed reform coupled their individual anxieties about porous gender boundaries (self-declaring gender without external verification) and physical boundaries (doors to a bathroom, confines of a doctor’s office) and, in doing so, institutionalised their fears of men’s violence against women. These fears worked to tighten the legislation through the introduction of further amendments to make GRCs conditional on satisfactory security checks (Findlay MSP SP OR 20 December 2022, col 199). MSPs argued for tightening the scope of reform because men might pretend to be women (using the GRC) to gain their trust and then abuse them (Findlay MSP SP OR 20 December 2022, col 200). MSPs like Greene, Robinson and Duncan-Glancy who supported reform also shared their individual fears about men’s persisting violence against women but alleviated these fears by separating (legitimate) anxieties about the need for secure (single-sex) physical boundaries from (illegitimate) anxieties about porous gender ones. They made clear that men’s access to women, to exploit and abuse them, was not conditional on possessing GRCs.

However, while several amendments relating to single-sex spaces were unsuccessful, anxieties about undermining single-sex spaces gained such currency throughout the debate that it prompted legislative tightening through the incorporation of a ‘for the avoidance of doubt’ amendment designed to alleviate anxieties. This amendment excluded any impact of reform on the *EA (GRR (Scotland) Bill 2022* (Stage 2), Section 15A; Robinson MSP SP OR EHRC 22 November 2022, col 60).²⁷ In doing so, MSPs made clear that the exceptions contained within the *EA* could be used to exclude trans women (or those pretending to be trans women) where it was a ‘proportionate means of achieving a legitimate aim’ (*EA*, schedules 3 and 23).

²⁷ During the debate, amendments were made to add ‘for the avoidance of doubt’ in response to specific provisions of the *EA*. However, these were rejected on the basis that to riddle the GRR legislation with piecemeal exceptions, as opposed to having an overarching exclusion contained in Section 15A *GRR Act (Scotland) 2022*, would only serve to add ‘confusion and opacity’ (Robinson MSP SP OR EHRC 22 November 2022, col 66; Robinson MSP SP OR 21 December 2022, col 59).

During the debate, MSPs advocated the need for clarity in reform or risk ‘inviting legal challenges to clarify contradictions that we as legislators will have created’ (Choudhry MSP SP OR EHRC 22 November 2022, col 51). Litigation aimed at ‘clarifying’ the relationship between sex and gender in the *EA* is ongoing because of interpersonal anxieties (that materialise between pro-trans and ‘gender critical’ activists) over the scope of exceptions to anti-discrimination law that permit the exclusion of trans women from women’s spaces. Such litigation, manifested primarily through judicial review, produces anxieties as equality practitioners become ‘anxious about the risk of litigation’ due to routine challenges to policies that encourage the inclusion of trans women (Emerton 2023, 102). This can be ironically juxtaposed with the views of some MSPs who argued during the GRR debate that reform to depathologise gender would ‘risk legislating in a way that [made] it harder for service providers’ (to exclude trans women) and this would result in remedial ‘court action’ (Hamilton MSP SP OR EHRC 22 November 2022, col 40; Thomson MSP SP OR 22 December 2022, col 58). Arguments concerned about the interaction of different legislative objects (*GRA* and *EA*) – generated through legislative and litigation fears of contact between them – worked to connect them.²⁸ Fear ‘work[ed] to link those objects together’ through the act of displacing one against the other (Ahmed 2006, 66).

Debates on how trans people might corrupt the ‘integrity’ of single-sex spaces or services are not new. Many radical feminist spaces (shelters, conferences, communes, festivals) from the 1970s had rules allowing only ‘women born women’ into their spaces (Califa 1997, 86; Koyama 2020, 741; Serano 2013, 48–69; Williams 2020, 723). This is echoed during the GRR debate, as one MSP observed that men have engaged in ‘flashing and voyeurism in single-sex spaces’ and there are ‘violent offenders and sex offenders in women’s prisons’ (Reagan MSP SP OR 21 December 2022, col 64). MSPs opposed to the reform framed the risk of violence by spatialising encounters between vulnerable women and abusive men in single-sex spaces and, in doing so, ignored the differences between each of these spaces. Shelters and prisons were conflated as safe spaces for women (when men are not present). By positioning single-sex spaces as zones of safety from men, the anxiety-alleviating heterosexist logic erased women’s perpetration of violence, for

²⁸ As Flora Renz (2023) notes, the *GRA* and *EA* use different definitions of what it means to change legal sex/gender (45) (see also *Craft* 2003). Sharpe (2020) echoes this analysis noting, ‘the *GRA* does not, nor was it ever intended to, have consequences for equality law’ (552). However, this boundary is rendered increasingly porous by anxious litigation that seeks to connect them through the displacement of the *GRA* by the *EA* (see *For Women Scotland* (2023)).

example, within lesbian relationships or women-only spaces (Robson 1990). This logic also occluded domestic inequalities, racialised economic exploitations, and state violence sustained by an anxious fixation only on exceptional forms of interpersonal violence between men and women (such as flashing or sexual assault in public spaces) (Bromwich 2023; Pearce et al. 2020a, 681; Spade 2011, 89; Stanley 2021, 88; Suk 2009).

These occlusions are entrenched throughout the GRR debate as MSPs opposed to the legislation spoke repeatedly of ‘predatory’ and ‘violent’ males who ‘endanger[ed] women especially at shelters for victims of domestic and sexual abuse’ (Gosal MSP, Hamilton SP OR 22 December 2022, col 54, 37).²⁹ The sexualisation of both ‘authentic’ trans people and those perceived as presenting fraudulently as transgender (as potential predators) eclipsed the vulnerabilities of trans people to coercion and abuse by those who claimed they were ‘protecting children’ or ‘protecting women’ (Carrera-Fernández and DePalma 2020, 748; Gill-Peterson 2021b; Gibson MSP SP OR 21 December 2022, col 163). In other words, the actual stigma or discrimination trans people face in these spaces was subordinated through a legislative rhetoric which preferred to elevate the hypothetical risks to children or women in these spaces. A hierarchy emerges here in who is legitimately able to experience fear: some cis women’s hypothetical fears of harm are legislatively prioritised over the fears (and humiliations) trans women experience when using public spaces.

Fears of gendered harms were co-constituted throughout the debate by making visible ‘past histories of association’ between gender, risk and public spaces (Ahmed 2006, 66). This is apparent in how public bathrooms, for example, are spaces projected as extensions of the female body, ones rooted in histories of trauma, abuse and harassment which need to be vigilantly patrolled as if it were one’s own body (Jones and Slater 2020, 835; Juang 2006, 247). Rather than effect safety for women, individual anxieties that lead to gender policing are institutionalised in bathrooms where users (women) are encouraged to monitor gender conformity and expel ‘wrong bodies’, which means trans women, butch women and non-binary people risk abuse in such spaces because they risk discomforting the ‘right kind’ of (cis white) women (Jones and Slater 2020, 842; Sharpe 2020, 466).³⁰ Meanwhile,

²⁹ In one example, an MSP describes the brutal rape and murder of a woman (at home) by a man who had changed his name. In doing so, not only are name changes and gender changes conflated, but the conditions enabling this violence are anxiously framed solely in terms of identity fraud (Findlay MSP SP OR 20 December 2022, col 101).

³⁰ Scotland EHRCJC (2022) notes that some (religious and ethnic minority) women might ‘self-exclude’ from such spaces or services because they are anxious about who (trans

despite the fears articulated by some legislators, public bathrooms pose no greater risk of sexual violence to gender conforming cis women in the context of gender recognition reform as most sexual violence takes place within the home (Fileborn et al. 2019; Hasenbush et al. 2019; Jones and Slater 2020, 839; Scotland EHRCJC 2022, 68; Suk 2009).³¹

Coercive institutions privilege gender segregation as a means of enforcing compliance with social norms (Spade 2006, 227).³² We can see this policing logic materialise in debates about prisons, shelters, bathrooms and sporting events that insist sexual differentiation for certain activities or spaces are necessary to address fears of biological domination (Background Briefing 2020; Briggs 2018; Cooper 2019a, 17).³³ Non-binary people are necessarily erased from these conversations. Indeed, in the context of non-binary people, the original reform crystallised some of the anxieties about disturbing a gendered system of governance, recognising the ‘significant’ legislative and resource implications with administrating non-binary recognition (Scottish Government 2022b, 22).

Anxieties about trans bodies as specious or threatening mirrored those directed towards gay people. As Greene MSP noted:

I cannot help but feel an air of sadness at some of the arguments that have been used against the reform of gender recognition, which are often, word for word, the same arguments that were used against the age of consent, against gay rights, against same-sex marriage and against same-sex adoption – words that, decades later, are being used to justify academic arguments about why the bill and those who support it are wrong. (Greene MSP SP OR 27 October 2022, col 91)

By drawing the arguments about risk and harm together – noting the social anxieties that underpin these logics – Greene MSP reminds us how

women) might be using them (69–70). See also Mason MSP SP OR 21 December 2022, col 44.

³¹ In the GRR debate, some evidence was tendered on the rise of sexual violence offences in Denmark following ‘self-ID’ legislation, which noted anxieties over the absence of clear data to determine the role (if any) of legal gender recognition on this type of violence. This pointed to the need for clearer data collection practices (Boyack MSP SP OR EHRC 22 November 2022, col 77). However, large empirical studies like the one done by Hasenbush (2019) show next to no risk across populations. I discuss this further below.

³² Single-sex spaces like prisons remain subject to specific risk assessment policies and the capacity to live as one’s gender in these spaces remains severely restricted (Davis 2011; Green 2013; Scotland EHRCJC 2022, 73).

³³ Gender codes vary between different types of sports and across recreational and elite levels, see Scotland EHRCJC 2022, 77–8).

sexualised projections about invasion, corrupting children and erasing biology function to curtail legal recognition. The emotional logics of fear and anxiety once used to deny same-sex relationship recognition are repurposed to deny transgender recognition. These fears of risk and harm are tethered to the idea of fraud, where an individual is more likely to fabricate their gender identity for the insidious purpose of accessing single-sex spaces reserved for women.

Fraud

Legislative anxieties about the misuse of GRCs that featured prominently in discussions about single-sex spaces also emerged in legislative attempts to prohibit fraudulently obtaining a GRC. Anticipating the risk of fraud as well as misuse, the bill introduced a new section to revoke the issuing of a GRC where an application was made ‘fraudulently’ (Scottish Government 2022a, 15; *GRR (Scotland) Bill 2022* (Stage 1), Section 8S(2)). In seeking to strengthen the prohibitions against fraudulent misuse, further amendments were debated ‘to prevent those male criminals who already lie and deceive, and whose victims are almost always women and girls, from committing serious wrongdoing’ (Findlay MSP SP OR 20 December 2022, col 78).³⁴ Criminalising false declarations was key to deter sexual and other harms.

While several amendments were introduced in relation to this issue with slight technical differences between them, they were generally aimed at pausing applications from those charged with fraud or domestic abuse, requiring sex offenders who apply for a GRC to disclose sex offending history to police, and making GRCs for sex offenders conditional on risk assessments (Scottish Parliament 2022c). While these amendments were refused, legislative anxieties led to the incorporation of an amendment that made it an ‘aggravating offence’ to obtain a GRC for the purpose of committing an offence (Greene MSP SP OR 21 December 2022, col 7; *GRR (Scotland) Act 2022*, Section 22A). In addition, those who are subject to sexual harm prevention orders are ineligible to apply for a GRC (*GRR (Scotland) Act 2022*, Section 8EB). In defending the expanded criminalisation of fraud through the GRR, Robinson MSP argued that the Sheriff could ‘look into whether the person was living in the acquired gender’ to determine the veracity of fraud in case someone claimed they ‘changed their mind’ about their gender only after being charged with an offence (Robinson MSP SP OR 21 December 2022, col 14).

³⁴ In making this argument, MSPs relied in recent evidence from the Special Rapporteur on Violence Against Women and Girls who claimed the reform would ‘potentially open the door to violent males’ (Chapman MSP SP OR 20 December 2022, col 78).

However, in attempting to allay the fears of those who fear fraudulent use of GRCs, those in favour of reform enacted a split between good/authentic transitioning and bad/fraudulent transitioning. In the context of sexual activity and public life, trans bodies are frequently characterised as deceptive or fraudulent irrespective of whether they are violent (Humphrey 2023, 269; Sharpe 2018). ‘Gender critical’ arguments against self-declared gender argue that it privileges a fictive ideology over material reality, and identifying as a different sex is always fraudulent (Zanghellini 2020, 7). This plays on and reinforces the idea that in cultural terms, ontological deception is *sine qua non* of what it means to be trans. Alex Sharpe (2018) has detailed this in ‘gender fraud’ prosecutions where the demand to fix coherent and unambiguous (gender) identities and (sexual) desires forecloses fluidity, flux, confusion and ambivalence (9). One might worry then, as many trans people do, about how ‘vexatious complaints’ or perceptions of fraudulence might frustrate legal processes designed to recognise them or place them at greater risk of criminalising scrutiny (Scotland EHRCJC 2022, 55).³⁵ While the amendment functioned to alleviate anxieties of risk and harm, there is a lack of clarity over what evidence might be adduced to prove fraudulent intention when obtaining a GRC (as needed for a criminal prosecution). Its incorporation in law cultivates new anxieties about how aggravating factors in fraud offences might impact trans people or fail to impact men guilty of crimes (Kerr MSP, Greene MSP SP OR 21 December 2022, col 15–18).

Concluding Reform

In concluding the debate, MSPs in support of reform explained that they ‘had done [their] best to allay anxieties’ and reform would end trans people’s ‘constant fear of being outed and treated differently because their identity documents are not consistent with their lived experience’ (Robinson MSP, Duncan-Glancy MSP SP OR 22 December 2022, col 34, 41). However, the Act (as amended) alleviated anxieties by giving statutory form to ‘dog whistles’ of predatory harm and fraudulence through the introduction of specific provisions or safeguards in the legislation (Chapman MSP SP OR 22 December 2022, col 55). MSPs opposed to reform spoke of women’s ‘real fears about the consequences of the bill’ and men ‘exploiting badly drafted law’ (Hamilton MSP, Whittle MSP SP OR 22 December 2022, col 36, 47). Women were ‘now in peril’ or ‘deeply, deeply worried’ and this reform ‘threw

³⁵ In response to this, one MSP argued for the need to narrowly specify ‘interested parties’ who might object to the issuing of a GRC and explicitly exclude those who have personal hostilities towards trans people (Duncan-Glancy MSP SP OR 21 December 2022, col 35). This amendment failed to get accepted.

caution to the wind' (Gosal MSP, White MSP SP OR 22 December 2022, col 53, 61).

What is clear throughout the different stages of legislative development is how grammars of anxiety and fear functioned to tighten the law – to mitigate against unwanted risks or harms – regardless of whether people were supportive or dismissive of the bill's objects. This was evidenced in the UK government's success in blocking implementation of the law. Following the passage of the bill, the UK government intervened to block royal assent of GRR on the basis of its 'adverse effects' on a reserved matter (its impact on the *EA* in England and Wales). The UK government's policy note crystallises some of the institutional anxieties of reform discussed above, emphasising the adverse effects of inconsistent legal regimes of gender in the UK, unknowable classes of people who may now transition gender, and risks of malicious or fraudulent GRC applications with no appropriate safeguards. Taken together, these presented risks of coherence in relation to the 'reserved matters' which the UK had legislative competence (UK Government Scotland 2023).

In upholding the legality of the UK government's intervention to block GRR, the Scottish Outer House of the Court of Session made room for these institutionalised anxieties. In its decision, the Court paid close attention to the fact that by broadening the category of persons who would be eligible for a GRC and to simplify the means of obtaining a GRC were significant to 'changing' the meaning of legal sex/gender (*Scottish Ministers* 2023, [67]). As mentioned earlier, the judicial tethering of the *EA* to GRR here presented GRR as generating 'adverse effects' on legal coherence because it purportedly created a broader class of GRC holders in Scotland than it did in England, which created a 'conflict' within a shared legal regime (*EA*) (*Scottish Ministers* 2023, [67]). To the extent the Court looked to the reasons behind the order, it accepted the fact that the Home Secretary 'could not reasonably have been expected to instruct statistical analysis of the impact of increased numbers of applications' for a GRC and could reasonably draw inferences as to the adverse effects even without (*Scottish Ministers* 2023, [73]). For example, the Court accepted the 'effect of divergence' on IT systems to be a 'legitimate' concern (*Scottish Ministers* 2023, [77]). The Secretary of State's anxiety was taken as self-evident, with no empirical evidence given to explain the adverse effect of an IT system divergence. The absence of heightened judicial scrutiny here might be explained by principles of administrative law that confine review to legal errors or procedural flaws rather than merits assessment. While that might be the case, what is important to note here is that by accepting the 'reasonableness' of the Home Secretary's steps in making the Section 35 Order, the Court shielded political anxieties about the impact of reform (as was also expressed by opponents during the GRR debate in Scotland) from

scrutiny. It refused to critically weigh the evidence behind the anxieties that made possible the UK government's purported inferences of 'adverse effects' caused by self-declared gender (*Scottish Ministers* 2023, [79–81]).³⁶

IV – Confronting Anxiety as a Means of Repair

What does an analysis of emotional grammar of anxiety and fear offer those who are invested in legal gender reform? This section combines the analytic and normative aspects of my argument to show how other forms of gender solidarity, legal argumentation, law-making and social justice might emerge if we think reparatively with anxiety and seek to loosen its tightening grip on law reform. In cases like *Goodwin* and *Bellinger*, I explored how progressive interventions for legal gender recognition relied on recognising and responding to the anxieties of trans people who experienced precarity due to a misalignment of their legal documentation with their social and personal identity. Yet, these interventions were inhibited by institutional anxieties that militated against forms of recognition that would compromise the integrity of gendered governance or corrupt the coherence of administrative systems, such as parenting (*McConnell*) and passports (*Elan-Cane*). In the GRR debate in Scotland, legislative anxieties shaped the structure of legislation. This was palpable when following how risks towards children and women were coded into statutory provisions that protect single-sex spaces and criminalise fraudulent declarations of gender. So how might we respond to institutionalised anxieties without entrenching social hierarchies and enabling harm?

In thinking through the conflicts generated by legal gender reform, I am reminded of an MSP who noted:

From all the evidence that I have heard, which is a lot, it is clear to me that women's and trans rights can, must and do already exist without one causing detriment to the other. (Duncan-Glancy MSP SP OR 27 October 2022, col 82)

Feminist and trans scholars have written in great depth about how both cis women and trans people are subordinated by gendered norms that enforce misogyny and sexism (Butler 2004; Hines 2020; Pearce et al. 2020a; Serano 2013; Stone 1992). That said, the polarising nature of recent legal gender

³⁶ This case does not focus on the policy substance of legal gender recognition. The decision is a judicial review concentrating on the statutory context in which the UK Government could block a law passed by the Scottish Parliament under Section 35, *Scotland Act 1988*. Lady Haldane upheld the validity of the Section 35 Order, noting the UK Secretary of State for Scotland had reasonable grounds for concluding that GRR adversely modified the law in relation to a 'reserved matter'.

reform mirrors earlier feminist contestations over sex/gender distinctions and both conflicts are structured by sets of anxieties that locate gendered life (both cis and trans) in contexts of risk, harm and vulnerability (Grosz 1994; Young 1990; Sharpe 2002). Rather than eliminate these anxieties and ‘resolve’ the dispute (even if such a task were possible), I instead ask what might be gained if we loosen our attachments to legal and social objects that generate anxieties or fears. How might we (as scholars, legislators, activists) critically hold space for anxieties and explore how we might creatively confront anxieties to legally repair harms affecting trans people, cis women and others who experience gendered violence? In concluding the chapter, I lean into the emotional grammars of legal gender recognition to critique the nature of legislative reassurance, consider the possibilities of decertifying legal sex/gender and imagine (non-legal) alternatives for gender justice.

Confronting Pauses and Reassurances

By following the grammar of anxiety throughout the legislative development of GRR in Scotland and case law relating to legal gender recognition, we can observe how delay, pause and consultation function as legislative holding spaces for anxieties and fears. MSPs opposed to the law invoked pause and delay (to consider the bill further) as a form of public reassurance. Specifically, their articulations sought to reassure those women ‘who have real fears about the consequences of the bill’ and to ‘reduce risks to those who are scared’ by holding back reforms that risked ‘putting the rights of one group above those of another’ (Hamilton MSP, Whittle MSP SP OR 22 December 2022, col 36, 48; Marra MSP SP OR 20 December 2022, col 181). Even those who led support for reform spoke reassuringly of the ‘extensive consultation’ and emphasised that ‘safeguards have been strengthened during the parliamentary passage of the bill’ to ‘allay anxieties’ (Robinson MSP SP OR 22 December 2022, col 32–3). In *McConnell*, the Court was sympathetic to the precarious position of trans men who gave birth but deferred recognition fearing they would compromise the coherence of ‘complicated, interlinked legislation’ and therefore ‘courts should be slow to occupy the margin of judgment more appropriately within the preserve of parliament’ (while the Court also expressed concern for rights of his child) (*McConnell* 2020, [82]). *Elan-Cane* followed a similar anxious path, as the Court held that changes to permit non-binary recognition should come after ‘appropriate research and careful evaluation’ (*Elan-Cane* 2020, [130]). In the Scottish reform process, the parliamentary scrutiny was deemed insufficient, and delay for further scrutiny emerged as ideal through legislative articulations of risk that portended unexpected harms. In the English case law, delaying the substance of a decision, by deferring

it to parliament, emerged through judicial articulations of risk, where courts sought to guard against overstepping their role and/or making policy decisions that could have worrying consequences.

However, using legislative or judicial pause/delay to contain individual anxieties relating to the hypothetical harms cis women and girls might face, or holding institutional anxieties about disrupting the coherence of governance arrangements, functions to occlude the persisting anxieties of trans people who endure actual harms because of their pathologisation, stigma and demeaning legal documentation. This is what sparked cases like *Goodwin* and *Bellinger*. What initiated the GRR reform process in Scotland were trans people arguing that making their legal recognition conditional on a diagnosis was humiliating, with one participant to the consultation describing it as ‘intensely pathologising and stigmatising . . . our identities are not mental health conditions’ (Scotland EHRCJC 2022, 26). Medicalised bureaucracies of legal recognition mean trans people experience individualised stigma and shame from having to present themselves as sick, they endure trauma through interpersonal exchanges where they are asked to ‘prove’ their identities and they feel anxious about what might happen if institutions refuse to recognise them (Global Action for Transgender Equality 2017; Humphrey 2023; Spade 2003, Spade 2011). Given these anxieties motivate the need for reform, the delay and ‘legal wrangling’ evoked throughout the GRR legislative process (especially during the debates on amendments to the bill) obscure the continuing and evidenced harms trans people experience while foregrounding anxieties relating to hypothetical harms that are unlikely to eventuate (Chapman MSP SP OR 21 December 2022, col 95; Jones and Slater 2020). Lack of legal recognition means trans people are subjected to the indignities of having to routinely justify their gender to strangers, hostile surveillance in public spaces (bathrooms) and exclusion from gendered spaces (Camminga 2020, 826; Jones and Slater 2020, 842; Sharpe 2020, 18). Meanwhile, as I have noted above, the anxious objections raised by those opposed to reform emerge through the spectre of predation (men fraudulently claiming to be women to attack them) which remain hypothetical and are not borne out by empirical studies to date (Hasenbush et al. 2019, 80).

Rather than seek comfort or reassurance through legislative pause or judicial delay, we might critique the current reform attempts to alleviate the purported conflicts between women’s and trans rights, alongside the institutional conflicts they generate. In other words, using the emotional grammar of anxiety enables us to recognise how anxious attachments in law might compromise the rights of trans people to dignity and the rights of cis women to live free from violence. At the conclusion of the GRR debate, Cole-Hamilton MSP claimed:

I am frustrated by the delay because it has not only stalled reform but has allowed a good deal of heat and hate to enter our considerations. I am heart saddened by that. It has divided families, communities and political parties. (SP OR 22 December 2022, col 44)

Far from comforting, the protracted reform process functioned to incubate hate, hostility and anger towards trans people as well fear and anxiety associated with women's rights. Yet, these affective attachments, ones generated through a process that presented trans and women's rights in conflict, obscured the patriarchal conditions that enable violence against cis women and trans people. By institutionalising anxieties towards the threat posed by male sexual predators who may obtain a GRC to victimise women, the institutional realities of domestic violence against cis women and trans people, which are typically perpetrated by one's kin rather than strangers, are erased (Fisher 2019; Renz 2023; Suk 2009).

By taking the individual and interpersonal anxieties of trans people and cis women seriously, we might learn to be more attentive to how these anxieties take shape in institutional contexts. In doing so, we can notice how 'difference and deviation are often registered as damaging those who are different' (Ahmed 2017, 197). That is, we might notice how those who express gender diversity in ways that eschew medical, social and legal norms 'damage' institutions that are invested in maintaining cis/heterosexual ideas of what it means to be a man or a woman. Alternatively, we can notice how they might also disrupt institutions that insist on gender coherence and this recognition might facilitate new legal avenues to recognise gender diversity. This approach is not just one that benefits trans and non-binary people, but also supports gender non-conforming cis women who are policed for failing to live up to stereotypes or aesthetics of femininity (Briggs 2018).³⁷ Following closely the anxieties of trans people and cis women who fear institutional and interpersonal violence leads us to confront institutional reassurances that seek to reproduce cis/heterosexist gender norms. This analytic task involves confronting temporalities of 'strangeness' or 'refusal' rather than comfort or familiarity, and this has normative value as it creates the affective conditions to value those gender non-conforming people (trans and cis women) who 'grow sideways' with 'life rather than lies' with their gender (Halberstam 2005, 74; Stanley 2021, 118; Stockton 2009, 92). This work demands both individual (from cis and trans women) and institutional (from legislators)

³⁷ Following the GRR, the Scottish government released a Non-Binary Equality Action Plan which has commitments to recognise non-binary people through data collection and review the use of sex/gender markers on government documents (see Scottish Government 2023).

courage. It requires law holds space for gendered fears and anxieties while facilitating fragile forms of solidarity that are built on refusing binary, essentialist ideas of sex/gender that are tethered to patriarchally ingrained ideas of vulnerability.

Undiagnosing and Decertifying Gender/Sex

Following fear and anxiety enables us to confront the risks that come with decertifying legal sex and undiagnosing gender. By humbly approaching the medico-legal question of the utility of diagnosis, we can recognise that there are competing demands from those who believe diagnosis foregrounds the material conditions (primarily healthcare) and those who eschew diagnosis because it erases conditions of autonomy and self-determination (Butler 2004, 84–9; Dietz 2018, 200–2). This tension was made apparent during the GRR debate, as some MSPs made clear that healthcare, as well as legal recognition, should be made accessible. Moreover, leaning into the individual and institutional anxieties caused by state categorisation of gender/sex, as apparent in *Goodwin*, *Bellinger*, *McConnell* and *Elan-Cane*, enables us to think about ‘what work the legal category of gender does in (re)producing the cisheteropatriarchy’ and how ‘that folds in different temporalities’ (Baars 2020, 18; Cooper 2023, 26). This reparative approach contests some of the ‘paranoid’ readings of gendered subordination (men’s violence against women) – evident throughout the opposition to GRR in Scotland – that insist on reading such acts through fixed categories of sex, where violence is reduced to an interpersonal exchange between different anatomies (Zanghellini 2020, 9).

As Davina Cooper (2023) argues, ‘a proposal to decertify sex and gender needs to anticipate and resolve vocalised concerns, show why fears are unnecessary, and, ultimately, gain success, where success is measured through accomplished legislative passage and effective application’ (19). A decertification project is imaginative by moving away from concrete proposals typical of law reform projects to a more ‘DIY’ experiment with design techniques to imagine new modes of relation, knowledges, institutions and ways of doing things through ‘critical and hopeful thinking’ (Cooper 2023, 19, 23).³⁸ For example, convergences of discomfort and anxiety experienced by disabled and trans people, who are marginalised by uneven bathroom or shelter access, can create opportunities for advocacy that centres the safety, privacy and dignity of non-normative bodies without having to settle on fixed sex categories (Grimm 2021; Renz 2023, 59; West 2014, 85).

³⁸ This approach to prefigurative law reform insulates the approach from accusations of being ‘far-fetched’ or ‘unfeasible’ as the proposal assumes the conditions necessary for its enactment. This approach is utopian in orientation (see Cooper 2020b).

Making critical room for objects that generate anxiety opens up avenues for fragile forms of solidarity across different identity positions. Institutionalised forms of gendered and sexualised violence persist in spaces like prisons that disproportionately target minoritised women, lack of state resourcing for safe housing consigns those dealing with domestic abuse to greater insecurity, and inadequate public sanitation limits social mobility (Davis 2011; Fileborn et al. 2019; Jones and Slater 2020). Leaning into these (shared) anxieties about violence, drawing out intersecting points of connection, reveals how gendered violence is socially constituted by institutional realities and interpersonal behaviours rather than biologically or innately fixed to particular sexed bodies. There is a rich history of solidarity between trans and feminist activists who organise together against social anxieties that police what it means to be a ‘real woman’ (Ashenden 2023; Fisher 2019; Hines 2020; Lavery 2023). And the ongoing anxious schisms between women’s and trans communities might be productively used to generate dialogues about the ways heterosexist structural violence persists in society and encourage these groups to relate to each other beyond the ossified terms of sex/gender currently made possible by legal recognition (Bernard 2020, 876; Pearce et al. 2020b, 885). To attend to this violence does not require having to adopt a universal definition of sex/gender (MacKinnon et al. 2023).

Thinking about decertifying sex/gender also exposes the relationship between fear and loss. Moving towards decertified gender makes it ‘murky’ and ‘less easy to articulate’ the unique gendered character of sexual harassment and sexual violence (Emerton 2023, 111). These fears were evident through the parliamentary tightening of legal gender reform in Scotland, which included additional statutory provisions to maintain single-sex spaces, criminalise fraudulent gender and entrench sex/gender data gathering and reporting obligations. Anxieties that tighten legislative requirements to police ‘authentic’ sex and gender are a means of guarding against ‘losing’ focus on gendered inequalities or harms. Yet, this anxious insistence on formal legal status obscures how race, religion and sexual orientation do not have formal legal registrations, but legal measures to differentiate between groups who have these characteristics are possible (Renz 2023, 50).

Moreover, these fears of loss attach us to inclusion within identity-centred anti-discrimination regimes that are sustained by fixing categories like sex or gender. This was palpable during the GRR debate through fears about compromising single-sex spaces and the legislative need to ‘avoid doubt’ about how equality law exceptions could be used to alleviate those fears. However, individual and institutional attachments to anxious objects (like anti-discrimination law) conflate the power of a formalistic approach

to non-discrimination (treating sex, gender, gender identity as fungible and discrete categories) with broader equality projects that seek to equalise the life chances of groups that are minoritised by systemic violence rather than their biology (MacKinnon et al. 2023; Renz 2023, 53; Spade 2011, 86). Thinking through anxieties that generate a sense of loss (by losing one's formal legal status as a man or woman) opens space to imagine broader interventions for equality (resourced healthcare, mutual aid, safe housing) that centre anti-subordination, care and respect (Cooper 2023, 34).³⁹ In *McConnell*, this might have meant legally abandoning terms like 'mother' and 'father'. In *Elan-Cane*, this might have meant allowing for non-binary passports. In both cases, this would mean accepting the institutional loosening of binary sex/gender governance. Rather than a self-declaration model that returns people to binary sex (as enacted by GRR in Scotland), a legal gender reform process might make room for children and non-binary people. We could self-identify and self-declare gender in whatever language best described us, obtaining individual validation of our identity even if the institutional necessity of requiring legal gender registration was rendered moot by decertification. As such, gender validation does not become irrelevant to areas of social, cultural, religious, and political life and gender recognition could be sought institutionally through varying social, cultural, political, and religious contexts.

Asylum law is instructive for imagining what decertification of sex/gender under conditions of anxiety might look like. Under international refugee law, jurisdictions like the UK recognise the claims of women and LGBT people who seek asylum on the basis that they experience a 'well-founded fear of persecution' owing to their 'membership of a particular social group' (Jansen 2013; Raj 2016a, 2016b). While the category of 'membership of a particular social group' focuses on whether a person belonging to the group has an immutable or inherent characteristic, case law also protects people who 'voluntarily associate for reasons fundamental to their human dignity' or where they 'share some interest or experience in common' (Ward 1993, [739]; Morato 1992, [404]). Conceptualising sex, gender and sexuality in terms of particular social groups focuses legal attention on how groups are socially perceived and constituted and how or why they might associate together without having to assume that these categories (sex, gender, sexuality) are fixed or the characteristics that define each category are universally shared. In doing so, asylum policy and jurisprudence have recognised and granted asylum to heterosexual women who experience domestic violence, gay men who have feminine expressions of

³⁹ See my discussion of substantive equality in Chapter 2.

gender, lesbians who were married to men, and trans women sex workers (Raj 2016b, 2016c, 2018). In the context of conflicts over sex-based rights and trans legal recognition, thinking about the social constitution of gender/sex in asylum law (along similar lines as Renz and Grabham do in relation to equality and employment law) allows us to consider how legal reparation to address gendered and sexualised harms is possible without subscribing to a fixed view of what sex/gender means.

In saying this, I do not want to romanticise the queer potential of thinking with asylum law. Asylum adjudication also illuminates the ways the law anxiously struggles to make sense of non-normative sexualities or genders and tries to block recognition of people who lodge 'bogus' claims. In seeking to alleviate the anxieties of refugee decision-makers who are tasked with scrutinising the authenticity of someone's sexual orientation or gender identity, those who seek asylum perform their identities by speaking about their sexual awakenings and distress, producing witnessing testimonies corroborating their sexual intimacies or gender histories, and participating in rituals of popular culture (attending Prides, visiting queer clubs, engaging with online social networks) to prove the veracity of their identities (Dustin 2018). Legal bureaucracies seek to alleviate their anxieties by judging these asylum claims around normative (ethnocentric) scripts of what it means to be LGBT. I would suggest that rather than seeking reassurances in the face of these anxieties, as discussed above, lingering with anxiety carves out space to confront fluid, moving, messy and disruptive sexualities or genders that eschew categorical fixity or coherence.⁴⁰

Cultivating Gender Self-Determination

Thinking with institutional fears and anxieties foregrounds the limits of representational forms of recognition and our attachments to law. During the GRR debate, all MSPs reinforced their attachment to law as a key means (amongst other educational, healthcare and social endeavours) to address inequality for trans people (those in favour of reform) and cis women (those opposed to reform). However, neither reform nor the status quo remedied the inadequate healthcare for trans people, the violence facing women in prisons and/or the inequities of resourcing in competitive women's sport. As Ahmed (2006) notes, 'fear does not involve the defence of borders that already exist; rather fear makes those borders, by establishing objects from which the subject, in fearing, can flee' (67). In the GRR debate, fear produces

⁴⁰ I have written more extensively about the possibilities of doing this in asylum law (see Raj 2020b, 94–115).

the borders of law as either undermining gender self-determination (from the perspective of trans people who seek out reform) or dangerous for sex-based existence (from the perspective of women who oppose reform). Fears here simultaneously move people from the law (because it places them at risk) and towards it (because it is the means to alleviate that risk).

By lingering with this affective logic, we can ‘slow down with law’ in some areas to experiment with new forms of gendered living and relating, even while we keep moving with law reform to make legal recognition easier for trans people (Cooper 2023, 27). Following this, we need to think creatively and critically with anxiety – rather than seek reassurance or comfort – about data gathering, data coding and data monitoring in ways that make identity-based projects work towards goals of equity, anti-violence and community flourishing (Cooper and Emerton 2020, 13; Guyan 2022, 192–4). This might lead us towards gender ungovernability – a mode of ‘living in refusal’ (Stanley 2021, 118). We might contour refusal with ambivalence or undecidability, taking up familiar forms of legal repair or legal sex/gender even while holding space to imagine (non-legal) alternatives to address the systemic violence against trans people and cis women (Cooper 2023, 36; Davies 2023, 166; Dietz 2018, 200).

Conclusion

Fears and anxieties shape the contours of law reform designed to recognise the rights of trans (and sometimes non-binary) people. In this chapter, I have followed how the emotional grammars of anxiety connect individual, interpersonal and institutional conceptions of risk and harm, with a focus on the purported conflicts of rights emerging between cis women and trans people in reforms about legal gender recognition. Rather than subscribe to the binary sex/gender debate or the polarising conflicts between differently positioned groups, I have sought to affectively think about how we might pursue reform in ways that better attend to the lives of those minoritised by systemic gender inequalities, interpersonal sexual violence and hostile social (mis)recognition.

I opened the chapter explaining my anxieties and fears about the pursuit of LGBT rights, especially in a context where this work is marked by public resentments and hostilities. Drawing on Sara Ahmed, I theorised how fear and anxiety function temporally (orienting us towards an impending future) and spatially (making threats or risks proximate to us). I contextualised how fears and anxieties that expose our vulnerabilities structure conceptual understandings of sex/gender as they relate to cis women and trans people. I then drew out how experiences of ‘gender dysphoria’ capture the stresses, fears and anxieties of those who feel alienated from their physical bodies and how transition functions as an important means of alleviating these anxieties.

In the second part of the chapter, I discussed how legal interventions that institutionalised recognition for trans people emerged by responding to their individual anxieties of having improper legal registration. Cases like *Goodwin* and *Bellinger* made possible ‘caring’ modes of judicial recognition that sought to alleviate the precarity trans people faced in society by aligning their legal gender with their social and personal expression of it (though the court in *Bellinger* passed the buck to parliament). Yet, as cases like *McConnell* and *Elan-Cane* illustrated, institutional anxieties also functioned to limit the scope of legal gender recognition, particularly when such recognition threatened to compromise the gendered coherence of institutional systems.

The third part of the chapter focused on self-declaration gender reform in Scotland to explore how emotional grammars of anxiety and fear determined the shape of reform, especially through the statutory amendment process. Using the conceptual anchors of (as well as legislative amendments in relation to) childhood, single-sex spaces/services and fraud, I mapped how individual and interpersonal anxieties are institutionalised to tighten the scope of reform in ways that occlude the material experiences of both cis women and trans people who experience inequalities.

In concluding the chapter, I considered what might be gained if we loosen normative attachments to anxious objects like law reform and hold critical space to reparatively engage with them. By following the emotional grammar, I reflected on the affective problems with delay and pause when pursuing legal gender recognition reform, as evidenced by the delays in Scotland. I brought recent scholarly work on decertifying gender in anti-discrimination law into conversation with asylum law to think about the tensions and possibilities of recognising gender/sex – and the inequalities that subtend them – without fixed definitions. Following emotional grammars illuminates reparative possibilities for securing autonomy, safety, privacy and relationality for those minoritised by gendered violence. This enables us to (re)imagine possibilities of decertifying and undiagnosing gender, and to cultivate new modes of gender self-determination. This is a critically hopeful task for legal interventions that support the flourishing of cis women, trans and non-binary people.

In the next chapter, I turn to pain and shame to explore how reparations for (internalised) homo/transphobic harms emerge in debates over banning ‘conversion therapy’.

4

Sensing Shame, Healing Pain: Tensions in Banning LGBT Conversion Practices

Introduction

Navigating tensions in LGBT law reforms involves attending to negative affects like hostility, resentment, anger, anxiety and fear that underpin their contestation. In Chapter 2, I contextualised the ways resentment and hostility – as a response to the perceived injury of diminishing free speech and the free exercise of religion – materialised to shield individuals and organisations from complying with anti-discrimination legislation. In Chapter 3, I explored how anxiety and fear – as a reaction to the purported harms caused by eroding single-sex spaces and undermining biological reality – functioned to tighten legislation that limited legal recognition of trans and non-binary people. In this chapter, I want to expand on my theorisation of pain and trauma articulated in earlier chapters and draw out how these emotions emerge alongside shame to circumscribe the purpose, scope and effectiveness of law reform designed to repair the homophobic and transphobic harms caused by ‘conversion therapy’.¹

Thinking about our sexual desires, sexual identities and sexual relationships is an intimate exercise. A few weeks before starting work on this chapter, I was holding hands with my boyfriend as we walked down a busy high street in Manchester, UK. The evening was crisp, and I was enjoying the warmth of his palm wrapped in mine as we walked home. We were engaged in a banal conversation about what we would watch on television when got home when a group of ‘lads’ in a car driving past us yelled loudly and quickly, ‘fucking gays’. The interpersonal exchange was disrupting and abrasive. We were hailed as ‘gay’ from a distance because our intimacy (hand-holding)

¹ I use the terms ‘conversion therapy’ (bracketed by quotation marks to contest the designation of it as therapeutic) and conversion practices synonymously throughout this chapter. I also use associated terms like ‘reparative therapy’ or ‘sexual orientation and gender identity change efforts’ when discussing specific histories or reports. These terms do not have fixed definitions, and vary between cultural and institutional contexts.

was visible. And the ‘fucking’ vernacular reminded us that there was something wrong (and sexualised) about what we were doing and who we are (‘fucking’ might refer specifically to sexual intercourse and/or broadly to charged negative feelings associated with an act or person). We let go of each other’s hands momentarily as I turned around to see the car drive onwards and turn into another street. I wanted to scream back, ‘Yes, we are!’ in defiance but the moment for them to hear me speak back had passed. Yet, the force of their hailing lingered. By drawing attention to us, as gay men holding hands in public, we became ‘problems’ to fixate upon and police through verbal abuse. I felt fear at the possibility that these homophobic comments could mutate into physical violence. I felt angry that these people felt entitled to comment upon my sexuality and relationship. But, more palpably in that moment, I felt shame. The conjunction of two simple words (‘fucking gays’) stigmatised who we were (‘gay’) and the visibility of our relationship (‘fucking’) was something to keep hidden from view to avoid being ‘called out’. In doing so, ‘shame marks a break in connection’ because in the moment of being called out my interest and care of being accepted in the world with my partner was not reciprocated socially (Probyn 2005, 13). Shame was a displacing emotion here because it heightened my self-awareness that we did ‘not fit’ in the space we were occupying and the desire to alleviate that feeling of displacement cultivated a movement to ‘hide’ (Probyn 2005, 39). Shame is a painful, visceral emotion because it draws attention to our purported individual failures by marking us out relationally as deficient or ‘wrong’ compared to others who behave ‘correctly’ or exist ‘normally’. My partner and I were not ‘normal’ in that encounter because we were not heterosexual, and we were not behaving ‘correctly’ because we made our sexuality visible by holding hands. This ‘normalising’ process relied on institutionalised social norms that shaped the conditions through which both the lads who called us out (of place), and ourselves as the intended recipients of their speech, understood what is ‘correct’ or ‘normal’.

In thinking about my encounter here with homophobia, pain and shame – and the policing logic it inspired – I want to approach law reform to ban ‘conversion therapy’ and explore how this reform materialises through grammars of pain and shame. Broadly conceived, practices designed to change, cure, suppress or repair non-normative sexual or gender identity can be described as ‘conversion therapy’. These practices emerge in varied clinical, social, religious, pastoral and cultural settings. The homophobic encounter my partner and I had might be more easily read as a ‘hate crime’ rather than ‘conversion therapy’ as it involved a verbal assault from strangers in a public setting. Yet, I have chosen to write about this experience as a way to preface the arguments I am about to explore in this chapter because practices designed

to pain and shame LGBT people into changing or suppressing an aspect of our identity take insidious forms that pervade everyday social relations. In doing so, I also follow Elspeth Probyn (2005) who notes 'shame is a painful thing to write about: an exposure of the intimacies of selves in public' (130). In writing myself in relation with law reforms to address conversion practices I seek to foreground the recursive ways in which individual, interpersonal and institutional encounters with shame constitute objects and methods of reparative legal inquiry.

I begin this chapter in Part I by contextualising how sexual desire and sexuality are problematised through logics of shame and pain. I return to queer scholars like Michel Foucault, Eve Sedgwick, Lauren Berlant and Sara Ahmed to outline the different discursive registers through which we understand homosexuality and gender non-conformity as a 'problem' to solve (religion, psychology, medicine, law and society) and the technologies of shame and trauma that structure those understandings (confession, therapy, surgery, policing and norms).

In Part II, I explore how the problematisation of sexual desire and sexuality led to 'reparative' attempts to cure, convert, suppress and/or change the 'broken' sexual orientations and gendered behaviours of those who did not conform to prevailing social norms. I detail the different types of conversion practices that exist (electroshock, chemical aversion, role play, prayer, exorcism, talk therapy) and how they materialise within particular clinical, religious, pastoral and social settings. While the forms and harms of these practices differ in shape, I argue that they share a common affective grammar in their articulation: the cultivation of shame and pain within a particular person as the means of 'converting' their sexual orientation or gender identity. Individual accounts of sexual shame and pain in relation to being LGBT and interpersonal exchanges of shame/pain to correct 'deviant' sexual desires or gender expressions are co-constituted alongside an institutional homo/transphobic environment that shames LGBT people.

While some progressive nations disclaim these practices of homo/transphobia, I trace how the condemnation of conversion practices also take shape through pain and shame. In Part III, I refract the institutionalised social/political dynamics of shame that sought to repair 'broken' LGBT people to consider emerging institutionalised forms of social/political shame that seek to repair the harms caused by conversion practices. By inverting the object of pain and shame (the problem is no longer homosexuality but homophobia), law reform materialises both as a response to the shame of enabling conversion practices to happen in the first place and a desire to shame those who continue to perpetrate conversion of LGBT people. In doing so, I briefly explain the different legal, policy and regulatory architectures have

objectified and caricatured the pain and shame of survivors to address the harms of conversion practices. I then detail how pain and shame function as emotional grammars of reform by analysing the recent legislative ban on conversion practices in Victoria, Australia. I explore how the individual forms of pain and shame expressed by survivors are taken up institutionally through reforms that promise an end to such negative feelings and social exclusions. I analyse how the legislative debate regarding conversion practices in Victoria, and the subsequent legislation enacted to ban it, relied on grammars of pain and shame to navigate conflicts over rights relating to religious freedom, children who seek medical treatment, dignity, identity and consent.

I pay close attention to the tensions that emerge between these ideas, as individuating or appropriating shame and pain risk romanticising the possibilities of law in repairing structural forms of LGBT suffering. By foregrounding the trauma and shame of survivors, I argue that legislative responses have identified the need for broader (non-criminal) remedies to address the harms of conversion practices. I suggest by critically engaging further with the grammar of pain and shame we might reparatively rethink approaches to religious freedom, childhood, dignity, identity and consent while legally repairing the harms of homo/transphobia. I conclude the chapter in Part IV by drawing out how reading emotional grammars gives us an opportunity to think through the tensions between individual, interpersonal and institutional consequences of shame and pain as objects of legal regulation as well as reparative techniques of legal governance. Rather than seek criminalisation to protect LGBT people, I think reparatively through the tensions with/against pain and shame from an institutional context to normatively emphasise civil and administrative routes (such as anti-discrimination laws) that prioritise safeguarding, autonomy, non-domination and dialogue for LGBT people.

I – Shaming Desire and Problematising Sexualities

Shame is central to the construction of homosexuality across a range of institutions.² Writing about the history of sexuality, Michel Foucault explores how homosexuality (and pleasure more generally) became a perverse ‘problem’ of social, psychiatric, legal and political interest in the late Victorian era. He writes, ‘the implantation of perversions is an instrumental-effect: it is through the isolation, intensification, and consolidation of peripheral sexualities that relations of power to sex and pleasure branched out and multiplied’ (Foucault 1978, 48). What is important to emphasise in Foucault’s analysis of sexuality

² I focus in this section on the affective problematisation of sexuality (and its associated relationship to gender). For more detailed discussion on the affective problematisation of gender and trans life, see Chapter 3. See also Peppermint 2021 and Raj 2023a.

as an effect of governance is how stigmatisation is a shaming process – to render a subject of (homosexual) desire ‘perverse’ involves differentiating that subject through discourses of negation or failure. In Catholicism, the idealisation of matrimonial, reproductive sexuality functioned to negate those sexual desires and intimate relationships (including many heterosexual ones) that failed to subscribe to such an ideal (Foucault 1978, 37). Those marked by their deviant desires were instructed to feel shame towards their desires and behaviours and called to repent through acts of confession (Foucault 1978, 19–21; MacKendrick 2018, 53).

This cultivation of shame was sustained through psychiatric and psychologising interventions that entrenched the pathologisation of homosexuality. Sigmund Freud (2011), the pioneer of psychoanalysis, described the nature of homosexuality through the lenses of arrested sexual development, narcissism and neurosis (where a person’s sexual desire had not yet matured) and gender (mis)identifications (where a person had a sexual desire to be with a person of the same sex rather than a social desire to be/mirror them). While Freud took an ambivalent position in relation to the morality of homosexuality, the clinical interest in homosexuality and bisexuality that his work inspired centralised issues of failure and deviation in relation to social environments and familial dynamics (Butler 1990, 78–89; Drescher 1998, 21; Sedgwick 1993, 153–64).³ Homosexual desire (in men) was a source of individual shame because it reflected the failure of a person (man) to ‘grow up’, or interpersonal shame by foregrounding the failure of one’s parent (typically mother) to support correct sex/gender role identification. While confession was the primary site to repent sexual shame experienced by gay or bisexual people in religious settings, talk therapy emerged in psychoanalytic contexts to repair the sexual shame they faced (Drescher 1998, 20–3; Foucault 1978, 67).

Legal rules and social norms emerged alongside religious and clinical discourses to shame sexual minorities. Writing about the stratification of sexuality, akin to Foucault, Gayle Rubin (1984) observes that sexual regulation functions through the production of stigma and deviance: sexual behaviours (gay sex, sadomasochism, masturbation) and sexual desires (homosexuality, object fetishes) are stigmatised as a threat to a social, sexual order that privileges heterosexual, monogamous, reproductive coupling. She writes:

³ It is beyond the scope of this chapter to explore the complex debates in relation to homosexuality and psychoanalysis, particularly the extent to which Freud’s work might be described as inspiring ‘homophobia’. For a careful consideration of these issues, see Drescher 1998 and Herek 2010. For a discussion of shame and homosexuality more generally, see Berlant 2011b and Bersani 2011.

Modern Western societies appraise sex acts according to a hierarchical system of sexual value . . . Extreme and punitive stigma maintains some sexual behaviours as low status and is an effective sanction against those who engage in them. The intensity of this stigma is rooted in Western religious traditions. But most of its contemporary content derives from medical and psychiatric opprobrium. (Rubin 1984, 275)

We can see from Rubin's writing how shame is an animating grammar that underpins religious, psychological, social and legal stigmas that problematise 'queer' sexualities and organise them through a hierarchy of social value. Problematisations of homosexual identity, for example, stigmatise same-sex desire by treating it as deficient, wasteful and wrong (Foucault 1978, 101–2; Rubin 1984, 275; Sedgwick 1990, 74). Gay sexual acts, such as 'bottoming' (where the anus is penetrated by a penis) or 'barebacking' (penetrative anal sexual activity without a condom), are socially feminised and subsequently shamed as demeaning and deadly (Bersani 2011, 99). These social stigmas, whether attached to sexual desires (individual identities) or sexual acts (interpersonal encounters), produce specific forms of sexualised shame. As an individuating affect, shame grounds the 'homosexual self' through the experience of its negation. That is, sexual shame brings an individual's sexual desire into negative relation with their desire for normality. In doing so, sexual shame can be experienced as an intense feeling of the 'subject being against itself' (Ahmed 2004, 103). Sexual shame is a 'negative' affect (to the extent it involves a negative relation to the self) that arises from a self-perceived failure to approximate a social norm (of heterosexuality). In the context of homosexual desire or gay identity, these failures are not static or universal but differentiated by the extent to which an individual perceives their deviation from social archetypes.

The individuating effects of shame are acutely felt through the experience of 'closeting' that structures gay life. Closeting is the subject of extensive academic commentary and popular culture representation which are beyond the scope of this chapter. Broadly speaking, 'the closet' functions as a social and personal metaphor to represent the productive effects of the alienation, isolation and inhibition associated with not being heterosexual (Sedgwick 1990, 3; Warner 1999, 8). In a world where heterosexuality is normalised and publicised, queer people carry an emotional burden to 'come out' from their privatised proverbial closets that keep their sexualities a secret hidden from public view (Cvetkovich 2011, 173; Sedgwick 1990, 72). In doing so, the closet produces, and is produced by, sexual shame. As described in more detail in Chapter 2, the social and political hostility directed to queer people engendered their isolation and exclusion from

public life and this was experienced by queer people as a type of closeting. Shame, as an individual feeling of social failure and a desire to hide such failure from public sight, secured the psychic existence of 'the closet' in the lives of queer people.⁴

Sexual shame, as expressed through the epistemology of the closet, has an institutional character. As Michael Warner (1999) writes, 'it is hard to distinguish shame from its politics' (6). Building on the work of Foucault and Rubin, Warner invites us to think about how sexual politics organise around shame. For gay and lesbian people, the desire to find a 'gay gene' and biologise homosexuality functions as a political strategy to repudiate the familial and moral politics of shame that typically stigmatise homosexuality as a sinful 'lifestyle choice' (Warner 1999, 9). Yet, for some queer people, shame offers us an insight into how our pleasures might disrupt oppressive social orders (Crimp 2009, 64; Gould 2009, 225; MacKendrick 2018, 4). Warner differentiates the pleasures and politics associated with sexual shame by detailing the responses of the 'stigmaphile' and 'stigmaphobe'. The 'stigmaphile' is a person who revels in stigma by engendering new/radical visions of political life and embracing their shame as a social or political resource while the 'stigmaphobe' is one who repudiates their stigmas and seeks (an always impossible) conformity as a means of erasing the shame that they feel (Caron 2009, 126; Warner 1999, 43).⁵ These positions emerge in fluid tension (Warner 2009, 287).

What is important to draw out from Warner's analysis is how sexual shame not only materialises through individual desires or interpersonal sexual activities, but it also institutionalises a pluralised sexual politics. Sexuality is not merely an individual orientation to an object of desire; it is a 'history of past approaches' and 'images that organize consciousness', which shape how bodies inhabit space and world (Ahmed 2004, 145; Berlant 1997, 57). Shame illuminates the affective reality of both individuals and institutions (dis)engaging with (re)productive norms related to political life that prize

⁴ In emphasising the role of shame here, I want to note this is not the only affect to consider in the production (and protection) of normativity and sexual identity. As Lauren Berlant (2011b) observes, 'normativity is a powerful adhesive not only (if at all) because of a motive to relocate sexual shame and enable thereby a performance of personality that's socially and psychically nonproblematic . . .' (88). Shame is an 'unpathologised' affect which assists individuals in making cognitive distinctions between what is desired, and what pleasures must be forgone to avoid further pain (Massaro 1999, 85). See Sedgwick 2003, 35–65; Sedgwick 2009.

⁵ This builds on Erving Goffman's theorisation of stigma. He theorises stigma as a 'special kind of relationship between attribute and stereotype' and proceeds to articulate the different ways individuals respond to the imposition of stigma (Goffman 1963, 14).

marriage, children, coupling, monogamy and domesticity. Individuals that fail to mime these norms are inhibited because of a shame that means that they are unable to move in a world or live comfortably in a space that has been naturalised as heterosexual and reproductive (Ahmed 2004, 148). Shame is a 'queer feeling' that arises when we are seen (by ourselves or others) to trouble attachments to institutionalised ideas of proper sexual life, whether this shame comes from engaging in promiscuous gay sex as a person with HIV or refusing to sanctify sex through a monogamous relationship (Ahmed 2004, 150; Gould 2009, 233).

I now turn to explore how individual and institutionalised 'queer feelings' became the object of reparative practices designed to 'cure' LGBT people in religious, medical, psychological, pastoral and familial contexts.

II – Conversion Techniques to Pain and Shame

In this part, I explore how the religious, psychological, medical, social and legal problematisation of sexual desire (and gender identity) created specific techniques to 'repair' problematic sexual desires and behaviours. This was (and remains) referred to colloquially as 'conversion therapy' or 'conversion practices' (Kelleher 2022). Such practices vary considerably in form across institutional settings. They range from invasive physiological interventions like electroshock aversion and chemical aversion to targeted psychotherapeutic activities like talking and role playing to spiritual practices like prayer and exorcisms. While these interventions are historically and culturally variable, what unites them is their shared focus on pain and shame. Pain and shame function as the affective currency through which these interventions are sourced (deemed 'necessary' to fix LGBT people) and evaluated (how they are subsequently measured as 'successful' by the extent to which they correct/suppress unwanted sexual desires or gendered behaviours).

In the 1940s, conversion practices took shape in the context of a medical insistence that heterosexuality is normal and natural and that homosexuality in people presented a 'phobic response to members of the other sex' (Herek 2010, 694). By framing homosexuality as a disease to 'cure', medical practitioners turned to the infliction of pain as a means of rehabilitating desire away from the 'same sex' towards the 'opposite sex'. For example, aversive 'conditioning' involved subjecting LGB people to erotic images of people of the same sex and then inducing pain in relation to their desire by electrocuting them or making them sick through the ingestion of nausea-inducing drugs (Herek 2010, 695; Jowett et al. 2021, 9). This infliction of pain (as a means to correct 'disordered' desire) gained legitimacy through legal infrastructures that presented such 'treatment'

of homosexuality as a rehabilitative alternative to the punishment of incarceration.⁶

While invasive physiological treatments formed part of the medical landscape to treat homosexuality, psychotherapies emerged as a clinical tool to change or suppress a person's non-conforming sexual orientation or gender identity.⁷ In his pioneering essay 'I'm Your Handyman: A History of Reparative Therapies', published in 1998, Jack Drescher detailed the different ways LGB (and some T) people have turned to psychoanalysis to cure them. In the 1960s, clinicians sought to unlock the 'latent' heterosexuality of their same-sex-attracted patients by confronting familial dynamics, childhood traumas and gender roles (Drescher 1998, 23–7). These forms of psychoanalytic treatment foregrounded the childhood pain of gay men in particular who were burdened by over-present mothers or absent fathers, and these psychoanalysts encouraged behavioural interventions where men would act 'masculine' and actively pursue sexual intercourse with women. Psychoanalytic approaches to address sexual deficits relied on psychodrama, where patients were urged to relive and work through their 'childhood trauma' through talk therapy and role plays (Jowett et al. 2021, 21). As one survivor of conversion practices notes:

Because of an innocuous limp wrist or subtle lisp, I was made to feel by licensed doctors that there was something wrong with me . . . But in the name of professional mental health and the licensure of the state, I was made to feel shame and engage in a fruitless labor that left me sad and broken. (Levovitz 2015, 97)

Shame, in this example, manifests through stigma. In this testimony, a 'limp wrist' and 'subtle lisp' are social markers that 'blemished' the survivor's character by impugning his masculinity (Goffman 1963, 14). The survivor speaks about how he comes up against himself: self-consciousness towards his bodily comportment, where he feels his 'limp wrist' and 'subtle lisp' made him believe he was 'broken'. We can note from this testimony that shame is a corrosive affect that sustains stigmas about possessing a set of deviant gendered expressions. Shame is a 'painful emotion' in this example because it illuminates the 'sense' of failure this individual might feel because they have failed to attain an ideal state of masculinity (Nussbaum 2004, 184).

⁶ Alan Turing is one of the more infamous examples of this. He was subjected to chemical castration after being prosecuted for 'gross indecency' (Moran 1996, Chapter 5).

⁷ These practices took different shape in relation to gender non-conforming and trans youth who sought medical treatment (Gill-Peterson 2018, 148–9). Florence Ashley (2022) details the different ways in which trans people are subjected to conversion practices (22–32).

From this survivor's testimony, we can discern the haunting association between homosexuality and childhood and how this worked to spotlight those children 'in trouble' who, without corrective intervention, would not approach adult heterosexuality (Stockton 2009, 7).

When homosexuality was depathologised as a mental illness in 1973, clinicians sought to emphasise problems of adolescent development through moralising rhetoric to address the 'dangerous lifestyle choices' of gay people and the need to protect children from such lifestyles (Drescher 1998, 39–40).⁸ In doing so, these psychotherapists aimed to entrench shame amongst those who sought their assistance. Sexual morality emerged as a core feature of counselling treatments that emphasised the evolutionary significance of heterosexual reproduction which led to a person becoming a 'complete human being' while homosexuality was deemed as natural as 'having a broken leg' (Drescher 1998, 30). These verbal exchanges reminded LGB people that their desires were deviant, and their feelings of shame associated with being deviant were also used to motivate them to rethink their desires and change their behaviours to align them more closely with heterosexuality. Shame in this example is both an interpersonal and individuating dynamic as it materialises through the therapist's verbal exchange about the deviance of homosexuality and the patient's internalisation of their shameful deviance through their conversation with the therapist. In doing so, shame is a 'sharp' and circulating contagion that moves between the psychotherapist who vicariously recognises the shamefulness of their patient's non-heterosexual desire and the patient who is motivated by feeling ashamed about the persistence of their non-heterosexual desire (Sedgwick 2003, 36–7). We can observe here the 'binding' force of shame – it connects us to others who witness our (or others') perceived failures and it attaches us to those norms that we constantly fail to live up to (Ahmed 2004, 107).

In the 1970s, as conversion practices emerged more prominently in religious settings, pastors and priests embraced pain and shame in pursuit of their conversion practices. Ex-gay ministries problematised homosexuality as an issue of 'sexual brokenness' that ought to be addressed pastorally with prayer, exorcism, scripture reading, fasting, self-flagellation, support and counselling (Fetner 2005, 85; Jones et al. 2018, 2, 13; Ozanne 2023, 193). Religious conversion practices, unlike their secular counterparts, did not necessarily seek to reorient individuals towards heterosexuality. Rather, in line with spiritual beliefs, these practices sought to suppress homosexuality or trans identity by

⁸ It is important to note that most psychanalytic, psychiatric and counselling professional bodies in the USA, UK, Canada and Australia denounce conversion practices and see it as professional malpractice (see, for example, British Association of Counselling and Psychotherapy 2023).

cultivating chastity and sublimation of sexual desire into ‘socially acceptable and productive activity’ (Csabs 2019; Jones et al. 2018, 2, 13). As survivors observe, such practices are layered by pain and shame: first there is the ‘silent hell’ where an LGBT person does not disclose their difference and remains tormented by the perpetual fear of being ‘found out’, second is admitting one’s ‘brokenness’ and leaning into their shame by embracing confession and prayer with a spiritual leader, and the final stage (if needed) involves seeking more ritualised interventions like exorcisms or deliverance where prayer does not work (Beer 2015, 94; Ozanne 2023, 195–9; Tomazin 2018). The memoir *Boy Erased* reflects some of these dynamics of pain and shame:

To think that God and the people around you would suddenly recognize your worth if you were seen as damaged and admitted it. This was LIA’s [Love in Action] currency, the trading of literal and proverbial scars, and I hated it. Everyone was trying to one-up everyone else, to render the most painful account. After all, Jesus was most identifiable by his scars, and we were being asked to take up His cross and follow Him. Some deeper cynicism was threatening to take control of my thoughts. (Conley 2016, 318)

What is palpable in this testimony is how Garrard Conley (2016) centralises pain, and how pain and injury function as the moral currency by which people are ‘valued’ when they undertake ‘conversion therapy’. These people are ‘scarred’ individuals who must recognise, confess and confront their brokenness if they aspire to live ‘normal’ (read: heterosexual) lives. We might describe the pain referenced here as an ‘inexpressible’ feeling because we cannot easily point to the precise object or visible injury that has caused Conley (or others like him) to feel broken or damaged (Scarry 1985, 17). However, Conley’s attempt to contextualise the pain of undergoing LIA’s conversion practices is also an attempt to develop a vocabulary to talk about that pain. His testimony gestures towards pain as an experience of vulnerability and an expression that makes his damage ‘readable’ (or at the very least perceptible) to his readers (Ahmed 2004, 21). Conley’s discussion of trauma brings to the fore the discursive (as well as material) dimensions of conversion practices (Cvetkovich 2003, 3). His testimony also reveals his own pain at having to endure a series of interventions that were based on ‘self-annihilation’ (Conley 2016, 328). Yet, recounting his exposure to these differing modes of pain also highlights Conley’s cynicism about what he has experienced.⁹ Cynicism is an emotional

⁹ Psychologists have critically scrutinised the efficacy of conversion practices, noting that they are deeply flawed, with selected studies showing participants demonstrating little to no reported changes on their sexual desires following treatment (see Jowett et al. 2021 and Maccio 2011).

response to the pain he has endured, as well as the hostility he now feels towards that pain.

Other testimonies from LGBT survivors of conversion practices in psychological and religious settings emphasise the individual, interpersonal and institutional dimensions of pain and shame. One gay man described his experience of an ex-gay ministry in Australia as having to ‘re-live painful experiences from childhood and you’re forced to identify things that you’d done wrong in the past’ (Tomazin 2018). A gay male survivor described signing a celibacy contract drafted by a pastor of his local church, noting the ‘micro-shame mechanisms were also conversion practices . . . I felt dirty and wanted to take my own life’ while another described the ‘crushing guilt’ that comes from feeling sexually broken (Lockhart 2021; Nunn 2021). A lesbian woman who underwent intensive prayer ministry and exorcisms explains that ‘part of the trauma of these abusive practices is that you, the victim, are always left with the burden of being told it is your fault, that you are not healed’ (Ozanne 2022). A trans man describes an encounter with a therapist who ‘ridicule[d] my experience of gender . . . He requested reasons behind my gender dysphoria so he could attempt to solve it and make me cis’ (Strudwick 2022). In each of these examples, the stigma of having same-sex desire or being gender dysphoric is a painful individual realisation that cultivates shame amongst those who are told to rid themselves of such ‘unwanted’ desires. These feelings of pain and shame get reinforced through interpersonal encounters of conversion practices that cultivate the shamefulness of homosexuality or trans life and sustain the painful brokenness of those who are ‘confused’ about their sexuality or gender. This leads some survivors to suicide. In these testimonies, shame and pain are also institutionalised through formal religious and psychological practices that create cultural environments where being LGBT is systematically stigmatised and LGBT people are therefore socially excluded.

In turning towards law, survivors have sought to foreground their experiences of shame and pain to demand a ban on such practices. They do so by refracting histories of sexual shame and pain by making legislators feel pained by these histories of abuse and shaming their failure to prevent it.

III – Repairing Pain and Shame through ‘Conversion Therapy’ Bans

Many psychological, medical, religious and legal systems in recent years have sought to repudiate the shaming and painful practices described above to affirm the dignity of LGBT people. As gestured to in Chapter 1, LGBT social movements have contested institutionalised politics of shame and violence by emphasising the privacy, dignity and equality of LGBT people. If gay desires and same-sex relationships have been legally and socially marked as sites of stigma and shame, LGBT litigants have sought to emphasise the

respectability of their identities and dignity of their intimacies to affirm their rights. Judgments relating to the decriminalisation of homosexuality have eschewed the closeting shame of homosexuality by foregrounding a gay ‘personal bond that is more enduring’ or a gay person’s ‘basic right to companionship’ (Lawrence 2003, 567; Navtej 2018, [155]). Marriage equality reforms have celebrated gay people’s ‘hope . . . not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions’ (Obergefell 2015, 28). Hate crime interventions have sought to condemn stigmas precipitating homophobic and transphobic violence (Haritaworn 2013). These law reforms have affirmed LGBT existence in public life to the extent it has been socially and legally rendered dignified and respectable, as opposed to stigmatising and shameful.¹⁰

Legislating Conversion Harms

In the context of such pro-LGBT reform agendas, political desires to remedy the social effects of sexual shame and to make amends for inflicting stigmatic pain on LGBT people underpin emerging legislative proposals to ban conversion practices. In other words, to have a political conscience that acknowledges the effects of state-sanctioned homophobia and transphobia means to be ‘shame prone’ (Best 2016, 17). In justifying the need for reform, pro-LGBT advocates objectify shame and pain into concepts that connect to human rights doctrines:

The deep impact on individuals includes significant loss of self-esteem, anxiety, depressive syndrome, social isolation, intimacy difficulty, self-hatred, shame and guilt, sexual dysfunction, suicidal ideation and suicide attempts and symptoms of post-traumatic stress disorder, as well as often significant physical pain and suffering. (Madrigal-Borloz 2020, 13)

Drawing this out, we can read the affective harms of pain and shame as violations of international human rights. Stigmatising sexual orientation and gender identity in a way that produces ‘self-hatred, shame and guilt’ and leads to ‘social isolation’ along with a ‘loss of self-esteem’ is a form of systemic discrimination. Inflicting ‘sexual dysfunction’ and ‘post-traumatic stress disorder’ on LGBT people through conversion practices is a violation of the right to highest attainable standard of health. Forcing LGBT people to endure ‘significant physical pain and suffering’ constitutes cruel, inhuman and degrading treatment. By connecting the violations of these rights

¹⁰ For more detailed discussion of how dignity, privacy and respect interact in law, see Raj 2020b, Chapters 2 and 6. For consideration of how norms around queer sex shape the articulation of rights claims in public life, see also Bell and Binnie 2000 and Gould 2009.

together, several legal scholars have emphasised that the structural stigmatisation enabled by conversion practices degrades all LGBT people irrespective of whether they have directly experienced a conversion practice (Madrigal-Borloz 2020, 15–16; Thoreson 2022, 458; Trispiotis and Purshouse 2022, 6; Trispiotis 2023, 18).¹¹

Legal reparations for conversion practices manifest across criminal, civil and administrative areas of law. General laws regulate some aspects of conversion practices. Criminal laws prohibit the most egregious forms of conversion practices, such as where a person is hormonally castrated against their will (assault occasioning serious bodily harm) or where a person is forced to have sexual intercourse with a person of the opposite sex (rape) (Madrigal-Borloz 2020, 9; Thoreson 2022, 461).¹² In the civil context, healthcare law provides tortious remedies where an individual can evidence conversion practices were due to medical negligence that resulted in certain types of psychiatric injury like post-traumatic stress disorder (Purshouse and Trispiotis 2022, 5). Workplaces are regulated by anti-discrimination laws that prohibit unwanted stigmatising or humiliating conduct (like repeated sexualised comments) against LGBT people (for example, Sections 13, 19 and 26 of the *Equality Act 2010*). Consumer laws have been used against ‘conversion therapy’ providers because they have engaged in unconscionable business practices by offering ‘cures’ with no efficacy (for example, *Ferguson et al.* 2015).

In recent years, governments have pursued specific legislative penalties against conversion practices. In surveying the global landscape, the UN Special Rapporteur on Sexual Orientation and Gender Identity observed that reforms to ban conversion practices diverged between wide-ranging bans that prohibit all types of conversion practices (Canada), recipient-based restrictions that limit protection to particular classes of vulnerable people (children) (Malta), provider-based restrictions that limit liability to particular classes of people (licensed health professionals, professionals in positions of trust)

¹¹ Much has been written about how conversion practices might amount to a form of torture in some circumstances (for example, where sexual violence is used as a tool to ‘correct’ lesbianism in women or chemical castration is used to suppress same sex desire in men) or as a form of ‘cruel, inhuman, and degrading treatment’ (for example, where LGBT people are subjected to public shaming or denied protection from domestic violence). See Trispiotis 2023, 22–30 and Wagenländer and Nash 2021, 2 (for a discussion of how this relates to the prohibition on torture in Article 3 of the *European Convention on Human Rights*).

¹² Criminal law has engaged with shaming certain offenders as a part of the sentencing process, although this relates to less serious offences. Restorative justice initiatives (for non-violent offences like driving while intoxicated and criminal damage) focus on ‘regenerative shaming’ by making the offender feel shameful about their behaviour to rehabilitate them and prevent such behaviour from reoccurring (see Nussbaum 2004, 223–50).

(Brazil), and practice-based restrictions that regulate associated activities like advertising (Illinois, USA) (Madrigal-Borloz 2020, 19). In addition to legislative infrastructures, administrative regulations (that provide oversight to psychiatrists, social workers, doctors, teachers, etc.) make the provision of conversion practices a disciplinary issue of professional misconduct (Haldeman 2002, 260; Raj 2023a, 88).¹³

Reforms to protect the dignity of LGBT people from the harms of conversion practices have generated contestation, echoing debates in Chapter 2, amongst those who see these law reforms as an encroachment on rights to freedom of religion and free speech. I will take this up in more detail in my consideration of the reform process in Victoria, Australia but here I just want to note broadly how bans on conversion practices are framed as a conflict of rights. Advocates for wide-ranging bans (even where they might disagree on their preference for criminal or civil law to target conversion practices) argue that enforcing ‘tolerance’ of LGBT people as a public ideal and defending the psychological integrity of LGBT people outweigh the limitations on those who would vilify LGBT people and choose to counsel them to change or suppress their existence (Ashley 2022, 77; Cella 2014, 107; Friedman 2014, 201; Taglienti 2021, 189). For minors, a commitment to destigmatise LGBT youth and promote their well-being trumps parental or religious objections to these bans (Jore 2014, 316, 328; Peleg 2023, 125). Advocates against such bans argue that people should be free to ‘consent’ to any treatment that might help them live a life according to their faith and those who disagree with LGBT ‘lifestyles’ should be free to do so without the risk of criminalisation or disciplinary sanction (McMurchie 2014, 1524; Newman et al. 2018, 526). This echoes the kind of arguments proposed by religious individuals in Chapter 2 who felt unable to comply with anti-discrimination norms.

Consulting Pain and Shame in Proposals to Ban Conversion Practices

I now want to turn to an Australian case study of law reform to follow the ways pain and shame circumscribe the purpose, scope and effect of a ban to eliminate conversion practices. While there are numerous case studies (some of which I have mentioned above), I focus on the subnational jurisdiction of Victoria, Australia. I do this for two reasons. Firstly, like my discussion of Scotland’s reform to legal gender recognition in Chapter 3 made clear, Victoria has a reputation as the ‘most progressive jurisdiction’ in Australia

¹³ Each of these penalties have different procedural implications. Penal sanctions are achieved by judicial enforcement following prosecution, fines are typically an administrative matter enforced by relevant government agencies, and disciplinary consequences emerge through licensing bodies (see Ashley 2022, 65–70).

when it comes to pursuing reforms to benefit LGBT people even while other Australian governments lag (Alcorn 2016). Secondly, the legislative ban enacted in Victoria is one of the most wide-ranging in the world, codifying criminal, civil and administrative penalties against anyone who provides conversion practices and protecting broad classes of people.

Before detailing Victoria's legislative debate, it is important to provide some social context to how pain and shame materialised in activist demands to ban such practices. In 2018, a consortium of LGBT organisations and academic researchers released a report titled *Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia* (2018 Report). This report was the first comprehensive study into the experiences of LGBT people who had experienced religious conversion practices in Australia and the report scaffolded arguments for reform with a particular focus on the situation in Victoria. In undertaking interviews with survivors of conversion practices, the report anchored 'the grief, pain, self-doubt and profound injustice experienced by all our respondents' (Jones et al. 2018, 21). Each interviewee identified some variation of anxiety, depression, trauma and shame when discussing being same sex attracted in a religious (Christian) context where such attractions were deemed sinful and perverse. Interviewees then spoke about the importance of faith in their lives and turning towards religious leaders when feeling 'broken' about their identities (Jones et al. 2018, 23). As the report makes clear, the pain and shame associated with 'sexual brokenness' took on interpersonal significance as people were encouraged to share their pain and shame within communities that might be able to 'save' them (Jones et al. 2018, 24). The person who seeks salvation or repair finds themselves caught in the tension of shame: they seek to push away their (sinful) same sex desires or trans identifications by cultivating their (pure) attachments to the norms (and people) of their faith. LGBT people's feelings of negation towards the impure queer self (individual) and the repudiation of that self by one's religious community (interpersonal) are institutionalised in religious settings. The report ends its survey of religious conversion practices by making explicit how religious institutions have formalised conversion practices – institutionalising the individual and interpersonal dynamics of pain and shame – through the work of 'ex-gay' ministries that offer commercial therapy, facilitate pastoral networks of advice/counselling and produce specific anti-LGBT literature (Jones et al. 2018, 24). By detailing the divergent ways in which religious conversion practices take shape in Australia, the report concludes with a scaffolded set of recommendations for law reform. Using Victoria as a case study, the report identifies the need for more professional codes opposing conversion practices, more effective healthcare complaints schemes, strengthened child safeguarding legislation, improved

consumer protections, narrowing religious exceptions to anti-discrimination laws (see Chapter 2) and clarifying the reach of medical negligence claims (Jones et al. 2018, 53–63).

Alongside this 2018 Report, a group of Australians who endured conversion practices released the ‘Sexual Orientation and Gender Identity Change Efforts Survivor (SOGICE) Statement’ (updated in 2020). In centralising the experiences of survivors, the statement notes:

Survivors of the ex-gay/ex-trans/conversion movement and SOGICE have endured and survived a system that dehumanised and shamed them, despite their sense of deep devotion and connection to their faith communities. (SOGICE Survivor Statement 2020, 6)

Stigma and shame anchor the experiences of survivors, and the statement makes clear that ‘survivors should be at the forefront of any conversation’ (SOGICE Survivor Statement 2020, 6). These experiences scaffold the terms by which survivors seek redress for the harms they endured. The survivors do not limit reparation to discrete types of conversion practices, seeking instead to address the ‘conversion ideology’ that makes these practices possible in the first place. In doing so, they recognise how interpersonal practices that aim to shame individual LGBT people (through pastoral advice, informal prayers, sermons, disciplinary sanctions, mentoring programmes, gender role plays) into changing or suppressing their sexual orientation or gender identity are structured by institutionalised ideologies that stigmatise sexual and gender diversity (SOGICE Survivor Statement 2020, 4–5). The survivors conclude with recommendations which include a national audit of conversion practices, enabling survivors to speak, greater legislative regulation of the mental health sector, consumer complaints investigations, stronger anti-vilification protections, strengthened public education, prohibitions on advertising, and capacity building for LGBT organisations (SOGICE Survivor Statement 2020, 4–5). While the statement identifies some instances where criminal penalties might be needed, it emphasises a move away from ‘punitive justice’ recognising that those who perform conversion practices ‘are also victims of the conversion movement themselves’ (SOGICE Survivor Statement 2020, 10).

While policy and public interest in the topic of banning conversion practices in Australia preceded these advocacy interventions in 2018, the 2018 Report and (to a lesser extent) the SOGICE Survivor Statement prompted the Victorian government to propose a ban on conversion practices and consult on the scope of such legislation. At the time, Victoria’s *Health Complaints Act 2016* provided a mechanism for survivors of conversion practices to lodge complaints against regulated medical practitioners who offered it to them. While the legislation enabled the Health Complaints Commissioner (HCC)

to investigate practices and issue prohibition orders to prevent these practices, the focus on health services excluded consideration of conversion practices that primarily related to 'ex-gay' ministries that do not involve professionally recognised forms of counselling. Following an inquiry by the HCC in 2018 and the 2018 Report identifying gaps in protection for 'conversion therapy' survivors, the Victorian government consulted on what criminal and civil laws ought to be used to address these practices and what/who should be the target of regulation while remaining sensitive to concerns about freedom of religion (Department of Justice and Community Safety 2020).¹⁴ The consultation outcomes reveal clear divergences between different identity groups with respect to law reform. LGBT advocates and organisations supported wide-ranging legislation that did not allow 'consent' as a defence to the provision of conversion practices. Many religious organisations supported a ban related to medical providers but were wary of a ban that impacted upon religious teachings relating to sexuality and gender (Department of Justice and Community Safety 2020, 3–4).

The Victorian government's consultation report centralises the pain and shame of survivors. The report details testimonies from survivors who talk about feeling 'perverted and sinful', internalising 'feelings of shame to such a degree that [their] mental, physical and spiritual health all suffered', and living in a 'constant state of worry and suicidal ideation' (Department of Justice and Community Safety 2020, 7–8). This shame does not alleviate the 'problem' of having such stigmatised desires, rather it is 'the body's way of telling us that we are interested [in the people we desire] and that we will continue to be despite shame's painful interruption' (Probyn 2005, 63). Given the breadth of conversion practices that generate such emotional harms, the report then outlines survivors' desires for reforms that cover all types of shaming and painful conversion practices (regardless of the person who provides them or the setting in which they take place) (Department of Justice and Community Safety 2020, 12). Like the SOGICE Survivor Statement and 2018 Report, survivors spoke about the value of a hybrid (criminal/civil) justice scheme. However, they emphasised the desirability of non-punitive reforms (conciliation, investigation, compensation) because of their procedural flexibility and suitability in most situations where conversion practices are the result of

¹⁴ The HCC inquiry into 'ex-gay' therapy was broader than the sample considered for the 2018 Report. While HCC's report has not been made public, the HCC identified the 'long-term psychological harm and distress' and recommended that the Victorian government introduce 'legislation to prohibit conversion therapy/practices, and supports for survivors of conversion therapy/practices, which may include resourcing for counselling/support services for those survivors' (HCC 2018).

ignorance or perpetrated by those who have undergone conversion practices themselves (Department of Justice and Community Safety 2020, 15–17).

Freedom of religion, however, remained a contested point in the consultation. Some survivors articulated their rights to be part of a religious or spiritual community without the threat of harm while others observed freedom of religious belief could not infringe the rights of others (LGBT people) to live without discrimination, stigma and abuse (Department of Justice and Community Safety 2020, 18). Religious organisations expressed serious concern that a ban ‘targets a wide variety of practices common to people of faith’ and ‘bans the whole Christian faith and way of life’ (Department of Justice and Community Safety 2020, 19).

The consultation process made space to address the pain and shame of survivors who had experienced conversion practices while safeguarding the concerns of those religious groups who considered sexual and gender non-conformity as traumatic or shameful. This tension framed the affective context in which legislation would be introduced and debated.

The Change or Suppression (Conversion) Practices Prohibition Act 2021

In late 2020, the Victorian government tabled the *Change or Suppression (Conversion) Practices Prohibition Bill* (the bill). Giving effect to the law reform consultation, the object of the bill was to ‘eliminate as far as possible the occurrence of change or suppression practices in Victoria’ while ensuring ‘all people, regardless of sexual orientation and gender identity, feel welcome and valued in Victoria and are able to live authentically with pride’ (sections 3(1) (a), (c)). What is striking about the bill is that it codified pride as the antidote to individual experiences of pain and shame, reminding us that the bill has institutional emotional significance in making LGBT people feel collectively ‘welcome and valued’ by enabling them as individuals to live ‘authentically with pride’. As David Caron (2009) notes, ‘pride produces an additional level of shame, it makes us ashamed of our shame’ (120). This dynamic was apparent if we consider how institutional expressions of guilt made visible the productive effects of pain and shame. Legislative guilt emerged as the bill recognised the institutionalised violence inflicted on LGBT people who had been told their sexual orientation or gender identity was ‘broken and in need of fixing’ (pain) (Section 3(2)(b)) and this affective recognition institutionalised legislative denunciation of ‘serious harm caused by change or suppression practices’ (shame) (Section 3(2)(a)).¹⁵ This co-constitution of pain and shame

¹⁵ Guilt is closely related to, but is differentiated from, shame. While shame is a self-reflexive affect that attaches to the identity of the individual, guilt attaches to particular acts of poor behaviour that warrant contrition (Best 2016, 18; Nussbaum 2004, 207–8). As Elspeth

cultivated legislative guilt which the bill sought to ‘smooth away’ by pursuing reparation through law reform (Probyn 2005, 45). In alleviating the shame and pain of those who experienced conversion practices, while smoothing over the institutional guilt of the state, the bill sought to proscribe any change or suppression practice (regardless of consent) that caused injury, prohibit the facilitation of conversion practices (including the production of documents), and limit advertising of conversion practices (Sections 10–14).

The bill did not limit the focus of regulation to registered practitioners of conversion practices nor did it specify discrete types of conversion practices that would be proscribed. Instead, the definition of conversion interventions broadly covered any ‘practice or conduct directed towards a person . . . for the purpose of changing or suppressing the sexual orientation or gender identity of the person; or inducing the person to change or suppress their sexual orientation or gender identity’ (Section 5(1)). In terms of prohibited conduct, the bill made provision for criminal penalties where conduct involved the intentional or negligent infliction of serious injury (ten years) or injury (five years) while adding fines for those who advertised such practices in violation of the law. Much of the bill, however, concentrated on a civil redress scheme that empowered the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to receive reports, investigate, conciliate, give directions, issue compliance notices and arrange agreements with respect to those who provided conversion practices (Part 3).¹⁶

The bill prompted considerable debates in the Victorian Legislative Assembly (LA) and Legislative Council (LC) between late 2020 and early 2021.¹⁷ In the sections that follow, I detail how legislative debates in relation to the bill were underpinned by grammars of pain and shame that enabled the passage of the bill (in a virtually unmodified form). I follow these emotional grammars to explain the tensions that emerged in legislative discussions over

Probyn (2005) summarises, ‘shame is deeply related not only to how others think about us but also how we think about ourselves. Guilt is triggered in response to specific acts and can be smoothed away by an act of reparation’ (45). I use guilt here to describe the ‘legislative intent’ because Parliament is responding to specific acts of harm and their failure to address such acts in the past.

¹⁶ The bill also introduced consequential amendments to definitions in Victoria’s anti-discrimination law to nuance existing definitions of sexual orientation and gender identity and expression while adding in ‘sex characteristics’ (Part 5). I do not consider these changes in detail here as they are beyond the scope of my argument in this chapter.

¹⁷ The Victorian Parliament is a bicameral legislature with a Legislative Assembly and Legislative Council. Both chambers are directly elected (though the former involves a constituency-based election while the latter is elected through a proportionate system of the entire Victorian electorate).

religious freedom, children who seek medical support, dignity, identity and consent. In following pain and shame in this part, I do not wish to exclude the importance of other emotions (like fear, anxiety, anger, hostility, resentment discussed in Chapters 2 and 3) in shaping the terms of these debates as well. Rather, my focus on pain and shame in this chapter is to draw out how the individual and interpersonal dynamics of pain and shame (caused by conversion practices) are recognised and contested through legislative institutions that express shame and pain over the harms caused by such practices and the (over)reach of reform to end such harms.

Religious Freedom

Recognising the depth of pain caused by conversion practices limited the scope of freedom of religion. In arguing against excluding religious individuals or communities from the scope of the bill, the Attorney General tabling the legislation noted the importance of addressing the ‘insidious and unrelenting “ex-gay” messaging that ate away at [survivors’] wellbeing and self-worth’ (Hennessy MLA Vic LA 26 November 2020, 3715). Many MLAs who supported the legislation began their contributions by acknowledging their ‘abhorrence’ at this ‘harm and hurt’ and then used the grammar of pain to describe how conversion practices ‘leave a trail of destruction in people’s lives’ and ‘cause a lifetime of trauma and harm to LGBT Victorians’ (Wynne MLA, Kilkenny MLA, Foley MLA, Connolly MLA Vic LA 10 December 2020, 4089, 4061, 4050, 4053). These points were echoed in the LC where MLCs spoke about recognising ‘trauma and pain and hurt and shame as it arises for members of our community’ and the ‘irreparable harm . . . [from] repeatedly hearing that you are broken’ (Shing MLC, Ratnam MLC Vic LC 4 February 2021, 211, 246). They observed how the legislation could ‘stem the trauma’ and ‘stop the harm to save lives’ (Foley MLA, Kilkenny MLA Vic LA 10 December 2020, 4051, 4061). As one MLA concluded in the LA debate, ‘in removing this discrimination we are not preventing religious freedom, we are not preventing freedom of assembly; we are preventing hurt’ (Ward MP Vic LA 10 December 2020, 4105). We can note here that pain becomes an institutional grammar that ‘surfaces’ not only the individual harms experienced by LGBT people who endure conversion practices but also contours the purpose and scope of legislation invoked to repair such harms by limiting religious freedoms in this context (Ahmed 2004, 24).

Repudiating shame caused by religious practices was also key to ensure that LGBT people did not see themselves as a ‘disorder, disease, illness, deficiency, disability or shortcoming’ (Hennessy MP Vic LA 26 November 2020, 3723, Section 3(2)(c)). MLAs referred to the earlier consultation process and testimonies from constituents where survivors spoke about how they

'internalised [their] feelings of shame to such a degree that [their] mental, physical and spiritual health all suffered', were told their 'very core is wrong', and were 'unable to speak for fear of bringing shame to their families and communities' (Foley MLA, Settle MLA, McGhie MLA Vic LA 10 December 2020, 4050, 4096, 4097). MLAs recognised the experiences of shame and refracted them as they spoke about keeping LGBT people 'safe from religious practices that are designed specifically to fill them with feelings of shame' and condemning some churches for 'teaching and reinforcing shame about being gay or trans' under the guise of care (Connolly MLA, Cupper MLA Vic LA 10 December 2020, 4054, 4090). While the law could shame religious conversion practices, supportive MLAs emphasised that the bill was narrowly tailored because it focused only on practices that were specifically directed to identifiable individuals. This was important because it avoided regulating general statements of religious beliefs or sermons (Symes MLC Vic LC 4 February 2021, 277). In doing so, MLAs redirected shame towards those who had a problem with the legislation, with MLAs rebuking those who opposed the bill as having 'for the longest time . . . inflicted the pain, created the stigma and intruded through the worst kind of moralising' and becoming 'one of the many who, sadly, seek to ostracise or condemn those who are struggling' (Andrews MLA, Fowles MLA Vic LA 10 December 2020, 4067, 4069). MLCs echoed the shaming statements made in the LA, with one calling 'shame on those who would not stand and actually take a position' and insisting they 'never dare march at Pride ever again' (Shing MLC Vic LC 4 February 2021, 213). It was the 'bigotry that needs the therapy . . . it is the bigotry that is broken' (Cupper MLA Vic LA 10 December 2020, 4090). In saying this, the MLA redirected shame away from LGBT people and towards the institutionalised homo/transphobia ('bigotry') that harmed them.

MLCs took up the repudiation of shame in response to claims about protecting religious freedom. Shing MLC summarised:

I want to touch on shame today because shame is at the heart of the need for this legislation, and it is a recognition of this shame that has brought about the importance of a bill like this. Shame comes in so many layers, and people who grow up in a family or in a faith that says that they are not good enough, that they are wrong – that we are wrong – that says in fact that love is conditional upon us either denying who we are or agreeing to change, or in certain tragic circumstances, too many of which I am aware of personally, are forced to change. (Shing MLC Vic LC 4 February 2021, 212)

What was palpable across the chambers was how shame functioned as an object of legislative interest when circumscribing religious freedom and how the statutory debate over the harms of experiencing individual forms

of shame subsequently institutionalised a specific grammar of shame. Shing MLC made this connection clear when she noted that shame was both an object of the legislation ('shame is at the heart of the need for legislation') and the method by which this legislation materialised ('shame that has brought about the importance of a bill like this'). In other words, by exposing its failure to protect LGBT people, the statute sought to turn away from the 'exposure' of its failures and aimed to find pride by no longer 'denying who we are' (as both LGBT people and parliament itself celebrated their integrity) (Sedgwick 2003, 97). The legislation did not seek to eradicate shame entirely, but it helped to create the conditions for a person not having to 'choose between [their] sexuality and spirituality' and 'encourage[d] greater understanding and empathy' between religious and non-religious groups (Patten MLC, Ratnam MLC Vic LC 4 February 2021, 247).

For MLAs and MLCs who refused to support the legislation in its current form, pain and shame still functioned as grammars underpinning their legislative contributions. They recognised trauma, pain and shame only to distance such practices as events in the past. These MLAs and MLCs condemned the 'historic so-called conversion practices' as brutal and 'straight-out barbaric' but distanced them both in time and space by noting serious harms 'occurred in the medical setting and not the faith setting' (Angus MLA Vic LA 10 December 2020, 4058; Finn MLC Vic LC 4 February 2021, 234). Alternatively, one MLA recognised the harms of such practices but expressed their 'greatest concern' over the civil liability scheme which did not have a time bar for lodging complaints and the overreach into faith communities (Roswell MLA, Wakeling MLA Vic LA 10 December 2020, 4071, 4075). This point was taken up in the LC where amendments were introduced to remove Part 3 of the bill, enable greater time for consultation, and stop the 'Orwellian' overreach into everyday conversations while banning the practices that 'we all find abhorrent' (O'Donohue MLC, Hayes MLC, Ondarchie MLC, Bach MLC Vic LC 4 February 2021, 208, 249, 264). The temporal distinctions of pain differentiated injuries: the 'abhorrent' harms of conversion practices are relegated to the past while the 'Orwellian' harms of interfering with religious freedom are made present. Pain was also spatialised, where medical settings were primarily responsible for the 'straight-out barbaric' practices while religious settings were now being threatened with the risk of criminalisation.

Dignity

The repudiation of individual forms of pain and shame resulted in an institutional 'pride' for MLAs and MLCs who concluded their supportive speeches by commending the bill to their respective chambers (Connolly

MLA, Richards MLA, Halse MLA Vic LA 10 December 2020, 4054, 4056, 4094; Pulford MLC, Tierney MLC, Ratnam MLC Vic LC 4 February 2021, 218, 233, 246). One MLA described her ‘great shame’ at witnessing an anti-LGBT sermon at her local parish but was now able to feel pride at the legislative work ‘to make sure that people can freely practise their sexuality without guilt, shame and trauma’ (Richards MLA Vic LA 10 December 2020, 4056–7). Other MLAs exclaimed that ‘there [was] no right to rob a person of their dignity by telling them that a part of who they are need[ed] fixing’ and emphasised that this legislation could ‘liberate people from those pains they feel’ by putting an end ‘now and for always to this harmful, shameful, and disgraceful practice’ (Hamer MLA, Halse MLA, Edwards MLA Vic LA 10 December 2020, 4099, 4091, 4110).¹⁸

Dignity materialised as a key goal of reform. The Victorian Premier emphasised that ‘no one should have to hide who they are or who they love, let alone apologise for it’ (Andrews MLA Vic LA 10 December 2020, 4066). One MLA drew attention to the ‘wonderful words’ in the bill and reparative potential of such statutory language:

These are words that hopefully help heal those living amongst us who have crumbled and been so hurt and traumatised by these barbaric practices. They are words that hopefully replace the words that survivors have used – words like ‘secrets’, ‘perverted’, ‘unforgivable’, ‘damaged’, ‘sin’, ‘hate’ and ‘hypocrisy’. (Crugnale MP Vic LA 10 December 2020, 4104)

Individual expressions of pain surfaced the harms of those who ‘have crumbled’ because of ‘barbaric’ conversion practices. In using words like ‘pride’ and ‘denounce’ in response to the pain and shame of conversion practices (evident in the negation of words like ‘perverted’ and ‘damaged’), the statute institutionalised respect for LGBT people. MLCs solidified this statutory respect, noting ‘Victorians deserve to live in a state which affirms their identity, promotes equality and outlaws practices that actively undermine this goal’ and that they do not ‘need to be cured’ (Watt MLC, Meddick MLC Vic LC 4 February 2021, 254, 268). In rejecting an amendment to exempt ‘familial discussions’ from the reach of the legislation, one MLC representing the Victorian government emphasised the ‘sometimes lifelong harm or fatal harm’ to ensure the law protected the dignity and well-being of children (Symes MLC Vic LC 4 February 2021, 302). The grammars of pain and

¹⁸ Queer and trans legal scholars have explored the importance of safeguarding LGBT people from shame and stigma while also noting way ‘dignity’ is often articulated in legal contexts to shore up heteronormative ideas about social respectability, sexual propriety, economic productivity and political palatability (see Raj 2020b; Stanley 2021; Thoreson 2022).

shame expressed through legislative debate worked to secure the dignity of LGBT people.

Medical Treatment and Children

For legislators who opposed the proposed framework of reform, pain associated with the purported harms of gender affirming healthcare functioned to block support for reform. This involved projecting an abstract image of pain while ignoring whether those who directly experienced gender affirming medical interventions viewed such a process as ‘painful’ at all. As noted in Chapter 3, there is a hierarchy of who is entitled to feel pain and anxiety, as legislators prioritise the emotions associated with the hypothetical child who regrets their medical transition over the fears of a young person forced into puberty because they are denied gender affirming care. As one MLA argued, ‘when we are dealing with a child having the potential to have medical intervention, we need to ensure that we get it right’ (Southwick MLA Vic LA 10 December 2020, 4047). While their focus was on isolating ‘gender identity’ as a problematic term, its legislative invocation serves to scupper the entire bill. Several MLAs and MLCs opposed to reform referred to a recent (at the time contemporaneous) decision of the English High Court to severely limit puberty blockers and hormone treatment to minors on the basis they lacked the capacity to provide informed consent (see *Bell* 2020).¹⁹ Supporting the need for further consultation, one MLA noted:

I believe we will look back at this period of affirmation supremacy with regret. ‘What were they thinking?’, we will say to doctors who caused infertility, mutilation and lifelong drug dependency. And a parliament in the future will say sorry and will pay compensation. (Staley MLA Vic LA 10 December 2020, 4055)

This MLA foregrounded pain and shame in distinct ways. In speculating about the risks relating to the provision of healthcare for trans minors, the MLA drew attention to the pain associated with ‘infertility, mutilation and lifelong drug dependency’ and generated the shame (of regret) where parliament would have to ‘say sorry’ and ‘pay compensation’. Appropriating another’s pain (a trans minor who sought medical transition) blocked recognition of the need for comprehensive reform.

¹⁹ This case related to public health services that provided puberty blockers and hormone treatments to young trans people in England. The case was overturned on appeal (see *Bell* 2021). For a more detailed treatment of these issues, see Chapter 3. I and others have also explored the attempts to exclude gender identity from conversion therapy bans in the UK; see Asquith 2023 and Raj 2023a.

This point was taken up in the LC where one MLC made the point:

This is not about electric shocks. This is about free individuals seeking advice on deeply personal matters [with] irreversible and life-changing consequences. (McArthur MLC Vic LC 4 February 2021, 251)

Pain functioned for opponents of current legislative reform, as it did when discussing religious freedom, as a grammar of differentiation. This time, however, the grammar of pain pointed to a different set of harms. By defining pain in terms of physically invasive practices like ‘electric shocks’, the MLC was able to distinguish less worrying practices that involved ‘free individuals’ who were just ‘seeking advice’. Moreover, by speculating on the ‘irreversible’ changes wrought by medical transition, pain surfaced the risk of physical harm for young people who would now be unable to seek counsel from medical providers on ‘deeply personal matters’ as healthcare providers would no longer be able to support them. This political fixation on speculative pain, however, obscured a key element of the legislation. Section 5(2) made clear that providing support, acceptance, advice, coping skills and assistance to someone seeking to undergo gender transition did not constitute a ‘change or suppression practice’.

Identity

In debating the scope of protection, shame and pain make visible the precarious nature of minoritised sexual or gender identities. In speaking passionately about the need for such legislation, Dimopoulous MLA noted:

Our sense of ourselves as children and adolescents is so fragile. One word in a group conversation not even directed at us can have lasting impacts, let alone change and suppression strategies directed at individuals. (Dimopoulous MLA Vic LA 10 December 2020, 4101)

We can observe here how the MLA recognised the power of a ‘word in a group’ to cause pain and shame by drawing attention to the failures or deficiencies of identities. As evident in the testimonies of survivors referenced throughout the legislative debates, LGBT identity is produced by painful realisations that one is different and this realisation generated shame amongst those LGBT people who sought to limit exposing their minoritised differences to others (Ahmed 2004, 109; Sedgwick 2003, 97). This painful and shameful recognition is not confined to individuals who experience conversion practices. As this MLA’s intervention reminds us, these emotions are institutionalised in how MLAs were being asked to grasp their ‘sense of [themselves] as children’, where parliament could give effect to its own vulnerabilities.

In response to MLAs and MLCs who advocated that sexual or gender identity could not be changed, some opponents of reform identified the shame over a purported inconsistency between an expansive definition of gender identity (and expression) and the legislation's failure to make room for gender questioning or fluid people. Hayes MLC argued:

We run the serious risk of deterring individuals from speaking about their internal conflicts and worries, knowing that the advice is forced to be biased, giving rise to a genuine risk of psychological damage and/or harm since they will be discouraged from seeking genuine counselling. We talk of gender fluidity, but this bill is prescriptive and prevents choice and in my mind is not fluid at all. (Hayes MLC Vic LC 4 February 2021, 216)

In foregrounding the bill's 'prescriptive' definition of conversion practices, shame emerged where the subject of the law (gender fluidity) came up 'against itself' (Ahmed 2004, 103). This was institutionalised through a self-negation within the reform, as the bill purported to recognise fluid gender identities but failed to countenance the fluidity of identity for the purpose of therapeutic conversations. There is an added dimension of pain here as the MLA surfaced the 'psychological damage and/or harm' by speculating situations where a queer or trans person might seek 'genuine counselling'. Another MLC observed that the bill took 'a very narrow binary view of gender and sexuality' which risked 'eras[ing] sections of the LGBTIQ+ community' (Quilty MLC Vic LC 4 February 2021, 256). By refracting shame – illuminating the law's internal self-negation – these MLCs sought to 'trouble' the aims and scope of law reform to the extent the bill ossified a definition of identity.

Consent

Legislative expressions of pain and shame functioned to reject an amendment that consent could be a 'defence' to those who would offer conversion practices in the form of talking therapies or prayers. In surfacing the harm of conversion 'conversations' (talking therapy or pastoral care) and the problem of consent, one MLA analogised it to the state's refusal to allow people to 'voluntarily let people use tanning beds or inject crystal methamphetamine' (Fowles MP Vic LA 10 December 2020, 4069). In doing so, the MLA recognised the pain of being told you are 'broken' was as invasive (though in a psychological sense) as experiencing extensive sunburn or having physiological scars from drug use. When considering amendments to permit 'consensual' conversion practices in the LC, one MLC noted:

If you are a gay kid and you have been bullied and harassed and your parents think you are an abomination, I reckon you probably would consent to

something if you thought it would work. We know from survivors it does not work. (Symes MLC Vic LC 4 February 2021, 297)

Childhood vulnerability captured how shame could induce ‘consent’ to such practices. A young person who experienced the pain of being ‘bullied and harassed’ alongside the shame of ‘parents think[ing] you are an abomination’ created the conditions of vulnerability for queer kids who wished to change an aspect of their sexuality or gender identity. By narrating such an example, the MLC (and those who supported the bill) gave institutional expression to the pain of LGBT people being subordinated. In doing so, supportive MLCs institutionalised shame (at the idea consent could be legitimate) by turning away from an amendment that would have permitted people to consent to such practices.

In the final part of this chapter, I turn to explore how we might think reparatively with pain and shame to critique and pursue law reform that repairs ‘conversion’ harms.

IV – Moving Pain and Confronting Shame

In recognising the limits of *Change or Suppression (Conversion) Practices Prohibition Act 2021* (the Act), one MLC who supported the reform also acknowledged that the legislation might be regarded as a failure to ‘go far enough’ to ‘prevent telling gay people that they are broken . . . or that they should be ashamed’ (Symes MLC Vic LC 4 February 2021, 271). I take this comment as a point of departure to think through ‘how far’ we can and should go with law to address issues of religious freedom, childhood integrity, dignity, identity, and consent in law. Queer scholars have argued shame offers us an affective tool to critically rethink social justice politics (MacKendrick 2018; Moon 2009; Probyn 2005). I take up their invitation by confronting the grammars of shame at the heart of law reform attempts to ban conversion practices and gesture to how we might follow emotional grammars of shame in the context of anti-discrimination law to circumscribe the scope of religious freedom and dignity. Queer scholars, as outlined in earlier chapters, have cautioned against embracing a politics of pain that aestheticises individual pain while obscuring conditions of inequality (Brown 1995; Berlant 1999; Cvetkovich 2003). In this final section, I develop a novel reparative analysis with individual and interpersonal expressions of pain and shame to consider how legal interventions might enable safeguarding, non-domination, autonomy and dialogue. This reparative approach addresses institutionalised homo/transphobic ideologies that ossify queer identities, impair capacities to consent, and inhibit access to medical support. By thinking reparatively with pain and shame, we can engage with

fantasies of legal repair inspired by legal bans on conversion practices and craft socio-legal solutions to end conversion harms.

Confronting Shame

In explaining the importance of a reparative queer critique, Sedgwick (2003) polemicalises that ‘the only move I can see worth making in this context is the actively antihomophobic one, valuing and exploring and sharing a plurality of sexual habitation, love, and even crucially knowledge’ (51). In the legislative process leading to the enactment of the Act, we can see how contesting individual experiences of homo/transphobic shame creates institutional conditions for recognising and affirming sexual and gendered habitations that do not conform to (cis/hetero)normative ideas. That is, we can create spaces to refuse social insistences on marital reproduction and binary sex as the only ways to exist in the world. The objects of the Act and the legislators’ speeches institutionalise the denunciation of tropes like ‘brokenness’ and ‘deficiency’ that shame individual queer and trans lives. The definition of conversion practices in the Act seeks to capture all types of interpersonal interactions that intentionally or negligently result in individual injury. These injuries are surfaced by legislators who draw on the pain and shame of survivors to illuminate the importance of the legislation.

By criminalising conversion practices, the Act projects stigma onto both conversion practices and those who would perpetrate them. This legislative stigmatisation (of conversion practices) is mobilised to ‘cover over’ the statute’s incompleteness in addressing what survivors describe as ‘conversion ideologies’ (Nussbaum 2004, 219; SOGICE Survivor Statement 2020, 4–5). Riffing on what Nussbaum (2004) refers to as the ‘infantile narcissism’ that structures shame, I argue here that legislative stigma is projected onto others (individuals who perpetrate conversion practices) to cover over legislators’ anxieties that they are unable to fully address the harms of homophobia and transphobia (220). In other words, legislative prohibition on conversion practices works to shame those who perpetrate it by stigmatising certain activities like exorcisms, talk therapies and pastoral advice as deficient and dangerous (Nussbaum 2004, 173–4).

Foregrounding the interpersonal dynamics of shame in conversion practices when debating the legislation (where a vulnerable person is ‘counselled’ to change or suppress their sexuality) enables legislators in Victoria to circumscribe the limits of religious freedom. They differentiate between general sermons that mark homosexuality or trans existence as sinful (which is legally permissible under the Act) and specific practices (prayer, counselling, exorcism) that describe a particular person’s homosexuality or trans existence as ‘broken’ and needing to be ‘fixed’ (which is now proscribed by the Act).

As one Victorian MLC representing the government made clear in her speech, 'general commentary on sexuality is not a change or suppression practice' (Symes MLC Vic LC 4 February 2021, 277). Yet, the emphasis on individual and interpersonal experiences of shame obscures the institutional religious contexts in which LGBT people are stigmatised (such as in sermons that preach the sinfulness of homosexuality and the dangers of such a 'lifestyle'). The parliamentary debates institutionalise shame over the persistence of conversion practices, and this prompts the need for an Act to make reparation for such harms. The depth of such reparation is evident in the structure of the legislation which threads criminal, civil and administrative measures and creates a hybrid enforcement mechanism. The Act enumerates a clear set of powers to research, investigate and conciliate (see Part 3 of the Act). However, while the legislation is wide-ranging, parliament's recognition of its failure to confront all types of homophobic or transphobic ideologies (both in the past and currently) results in it 'turning away' from that scene of failure and using the Act to 'cover over' those failures (Ahmed 2004, 104).

The above discussion demonstrates that legislators will need to strike a balance between conflicting interests (religious freedom and sexual dignity) and this is where engaging critically with shame is productive. Feeling the limits of parliament's institutional shame is productive because it 'inaugurates an alternative way of being in the world' (Probyn 2005, 56). To think alternatively about/with individual, interpersonal and institutional expressions of shame when addressing the harms of conversion practices, I turn to anti-discrimination law. Anti-discrimination law is paradigmatically useful because it focuses on the impact of conduct, rather than the intentions or motivations underpinning it. For example, the *Equality Act 2010* (UK) proscribes unwanted conduct (harassment) in workplaces and other recognised settings that 'violate dignity' or create an 'intimidating, hostile, degrading, humiliating, and offensive environment' (Section 26) in specific workplace, service provision, accommodation and education contexts. What is instructive about this harassment provision is that it recognises shame as an individual harm (as a violation of dignity) which might arise through an interpersonal encounter (sexual harassment between colleagues in a workplace) while also making room for institutionalised experiences of shame (where someone must inhabit a 'humiliating' environment). While this equality protection against harassment is limited to specific contexts, and excludes religious spaces, I extend the concept speculatively here to see what it might offer reforms relating to conversion practices. Extending this principle to the context of conversion practices, we could conceive of generalised but repeated statements (even religious ones) that proclaim homosexuality is disordered, or gender non-conformity is diseased, as creating environments

of shame that impair the dignity of LGBT people even if they do not target a specific individual.²⁰ The Act discussed above innovates civil remedies to resolve shame-inducing interpersonal conflicts (such as between queer religious people and their pastors) which may result in shaming interventions that challenge institutional cultures. For example, where someone is willing to make a complaint to an administrative agency (VEOHRC), there is the possibility of the agency requesting information, facilitating conciliation, authorising agreements, issuing prohibition orders and/or making referrals to the police (Sections 24–49). However, the Act's narrow definition of conversion practices with its emphasis on interpersonal encounters limits the extent to which institutional (religious) cultures or beliefs that vilify or degrade LGBT people are brought into scrutiny. Adopting a harassment definition, such as the one expressed by the *Equality Act 2010*, would broaden protections for LGBT people who experience institutionalised stigma and shame in religious settings. Religious individuals enjoy a right to preach according to their beliefs. However, shame illuminates (both for the religious organisation that may feel shame over their behaviour and the queer person in question who endures the shaming effects of sexual stigma) how such a right ought to be circumscribed to the extent it creates a hostile, degrading, humiliating, intimidating or abusive environment for others.

Inviting legislators to engage with their shame over failing to stop homo/transphobic indignities 'may reorder the composition of [law's] habitus' which enables legislators to make 'quite different choices' when it comes to reform (Probyn 2005, 56). In the legislative debates, the shame of failing LGBT people by not legislating was apparent throughout the contributions of those who pursued the Act. Yet, the desire to 'cover' these failures with law – to limit parliament's exposure to further shame – inhibited legislators from pursuing reforms that might have addressed institutional cultures of homo/transphobic shame. Making room to critically linger with individual, interpersonal and institutional expressions of shame, however, points to the possibilities (as well as limits) of expanding reform.

²⁰ The Act refers to 'harassment' but only to the extent that it relates to conduct that specifically targets an individual (Section 65). Legal prohibition against harassment is grounded in substantive values like dignity (Fredman 2011, 228). While the *Equality Act 2010* creates a broad definition of harassment that is useful to think with in an abstract sense, it is important to note that the *Equality Act 2010* only regulates harassment in specific public spaces and contains various exemptions, including in the context of sexual orientation and gender identity (named 'gender reassignment') (Fredman 2011, 91). For another example, see *Equal Opportunity Act 2010* (Vic).

Moving Alongside the Objectification of Pain

Pain and shame are vivid emotions that surface the harms of conversion practices. Throughout the debate to ban conversion practices, legislators in Victoria began by acknowledging the ‘hurt’ or ‘trauma’ that pervaded the lives of survivors who had experienced conversion practices. Numerous legislators made explicit references to the testimonies of survivors to anchor their arguments in support of the Act. Even those who hesitated with reform and urged further consultation with communities before proceeding with legislation recognised the ‘abhorrence’ of conversion practices (particularly those of the invasive physiological kind such as electroshock interventions). In recognising the depth of trauma (and shame) that shaped the lives of ‘conversion therapy’ survivors, legislators sought to transform individual experiences of pain into an object of legislative focus. The Act sets this out clearly when it references the need to ‘give statutory recognition to the serious harm caused by conversion practices’ and to repudiate the pain-inducing idea that LGBT people are ‘broken and in need of fixing’ (Section 3(2)(a), (c)). In giving statutory form to the pain of survivors, the Act attempts to repair the hurt that survivors of conversion practices have endured. It does this in symbolic and material ways. If, as Trispiotis and Purshouse (2022) make clear, conversion practices are a systemic stigmatic harm against LGBT people by degrading the worth of their sexual orientation and gender identity, the Act seeks to repair this symbolically by explicating the need to make LGBT people ‘feel welcome’ and feel ‘pride’ (Section 3(1)(c)). This was affirmed by MLAs who drew attention to how statutory language provided ‘wonderful words’ to heal histories of trauma (Crugnale MP Vic LA 10 December 2020, 4104). Moreover, by recognising the individual injuries caused by conversion practices, the Act creates a series of new offences and supplements these with civil remedy schemes (as well as criminal ones) in order to provide individuals with clear redress for the pain they have experienced.²¹

As discussed in Chapter 2, institutionalised grammars of pain that focus on individuating pain risk obscuring social conditions that enable inequalities. Berlant (1999) argues that we must distinguish between ‘trauma’ as the shock or surprise that arises from violence/subordination and ‘adversity’ as the conditions of that violence/subordination (77). Throughout the legislative debates, MLAs and MLCs (even if they had concerns about the legislation)

²¹ The Act makes consequential amendments to family violence legislation to clarify that conversion practices is an example of ‘emotional and psychological abuse’ within the context of that legislation (Section 64). It is also possible to conceive of conversion practices as a form of ‘coercive control’ (see Herring 2023).

recognised individual testimonies involving familial rejection, corroded self-esteem and suicidal ideation, and they emphasised their ‘abhorrence’ in response to the existence of such painful accounts. Legislators expressed their ‘shock’ at the existence and persistence of such practices designed to pain and shame LGBT people into changing who they are. Legislators in Victoria were ‘moved’ by registering the pain of survivors. Law became an instrument in the process to remedy emotional registrations of injustice by attempting to ease LGBT pain (Berlant 1999, 53). But by institutionalising the pain of survivors, the Act consolidates the idea that sexual and gender identity is something fixed and possessed uniquely by an individual, which means it is harmed by any attempt to change or suppress it (see Sections 3 and 5 (1)). Yet, as a few legislators who expressed concern about the Act in its current form noted, a ban on conversion practices risks denying support to people who are ‘questioning’ (what they perceive to be) problematic aspects of their sexuality or gender. While the Act makes room to provide support to those undergoing medical transition or engaging in ‘identity exploration’, it is unclear how providers of therapy or pastoral care might distinguish between acts designed to change or suppress an aspect of (fixed) identity and those ‘coping skills’ which functionally effect the same outcome (Section 5(2)(a)(i), (v)). This is not to deny that interventions play a role in clarifying or enabling people to better understand their positionalities and desires. Rather, I am wary of how legislative predication of sexuality or gender as an immutable category of identity through legislation is problematic for therapists (Victor 2014, 1550). The legislative debate emphasised this concern in respect to gender affirming healthcare by registering the pain (of regret) of minors who medically transition.²² While not endorsing the transphobic anxieties of legislators (also discussed in Chapter 3), we can reparatively take their registration of this speculative pain as illuminating limited statutory definitions that presume identity is fixed and people can simply ‘live authentically’ without supporting material conditions that might include healthcare, housing and education.

By appropriating the pain of conversion therapy survivors to understand it as a ‘problem’ of fixed identities subjected to change or suppression, the law conceals and reproduces its own complicity in perpetuating the social negation of queerness and (non-medicalised) forms of transness that resist these ‘authentic’ categorisations (see Serano 2022; Stanley 2021). Moreover, the

²² In some jurisdictions, politicians have argued that the provision of gender affirming healthcare is a form of ‘gay conversion therapy’ (Adu 2023; Grimley MLC Vic LC 4 February 2021, 208–11). While these anxieties are not borne out in any clinical or empirical studies, it is worth noting as this discourse begins to compromise the possibility of comprehensive ‘conversion therapy’ bans (see Raj 2023a).

idea of ‘living authentically’ in one’s identity hangs in the object of the Act as something which can be realised as long as conversion practices are not performed. Yet, as I have made clear in discussions of religious exceptions to anti-discrimination law (Chapter 2) and legal gender recognition (Chapter 3), creating conditions for LGBT people to flourish requires material resources (housing, healthcare, education). The shift in political feeling to stigmatise conversion practices, rather than LGBT people, is partly accompanied with the substantive changes as the Act promises a ‘trauma-informed’ civil redress scheme with educative and research functions developed in partnership with survivors (Sections 18–20). Yet, in anchoring the legislation around individual experiences of pain, there is a scaffolding of harms and remedies within the Act in a way that links the eradication of individual pain (and shame) endured by survivors with the achievement of a broader anti-homo/transphobic politics.

Broadening the discussion of ‘conversion therapy’ bans beyond the specific terms of the Act and the accompanying legislative debate, I want to think about how institutionalised objectification of pain contours the possibilities of using law to safeguard LGBT people from stigmatic harms:

Feeling politics takes all kinds: it is a politics of protection, reparation, rescue. It claims a hard-wired truth, a core of common sense. It is beyond ideology, beyond mediation, beyond contestation. It seems to dissolve contradiction and dissent into pods of basic and also higher truth. (Berlant 1999, 58)

Moving within an economy of pain shapes a space of uncontested truth, an ‘obvious thinking’ that appeals to ‘common sense’ (Berlant 1999, 59). Public appeals for recognising and objectifying the pain of survivors are risky because they place feeling beyond contestation or mediation. Berlant’s discussion reminds us that in taking the pain of survivors seriously, we must also recognise that demands for protection, reparation and rescue that fixate on single sources of, or ‘truths’ about, harm are problematic. When an individual’s pain is fetishised in law or appropriated by another (such as a politician), it institutionalises the capacity of law to remedy it (Heyes 2020, 132). It reduces the individual to their state of ‘authentic’ pain while decoupling the conditions of their suffering from the state’s investment in the continued marginalisation of sexual and gender diversity that refuses to conform. Those who seek out conversion practices have complex and painful relationships to their sexual orientation or gender identity (Maccio 2011; Ashley 2022; Ryan et al. 2020). As the SOGICE Survivor Statement makes clear, perpetrators of conversion practices are also often survivors of them.

While legislators understandably seek solutions to alleviate such pain, the desire to shift an individual's 'bad feeling' (either the survivor's or the legislator's) without attending to the structural or discursive conditions that give rise to such feelings, renders the emotive appeal to legal remedies hollow for those who desperately seek them. In response, rather than prefiguring and legislating against every possibility of pain, we might affirm the dignity of LGBT people generally, and survivors of conversion practices especially, by pursuing a 'genuine openness' to reform 'which will, of necessity, run sometimes into obstacles and harm' (MacKendrick 2018, 104). In other words, instead of trying to 'cure' trauma with a simple therapeutic solution, we should think more critically about the directions trauma moves us in and how it reverberates interpersonally, temporally and spatially (Cvetkovich 2003, 47).

By focusing on the differential distribution of pain, we should think about why/how we remain hopeful about the law's capacity to repair harm and deliver justice through the individuation of pain. This involves pressing pain beyond an individual pathology or institutional inevitability and remaining open to what we seek as the appropriate methods to 'heal' such pain (Hall 2009, 36).

Rethinking Fantasies of Repair

The shame and pain that materialise through law reform remind us how our legal hopes for repair might fail. The Act and the legislative debates in Victoria that gave effect to a ban on 'conversion therapy' constructed a fantasy of reform that pitched reform as effecting pride. Numerous legislators made reference in their speeches to 'overcoming' the homo/transphobic traumas and shames of the past through the pursuit of law that promised to prevent conversion harms from (re)occurring and offering compensatory remedies to those who had. As one legislator exclaimed, the government's law reform process was 'another step towards destigmatising issues of homosexuality and gender fluidity' (Addison MP Vic LA 10 December 2020, 4091). The Act institutionalises optimism for Victoria's future in contradistinction to the shame of the past. While pain and shame attach us to objects that make us feel bad, optimism attaches us to things that are conducive to our flourishing. As a site of promise, optimism is a relational structure that binds us to objects, events and fantasies in precarious ways (Berlant 2011a, 2). As Berlant reminds us, however, optimism is 'cruel' when we are attached to institutions that inhibit the capacity for transformation (Berlant 2011a, 43).

Exploring this affective tension ('cruel optimism') in the context of regulating conversion practices returns us to the question of what, if any, hopes should we have for law? Our fantasies of law reform can be painful precisely because they return us to a situation where the elimination of

homo/transphobia is both possible and impossible to realise within criminal, civil and administrative remedies. Shame and pain are enduring features of LGBT life, as LGBT people are routinely subjected to practices that degrade, dehumanise and humiliate them. In drawing out the individual experiences of shame, I have foregrounded the possibilities of shaming law to stay attuned to situations of ongoing stigmatisation. Rather than stigmatising criminal mechanisms which prove burdensome procedurally (the high evidential bar to secure convictions) and substantively (the punitive impacts on perpetrators who might be vulnerable themselves), we can find inspiration in administrative schemes that broaden the capacity for the state to investigate, conciliate, prevent, educate and report. While limited in reach (due to narrow definitions), Part 3 of the Act recognises law's failures to prevent homo/transphobic sentiments. In doing so, it elaborates powers for an administrative agency to ensure the state keeps working to address insidious shaming dimensions of conversion practices as encountered by LGBT people. We might suggest here the law's 'repeated exposure to scenes of shame reactivates and feeds the [institution's] capacity to experience shame' (Probyn 2005, 85). Following shame as a grammar that connects a particular harm with a form of repair reveals the partial utility of civil schemes to remedy conversion practices.

By following pain and shame as a means of repairing conversion harms, we can refuse to countenance legal 'defences' that enable consent to conversion practices. Reform proposals in Victoria and elsewhere have grappled with the question of whether regulation should extend to 'consensual' practices (Ashley 2022, 82; Trispiotis 2023, 32). A focus on individual feelings of 'brokenness' (pain and shame) in respect to LGBT identities and how these feelings are heightened by interpersonal (counselling), and institutional (religious beliefs) dynamics of shame expose how consent is impaired by affective power imbalances.²³ Choices circumscribed by pain and shame mean that, irrespective of whether these practices 'work', legislators should be cautious to allow consent to function as a justification. As queer and feminist scholars writing on consent have argued, we should eschew a 'check box' approach to decision-making or one that accedes to 'negotiation under oppression' (Fischel 2019, 18; Srinivasan 2021, 67). Law reform that takes pain and shame seriously, even with the caveats I have outlined above, is important for broadening a conception of legal justice that foregrounds personal safety and social flourishing. As Joseph Fischel (2019) argues, autonomy and accessibility provide us with richer conceptual tools because they emphasise the

²³ While it is beyond the scope of this chapter, there is literature dealing with the issue of queering consent (see, for example, Jones 2023).

need to create social conditions of care, non-domination and dialogue that facilitate decision-making (135–71). I expand on Fischel's thinking here, and the arguments of 'conversion therapy' survivors that I have discussed earlier, to suggest that legal bans on conversion practices could be effective in achieving this if they, as the Act partially does, take a destigmatising approach to issues of identity while providing broad mechanisms for people to seek support for their experiences of shame.²⁴ Parsing pain and shame as grammars giving effect to law reform holds space to critique the promises of, while still pursuing, calls for greater forms of individualised shaming through the pain of punishment (through criminal law) and calls for greater equity that involve shaming institutions and practices by remedying the differentiated ways in which anti-LGBT stigma persists in society (through research, education and administrative mechanisms).²⁵

In order to pursue this kind of shameful and painful law reform, we need to not only be critical of law's capacities to repair social stigmas, but we also need to accept failure as part of the strategy for reform:

In scenarios of cruel optimism we are forced to suspend ordinary notions of repair and flourishing to ask whether the survival scenarios we attach to those affects weren't the problem in the first place. (Berlant 2011a, 49)

Berlant's argument brings into sharp relief the way the fantasies we have of legal rights, the demands we make of justice, and our emotional attachments to ideas of equality may limit our ability to negotiate new modes of living (and legislating). Engaging with these affective commitments positions us at an 'impasse' – do we break with these fantasies, pursue them further or pause to think pedagogically with them? Instead of choosing one answer, I have argued that grammars of pain and shame illuminate plural ways to legislate against conversion practices. Victoria's legislation, while only in operation for a few years, generatively institutionalises pain and shame to enact different paths of regulation. While these interventions might fail to achieve their promise for the reasons I have outlined above, the material and symbolic supports offered by the reforms are important. It is in reckoning with continued failure – leaning into the pain and shame such failure might generate – that we can pursue legal and non-legal interventions to alleviate the serious, systematic stigmatisation of LGBT people. We (as advocates,

²⁴ For more detailed discussion on stigma, harm and legal reparation, see Solanke 2016 in Chapter 2 of this book.

²⁵ Legal scholars have considered what 'transformative reparations' that value repair and reconciliation might look like in this context by drawing from existing transitional justice literatures, see Mavronicola and Davies 2023.

legislators, survivors) might, to borrow from Jack Halberstam (2011), need to think about the 'queer art of failure' where we embrace 'failing well, failing often, and learning . . . how to fail better' (14). This will mean paying close attention to the implementation of reform alongside the resourcing underpinning it and being open to constantly revising our legal interventions where promises of ending conversion practices do not materialise in the lives of LGBT people.

Conclusion

Hostility towards LGBT people remains painfully and shamefully pervasive. My anecdote at the start of this chapter gave a sense of the banality of homo/transphobia and the alienating shame and pain such an incident engenders. The testimonies of 'conversion therapy' survivors that I have outlined in this chapter barely surface the insidious ways harms of homo/transphobia continue to cut across cultures, communities, faiths and geographies. We cannot ignore the pain and shame of survivors who seek to contest the life-shattering messages communicated by conversion practices that lead to serious harm and sometimes suicide (Sullivan and Schiavo 2023). Yet, by refracting pain and shame institutionally, following their grammars in law, we might think of generating new forms of political affiliation and legal repair. As Probyn (2005) notes, 'ideas and writing about shame seek to generate new ways of thinking about how we are related to history and how we wish to live in the present' (162). This chapter has been an exercise in writing through how shame and pain shape individual or interpersonal conflicts relating to conversion practices while navigating how these emotions are institutionalised in the pursuit of reform.

I contextualised debates over conversion practices by drawing out the logics of shame that subtend the social, medical, psychological and legal problematisation of homosexuality. Rather than sexual orientation being a fixed aspect of personhood, I scaffolded how discourses of sexuality and sexual regulation emerged to stigmatise homosexuality as sinful, diseased, perverted and predatory.

In giving effect to these discourses of stigma and shame, I outlined how conversion practices emerged formally in religious, clinical, social and religious settings. While varying in type (chemical aversion, talking therapy, exorcism) and degree of harm (physical scars, anxiety, suicidal ideation, suicide), these practices relied on the infliction of pain and shame towards a person's same sex desires or cross-gender identifications.

In seeking repair for such pain and shame, I then examined how survivors and activists turned to law as a means of prohibiting such harms. The reform process relied on affective redirection of shame and pain: conversion

therapy bans seek to denounce the stigmas associated with LGBT existence and instead stigmatise those practices, and those individuals, who seek to stigmatise LGBT people. Much like conversion practices themselves, reforms to regulate or ban ‘conversion therapy’ take varying forms across criminal, civil and administrative areas. I turned to Victoria (Australia) and the legislative debates that gave rise to the *Change or Suppression (Conversion) Practices Prohibition Act 2021* to examine how the grammars of pain and shame tension the development of a ban. The grammars of pain and shame in the law reform process circumscribed and contested ideas of religious freedom, childhood access to medical treatment, dignity, identity and consent.

In concluding my analysis, I sought to reparatively engage with grammars of pain and shame to think about the utility (and sometimes futility) of legislating to ban conversion practices. I critiqued law reforms that anchored repair in terms of only addressing individual shame and interpersonal experiences of pain while ignoring broader institutional conditions of domination. I observed how narrow definitions of pain and injury militated against making room to address ‘conversion ideologies’ and obscured expressions of queer and trans subjectivity that do not fit within legal categories that presuppose identity as innate or fixed. Yet, in approaching the question of reform by loosening attachments to pain and shame, I was able to illuminate modes of repair, inspired specifically by the Victorian legislation and anti-discrimination law more generally. I argued that critically analysing grammars of pain and shame make it possible to address the ongoing, systematic stigmatisation of LGBT people through reforms that emphasise safeguarding, autonomy, non-domination and dialogue.

5

Confronting Concerns: Contests over Sex and LGBT Education in Schools

Introduction

Conflicts over the purported expansion of LGBT rights are characterised by grammars of hostility, anger, resentment, fear, anxiety, pain and shame. In Chapter 2, I detailed how institutionalised resentments over the reparative scope of pro-LGBT equality laws sustained individual freedom of speech and religious objections in relation to the provision of commercial services. In Chapter 3, I sketched how individual fears and anxieties about legal gender recognition are solidified through legislative debates that foregrounded the safety and integrity of cis women while circumscribing the reparative potential of self-declared gender. In Chapter 4, I explored how the individual pains and shames experienced by ‘conversion therapy’ survivors were institutionalised through reparative legislation to prevent the continuation of such practices, but such reforms were deemed painful for those who now felt unable to speak freely about their religious beliefs. In this final case study chapter, I take up these emotional grammars through a reading of ‘concerns’ relating to reforms directed at sex and LGBT education in schools.

To speak about ‘feeling concerned’ is to invite consideration of a range of emotions. As I was undertaking research for this book, I attended a ‘Drag Law’ workshop hosted at a nearby university. The workshop was the launch event for a new network that had been set up to bring together scholars, drag artists and community activists to explore how we all might use law to better support drag performance (as a form of work) as well as thinking about how we might ‘drag’ law (as a form of teaching, a method of research, an object of study).¹ This collaboration felt acutely important given various political attacks on drag culture that were happening at the time (Clark 2023; Hamilton 2022; Hildebrand 2023). One of the activities we were tasked with

¹ The ‘Law’s a Drag’ Network was set up Rosie Fox and James Greenwood-Reeves at the University of Leeds. You can follow the network on Instagram at @lawsadrag.

was to engage in a drag role play where we advertised the services of a law firm that specialised in providing services to drag artists. I decided to dress up as Wonder Woman for the advertisement. The event, as the organisers had intended, was a lot of fun.

After the event, I proudly shared a photo of myself in Wonder Woman drag on Twitter/X. Within minutes, I was barraged with comments from strangers. One person curtly called me a 'groomer' while another went into more specific detail to argue that I had 'dressed this way to make [my] students uncomfortable'. While reading the comments attached to my photo, I felt concerned. I was anxious that my image was circulating amongst people who thought my outfit was deliberately provocative or felt that I was a danger to children. This anxiety connected to shame: I ruminated on how my image might be read by an online public who would see me as unprofessional or silly and would ridicule my feminine demeanour. Feeling ashamed that I had 'failed' to be professional in that moment led me to fear the online consequences (such as further negative comments) that may follow. I deleted the photo.

I was hurt, angry and resentful. I resented that I was forced into compromising the visibility of my gender expression (something I find joyful) to prevent online harassment. It was a painful moment, but it was also an enraging one as it solidified my commitment to doing scholarship and activism that sought to challenge such hostilities in the public sphere.

I start with that anecdote to introduce the themes of this chapter because it captures how 'concern' functions as a mobile container for a range of emotions including anxiety, shame, resentment, pain and anger. For those on the internet who felt disconcerted by an image of me in drag at a university, their individual concerns mobilised through a resentful disavowal of my image, anxious projection that my presence in an educational environment is damaging to students, and shaming condemnation of my choice of dress. I take up these connected emotions to think through two (England and Florida) ongoing law reform contestations about sex and LGBT education in schools. While not representative of all legal debates on LGBT or sex education in schools, these two legal contests evince a convergence of individualised emotions. These emotional grammars also produce institutionalised (legal) ideas of visibility, difference, free speech, religious belief, safety, well-being, dignity and childhood canvassed in earlier chapters.

I begin this chapter in Part 1 by building on previous discussions of sexuality and gender to focus on how emotions of shame, anxiety and resentment structure institutional ideas of childhood. I consider how these emotions institutionalise childhood in terms of innocence and vulnerability that require safeguarding from unruly intimacies and bodies.

In Part II, I explore how such discourses of childhood materialised in schools in the mid to late twentieth century where sexual censorship and moralising instruction were facilitated by interpersonal and institutional pedagogic encounters. In this section, I explore how stigmatising non-heterosexuality and gender non-conformity led to censorious shaming dynamics that limited LGBT visibility even as reforms were happening to decriminalise homosexuality. I briefly detail this through the emergence of laws such as ‘Section 28’ in the United Kingdom (UK) that sought to prohibit the ‘promotion of homosexuality’ in schools (*Local Government Act 1988*).

In Part III, I consider how reparative approaches to addressing sexual stigma in schools emerge through sex and LGBT education. I briefly outline the different ways sex and LGBT come to matter in formal secondary education settings, with a particular focus on the UK and United States (US). I start with the regulatory consolidation of Relationships and Sex Education (RSE) in England alongside litigation that emerged to contest the inclusion of LGBT-affirming initiatives in schools. By analysing emotional grammars of this reform, I draw out how such initiatives are circumscribed by parental resentments over schools encroaching on their rights, public shaming of schools who teach ‘sexualising’ content and social anxieties over children being ‘confused’ or ‘indoctrinated’ by LGBT content. Building on these themes, I consider reforms that have moved in an opposite direction. Looking to Florida, I explore recent statutory interventions to limit the scope for discussing (homo)sexuality and (trans)gender in public schools. *HB 1557* (‘Don’t Say Gay’) and *HB 1069* (‘Don’t Say They’) are parental rights initiatives that code parental resentments, fears and anxieties towards sex education, the circulation of material affirming queer lives, and the use of preferred pronouns in schools. While reforms in England and Florida result in different approaches to sex education, I argue that they share emotional grammars that limit the scope for affirming queer visibility, pleasure and intimacy, and occlude some of the institutional, interpersonal and individual harms LGBT people experience.

I conclude in Part IV by outlining the social utility of navigating the individual, interpersonal and institutional resentments, anxieties, shame and pain that feature in reform conversations about sex and LGBT education in schools. In doing so, I seek to confront concerns that manifest in law to rethink community responsibility for education, flourishing and safety. I suggest we might critically loosen law reform investments in anxiety and shame when pursuing LGBT rights – along with rethinking religious pain and parental resentments – to disrupt the cis/heteronormative didacticism of ‘progressive’ LGBT education initiatives. It is important to challenge emerging political dynamics that transact in individual forms of shame, fear,

anxiety and hostility and seek to institutionalise concerns in order to erase LGBT existence from public life.

Part I – Affective Vulnerabilities of Sexuality and Childhood

In Chapters 3 and 4, I outlined how sexuality and gender are produced by social, legal, religious and psychological discourses that vary across cultures and histories. In this chapter, I contextualise specifically how these discourses are imbricated in notions of childhood.² We might think of children as simply those aged under eighteen.³ However, childhood is not a static or predetermined state. As queer scholars have observed, childhood is an abstracted ideal and transitional state underpinned by expressions of innocence, trouble and vulnerability (Berlant 1997; Edelman 2004; Sedgwick 1993; Stockton 2009). Childhood is a state of plasticity where children are ‘moulded’ by parental, clinical and social instruction into becoming ‘proper’ adults (Gill-Peterson 2018, 5). While this is true for all children, it can take different forms and it can be more anxiety generating when the objects of ‘concern’ are LGBT children. Thus, as Jules Gill-Peterson (2018) documents, trans childhood is subject to pathologising clinical discourses that view trans children as unruly or ‘unfinished’ plastic objects to be moulded into properly gendered and racialised adult subjects (3). Eve Sedgwick (1993) makes a similar observation in relation to gay and lesbian children who are viewed clinically as a ‘haunting abject’ that results in homophobic familial pressure to stamp out effeminacy (in gay boys) so that they might grow up to be proper men (158).⁴ We might think of children as temporally constituted in oppositional terms to adults (Stockton 2009, 5). In materialising childhood through a retrospective adult projection, children are invested with fantasies of the future as they are rendered into idea(l)s capable of reproducing forms of social citizenship that value heterosexuality, monogamy, domesticity and family (Edelman 2004, 134; Halberstam 2011, 73). Tethering childhood to (heterosexual) citizenship produces public cultures that are invested in protecting children from insidious (queer) influences that risk ‘corrupting’ children or distracting them from becoming productive adults capable of reproducing (hetero)sexual norms (Berlant 1997, 5; Sedgwick 1993, 154–64).

² There is an expansive literature on children and childhood that is beyond the scope of this chapter. Given the nature of my case study, I focus briefly and specifically on queer and trans scholarship about childhood.

³ In many jurisdictions, eighteen is the age of legal adulthood (which confers a range of legal rights such as the right to vote, marry, consume alcohol, etc.).

⁴ This type of policing and shame (as forms of conversion practices) is discussed in Chapter 4.

What is striking about queer and trans scholarship about childhood is that they evince how institutional conceptions of childhood – framed in terms of vulnerability, innocence and trouble – are made possible by grammars of fear, pain, anxiety and shame. A child may be at risk of ‘arrested development’ and ‘refusing to grow up’ if they embrace queer pleasures like erotic same-sex relationships (Stockton 2011, 11; Warner 1999, 24–33). Such troubling children are subjected to correction: they experience interpersonal familial and social interventions that seek to cultivate shame towards their queer desires (such as the conversion practices described in Chapter 4) to ensure they grow up into cis/heterosexual adults. Childhood vulnerabilities to sexual perversion are made possible by expressions of anxiety that materialise the vulnerability of children to particular forms of risk (from individual queer desires) and shame that materialises a defence to such childhood vulnerability (from institutionalising anti-gay stigma and moral policing). Childhood vulnerabilities to gendered deviation are generated by anxieties over medical interventions (from trans kids who desire bodily transformation) and materialise through a defence against such interventions (from institutionalising anti-trans scrutiny as a precondition to medical care). This affective interplay across individual, interpersonal and institutional scales is important (for those invested in cis/heteronormativity) to prevent the pain that awaits queer or trans children who become queer or trans adults and are then burdened by relationships that are ‘unnatural, damaged, and fraught with various kinds of dysfunction’ (Ward 2020, 4). These fears of a painful future for children emerge through spatial and temporal registers invested in ideas of sexual and gender normativity: childhood is a pliable transition that risks being thwarted by queerness or transness in the case of children who deviate from expected social norms (Ahmed 2004, 65–71; 2006, 68–70). Emotions constitute the vulnerabilities of childhood.

Part II – Governing Sexuality and Censoring Sex in Schools

Discourses of childhood and sexuality that figure their relationship to each other in terms of vulnerability, plasticity and trouble emerge within a range of public institutions. Schools emerge as a key site where discourses about childhood are produced and children are disciplined into subjects.⁵ Writing

⁵ Schools vary enormously in terms of their physical architecture, methods of instruction, and types. Schools are usually differentiated by primary and secondary divisions and can be public, private or religious in character. They are also sites that are segregated or differentiated by sex, race, class, religion and disability. These nuanced distinctions are important but are not the focus of this chapter. For more detailed discussion of education and social differentiation (see Ahmed 2019, 101–40; Clare 2015, 82–5; Hall 1980, 15–47; Fredman 2020a, 83–110).

about schooling in the eighteenth century, Michel Foucault (1978) argues that schools function as sites of sexual surveillance where everything from the 'space for classes, the shape of the tables, the planning of the recreation lessons, the distribution of the dormitories' created conditions to monitor young boys' 'precocious, active, and ever present' sexuality (28). Schools are not simply inert spaces of pedagogic instruction but are political zones where bodies are disciplined by particular sexual norms and ideologies communicated through the architecture of the school (layout of tables and chairs, partitions between dormitories), forms of instruction (teachers speaking, reading textbooks), and methods of evaluation (examinations, answering questions in class) (Bourdieu 1997, 180; Foucault 1978, 27–8; Lakomski 1984, 152).⁶

Schools as sites of sexual governance are formed through anxieties over unruly or unfinished bodies (children) that need to be disciplined. These anxieties are managed through institutional dynamics of schooling which include vertically scaffolding levels of educational instruction alongside physical growth (Kindergarten to Year 12), investing authority within specific bodies (teachers) and encouraging obedience to authorised forms of knowledge taught in class (Meyerhoff 2019, 15).

Obedience and discipline as techniques of educational governance are cultivated through interpersonal dynamics of shame, where students 'avoid shame in the eyes of their teachers and fellow students' by performing well in examinations, which function as measures of educational success (Meyerhoff 2019, 15). However, shame can materialise in more insidious ways in schools, such as through the stigmatisation of effeminacy in boys when they are bullied for engaging in 'feminine' play in the schoolyard or 'idleness' of boys who are subject to pastoral chastisement for refusing to labour in a way that might be productive (Ahmed 2019, 116; Sedgwick 1993, 157). For girls at school, stigma materialises through discourses that treat their sexuality as either non-existent or as a civilising counterpoint to those of men when expressed through marriage (Smith 2020, 41–2). These interpersonal encounters at school – mobilised through the institutional cultivation of shame and anxiety – have individuating effects on children. In other words, students internalise gendered or sexualised educational norms through their interpersonal interactions at school and these shape their personal sense of identity. In Chapter 4, I discussed stigmatisation as a social, religious and familial process that produced the feeling of 'brokenness' in queer children.

⁶ Schooling also sits within broader neoliberal logics of capitalism. Schools are no longer conceived as inalienable public goods but are increasingly privatised, with parents being seen as consumers who should have 'choices' not only about the type of school they use but also if they wish to educate their children at home (Monk 2011, 185).

In this chapter, I follow stigmatisation as a social function of schooling designed to produce the ‘at risk’ queer or trans child who, with proper instruction, could live a ‘normal’ life as a productive cis/heterosexual adult.

Sexual censorship emerges as key feature of protecting children. Even in countries that were moving towards decriminalising homosexuality, the figure of the ‘at risk child’ generates institutional anxieties. Take the Wolfenden Report as an example. In the 1950s, in England, the British government appointed Lord John Wolfenden to lead a committee that was tasked with reviewing the appropriateness of criminalising homosexuality.⁷ The Committee recognised that homosexuality was a moral problem or mental illness that invited a legitimate ‘expression of revulsion’ but also noted such ‘moral conviction’ was insufficient to warrant criminalisation (Wolfenden Committee 1957, [54]). Yet, the Committee noted the particular risk of homosexuality posed for vulnerable young people. They described the ‘inducement’ and ‘indulgence’ of homosexuality involving boys and young men (Wolfenden Committee 1957, [46]). By doing so, they anxiously rendered homosexuality in institutional terms as a public influence that could disorder the moral life of children who were impressionable to such influences. Publicising homosexuality might lead to their corruption. These grammars of disgust and anxiety took effect in the report as the Committee only recommended the partial decriminalisation of homosexuality (where individuals were aged over twenty-one) and emphasised that ‘public actions’ ought to remain criminalised. We can see a resonance here with what I discussed in Chapter 2. While homosexuality as a private identity (being gay) ought to be tolerated and allowed, public expressions of that sexuality (getting married and requesting a wedding service) remain contested. Privacy (as a space hidden from public view) materialises as the appropriate container for the anxieties and disgust these non-normative sexualities produce.⁸ What is important to emphasise about these histories of policing sexuality in public is how, even in moments of legal progress, queer sexuality remains a site of anxiety that law both responds to, and reproduces, through forms of regulation and exception. For children specifically, this regulatory impulse takes a censorious form where expressions of non-normative sexuality (same-sex intimacy, gay desire, queer popular culture) must be kept hidden from view lest they corrupt innocent, or incentivise wayward, children (Bell and Binnie 2000, 81; Smith 2020, 93; Stockton 2009, 12).

⁷ The Committee also considered prostitution offences. For more detailed discussion of this, see Smith 2020, 96–101.

⁸ I discuss the different dimensions of disgust and the ‘publicness’ of homosexuality elsewhere, see Raj 2020b, Chapter 2.

Schools then are sites of sexual censorship and moral instruction in response to public displays of homosexuality. We can look again to the UK and US to see how this has unfolded. Despite the partial decriminalisation of homosexuality in the UK and several American states during the 1960s–1990s, homosexuality remained a subject of significant concern in their respective political cultures. The escalation of popular cultural representations of homosexuality triggered political anxieties that viewed such material as ‘corrupting’ or ‘pornographic’, irrespective of whether they were seen by children (Baker 2022, 35; Berlant 1997, 62). The political responses to the emergence of HIV/AIDS, particularly in the US, was to treat it as an isolated ‘gay disease’ rather than a public health issue (Bell and Binnie 2000, 22–4). Homosexuality was gaining public visibility to the dismay of many political leaders who viewed it as both socially corrupting (pornographic) and bodily corrupting (diseased).

In a notorious speech to the British Conservative Party Conference in 1987, the then Prime Minister, Margaret Thatcher, claimed that ‘children who need to be taught to respect traditional moral values are being taught that they have an inalienable right to be gay’ (Thatcher Foundation 2024). Echoing the rhetoric of the Wolfenden Committee, Thatcher presented homosexuality as antithetical to the morality of children who she framed as being at risk. It posed a particular danger to children not simply because homosexuality itself was immoral but also because talking about the acceptability of homosexuality functioned as a broader social and educational risk: it distracted children from proper educational development to become productive citizens. In 1988, the Conservative government led by Thatcher gave statutory effect to the political anxieties about the ‘promotion of homosexuality’ through an amendment to local authority legislation.⁹ Effected by ‘Section 28’, the new law placed a prohibition on local authorities in the UK (councils) to not ‘intentionally promote homosexuality or publish material with the intention of promoting homosexuality’ or ‘promote the teaching . . . of the acceptability of homosexuality as a pretended family relationship’ (Section 28(2A), *Local Government Act 1988*). In writing about the effect of Section 28, Paul Baker (2022) notes that, while the law did not specifically regulate the conduct of teachers, it created a ‘tense, frustrating and scary life for LGBTQ+ teachers’ (189). Detailing the accounts of teachers working in British schools during the 1990s, he notes that the vagueness of the law (what counted as ‘promotion’?) meant teachers felt anxious about

⁹ I do not detail the rich social and political histories that underpin the development of Section 28. For more detail on this, see Baker 2022.

disclosing their sexual orientation or relationship status to students or colleagues because they were unsure of the professional sanctions that might follow if they did. Statutory vagueness created a hostile environment, one of anxious self-surveillance, mirroring laws criminalising homosexuality, as teachers were unsure when, how and to what extent such sanctions would be enforced against them (Lugg and Adelman 2015, 47; Purton 2017, 100). Teachers who spoke pedagogically about sexuality, as a topic of study, would be shamed as ‘dirty’ as a result (Irvine 2014).¹⁰ Students noted how they felt greater shame towards their homosexuality because they were unable to learn about it in school and feared being further marginalised if they turned to their teachers to seek support when they experienced homophobic bullying from their peers (Baker 2022, 188–200).¹¹

What is important to draw out here is how Section 28 responded to specific sexual anxieties about children and, by doing so, institutionalised different sets of sexual anxieties. This materialised individually for queer teachers who feared interpersonal disclosures about homosexuality would compromise their personal identity and professional integrity. For queer students, experiencing individual shame towards their sexuality (and associated gender expressions) alongside their individual fears about being abused in school, these problems were exacerbated by the statutory architecture of Section 28.

While the law was formally repealed in 2003, the grammars of anxiety and shame that underscored that legislation remain alive in education.¹² In the UK, they materialise in current debates over sex and relationship education in schools (Baker 2022, 275–302). I take up this discussion in the next part by considering reparative legislative attempts to reckon with histories of individual stigma, pain, anxiety and shame experienced by LGBT people. The provision of inclusive sex education in schools relies on institutionalised grammars of shame, pain and anxiety which circumscribe the scope of such legal repair.

¹⁰ The production of sexual knowledge is stigmatised by educational institutions as ‘dirty’ because it involves attending to forms of personal and social life that are messy, disruptive, disgusting and subjective (Irvine 2014).

¹¹ Much of the discussion of Section 28 concentrates on homosexuality. I pick up more recent contestations and erasures around gender identity or being trans in Parts III and IV of this chapter.

¹² It is important to note that laws against the ‘promotion of homosexuality’ are not consigned to the past. Much like the criminalisation of homosexuality (discussed in Chapter 1), these ‘no promo homo’ laws are commonplace in several jurisdictions today. Russia and Hungary are two examples of states that have recently strengthened laws against teaching LGBT affirming content (Kondakov 2022; Rankin 2021). I will discuss US examples later in the chapter.

Part III – Reforms and Concerns over Sex and LGBT Education in Schools

We might be tempted to think that the shift away from censoring discussions of sex in schools to what we now call ‘sex education’ represented a shift in the grammars of anxiety discussed above. Yet, early discussions of sex in schools were made possible by institutionalised anxieties that emphasised adolescence as an unruly state while encouraging individuals’ fears and shames about sexual behaviour were necessary to control wayward adolescents. For example, concerns about teenage pregnancy and the spread of sexually transmitted infections were emotional objects by which politicians and media problematised adolescent sexuality as something to be anxiously controlled by stigmatising and cultivating shame amongst those who engaged in pubescent sexual activity (Goldfarb and Lieberman 2021; Kantor and Lindberg 2020; Tran et al. 2023). In countries like the UK and US, education remained a means of social control against such teenage licentiousness. Sex education, typically housed within a broader science education framework, concentrated on biological information about heterosexual reproduction and the bodily fluids through which venereal diseases were spread (Jones 2011, 141; Tran et al. 2023, 5064). To the extent that social information subtended biologically essentialist discussions, they would emphasise abstinence from sexual intercourse until marriage (Jones 2011, 142). In doing so, conversations around queerness and gender non-normativity were absent from curricula or, where such content was included, it was framed in stigmatising terms of sin, disease and criminality (Lugg and Adelman 2015, 47; McNeill 2013, 281).¹³ Even more formalised sex education interventions that introduced contraceptive use (condoms, dams, birth control pills, etc.) did so on the basis such education could assist with managing ‘risk taking behaviours’ and these still largely focused on heterosexual intercourse (Jones 2011, 144–8; Meadows 2018, 288).

In response to the stigmatising effects of these political anxieties, ‘comprehensive sex education’ and ‘LGBT education’ emerged as a means of correcting the biases of earlier biologised, heteronormative versions of sex education (Lugg and Adelman 2015; McNeill 2013). From seeing homosexuality or gender non-conformity as a risk to anxiously prevent through the cultivation of shame, educational authorities began to recognise the risk of LGBT students experiencing the pain of bullying (Griffin and Ouellett 2003, 108;

¹³ In jurisdictions like the US, several states criminalised homosexuality until those statutes were rendered unlawful because of a constitutional law ruling in 2003 (see Chapter 2).

Monk 2011, 188). From an interpersonal perspective, this meant teachers would surface the risks of an individual experiencing homo/bi/transphobic violence and engage in conversations with students to encourage respect or tolerance of difference to destigmatise what it means to be LGBT (Goldfarb and Lieberman 2021, 16; Gowen and Winges-Yanez 2014, 796). This also included broader discussions of consent (in relation to sexual activity) as well as respectful relationships (Goldfarb and Lieberman 2021, 16; Jones 2013, 149–50). To speak of LGBT education in this reparative context, however, is to recognise that interpersonal interventions were curated informally based on school discretions that were not institutionally required by either law or policy. These informal interventions could include teaching books with LGBT characters, creating Gay-Straight Alliances outside formal teaching hours for peer dialogue and support, and inviting advocates from LGBT community groups to speak about the ill effects of homo/bi/transphobia (Griffin and Ouellett 2003, 109–11; Tran et al. 2023, 5068). While the sex education approaches described above offered some affirmation of LGBT lives, the ongoing stigmatisation and bullying of LGBT students, alongside the lack of sustained pedagogic attention to these issues, prompted law to entrench such initiatives formally (Bradlow et al. 2017).

In the rest of this part of the chapter, I turn to examine the statutory consolidation of sex and LGBT education across two common law jurisdictions. I start with the *The Relationships Education, Relationships and Sex Education and Health Education Regulations 2019* (England) ('RSE Regulation') to mandate RSE in English schools. By navigating the legislative debate and subsequent statutory guidance alongside contemporaneous litigation related to other aspects of LGBT education in schools, I consider how emotional grammars of anxiety, shame, resentment, fear and pain make possible law reform in this area. I map how religious and racialised resentments over interfering with parental rights, cultural anxieties and fears over 'indoctrinating' children, social shames over 'sexualising' children, and the pains of LGBT stigma function to circumscribe the reach and scope of sex education that relates to LGBT people. I then move my discussion to Florida, to draw out how those emotional grammars emerge in recent statutory reforms (*HB 1557* and *HB 1069*) to ban this content. While reforms in the UK and Florida result in different legal outcomes, I draw out how these reforms share emotional grammars that limit the reparative scope for affirming the rights of LGBT children.

England

The repeal of Section 28 emerged within a broader legislative programme to affirm the rights of LGBT people. In the first decade of the twenty-first

century in Britain, the Blair Labour government legislated to equalise the age of consent for gay and heterosexual sex (at the age of 16), made same-sex couples eligible to adopt children, introduced civil partnerships for same-sex couples and prohibited discrimination based on sexual orientation in relation to employment and access to goods and services.¹⁴ The Cameron Conservative coalition government introduced marriage equality in 2013. This reform context is important to highlight because it sets the legislative scene for successive governments' pro-LGBT equalities agendas concerned with 'improving the lives of LGBT people' by addressing LGBT people's pain, fears, anxieties and shame (UK GEO 2018a, 2). In 2017, the British government launched its largest consultation of LGBT people to identify what issues remained to be addressed. The survey identified a range of issues including healthcare, safety, education and prejudice. For this chapter, I concentrate on the education-related findings. The report highlighted that only 21 per cent of all respondents recalled discussion of sexual orientation or gender identity at school and one-third of those who were in school in 2016/17 noted receiving negative or mixed reactions for being LGBT, though the younger cohort disclosed being more open about their identity with their classmates (UK GEO 2018b, 100). A survey conducted by Stonewall (the leading LGBT NGO in the UK) made similar findings in 2017, noting that 45 per cent of LGBT students in British schools had been bullied for their identity (Bradlow et al. 2017, 6). Acknowledging the persistence of homophobia and transphobia in schools, the British government committed to pursuing educational reform so LGBT children could 'feel their education is relevant to their identity' and 'participate in their education without fear of bullying' (UK GEO 2018a, 12).

Recognising the individual fears and anxieties of LGBT children in school, the British government announced its plans to introduce a comprehensive overhaul of its statutory guidance on Relationships and Sex Education (RSE). The current version had not been updated since 2000 and key aspects of sex education relating to homosexuality 'remained segregated from the National Curriculum' which meant that teaching about LGBT people varied between schools (Johnson and Vanderbeck 2014, 190). In recognising the need for reform, the government acknowledged that existing guidance was 'overly influenced by the nervousness' surrounding Section 28 and therefore was not sufficiently 'balanced or positive' about LGBT lives/relationships (UK Department for Education 2019a, 4). Policy anxieties in the context

¹⁴ The latter two aspects are discussed in more detail in Chapter 2. For more detailed exploration of these reforms generally, see Johnson and Vanderbeck 2014.

of Section 28 cast a long policy shadow that kept LGBT lives obscured in a way that demeaned their existence. The RSE Regulation was tabled in parliament in February 2019 to remedy this ‘nervousness’ and secure the inclusion of LGBT content in British primary and secondary schools on a legislative footing. It introduced amendments to different pieces of primary and secondary legislation to mandate relationships education for primary schools, relationships and sex education for secondary schools, and health education for all pupils.¹⁵ It also set out that draft statutory guidance made pursuant to this legislation should emphasise the importance of marriage and civil partnership for family life, relationship safety, characteristics of healthy relationships, and the impact of relationships on health and well-being. It also provided an exception for parents who wished to withdraw their children from such education (until the age of fifteen) and recognised that teaching should be age appropriate and sensitive to any religious ethos of the school.

Much like the reforms to legal gender recognition discussed in Chapter 3, the British government launched a public consultation on its draft guidance noting that its guiding principle was to ‘keep children safe’ and ‘help foster respect for others for difference’ (UK Department for Education 2019b, 3–4). The consultation responses materialised the emotional conflicts between the inclusion of LGBT education on the one hand and religious freedom, parental rights to object and withdraw their children from such education, and inappropriate sexual content on the other.¹⁶ These individual and interpersonal conflicts took institutional shape through the legislative debates that framed the passage of the RSE Regulation.

The impetus for RSE reform was political anxiety and fears directed towards the vulnerability of children. When tabling the RSE Regulation, the then Secretary of State for Education emphasised the ‘great risks’ that came with emerging technologies and the need to safeguard young people from ‘great harms’ (Hinds MP HC 25 February 2019, col 36). MPs spoke of the ‘horrifying figures on bullying’ and ‘high levels of self-hatred and mental health issues, self-harm and sometimes even suicide’ faced by LGBT

¹⁵ These included the *Education Act 1996*, *Education Act 2002*, *Education (Independent School Standards) Regulation 2014*, *Non-Maintained Special Schools (England) Regulations 2015*. Scotland and Wales are not subject to these regulatory changes and have introduced their own curricula that have been presented by their respective governments as being more progressive on LGBT issues than the English version (see Bradley 2021; Tonic 2018).

¹⁶ Most of the respondents to the consultation felt the guidance was inappropriate in its current form, objecting primarily to the inclusion of LGBT content across relationships and sex education. The public and legislative debates on RSE also related to pornography, sexting and social media, but I do not focus on these in my analysis.

people (Rayner MP HC 25 February 2019, col 38; Eagle MP HC 20 March 2019, col 1148). One lord added that a 'bonfire of misinformation' created the conditions for disparaging sexual and gender diversity while another disclosed their personal experience of suicidal ideation because they 'did not have that safe space' at school (Lord Cashman, Lord Scriven HL 24 April 2019, col 635; 654). Surfacing the individual traumas (sexual shame, depression, suicidal ideation) of LGBT children (including their own) was key to parliamentarians recognising the potential for further harms (bullying, suicide). In doing so, the legislative debate institutionalised anxieties and fears over traumas that might repeat (Salecl 2004, 120). Fears over school-based homophobia and transphobia materialised in the debate through a spatial logic that located anti-LGBT attitudes within the place of schools and a temporal logic that recognised future possibilities of pain (self-harm, suicide) emerging from those attitudes (Ahmed 2004, 69).

RSE became the means by which such institutionalised anxieties, fears and traumas about LGBT life could be addressed by reassuring parliament that LGBT people would not be subject to further bigotry or harassment in schools. RSE would 'protect children' by teaching them 'other (LGBT) family structures are just as loving and caring as their own' while enabling LGBT children to 'feel confident enough to navigate the world' (Gibb MP HC 20 March 2019, col 1150; Lord Scriven HL 24 April 2019, col 654). It was precisely this promise of RSE that generated parliamentary anxieties towards the scope of parental withdrawal and religious objections enabled by RSE Regulation. One MP observed it was 'depressing' and 'deeply painful' to suggest parents should be permitted to object to their children being 'exposed' to the existence of same-sex families (Bryant MP HC 20 March 2019, col 1151). Other MPs expressed their concerns about whether exceptions in the regulation meant 'there [was] a risk that some LGBT children . . . [would] miss out' and this would deny 'safeguarding children from abuse and harm' as most child abuse is 'carried out within the extended family' (Walker MP, Streeter MP, Champion MP HC 20 March 2019, col 1154, 1162, 1165). By drawing attention to the presence of exceptions to the provision of LGBT education, the legislative debate generated anxieties that surfaced how some forms of stigma and abuse would remain due to the existence of withdrawal and religious sensitivity 'loopholes' contained within the regulation.

Shame also circulated in these debates and underpinned the need for reform. MPs and lords drew from personal experiences and other testimonies to explain the individuating effects of social stigmatisation and shame on LGBT youth. MPs described feeling 'dirty and alone . . . [because schools] failed to value the place of LGBT people in society' and the 'pain' of having one's identity associated with 'corruption' (Pollard MP, Bryant MP HC

20 March 2019, col 1169, 1151). Some lords similarly spoke of feeling ‘ashamed and confused . . . and had no understanding of how to cope with it’ and presented RSE as the antidote to make children ‘feel normal’ (Lord Liddle, Lord Scriven HL 24 April 2019, col 645, 654). Surfacing the effects of LGBT children’s experiences of stigma and feelings of shame were key to motivating reform. RSE resolved individual forms of shame by destigmatising sexual and gender diversity. Moreover, the parliamentary debate also expressed an institutional shame, recognising that ‘they have taken such a long time to get here’ (Bryant MP HC 25 February 2019, col 46). By doing so, parliament expressed failure at not resolving such issues earlier for LGBT people and living up to its purported role of safeguarding the rights of all citizens (Ahmed 2004, 107). In other words, shame functioned as an emotional grammar to enable reform.

Resentments, fears and anxieties also featured in the legislative contestation over the vague scope of the reform. Returning to parental objections, several MPs and lords expressed concern that parental rights were eroded by RSE Regulation. They described the need to ‘tread very gently’ on parental rights and questioned the regulatory vagueness of the ‘exceptional circumstances’, noting a head teacher might exploit this legislative ‘vulnerability’ to override a parental objection when offering sex education to their child in a secondary school (Freeman MP, Leigh MP HC 20 March 2019, col 1152, 1147; Lord Curry HL 24 April 2019, col 643). Regulatory vagueness was also given effect through parliamentary anxieties that are tethered to RSE material that might be deemed ‘inappropriate’ where ‘lines between relationships and sex education are far more blurred than is recognised’ and which usher a shift ‘between the family and the state’ (Bishop of Durham, Lord Curry HL 24 April 2019, col 639, 641). Foregrounding individual parental pain (loss of educational control, breakdown in child/parent relationships) structured legislative fears and anxieties that a vague RSE reform would portend an erosion of parental rights.

Alongside this, religious objections to RSE reform emerged through grammars of resentment. MPs recognised the ‘resentment among our constituents’ particularly amongst those (Muslim, Jewish, Christian) religious communities who felt like they had been ‘shout[ed] down [for their] sincere questions or concerns’ and who might now ‘conclude that the UK is no longer a country where they are welcome’ (Offord MP, Mahmood MP, Timms MP HC 20 March 2019, col 1147, 1159, 1166). Others expressed resentment more forcefully by recognising how religion had been burdened by an expanding secular agenda, with one lord claiming that teachers with ‘biblical convictions’ would be forced ‘to go against their religious convictions’ (Lord McCrea HL 24 April 2019, col 653). Individual resentments

over the state burdening the exercise of faith (as discussed in Chapter 2) took institutional shape in the legislative debate by framing the need to narrow the scope of RSE reform.

While RSE reform was ongoing, protests emerged across a few schools in Birmingham (BBC West Midlands 2019, Kelleher 2019). These interpersonal contestations between parents and schools mirrored legislative anxieties and resentments around parental rights, religious freedom and free speech. These protests related to the provision of LGBT books and anti-bullying programmes that were delivered in some primary schools to address LGBT stigma and ‘otherness’. One school caught in this furore was Anderton Park Primary School, a community school in Birmingham with a majority Muslim demographic, where some parents withdrew their children and raged against ‘LGBT sexual education’ by turning up to the school with megaphones to protest (*Afsar* 2019, [3]). They were met with pro-LGBT counter protestors at the school gates. The escalation of the protests resulted in the *Birmingham City Council v Afsar and others* (2019) litigation where the school sought an injunction against the original protestors because of the disruption to teaching and danger to children, other parents and staff their presence caused.¹⁷ Their abusive conduct had anxiety-inducing impacts on the well-being of staff, students and other parents while the noise generated by the protests inhibited teaching at the school (*Afsar* 2019, [90–5]). In their submissions to the High Court, the protestors responded by expressing their individual resentments that ‘the teaching of LGBT issues’ unlawfully discriminated against British Pakistani Muslim children (and their parents) to the extent that they could not preserve their cultural values that are ‘centred on heterosexual relationships in marriage’ (*Afsar* 2019, [37]). Moreover, these parents felt the school’s inclusion of LGBT content alienated some children and themselves by making them outsiders to the school (as many were now literally protesting outside the school gates).

This litigation is instructive to read alongside the legislative debates because it captures how competing individual anxieties (school fears over teacher safety, mental well-being of students, staff and other parents who were fearful of going to school) and individual resentments (parents feeling alienated by a ‘sexualised’ curriculum, parents feeling hurt because the school burdened their religious or cultural values) had to be resolved by the Court. The Court recognised the parents’ right to free speech but also noted

¹⁷ The litigation raised several procedural and substantive points related to the *Equality Act 2010* and its interaction with Articles 8, 9, 10, 11, and 14 of *European Convention on Human Rights*. I do not detail these here, as I am more focused on distilling the anxieties, resentments, pain and fears that those legal issues gave rise to.

the extent to which such a right might be infringed where proportionate to ‘achieving a legitimate aim’ (protecting the integrity of the school). By recognising the depth of disruption and hurt caused by the ‘megaphones’ and ‘aggressive language’, the Court gave effect to its own anxiety by making present the risk of noise/disruption to ‘innocent third parties’ who endured indefinite ‘unwarranted intrusion’ (*Afsar* 2019, [64], [79]).¹⁸ To resolve this anxiety and safeguard against further risk, the Court issued a permanent injunction against some of the protestors. The Court literally resolved the interpersonal conflict between protestors and the school by anxiously demarcating the boundaries that both could occupy. The protestors were still allowed to protest but they were pushed outside the gates onto a nearby park and blocked from using a megaphone to amplify their messages as this would still be heard at school. By doing so, the Court could safely contain the resentments of protestors who were still able to speak their messages while addressing the individual anxieties of those inside the school. In emphasising the ‘third parties’, the Court also presented disruption as a threat to third parties who might happen on the scene and who needed to be protected. It was not a specific concern for LGBT people/kids in the school as such but rather a generalised concern about others. This enabled the Court to avoid taking ‘sides’ but still intervened to resolve the deadlock.

The emotional grammars giving effect to legislative contestations of RSE Regulation and the *Afsar* litigation are apparent in the conclusion to RSE reform. Legislative reassurances were made throughout the legislative debate by those representing the British government, noting that ‘a balance need[ed] to be struck’ and there must be ‘ongoing dialogue’ with parents and people of faith (Hinds MP HC 25 February 2019, col 46; Lord Agnew HL 24 April 2019, col 629). While regulations are not subject to amendments, legislative reassurance in the development of statutory guidance functioned to address the traumas, anxieties, fears, shame and resentments discussed above. This is apparent when examining the statutory guidance. The statutory guidance begins by affirming the need to ‘respect’ differences in students’ backgrounds/identities and directs schools to be ‘alive to issues such as everyday sexism, misogyny, homophobia, and gender stereotypes . . . to build a culture where these are not tolerated’ (UK Department for Education 2019c, 4–5, 14).¹⁹ Anxiety and fear structure RSE curricula as risks of sexual harm remain

¹⁸ The language used by some parents during the protests was violent with some conflating paedophilia and homosexuality. Similar protests have spilled out to other schools, including in Manchester (see Dulhanty and Simpson 2023).

¹⁹ It is important to note that transphobia is absent from this list and much of the statutory guidance gives short shrift to gender identity despite referring to ‘LGBT’.

spatially and temporally proximate throughout the guidance. The guidance for secondary schools emphasises safeguarding and risk management by teaching pupils to recognise sexual violence, manage the harms present in online spaces, understand legal penalties for the sharing of self-produced sexually explicit material, engage with criminal law relating to sexual assault, and grasp the consequences of sexually transmitted infections (UK Department for Education 2019c, 15, 28–9).

The guidance also notes parental and religious anxieties and provides reassurances. The guidance insists that schools take account of the religious backgrounds of school pupils to ensure topics ‘are appropriately handled’ (UK Department for Education 2019c, 12). Although schools with a religious ethos are still required to comply with the *Equality Act 2010*, provision is made to foster dialogue with parents and share materials to be used in class to mitigate against parental concerns (UK Department for Education 2019c, 17–18).

Shame is also effected through the guidance. The guidance notes the equality of same-sex relationships in terms of marriage and civil partnership to destigmatise LGBT lives. Yet, the guidance reproduces a hierarchy of relationships by reifying those relationships that are ‘committed’ and ‘stable’ while affirming why ‘marriage is an important choice’ (UK Department for Education 2019c, 27). As I have shown in Chapter 4, such logics function through an insidious shaming. Young people are encouraged, on the one hand, to respect platonic and other marriage-like relationships while, on the other, they are encouraged to defer the sexual kind or avoid the dangerous non-committed kind. Those who refuse the former are made to feel shame as they ‘break the connection’ to a social order that privileges monogamy and matrimony and views deviating behaviours as a deficiency or failure (Probyn 2015, 13).

In March 2023, the British government announced a review of RSE programming in schools in response to some public concerns that content was being taught that was ‘inappropriate’ or ‘contested’ (Long 2023, 17). In December 2023, though not related to RSE directly, the government released draft (non-statutory) guidance relating to gender questioning young people in schools. This guidance framed trans youth in terms of ‘gender identity ideology’, a phrase which itself might be viewed as born of ideologies that view sexual and gender difference as socially dangerous (McEwen and Narayanaswamy 2023, 8). It is structured by a series of policy anxieties that direct teachers to inform parents of their child’s social transition and to actively question the social transition of minors who wish to change their name, dress and pronouns (UK Department for Education 2023). In making these concluding observations about RSE and related policy initiatives in

England at the time of writing, I am keen to draw out how institutionalised anxieties, shame and fears continue to contest the scope of reform designed to affirm the rights of LGBT (and all) children.²⁰ In the next section, I show how such emotional grammars have functioned legislatively to limit discussion of sexual orientation and gender identity in schools. In doing so, I consider how the emotional grammars of pain, shame and resentment construe 'LGBT lifestyles' (specifically the idea that a child might live such a life) as harmful to children.

Florida

If Scotland (UK) and Victoria (Australia) are two subnational jurisdictions that are held out for their 'progressive' credentials when it comes to protecting the rights of LGBT people as discussed in Chapters 3 and 4, then Florida emerges as their conservative counterpoint. In recent years, Florida's executive and legislative establishments have pursued reforms to push back against 'wokeness' and 'gender ideology' in the context of education. These two terms emerge as rhetorical containers that hold together political anxieties, fears and resentments over critical social theories that foreground issues of structural racism, reparations, whiteness, patriarchy and heteronormativity to challenge inequalities related to existing social and political arrangements (as explored in Chapter 1). In April 2022, Florida passed legislation called the 'Stop WOKE Act' that prohibited school instruction (as well as training in employment) that told individuals they were 'inherently racist, sexist, or oppressive, whether consciously and unconsciously' and said they should 'bear personal responsibility for and must feel guilt, anguish, or other forms of psychological distress' over historic discrimination (Reilly 2022).²¹ What is striking about the statute is how it both responds to, and cultivates, specific emotions across individual and institutional scales. The law recognises the shame, guilt and pain some privileged people might experience when confronted with histories of racialised, gendered and sexualised oppression and seeks to foreclose such negative feelings by institutionalising a prohibition

²⁰ At the time of writing, new draft guidance had been developed to limit scope of discussing issues relating to 'gender identity'. For more information, see UK Department for Education 2024.

²¹ 'Stop WOKE' stands for 'Stop Wrongs Against Our Kids and Employees' (*HB 7 2022*). Some parts of the legislation were subsequently blocked from enforcement. The American Civil Liberties Union brought together a group of educators to challenge the constitutionality of the legislation on the basis that it violated the free speech and equality guarantees for some educators by imposing impermissibly broad and discriminatory viewpoint restrictions (ACLU 2022). Other Republican-led US states have passed similar laws, which are also the subject of litigation (Segal 2017).

against forms of education that cultivate them. By doing so, the law gives effect not only to the individual emotions of those who experience ‘woke teaching’ but also gives statutory form to legislative anxieties and resentments that make present the threats and harms of critical sexual, gender and racial knowledges that disrupt neoliberal governance (Golden 2023).

It is within this broader context of political anxieties and resentments towards ‘wokeness’ that specific laws and policies have emerged in Florida that target schools and education related to sexual diversity and gender autonomy. Couched in terms of opposing ‘gender ideology’, these legal interventions aim to entrench the static nature of binary sexual difference and the social value of the heterosexual family unit by obstructing women’s reproductive freedoms, legal recognition of same-sex families, and gender-affirming healthcare (McEwen and Narayanaswamy 2023; Ryan 2023; Yurcaba 2023). Political contestations over sex, gender and sexuality in the public sphere are considered part of a ‘culture war’ in which ‘liberals’ and ‘conservatives’ battle for the supremacy of their respective ideologies (Gevisser 2020, 72). Schools are key battlegrounds in these wars with political resentments, social anxieties, and public traumas operating as key emotional grammars through which these wars to protect children and safeguard education are fought (Nash and Browne 2020, 90).

In the US, individual states vary in their approach to the teaching of LGBT content with only about ten mandating positive discussion of sexual orientation while eight states have laws specifically proscribing such teaching (Meadows 2018, 301; Tran et al. 2023, 5064–5). While some federal public policies make provision for recognising different family forms and sexual identities, at best these policies evince a ‘deep ambivalence towards diversity’ as they create a hierarchy of family forms, where nuclear families are rendered more ‘valuable’ to the state (McNeill 2013, 834).²² Florida was a state that already required schools to teach about the benefits of monogamous heterosexual marriage in HIV/AIDS education classes and (despite now being unlawful) passed a state constitutional amendment defining marriage as the union between a man and a woman (Rosky 2022, 1855). Florida sought to further tighten and centralise the heteronormativity of its sex education by censoring the teaching of LGBT content in public schools through two key statutes, *HB 1557* (‘Don’t Say Gay’) and *HB 1069* (‘Don’t Say They’).

²² I discuss the sexualisation of the state more carefully in Chapters 1 and 2. For a discussion of how sexual hierarchies function socially and politically, see Rubin 1984.

‘DON’T SAY GAY’

HB 1557 was introduced by Florida lawmakers in 2022 and framed primarily in terms of defending ‘parental rights’ over the sexual education of their children. The Governor of Florida, Ron DeSantis, described the law as responding to the fact that ‘parents’ rights have been increasingly under assault around the nation’ and protecting parents from schools who use ‘classroom instruction to sexualize their kids’ (Governor of Florida 2022).²³ By tethering the anxieties of parents to the sexualisation of classrooms, DeSantis foregrounded the law as a resentful and hostile rebuke of those who seek to undermine parental rights. As such, *HB 1557* mandates that schools notify parents of their children’s well-being (which might include ‘outing’ to parents those who disclose their wish to transition gender), prohibits instruction on matters relating to sexual orientation and gender identity from kindergarten to grade 3 (and only permits it in a manner that is ‘age inappropriate’ for other grades), requires parental consent for well-being questionnaires given to students and creates a cause of action for parents who wish to challenge ‘inappropriate’ material used in schools (Section 1001.42(8), *Florida Statutes*). In leading the debate on the bill, proponents of the legislation emphasised their concerns about stopping teachers from ‘digging into the different types of gender and how that might work’ and the ‘trendy posture’ of being LGBT (Rep. Harding 2/22/22 House Session; Senator Blaxley 3/8/22 Senate Session). One of the sponsors of the bill claimed quizzically:

Why is everybody now all about coming out when you’re at school? . . . How much of this are [*sic*] genuine type of experiences and how many of them are just kids trying on different kinds of things they hear about and different kinds of identities and experimenting. (Senator Baxley 3/8/22 Senate Session)²⁴

Legislative anxieties took shape through the bill by foreclosing possibilities of children ‘experimenting’ with being LGBT (which is a similar argument discussed in Chapter 3 about the legal recognition of young trans or

²³ Parental rights are constitutionally and statutorily protected in the US. For a useful summary of the legal protections relating to parental rights and how this guided debate on the bill, see Fla. H.R. Comm. on JC, *HB 1557* (2022) Staff Analysis (17 February 2022) and (25 February 2022).

²⁴ Portions of the legislative debate on *HB 1557* and *HB 1069* extracted in this chapter are taken from media reports and litigation documents as well as official online recordings (see The Florida Channel 2/22/22, 2/22/22 – Part 1, 3/7/22 – Part 3, 3/8/22, 3/31/23, 5/3/23). The Hansard for Florida only details the tabled amendments and voting results.

non-binary people). The escalating number of young people ‘coming out’ at school as ‘celebrities’ triggered legislative worries that the legislation sought to contain by prohibiting ‘instruction’ of LGBT content in public primary schools. Parental rights figured here as the terms by which legislators could anxiously resist increasing LGBT visibility. They did so by effecting reform that institutionalised parental investments in heterosexual ‘core belief systems and value’ and prevented children from leading a ‘double life’ in school where they deviated from cis/heterosexuality (Senator Blaxley 3/8/22 Senate Session; Rep. Clemons 2/24/22 House Session). Other legislators spoke of materials such as the ‘gender bread person’ or conversations in school about gender transition to figure anxieties about children being taught that sex was something other than biologically binary (Rep. Hernandez 2/24/22 House Session; Senator Garcia 3/8/22 Senate Session). Political anxieties about the indoctrination or grooming of children into ‘dangerous lifestyles’ foregrounded in this debate were alleviated by the statutory reassurances of the bill. These reassurances took shape in legislative contributions that spoke about the desirability and importance of maintaining childhood ‘innocence’ through the censorship of (homo)sexual topics in schools while allowing parents to have such conversations with their children at their discretion (Senator Burgess 3/7/22 Senate Session; Rosky 2022, 1849).

In response, legislators who contested the scope of the reform drew attention to its vagueness and the anxiety, fear, shame and pain such vagueness risked generating. Legislators foregrounded the collective ‘distress’ of an entire (LGBT) community that was now isolated and stigmatised as ‘inappropriate’ for inclusion in the classroom while noting the individual pains experienced by suicidal or suiciding LGBT teenagers who felt ashamed about their identity (Rep. Smith, Rep. Bartleman, Rep. Willhite 2/24/22 House Session; Senator Book, Senator Stewart 3/8/22 Senate Session). The law itself was an act designed to inflict ‘hurt’ in the community (Rep. Grieco 2/24/22 House Session). Others recognised the anxieties of teachers who would be unsure what counted as not ‘age appropriate’ or as to the line between ‘instruction’ (which was prohibited) and ‘discussion’ (which was arguably permitted) and who were concerned about being forced to withdraw content because of one parent’s objection (Rep. Rayner, Rep. Duran 2/24/22 House Session; Senator Ausley, Senator Cruz 3/8/22 Senate Session). One legislator noted ‘the bill ha[d] no cross reference to any definition of classroom instructions . . . They [kept] it vague to create an environment of fear and censorship’ (Rep. Driskell quoted in Call 2022). Anxiety-inducing examples raised during the debate included whether teachers could disclose their marital status to students, whether schools could teach about different family structures, and the possibility of maintaining specific anti-LGBT bullying

policies (Rep. Smith, Rep. Rayner, Rep. Eskamani 2/22/22 House Session; Senator Farmer 3/8/22 Senate Session). Statutory vagueness materialised as an anxiety-inducing threat as legislators opposed to the bill tethered the fears of teachers to a climate of censorship wrought by the legislation. There is a resonance here between unruly childhoods and statutory vagueness, as both are open-ended and unfinished. We can note the vagueness of the statute is deployed against the unruliness of childhood, leaving open different statutory possibilities that can meet and discipline a child's becoming (stopping their queerness).²⁵ Other legislators opposed to this vagueness drew out the emotions of students experiencing pain and shame about their sexual orientation or gender identity who might fear being unable to access support from teachers. They emphasised how this law would have a harmful censorious effect on children as not only is there no visibility for LGBT issues in schools, but there is knowledge that the reason for the lack of visibility is the 'inappropriate' shamefulness associated with 'sexualising' LGBT content.

During the amendment process of *HB 1557*, these conflicting pains, fears, resentments and anxieties took shape through suggested amendments to the statutory text. Those opposed to the bill's premise mobilised their anxieties and pains described above to introduce amendments to 'care' for all students and to statutorily create a school atmosphere that was a 'comfortable and respectful atmosphere' for children (Rep. Nixon 2/22/22 House Session; Senator Polsky 2/7/22 Senate Session). The anxieties and fears over the consequences of 'outing' LGBT students to their parents resulted in the bill's sponsor withdrawing an amendment that would have made outing a requirement (Goñi-Lessan 2022). Other suggested amendments included making it a requirement for schools to provide a 'safe and supportive learning environment' irrespective of identity, report suspected abuse, refuse to 'out' students to their parents without student consent, to provide LGBT affirming materials, and create a cause of action for students irreparably harmed because of being outed, and specify in detail what counts as 'instruction' (Fla. H.R. Jour. 712–14 (Reg. Sess. 2022)); Fla. S. Jour. 716–18, 724–5 (Reg. Sess. 2022)). These were all defeated as legislators in support of the bill foregrounded their resentments towards parental rights being eroded and expressed their anxieties over the circulation of inappropriate 'sexualising' material that risked confusing or 'corrupting' children.

With respect to legislative anxieties and fears over eroding parental rights, the bill's scope was also expanded during the debate to create a stronger enforceability mechanism for parents while burdening school districts who

²⁵ I am grateful to Kay Lalor for making this point.

wished to challenge parental objections. The accepted amendment clarified that the appeal process would be administrative rather than judicial in character, involving the appointment of a special magistrate and that the costs would be borne by the school district (Fla. H.R. Jour. 713 (Reg. Sess. 2022) (CS for HB 1557)).

Following the passage of the legislation, Equality Florida (the leading LGBT NGO in Florida) pursued litigation to secure an injunction to prevent the enforcement of *HB 1557*. Their complaint foregrounded the ‘hostility’ of the legislative enactment and argued that it violated the free speech, privacy and equality rights of teachers and students contained within the US constitution and related federal anti-discrimination law on education (*Title IX*). Specifically, the complainant claimed the law exhibited ‘animus’ towards LGBT people noting that legislators allowed their ‘fears’ of LGBT students living ‘their true identity’ to take effect through the law’s ‘state-sanctioned hostility’ (Petition in *Equality Florida et al.* 2022, [4]). Much of the complaint highlighted the institutional and individual fears fostered by vague statutory terminology (which were also noted by legislative opponents of the bill). Schools (institutions) and teachers (individuals) ‘fear(ed) running afoul of the law’ by discussing or showcasing any aspect of LGBT identity (Petition in *Equality Florida et al.* 2022, [11–20]). Drawing from the testimonies of students, the complaint foregrounded individuals’ anxieties, shame and pain. It described students who were concerned about whether they could seek information through school about being gay, be safely ‘out’ to their peers in school, organise LGBT-themed events, write about LGBT life and seek support for bullying or family abuse (Petition in *Equality Florida et al.* 2022, [29–53]). Parental fears of their child’s isolation and the shame their child might experience as a consequence were figured in the complaint to contest the ‘silencing’ effects of *HB 1557*, while teachers and schools feared their new-found ‘vulnerability’ to litigation if they sought to be supportive of LGBT students (Petition in *Equality Florida et al.* 2022, [177], [180]). The complaint noted how these anxieties were then institutionalised as schools felt the threat of litigation and responded anticipatorily by censoring content before the law had even taken effect (Petition in *Equality Florida et al.* 2022, [194]).

The US District Court refused the complaint on the basis that the complainant lacked standing on ‘traceability’ (identifying the injury) and ‘redressability’ (appropriateness of the remedy) grounds.²⁶ In issuing an interim order

²⁶ Standing is a legal term that refers to a procedural hurdle that a complainant must overcome to seek judicial review. This involves demonstrating they have a sufficient interest in the issue by identifying a tangible injury and clear remedy (such as injunction) that will address that injury.

to dismiss, the Court took note of the complainant's anxieties and fears only to associate them with 'injuries [that] flowed from something other than the law's enforcement' (*Equality Florida et al.* 2022, 4). The Court was unable to recognise 'the culture of fear' as a material effect of the law and noted the legislative 'sentiments' behind the law or 'chilling' environment cultivated by the law were insufficient in specificity to evidence an 'actual stigmatic injury' (*Equality Florida et al.* 2022, 6, 8, 13). In doing so, the Court effected a distinction between the existence of a law (which may have harmful symbolic effects that cannot be legally remedied) and its enforcement (which can be the subject of an injunction) (*M.A. et al.* 2023, 7). Here, the Court refracted the institutional anxieties about vagueness that were given effect during the legislative debate. Specifically, the Court saw the complainant's speculative arguments (preventing LGBT clubs, banning books, removing lines from musicals) as either 'too vague' or disconnected from its enforcement. While acknowledging the 'deep hurt and disappointment' felt by complainants in response to the law, the Court held that they 'must allege more' to show a specific pain (*M.A. et al.* 2023, 21). The ruling expressed anxiety over compromising the rules of standing by granting review where plaintiffs had not discharged their burden.²⁷ As such, the failure of the applicants to meet the standing threshold for judicial review meant the substantive issues relating to 'free speech' (a core US constitutional value) were not addressed in detail by the Court.

'DON'T SAY THEY'

Following the passage of *HB 1557*, the Florida Legislature moved to enact *HB 1069* which expanded the existing prohibitions and mandates on classroom instruction with respect to sex education.²⁸ Dubbed 'Don't Say They', this law was a rebuke to 'woke gender ideology' and effectively proscribed the use of gender affirming pronouns in schools as well as recognition of gender fluidity (Governor of Florida 2023). Giving effect to parental anxieties about safeguarding their children and political resentments towards

²⁷ Given the order dismissing the complaint was focused on whether the complainant had standing, the substantive issues are not detailed in the jurisprudence. These issues remain alive and were the subject of appeal through the US appellate court structure. At the time of writing, a settlement was reached between parties to clarify the possibility of 'discussing' (not 'instructing') matters relating to sexual orientation and gender identity in public schools. For specific details on what this now allows in schools, see McMillan, Demillo and Mulvihill 2024.

²⁸ Building on *HB 1557*, the law restricted classroom instruction on sexual orientation and gender identity until grade 8. The law also would prohibit discussions of menstruation and has been dubbed by some as the 'Don't Say Period' Bill (see Okamoto 2023).

‘gender ideology’, as discussed earlier, the law made it clear that sex was an ‘immutable biological trait’ and deemed it ‘false to ascribe to a person a pronoun that does not correspond to a person’s sex’ (Section 1000.71(1), *Florida Statutes*).²⁹ Moreover, it mandated that where sexual health education was provided to students (from grades 6 onwards), such content needed to emphasise the value of heterosexual reproduction, teach sexual abstinence and monogamous heterosexual marriage as a way to avoid sexual disease or infection, and encourage control of personal behaviour that comports to these ideals (Section 1003.46(2), *Florida Statutes*).³⁰ Parental rights were expanded by requiring school boards to make public their sexual education policies, allow parents to read materials relating to sex education where others have raised an objection, and create a comprehensive complaints and surveillance mechanism similar to *HB 1557* (Section 1006.28(2), *Florida Statutes*).³¹

Legislative supporters of the bill anchored parental rights through their acknowledgement of the anxieties and fears parents faced raising children. Legislators figured society as the threat to children by ‘coming at [them] . . . [with] an agenda to make them confused’ and *HB 1069* functioned as a legislative guard for parents who wished to protect children at ‘impressionable ages’ from such anxieties (Senator Yarborough, Senator Grall 5/3/23 Senate Session). Others claimed classrooms had become a ‘social justice experiment’ where children were being taught ‘silliness’ (Rep. Fine 31/3/23 House Session). Legislative anxieties made present the vulnerabilities of both parents and teachers to a ‘woke’ agenda that forced them to ‘violate their personal convictions’ by using pronouns that did not comport to a person’s sex assigned at birth (Senator Yarborough 5/3/23 Senate Session). These legislative anxieties enabled the passage of legislation.

Those legislators opposed to *HB 1069*, as with *HB 1557*, spoke about its statutory vagueness and the climate of anxiety and shame the law effected. Specifically, some legislators noted that the parental objection contained within the bill would result in the codification of institutional anxiety that curtailed the ‘free exchange of ideas’ as schools would be required to take anticipatory action to a perceived problem through a ‘ban-first, review-later’

²⁹ People who are intersex (atypical hormonal, chromosomal or gonadal expressions of sex) are exempted from this law (though they are referred to clinically as people with ‘disorders of sex development’).

³⁰ For a detailed legal analysis of what this would entail in practice, see Fla. H.R. Comm. on JC, *HB 1069* (2023) Staff Analysis (March 23 2023).

³¹ This was partly motivated by concerns over certain LGBT books in schools, such as ‘Gender Queer: A Memoir’ by Maia Kobabe (Atterbury 2023).

approach (Rep. Edmonds 31/3/23 House Session; Senator Polsky 5/3/23 Senate Session). Other legislators commented on the ‘disrespect’ towards, and ‘alienation of’, trans and non-binary people codified in the bill, which sought to ‘marginalise’ and shame those children who are ‘different than us’ while shaming teachers as ‘indoctrinators’ of students if they acted to support those differences (Rep. Harris, Rep. Cross 31/3/23 House Session; Senator Davis, Senator Book 5/3/23 Senate Session). In response to these anxieties, shame and pain, legislative amendments were introduced to provide accurate sexual health information relating to LGBT people, require teachers to use preferred pronouns where parents had requested it in writing, prohibit any instruction designed to change a person’s sexual orientation or gender identity, and clarify that marriage (regardless of gender of those in the marriage) should be taught (Fla. H.R. Jour. 367–70 (Reg. Sess. 2023) (Fla. H.R. Jour. 684–6, 729–30 (Reg. Sess. 2023))). Each of these amendments were defeated.

It is beyond the scope of this chapter to detail the rich discursive complexities of the legislative debates and social contestations relating to the RSE Regulation, *HB 1557* and *HB 1069*. Rather, I have brought these statutory developments together and selected illustrative contributions made during each of their respective legislative debates to highlight the emotional grammars of pain, shame, anxiety, fear and resentment that circumscribe LGBT education in schools. Parental rights, free speech, religious freedom and non-discrimination derive their legal reach through institutional traumas, resentments and anxieties that are codified through each type of law reform. While England and Florida evidence two different outcomes in relation to LGBT education in schools, they both share emotional grammars that limit the types of sexual and gender diversity conceivable in schools.

Part IV – Confronting Institutional Concerns

In the final part of this chapter, I explore how we might think reparatively about these emotional grammars to confront institutionalised concerns. I look at how legislators might loosen sexual anxiety and shame in the provision of LGBT education and navigate religious pain and parental resentment to create educational spaces that better support the well-being and flourishing of LGBT children (as well as teachers and parents) in schools.

Sexual Anxiety and Shame in Sex Education

Grammars of anxiety structure reform related to sex education through the production of childhood sexual risk as an object to manage or contain. If we look at the case studies discussed above, the pursuit of reform in both England and Florida relied on foregrounding individual parental and social

anxieties over ‘sexualising’ content corrupting children and, in doing so, institutionalised anxieties through reforms designed to keep children safe. Each example involved legislation making present a trauma (violation of childhood, undermining parental authority) that risked repeating in the near future (Salecl 2004, 120). In England, these anxieties took shape in regulation and statutory guidance that scaffolded LGBT and sex education as a means to prevent childhood exploitation (in relationships education), curtail unwanted sexual encounters (in sex and relationships education) and challenge social isolation (in health education). In Florida, institutional anxieties produced a law reform process that tied children’s vulnerabilities to educational ‘confusion’ and parental insecurities over schools ‘indoctrinating’ their children with inappropriate content about gender or sexuality. The legislative enactments (*HB 1557* and *HB 1069*) became a means to guard against this by proscribing content that would undermine the innocence of children or compromise the integrity of parental relationships with their children.

By following the grammars of anxiety in two juxtaposed reform situations, we can think reparatively about the rights of LGBT children and young people in schools. In the debate surrounding *HB 1557* and *HB 1069*, both the opponents and proponents of the legislation evinced their shared aversions and anxieties towards ‘sexual activity’ being taught to children even while disagreeing about the scope of reform. In fact, opponents of the legislation sought to replace ‘sexual orientation and gender identity’ with the language of ‘human sexuality or sexuality activity’ in order to stop children learning about any type of sex (whether heterosexual or queer) (Fla. S. Jour. 717 (Reg. Sess. 2022)). During the parliamentary debates over the RSE Regulation, both proponents and challengers to reform identified the importance of safeguarding parental rights to withdraw children from sex education, even in secondary school contexts. These grammars of anxiety worked to render sex into a subject that was corrupting, dirty and risky and this created the possibility of reform acting as a means to contain sex by reassuring children, parents and legislators that either such content would not be taught (*HB 1557/1069*) or that it would be taught strictly (RSE Regulation). Yet, as critical sexuality scholars have noted, this risk-centred approach obscures the importance of (queer) pleasures, desires and identities that eschew normative ideas of heterosexual sexuality or penetrative sex (Gowen and Winges-Yanez 2014, 794–8; Jones 2011, 151–64; Kantor and Lindberg 2020). Reforms produced childhood in static or abstracted terms that elided the material differences between children (Jones 2013; Toft and Franklin 2020). This was particularly acute for young trans and non-binary people whose needs, bodies and intimacies were either ignored in such education (RSE statutory

guidance makes no mention of this) or explicitly excluded from all curricula (*HB 1069*).³²

Rather than seeking greater ‘inclusion’ in sex education, a reparative focus on the effects of anxiety in law reform contexts might direct us towards questioning the desirability of formalising such educational initiatives in the first place. In the first part of this chapter, I explained how schools functioned as policing and disciplinary institutions. In sex education, the reification of social scientific and biological expertise continues to feature prominently as a policing logic – it is deemed necessary to alleviate parental or social anxieties that such content might be inappropriate or inaccurate. This was apparent in amendments that sought to reform *HB 1557* and *HB 1069*. Rather than seek reassurance or policing expertise as progressive legislators did, we might hold space for anxiety and rethink the structuring (and sometimes violent) effects of promoting heteronormativity in schools and the ‘positive affects and affective states [that] are linked with normative family forms’ (McNeill 2013, 833, 841). This involves untethering marriage (as apparent in England and Florida’s approaches to sex education) as the primary locus through which sex is understood and valued. And it requires attending to the ways sexuality comes to be socialised as both an interpersonal dynamic and an institutional technique of governance (Wiegman 2017).

Legislators might make room for anxiety by turning away from statutory reforms that mandate specific types of reassuring education and, in doing so, create opportunities for non-formalised educational initiatives at a local or community scale that foreground the knowledges and experiences of young people. This would approach learning about sex and forms of social difference by refusing to prescriptively define them through law or policy. This means encouraging learning about sexuality or difference as an ‘event’ involving questions, dialogue and creativity where encounters produce ‘concepts that problematize’ by allowing students to be a ‘wrench in that [education] system’ (Springgay 2022, 17; Brim 2020, 109). Learning about sexual and gender differences becomes less about moralising the worth of specific types of relationships and more of an attempt to ‘engage with the world in a continual, expansive way against education’s systematic short circuiting’ by interrogating ‘what subtends the demand for identity and difference’ (Meyerhoff 2019, 62; Menon 2015, 2). In practical terms, this might involve discussing, imagining or role playing with students (in English, History, Science, Art)

³² Trans and non-binary people are largely absent in much discussion about sex education, including those that advocate a comprehensive or progressive approach. For a consideration of how sex education might take better account of trans and non-binary lives, see Bradford et al. 2019 and Haley et al. 2019.

how human diversity takes shape and how our understanding of those differences has evolved over time. We might withdraw legal prescription to nurture these pedagogic dynamics.

In saying this, I do not wish to discount the valuable effects of progressive RSE education and the greater sense of diversity, inclusion and belonging possible because of reforms that explicitly recognise the worth of LGBT people (Baker 2022, 299–302; Goldberg and Abreu 2023, 17; Weiner 2005, 234). Moreover, it is important to note that this does not mean that sexual material (such as porn) should be uncritically provided to young people.³³ Rather, I take a similar approach to Chapter 3 where I discussed the anxious potential of deformatising legal sex. By taking anxieties as a reparative analytic when approaching demands for better LGBT policy, particularly those of children and young people who sex education is designed to support, we can create room for surprising and unimagined, but imaginative, forms of LGBT and sex education that do justice to the rich diversity of children's lives and the communities to which they belong. This could include co-curating workshops with young people, encouraging research projects about histories and politics of sex/sexuality, and artistic activities.

We can build on the potential of supporting LGBT children by thinking reparatively with shame. In Chapter 4, I explored some of the productive effects of shame at an institutional level while reckoning with individual and interpersonal forms of conversion practices that shame and stigmatise LGBT people. In this chapter, I noted the reform debate and subsequent statutory guidance in England recognised the individuating effects of shame on LGBT children who were denied a vocabulary to positively affirm themselves at schools while institutionally expressing shame over their parliamentary failures to cure such homo/bi/transphobic stigma in a timelier manner. The reform debates and legislation in Florida foregrounded shame towards schools and individuals who exposed children to inappropriate sexual content or gender affirmation while institutionalising that shame through statutes that enforced a silence over LGBT lives. In reading these reforms together, institutional shame materialises as the feeling of exposure where the legislative subject is made to come up 'against itself' through a scene of failure (legislative failures to protect children from stigma or sexualisation) and the subject seeks to

³³ For a critical discussion on porn and its effects on sexual ethics generally, see Srinivasan 2021, 33–72. Srinivasan is not advocating we show porn to minors as a pedagogic practice, as her discussion relates to the students she teaches at university. However, her prompt does invite us to think about how we might talk about sexualised content (through references to popular culture or social media consumed by young people) in a way that addresses sexual ethics, exploitation and objectification.

reassert itself by moving away from that scene of failure (statutory interventions to protect children from stigma or sexualisation) (Ahmed 2004, 103; Sedgwick 2003, 116).

Holding analytic space to confront institutional shame that guards against queer (homo)sexual expressions of intimacy or (trans)gender forms of identity points to making greater space for discussion of pleasures, bodies and desires. In each of the reform examples discussed above, pleasure is absent. Coding shame through statute or policy figures being LGBT as either a non-existent feature of childhood (*HB 1557/HB 1069*) or a sanitised identity that can be indexed to monogamy, stability, family and respectability (RSE Regulation). In doing so, those young people whose desires, bodies or identities refuse to comport to such logics are made shameful to the social order and feel alienated in life (Garland and Travis 2023; Kantor and Lindberg 2020). Confronting institutional shame becomes necessary to rethink education that binds predetermined forms of desire to intelligible identities. A destigmatising approach to sexuality and gender would recognise that sexual or gender experiences might be fluid while emphasising the integrity of each person to self-define what those experiences mean to them (Currin et al. 2020; Preciado 2018; Stanley 2021). Rather than anchor discussions about ‘healthy’ or ‘respectful’ sexuality in terms of binary understandings of consent, the messy interpersonal dynamics of sexual, racialised, classed and gendered shame point to an ethics of sexuality that foregrounds autonomy, liberty, accessibility, relationality, care and refusal (Buchanan 2023; Buggs and Hoppe 2023; Fischel 2019; Hathaway 2022; Srinivasan 2021).³⁴ This would prioritise educational responses that engage with how individualised forms of sexual shame are co-constituted by relational and cultural dynamics. These forms of education are possible if legislators actively resist the privatising consequences of legislative shame that foreclose engaging publicly with the richness, contingency and discomfort of encountering LGBT existence.

Rethinking Religious and Parental Resentments

Rethinking contestations of LGBT education in schools involves addressing parental resentments. In the *Afsar* litigation and *HB1557/HB1069* debates, parental resentments towards ‘LGBT ideology’ took shape through expressions of parental pain as parents felt wounded by schools teaching content to their children that undermined their parental authority (that was invested

³⁴ A more comprehensive discussion of sexual ethics and politics is beyond the scope of this chapter. For a detailed look at the problems with sexual consent and the need for a more relationally attentive, caring sexual politics and justice, see Fischel 2019 and Srinivasan 2021.

in cis/heterosexuality). Litigation and legislation became institutionalised expressions of resentment as law was instrumentalised to 'return pain' to those (schools) who were rendered as causing injury to parents (Brown 1995, 67). Resentment took shape through legal rights (collective protests in *Afsar*, individual objections in *HB1557/HB 1069*) that could prohibit the circulation of certain teaching materials in schools. Alternatively, as the *Equality Florida* litigation and RSE Regulation debate made apparent, inclusive education was a means of responding to legal histories of subordination that injured LGBT families. Parental resentments towards the effects of homo/bi/transphobic stigma on their children alongside legislative resentments about unrestrained bigotry resulted in a pain-inducing return of law. In other words, this involved either blocking interpersonal forms of bigotry in schools by inflicting pain on bigots/bullies through a school sanction (RSE Regulation) or blocking enforcement of laws that would institutionalise bigotry in schools by inflicting pain on a hostile legislature through an injunction (*Equality Florida*). These conflicting 'wounded attachments' in law (as Wendy Brown might describe them), however, share an emotional grammar of resentment. They both ossify the potential of law to remedy the hurts experienced by either sets of parents through the infliction of pain. In doing so, both 'progressive' and 'regressive' law reforms on sex and LGBT education affectively privilege the position of parents in dictating what ought to be imaginable to teach to children in school.

Withdrawing from parental resentments creates the conditions to showcase what children might want or need from sex education. By refusing to see sex education as a potential injury to parents that might result in painfully protracted litigation and viewing children as rights-bearing subjects rather than possessions of their parents, educators would be freer to explore types of learning that involve collaborations between teachers, children and communities and develop new resources to support LGBT life (Currin et al. 2020, 1792; Gowen and Wings-Yanez 2014, 795). Loosening the focus on parental resentments can also create space to foreground the individual hostilities faced by LGBT students and develop affirming interventions through dialogue that seek to address homo/bi/transphobic stigma in a way that feels relevant to them (Goldfarb and Lieberman 2020, 23; Monk 2011, 201).

Religious and racialised contestations over sex education also took shape through grammars of resentment. In England, legislative debate acknowledged the painful position of individual religious educators who were burdened by reform that would force them to act in a way that compromised their religious conscience (in a similar way to discussions of anti-discrimination law in Chapter 1). While the reform did not exempt religious individuals from its scope, the regulation and statutory guidance gave effect to these religious

resentments by making vague textual references to allow faith-schools to acknowledge their religious ethos when teaching about sexuality (Johnson and Vanderbeck 2014, 201–6). These resentments took on a racialised dimension in the *Afsar* litigation and RSE legislative debate as protestors and counter protestors to LGBT content in schools routed their respective rights claims (religious freedom, right to non-discrimination) through an appeal to British values. Muslim protestors spoke of being minoritised by the school because of their faith being demeaned in a racially discriminatory way while (mostly white) counter protestors positioned Islam as a threat to their sexual freedom (Nash and Browne 2020, 100–8). Legislators during the RSE debate emphasised the need to reckon with competing resentments, with one noting the need to avoid compromising LGBT rights while also avoiding the demonisation of Muslim constituents for raising legitimate concerns (Mahmood MP HC 20 March 2019, col 1159).

In Florida, race and religion featured less explicitly in the specific statutory debates. However, reform emerged as part of a series of statutory measures that gave effect to political resentment towards ‘woke gender ideology’ and critical race theory. Parental and political resentments towards contested ‘ideologies’ being taught in school ‘othered’ non-conforming gender and sexuality as a foreign threat to familial and state order that valued the (white) cleanliness of heterosexuality (Búrca 2023; Nash and Browne 2020; Ellis 2023; Marchlewska and Cichocka 2020). These institutionalised resentments took racialised shape in *HB1557/HB 1069* as they presented bodies through colonial fantasies that imagine sex as a binary and sexuality as fixed (and normatively heterosexual). This resentful imagining of queer ‘others’ erased sexual difference and gender fluidity, differences that are expressed without the same kinds of policing or censorship in decolonial spaces.³⁵

As discussed in Chapter 1, making space to recognise the concerns of minoritised communities who repudiate homosexuality or transgender identity based on their religion or race require legislators to withdraw from institutionalised resentments that place religion, culture, sexuality and gender in perpetual conflict. This is not simply a request for greater ‘tolerance’ of difference or amplifying one set of traumas over another (Brown 2006; Cvetkovich 2003). Instead, sex education needs to engage critically with difference to avoid the ‘universalizing of white middle-class LGBT youth experience and identity’ (Griffin and Ouellett 2003, 111). Queer Muslims note that framing individual resentments about LGBT education as a conflict between religion

³⁵ The sexual and gendered dimensions of racial governance are beyond the scope of this chapter. For more detail, see Balani 2023 and Stanley 2021.

and sexuality (where one must cede to the other) is unproductive because it erases their individual experiences of both (Mir 2019; Zondon 2019). Ferhan Khan suggests that we ‘need to give queer Muslims a voice. Let us go into the schools and talk to the children. Give us the brief, the resources and the platform – if you really care’ (Mir 2019). Khan’s words speak to being queer on the outside of a law reform debate that prioritises the resentments of white LGBT people and straight religious (Muslim, Christian, Hindu, Jewish) individuals. Rather than subscribe to institutionalised grammars of resentment that create a religion/sexuality binary in resolving contestations of discrimination in the sex education space, Khan’s words gesture to why it is important to highlight the anxiety, fear, shame and pain of queers who disrupt this affective stronghold and showcase different ways of sexual or gendered existence that do not necessarily require privacy or visibility.³⁶

In practical terms, this means moving away from legislated resentments towards particular (minoritised) groups of people and the state giving resources to queer religious folks to come inside schools to work with parents, teachers and students (Jones 2011; Lugg and Adelman 2015; Mesner 2018). This might provide a better route to build solidarity between LGBT people and religious minorities in a way that acknowledges, rather than erases, their existences while backgrounding resentments between these groups. The statutory guidance on RSE in England is an avenue that does enable this to some extent, as it provides a policy infrastructure to both affirm LGBT young people and address intersecting experiences of bullying, harassment and discrimination. Yet, perhaps loosening expectations of legal regulation is more important if we are to mediate between those minoritarian differences that arise between and within communities with layered power dynamics (as evidenced in the *Afsar* and *Equality Florida* litigation and the statutory reforms to which litigation was a response). We need to think creatively from outside law about how we might resource cross-cultural dialogues outside a formalised curriculum – outside mandated legislative requirements on sex – using alternative educational initiatives (such as public art) and occupying non-school spaces (such as places of worship or community halls).³⁷

These approaches do not come easily (noting the entrenched resentments discussed above) and are not without risks. As Tiffany Jones (2011) elaborates in her comprehensive review of sex education, ‘the key is being aware of the inherent flaws and limitations of taking any one perspective and

³⁶ Douglas Nejaime (2009) explores the privatising effects of the religion/sexuality binary in legal discourses about inclusion and accommodation.

³⁷ There are several examples of what a collaborative, non-elitist education might look like in practice. For more detail, see Brim 2020, Mesner 2018 and Springgay 2022.

considering students' needs from many angles' (166). It is beyond the scope of this chapter to review the different types of sex education that are being developed. However, what I have sketched out in this section is a conceptual approach that provokes us to think creatively and reparatively through emotions, like anxiety, shame and resentment, rather than by shunning or trivialising them. This thinking invites experimentation, critique and reflection across individual, interpersonal and institutional scales.

Conclusion

In so-called progressive places like the US and UK, it now feels like a dangerous time to proclaim that you are LGBT. As 'gender ideology' gains currency in progressive media and political circles, lives, intimacies and bodies that contest the homonormativity of social respectability find themselves increasingly subject to moral opprobrium (Nash and Browne 2020). I began this chapter with an anecdote to emotionally personalise this context by describing the social media climate I encountered when I shared a photo of myself in drag. The resentments, fears, anxieties, shame and pain projected onto me by online strangers making unsolicited comments about my supposedly inappropriate appearance, predatory demeanour and professional failure made me retreat from the public space of visibility. I felt the exposing sense of shame, the wounding nature of resentment and the anxious trepidation that I might be the subject of further hostile scrutiny. Yet, mine is not an isolated case. Children in schools experience this every day and, as a queer legal scholar and activist invested in the well-being of LGBT people, I feel the urgency to address this problem. To this end, improved sex and LGBT education in schools is an important avenue to pursue.

I began Part 1 by illustrating the ways in which social anxieties, shames and fears underpinned the articulation of childhood, gender and sexuality. Drawing on the work of queer scholars, I noted how children and childhood are figured politically as conceptual abstractions to contain adult anxieties about gendered deviance and sexual corruption.

In Part II, I considered how education emerges as a technique of governance to control such sexual waywardness and gender fluidity. By examining policy interventions that prohibited the 'promotion of homosexuality', I considered how educational spaces became key to cultivation of anxiety and shame within young people who refused to conform to cis/heterosexuality.

I contrasted this with the emergence of more inclusive sex and LGBT education in schools which aimed to destigmatise certain forms of sexual orientation and relationship types. In Part III, I detailed the emergence of RSE in English schools through an examination of how reform responded to individual LGBT anxieties, pains and shames caused by sexual marginalisation

and refracted them institutionally through grammars of reform that sought to shame (religious) bigotry and cultivate spaces that were less harmful to LGBT people. I read this against opposing reform agendas in Florida that spotlighted parental rights to anxiously repudiate LGBT content as a threat to parental authority and children's innocence. These reforms institutionalised parental fears, resentments and anxieties towards the teaching of sexual orientation and gender identity in order to prevent the injury of sexualising children or confusing them with inappropriate material.

Drawing these emotional grammars of reform together, I considered in Part IV how legislators might navigate grammars of resentment, anxiety and shame and withdraw from prescribing sex education content in schools that erases the elusive, messy and discomfiting dimensions of sex, gender and sexuality. Resisting sexual anxieties and shame, while moving away from parental and religious resentments, became key to pursuing reparative forms of learning that value pleasure, surprise and co-creation. Reading these emotional grammars provides us with a conceptual framework to think differently about the minoritising differences between cultural, religious, sexual and gender minorities.

In the final chapter, I seek to thread the reparative ideas for reform discussed in this and earlier chapters to affectively reimagine the future of legal rights for LGBT people.

6

Affecting Repair: Futures and Forms of LGBT Rights

If my imagination presents the sixties to me as a moment of awakening, the classroom exposed a different subterranean emotional drama. No matter how I planned the course, somehow what emerged was a story of loss and devastation, a declension narrative that took my students through the rise – and then fall – of hope and optimism.

(D’Emilio 2002, 235)

Queer Feelings, Conflicted Reflections

Speaking about the excitements, frustrations, disappointments and promises of the 1960s (in a speech given in the 1990s), the activist and historian John D’Emilio explains how retrospection is an affective encounter. If ‘the sixties’ is his object of study, D’Emilio notes how such an object materialises as an ‘emotional drama’ filled with shifting dynamics of ‘hope and optimism’. This emotional drama is not one that might be dispassionately observed and written about from an academic distance. Rather, as an activist and ‘open’ gay man living through the 1960s, D’Emilio explains how his emotions entangle him to his object of study – an object that both produces, and is produced by, the emotions of his encounter with it. D’Emilio’s words are timely because they capture the emotional drama of writing a scholarly text about an object (a history of gay activism) that one feels intimately connected to as a (former) participant and (current) observer. Like D’Emilio, I have been entangled in a set of emotions (as a queer person, an LGBT rights activist, a critical scholar) when approaching the reparative potential of LGBT rights and reforms. It is an area I have been actively participating in through advocacy, as well as writing about academically, for over the past two decades. In doing so, I have been consistently reflecting on the hopes and disappointments of repair as realised by legal rights and law reforms that have sought to improve the lives of LGBT people, their families, and our communities more broadly.¹ Rather

¹ For more detailed exploration of these emotions and how they shape pedagogies of LGBT rights in law, see Raj 2023b.

than try to separate myself from these emotions, I have attempted in *The Emotions of LGBT Rights and Reforms: Repairing Law* to use the emotions (anxiety, hope, frustration, anger, pain, resentment) I encounter as an LGBT person/activist/scholar as a personal entry point to think through the affective shape and emotional grammar of rights and reforms as they emerge socio-legally through conflict and repair. This foregrounding of emotional labour is not new to activist-scholars, like D'Emilio, who have been undertaking this critical scholarly work for decades. I write within broader histories of critical race, feminist and queer scholarship that attend to how our experiences, subjectivities and positionalities are constitutive of our individual relationship to the world as well as the analytic, critical and normative questions we pursue (Ahmed 2017; Arendt 1963; Brim 2020; Gill-Peterson 2019; Maroney 2006; Muñoz 2009; Wiegman 2012). Specifically, I find myself in intellectual traditions of queer affect scholarship, where I approach the 'cluster of feelings' and 'identifications' that animate my inquiry into LGBT rights and reforms and seek to 'salvage' the objects (rights, reforms) that emerge through that inquiry (Amin 2016, 173; Crimp 2002, 192; Love 2007, 32).

While researching case studies for this book, I surveyed LGBT scholars in the UK for a related research project where I was interested in exploring how emotions materialise when teaching LGBT rights in law school.² Like D'Emilio, all the scholars who responded to the survey detailed various productive aspects of emotion. They described how emotions shaped their pedagogies, ranging from the kind of topics they included within the curriculum through to the forms discussion would take in the classroom. Most scholars who responded described feeling hopeful about their teaching praxis, noting the 'shining attitude' and the 'lightbulb moments' of students who found themselves learning not only about discrete topics that they were previously unaware of but also about their passions, aspirations and lives (Raj 2023b). Yet, their hopes were also tempered with anxieties. Some scholars felt the 'exposing and anxiety-inducing' effects of teaching (sexual/race/gender) content about one's desire or one's identity that might be challenged politically as 'controversial' (Robson 1998; Williams 1988). Other scholars described the 'frustrating' aspects of teaching about 'progressive' law reform (such as hate crime laws) because they reproduce binary understandings of gender or institutionalise forms of racism (Ioanide 2015; Quah 2023; Spade and Willse 2000; Watego et al. 2021).

² These interviews were conducted as part of a project funded by the UK Association of Law Teachers on the emotional experiences of teaching LGBT rights in British law schools (often taught in Gender, Sexuality and Law modules). I am grateful to all the participants who provided such rich commentaries. The project received ethics approval from Keele University. The survey responses remain on file with the author.

Following these emotions is instructive because it exposes the recursive and co-constitute relationship of emotion across individual, interpersonal and institutional scales. As Sara Ahmed makes clear, emotions are performative in the sense that they 'do' what they say. Emotions are 'impressions' or 'attachments' that emerge 'through the movement and circulation of objects' (Ahmed 2004, 6, 11). We observe emotions in the way our body feels about an encounter with an event, object or person (individual), how we inhabit a relationship with others within a particular space (interpersonal), and the attachments we have to social systems or norms that enable or disable our movement in the world (institutional). Like the scholars I surveyed, when writing this book, I have confronted my individual hopes and disappointments of reform aimed at repairing inequality or violence, the anxieties and indignation I felt when engaging in interpersonal conversations about LGBT rights in classrooms or online spaces with those who question the legitimacy of LGBT existence, and the anger and pain that emerged when responding to the political or media institutions that seek to erode, rather than repair, LGBT lives.

My affective encounters have prompted me to think methodologically, critically and normatively about the nature of repair when studying LGBT rights and reforms. Repair/reparation functions as a legal goal of LGBT people, who seek to realise repair of institutional inequalities and interpersonal harms through rights and reforms. I also deployed repair conceptually as a mode of emotional analysis to scan and amplify the organisation of emotions in LGBT law reforms that seek to repair LGBT harms (inequality, violence, discrimination and non-recognition). This conceptual work involves superimposing different registers of repair (as a political claim, a mode of analysis) across individual, interpersonal and institutional scales and recognising how reparations for LGBT people take shape through emotional grammars of law. The emotional grammar of law in this book has referred to the ways in which emotions (resentment, anger, pain, shame, anxiety, fear) produce, shape, organise and communicate specific legal ideas about rights (free speech, religious freedom, non-discrimination). Threading the work of critical race, queer and feminist scholars, I have coined emotional grammar as a conceptual framework to describe the 'disciplinary organisation' of LGBT rights and reforms in legislative, regulatory, policy and jurisprudential contexts and as a critical tool for 'antihomophobic inquiry' that parses the socio-legal effects of rights and reforms while seeking to ensure the flourishing of LGBT people (Ahmed 2017, 32; Sedgwick 1993, 51; Wiegman 2012, 60).

This analytic approach is significant for descriptive purposes because it provides scholars with richer vocabularies to better understand the form of

LGBT rights and reforms and their co-constitutive relationship to each other. It ‘focuses on emotions as signs meant to organise our understanding of rights’ (Temple 2019, 181). This approach also has critical and normative implications. For individuals (scholars, activists, lawyers, legislators, judges) invested in rights and reforms as a means of repairing harm and promoting the needs of (safety, equality, dignity, liberty) LGBT people, emotional grammar provides a framework to critique the relationship between the promise of rights/reform and their material outcomes. This critical intervention also provides conceptual tools to rethink how our normative goals of improving LGBT lives might be reimagined through legal rights and reforms.

In the remainder of this chapter, I think through the descriptive, critical and normative trajectories of emotional grammar and repair by combining case studies covered in the book. I gesture to how we (as scholars, lawyers, legislators) might pursue repair by feeling rights and reforms through the conflicts that subtend each of the case studies in the book. I conclude with a few conceptual provocations to reparatively reimagine rights, rather than delivering prescriptions of reforms for us to embrace.

The Hopes and Disappointments of LGBT Reforms

Concepts of LGBT rights and reforms are in flux. To speak about ‘LGBT’ or ‘rights’ or ‘reforms’ is to recognise that the joining together of these terms in political, activist or scholarly registers reflects cultural and historical dispositions. As Swethaa Ballakrishnen (2023) argues, the ‘meaning making’ of activism or rights-work is never predetermined in advance by linguistic categories/labels like ‘LGBT’ or ‘reform’. To take a critical race, feminist, and/or queer lens to the work of LGBT rights and reform is to recognise that LGBT bodies, discourses and institutions are not static and how we speak about them shifts with time and geography (Baudh 2017; Gevisser 2020; Nwanne 2020; Raj 2020a; Spade 2011; Yoshino 2002).

Around the world, governments are contesting the rights of sexual and gender minorities by caricaturing them as threats to cultural values, social orders, religious beliefs and political arrangements, with many at risk of criminalisation and violence by state authorities (Amnesty International 2024; Búrca 2023; Terry and Butler 2020). State repair of LGBT inequality is being replaced by increasing state retrenchment of LGBT rights. Alongside this, queer and trans people contest the terms of ‘rights’ altogether for failing to address systemic harms and (re)distribute economic or social goods to enable them to flourish. Queer and trans people, and their allies, are struggling with and against such politics. These contestations, however, are not confined to ‘regressive’ state actors. In fact, ‘progressive’ states which have decriminalised homosexuality, permitted same-sex relationship recognition

and provided legal and medical routes for gender transition, are increasingly entangled with 'anti-gender' discourses which capture the 'pushback' to changing gender and sexual norms (McEwen and Narayanaswamy 2023, 3–6). Jurisdictions which purportedly embrace sexual liberality and gender freedom are plagued with individual, interpersonal, and institutional anxieties about how such forms of progress undermine 'common sense' (Berlant 1997; Hsu 2019; McEwen and Narayanaswamy 2023). In Chapters 3 and 5, I described how these discourses materialised in political 'anti-woke' sentiments that chastised gender and sexual diversity as a denial of common sense.

I have chosen to focus on 'progressive' jurisdictions (US, UK, Australia) in this book because we hold them out as hopeful places for LGBT people to live while also being places captured by 'anti-woke' disappointments. These jurisdictions have provided rich case studies because they have allowed me to explore both the hopes and disappointments of LGBT rights and reforms as they have materialised together through intermural conflicts.

Conflict and repair are key threads that connected the case studies in this book. In Chapter 1, I traced how critical legal scholarship has contended with the limited utility of rights in repairing the inequalities faced by minoritised sexual, gendered and racialised groups. This chapter drew attention to the policing and violent functions of law (incarcerating Black and Indigenous people, criminalising sexual and gender transgression, prohibiting reproductive healthcare) and the activist-scholarly ambivalence of seeking repair through violent institutions (Brown 1995; Davis 2016; Gilmore 2022; Hartman 2019; Sharpe 2023; Spade 2011; Stanley 2021). I placed this ambivalence in the context of critical race, feminist and queer scholarship that recognised institutional inequalities while acknowledging the tactical benefits of reform as a means of ameliorating individual and interpersonal harms in a world shaped by racism, coloniality, capitalism, misogyny, capitalism, ableism, homophobia, transphobia, etc. (Ballakrishnen 2023; Cooper 2004, 2019a, 2023; Cossman 2021; Smith 2020; Srinivasan 2021). I took these conflicted scholarly positions about law reform and their respective reparative ideas about legal rights as a conceptual departure point. These ideas allowed me to frame contemporary conflicts over LGBT rights as an affective consequence of the limited reparative power of law (disappointed LGBT people who still face stigma, inequality and violence despite the hopes of reform) and the opposition such reforms garnered in the first place (disappointed individuals who feel alienated or harmed by the existence of such reforms because they compromise their conscience, beliefs and speech). This registered as a 'cruel optimism' where the promises of rights (religious freedom, free speech, non-discrimination) failed to materialise as conditions conducive to the flourishing of either LGBT or religious groups

(Berlant 2011a). I took these conflicts as a generative encounter to think about how we might describe, critique and pursue rights and reforms in a way that does justice to those who are minoritised by individual forms of discrimination, interpersonal acts of violence and systems of domination.

In Chapter 2, I began this exploration by tracking the forms of hostility and resentment that emerged through anti-discrimination laws. I drew attention to how resentments of LGBT people who experienced discrimination featured in the turn to anti-discrimination statutes as a means of repairing those harms. I explored how these laws were resented by those who felt their objections to having to provide services to those in same-sex relationships and views about homosexuality were sidelined. These grammars of resentment took institutional form as jurisprudence parsed the extent to which religious beliefs or free speech objections could enable someone to avoid complying with general anti-discrimination laws. More recently decided cases in the US and UK like *Masterpiece Cakeshop*, *303 Creative* and *Ashers Baking* acknowledged the resentments of those (religious) business owners who felt burdened by anti-discrimination norms and the jurisprudence resentfully carved out space to safeguard the free speech and religious freedom rights of those individuals. Yet, the jurisprudential grammars of resentment articulated by the majority in those cases not only produced the scope of religious freedom and free speech, but they also obscured the hostile stigmas and resentments LGBT people faced when trying to access commercial services that were now denied to them. This case law affectively produced indignities against LGBT people (as individuals) and LGBT existence (as an institutionalised concept). Confronting these emotional grammars in individual and institutional scales, while parsing them alongside ideas of social difference (Menon 2015), substantive equality (Fredman 2016) and intersectionality (Ahmed 2012; Collins 2019), provided a normative means to reimagine interventions to better protect LGBT people from discrimination.

In Chapter 3, I developed my analysis of conflict and repair by addressing anxieties and fears that emerged in debates over the legal gender recognition of trans people in the UK. By situating debates about legal categorisations of sex/gender within broader individual and institutional anxieties about being a man or a woman, I was able to articulate the emergence of legal gender recognition as an anxiety-alleviating phenomenon. Drawing on cases like *Goodwin* and the subsequent enactment of the *Gender Recognition Act 2004*, I pointed out how recognising the privacy rights of trans people was made possible by litigants foregrounding their anxieties towards being misgendered and how legal interventions aimed to alleviate such anxieties by creating a mechanism to change legal sex/gender. In doing so, grammars of anxiety took shape in law reform that sought to reassure binary sex categories by allowing people

to gain legal recognition that matched with a binary social and pathologised expression of sex/gender. However, these grammars of anxiety also shaped the statutory terrain of reform in relation to self-declared forms of gender that no longer required social or medical gatekeeping. Scotland's attempt to reform its gender recognition process was characterised by competing individual and interpersonal conflicts of fear and anxiety: trans people who were anxious or distressed about seeking medical approval prior to legal transition and some (cis) women who felt anxious that self-declared forms of gender would result in increased forms of violence as the integrity of their 'single-sex spaces' was compromised. These anxieties took institutional shape in the Scottish parliamentary debate and amendment process that focused on governing risk, specifically as these grammars of anxiety tightened the scope of legislation (limiting access to adults, requiring a 'cooling off' period, not changing statutory exceptions for single-sex spaces, and prosecuting fraudulent claims). The legislative attempt to alleviate anxieties through this process resulted in a reform that failed to acknowledge children, gender fluidity and non-binary people (Gill-Peterson 2018; Grabham 2010; Stockton 2009). Hopes for gender recognition reform in Scotland were not only dislodged by the amendment process but have been indefinitely forestalled by the British government's intervention to suspend the operation of the Scottish legislation. Following these grammars of anxiety provided an opportunity to rethink the polarisation of women's and trans rights, as individual anxieties about violence and abuse provided a shared lens for both cis women and trans people to recognise the institutionalised forms of misogyny and transphobia they were subjected to in/through law and society (Ahmed 2006, 2017; Nash and Brown 2020; Spade 2011; Srinivasan 2021). Rather than erasing these individual or institutional anxieties, I held space for them as an opportunity to pursue solidarity between minoritised groups of people and shape reforms (legal and non-legal) that address the safety, dignity and identity of those whose lives are marred by gendered violence.

Chapter 4 consolidated conflicts over religious freedom, free speech and dignity by thinking about how pain and shame organised responses to end 'conversion therapy'. I began the discussion in this chapter by detailing how individuals and institutions direct stigma and cultivate shame towards sexual minorities. These forms of shame gave rise to religious, social, medical and psychological interpersonal interventions designed to cure or suppress sexual and gender diversity and this shame was also internalised by those individuals who sought out conversion practices to make them 'normal'. I contrasted these shameful features of history with reforms that have sought to end the trauma and shame of conversion practices. Following the statutory debates over the *Change or Suppression (Conversion) Practices Prohibition Act*

2021 in Victoria (Australia), I explored how pain and shame materialised as emotional grammars that gave form to statutory criminalisation and civil penalties along with carving out space for (some religious) acts that would not be subjected to legal liability. The pain and shame of individuals who have endured conversion practices was taken up through legislative processes that refracted that shame against institutions and individuals that treated queerness and transness as deficient, disordered or dangerous. While prohibitions on conversion practices offered hope to those who could now seek reparations for stigmatising and traumatic interventions, the exclusions of general religious sentiments which stigmatise and shame LGBT people along with the institutional fixation on individual pain disappointingly obscured the institutional contexts in which LGBT people routinely experience stigma and harm. I explored how pain and shame gave effect to conflicts between religious freedom, parental rights and free speech as legislative institutions sought to repair LGBT existence. Thinking with grammars of shame as a productive encounter (Ahmed 2006; Probyn 2005; Sedgwick 2003) and pain as an ossifying moment (Berlant 1999; Cvetkovich 2003; Scarry 1985), I explored how we might think with and against shame and pain when using law reform to repair the continuing harms of homo/bi/transphobia.

The final substantive case study in Chapter 5 took the above emotions together to explore how concerns materialised in ongoing conflicts over the presence of LGBT and sexual content in schools. The push to destigmatise LGBT identity and to ensure greater social acceptance has resulted in statutory and policy initiatives to promote inclusive education, such as the *Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019*. I read these kinds of reform against the current political weaponisation of 'woke' and 'gender ideology' as a conceptual container to resist the increasing visibility of LGBT people that has been possible because of changing sexual and gender norms (Búrca 2023; McEwen and Narayanaswamy 2023). I described this as a 'concerning' process because concern materialised as an affective container for individual anxieties about gender fluidity, shames about sexual deviance, resentments about corroded family structures, and fears about corrupted childhoods. The individual anxieties that emerged through interpersonal encounters (discussions at the kitchen table, books in classrooms, content on social media) took institutional shape as politicians pursued legislative resistances in the form of *HB 1557* and *HB 1069* in Florida (US) as an example. Echoing earlier political concerns over corrupted childhood (such as 'Section 28' in the UK), legislative enactments have consolidated concerns in statutory text through grammars of anxiety, fear, shame, pain and resentment. These emotional grammars circumscribed discussions of gender fluidity and sexual pleasure while contouring the scope

of parental rights to object to such content. By doing so, they limited the scope of schools to nurture the flourishing or well-being of LGBT children (Fischel 2019; Gill-Peterson 2018; Stockton 2009; Rubin 1984). Holding analytic space to parse the emotional grammars in these legislative debates exposed how both 'progressive' and 'regressive' reforms in this area relied on managing discomforts around gender, sexuality and pleasure. Thinking affectively with these grammars was critical if we were to pursue legal or social interventions that facilitated education to support LGBT children.

Each of these reform case studies has shared conceptual anchors as well as emotional grammars rooted in conflict and repair. Debates over the public/private division of sexual and gender difference, the notion of sexual and gender diversity in childhood, the nature of individual or interpersonal safety, and the nature of dignity have subtended each case study. These conceptual anchors, produced by the emotional grammars discussed above, have weighted the rights to free speech (Chapters 2 and 3), religious freedom (Chapters 2, 4 and 5), parental authority (Chapters 3 and 5) and non-discrimination (Chapters 2, 3, 4 and 5). The conflicts these rights have inspired provide an opportunity to approach conflict not as a necessarily destructive encounter but as a productive one that shapes human relationships. As Sarah Schulman (2016) observes, we must avoid 'conflating conflict with harm' and 'mistaking internal anxiety for external injury' (17). I have taken up this provocation throughout this book as an opportunity to stay witness to conflict and open to surprise – while remaining inconvenienced by the lack of simple solutions – in order to rethink and reimagine affectively what rights and reforms might look like (Berlant 2022; Sedgwick 2003; Sharpe 2023).³

In the final part of this book, I sketch out how we might anchor rights for LGBT people using different reparative concepts. I build on the reparative work articulated by critical race, feminist and queer scholars to outline how we might pursue legal rights for LGBT people without flattening the legal complexities and scholarly critiques, along with the hopes and disappointments of legal repair. While the focus of this book is on LGBT rights and reforms, the reparative process of understanding emotional grammars of law and thinking reparatively about rights speaks to other areas of critical scholarship and reform concerned with minoritised people. This includes matters of gender, racial, reproductive, decolonial and disability justice, which I draw on in the section below to outline some forms of 'reparative rights'.

³ I am part of a collection of scholars and activists who are engaged in this critical reimagining legal work as part of The Queer Judgments Project. For greater details on this, see Ferreira, Moscati and Raj 2025.

Reparative Forms of Rights

How do we (as activists, scholars, lawyers, judges, policymakers) hold space for feelings while being discomforted by them? What shape should those feelings take in the pursuit of legal rights and law reforms that repair the harms LGBT people experience? *The Emotions of LGBT Rights and Reforms: Repairing Law* ends with an invitation to scholars, activists, lawyers, judges and legislators interested in using law to safeguard the lives of LGBT people. This invitation is to think reparatively about ourselves, our desires and our aspirations as we pursue legal forms of repair. This means confronting emotional entanglements we have with 'LGBT rights' and refusing to disentangle from them to arrive at some 'objective' analysis or 'correct' path for reform. A task like this requires a reparative focus on the relationships (with objects, people, places) we find ourselves embedded in and the attachments those relationships generate. Such work is reparative because it enables the 'freer expression' of underused or underthought qualities of an object and involves 'learning how to build small worlds of sustenance that cultivate a different present and future' in relation to those objects (Ahmed 2019, 26; Wiegman 2014, 11). Reparative work in critical legal studies means recognising rights and reforms as provisional, elusive and messy objects that we must attend to, and with, if we are to build critical knowledges that sustain minoritised forms of life.⁴ As critical legal scholars, we need to think carefully about how people feel about their rights as individuals and connect this to how individual feelings take institutional shape when legal institutions give effect to them, without 'harmonising' these legal circulations of emotions or abstracting them into a 'moral problem' of doctrine (Abrams 2011, 562; Temple 2019, 102; Wall 2023, 192).

I illuminate alternative conceptual pathways for LGBT rights by returning to how I have threaded critical race, feminist and queer theories to conceptualise my emotional grammar framework. I consider the potential of rights to bodily autonomy and integrity, social belonging and accessibility, sexual liberty and identity fluidity. I illuminate these rights as 'conceptual thoughtways' in concluding the book because they allow for conflict and create opportunities for solidarity across individual, interpersonal and institutional scales.⁵ Specifically, I think about how we might reimagine rights in

⁴ Reparative scholarship is beyond the scope of the chapter to detail. See Chapter 1 and Wiegman 2014, Hemmings 2014 and Stacey 2014 for discussions of working reparatively with scholarly or archival objects.

⁵ I take inspiration here from the critical feminist work of Flora Renz and Davina Cooper who have been leading a project tasked with imagining the future of legal gender. One of

terms of intersectionalities (recognising related institutional dynamics that minoritise people), non-domination (social and political power dynamics that emerge through interpersonal encounters) and compassion (fellow feeling that moves us towards humility, reflection and action) (Arendt 1963; Collins 2019; Snitow 2015). Rights to bodily autonomy, social belonging and accessibility, sexual liberty and identity fluidity are more ‘opaque’ than rights to speech, religion and non-discrimination to the extent they do not necessarily rely on indexing difference to static categories or prescribing content in individual terms (Glissant 1990, 189–94). These rights overlap and hold room for interpersonal conflict and tension while also attempting to repair individual and institutional harm, violence, and inequality.⁶ We can seek law as an ‘affirmative remedy’ to address individual grievances or collective injuries at a symbolic level while also pursuing more ‘transformative remedies’ in the form of political interventions that change ‘inequitable social outcomes’ (Fraser 1995, 18). This returns us to the descriptive, critical and normative dimensions of repair that motivated this book.

Bodily Autonomy

Bodily autonomy refers to a right in which a person is able to exercise informed decision-making capacity over their bodies (what they wear, how they walk, which healthcare they need, when they work, etc.). This right has emerged as politically desirable in a context where minoritised people (women, Black folks, migrants, queers, disabled people) express resentments over the lack of institutional or interpersonal conditions that enable them to make choices over their lives (MacKinnon and Crenshaw 2019). Minoritised people are disciplined by interpersonal or institutional dynamics that epistemically, socially, economically, politically and/or physically cage their bodies in ways that foment their pain, shame, anger and anxiety. This affective context provides a normative basis to pursue a right to bodily autonomy that takes seriously the affective material and dignitary harms experienced by individuals while loosening the literal hold institutional anxieties have over (regulating) their bodies.

their articles uses English anti-discrimination law and concepts garnered from protected characteristics like disability and religion to reimagine gender-based discrimination protections (Renz and Cooper 2022).

⁶ Human rights are the subject of significant critical interest beyond the scope of this book. For examples of recent critical scholarship that recognises the violence of rights as they are articulated through law while also exploring the prefigurative or utopic potentials of using rights for social change, see Ballakrishnen 2023, Coleman 2024, Kalulé 2023, and Lalor 2023.

For those who seek to self-declare their gender (Chapter 3) or express their sexual identity or intimacy in non-conforming terms (Chapters 1, 4, 5), bodily autonomy functions as an important right to pursue through law. In Chapters 3 and 5, I drew attention to how institutional (binary sex classifications, heterosexual health curricula) and interpersonal (policing gendered appearances in bathrooms, encouraging abstinence through conversations in schools) dynamics functioned to derail the dignity of trans or non-binary people and queer desires or relationships. Resisting these institutional and interpersonal dynamics of policing means foregrounding the messy, disruptive and material aspects of the body more explicitly. Feminist scholars have pointed to how this right derives its reparative potential in relation to persisting patriarchal interactions (sex, marriage) and institutions (home, work) that seek to control women's domestic labour, sexual agency and reproductive choices (Franke 2009, 29–44; Reilly 2009, 69–92; Smith 2020, 37–60; Snitow 2015, 275–92). To conceptualise the right to bodily autonomy is to recognise the right as embodied: autonomy shapes, and is shaped by, the body (Butler 1990). This right generates room for individual and institutional anxieties because resisting social norms that prescribe gendered ways of being involves letting go of the reassurances provided by socially differentiated categories of how men and women ought to behave. For trans people seeking to self-declare their gender, intersex people seeking to prevent unwanted surgical modifications of their bodies, or cis women seeking to prevent the inhibiting stereotypes associated with their biological sex assignments, this means generating institutional anxieties and pains to binary legal sex/gender classification systems (Carpenter 2021; Grabham 2012; O'Brien 2015). This goes beyond formal legal gender recognition, as matters of bodily autonomy extend to access to gender affirming healthcare and how autonomy is respected within the context of medical interventions. While conflicts persist over proliferating legal sex/gender categories or abolishing them altogether, bodily autonomy sets out the importance of creating institutional (social, political, economic) conditions in which people can live with basic decency even while recognising that conflicts might continue to persist over how individuals define gender (Nussbaum 2011, 18; Srinivasan 2021, 179). I take inspiration from asylum law to note how we might recognise the institutional and interpersonal contexts in which queer bodies experience violence as a 'particular social group'. Protecting against this violence – via the grant of asylum – does not require an agreed legal definition of 'appropriate' expressions of sexuality or gender (though many asylum cases problematically still do), instead law can make room for minoritised cultural and geographic bodily differences.

In the context of sex education, bodily autonomy foregrounds pleasure and desire (including of children and young people) in ways that might

make educational authorities, parents, teachers and politicians anxious and ashamed. Rather than turn away from this, queer scholarship foregrounds how pleasure/desire problematises the coherence of the body and opens us up to surprising interpersonal encounters (Fischel 2019, 63; Srinivasan 2021, 91). The right to bodily autonomy figures anxiety or pain as a condition of its existence because it requires opening opportunities for individuals to live in ways that might be 'risky' or surprising to others or the institutions they inhabit. Bodily autonomy takes sex education not as a harm reduction enterprise but a pleasure-centring, human flourishing endeavour that means we might feel less shame or anxiety over our bodies or intimate relationships with others. To suggest this is not to uncritically accept all choices one might make in the name of consent.⁷ This is particularly important, as I noted in Chapter 4, when considering how conversion practices are performed on those who 'choose' them. Rather, a reparative pursuit of bodily autonomy seeks to enable the right of minoritised people (queers, children, cis women, trans people) to make decisions without the violence of the state shaming or punishing them for doing so through criminal penalties.

Bodily autonomy makes room for institutional anxieties and interpersonal resentments while seeking to use law to ameliorate the shame, pain and resentments of those who are denied control of their bodies and relationships. In Chapters 2 and 5, I canvassed resentments emerging between those who sought out public accommodations (to bake their gay wedding cakes or teach about the existence of same-sex families) and those who felt unfairly burdened by having to engage with them. Rather than resolve interpersonal resentments by adjudicating separate identity-based claims through free speech, religious freedom and parental rights, I used resentment to help expose how queer religious bodies are denied autonomy and substantive equality. Bodily autonomy for religious queers resists spatialising logics of resentment that cleave sexuality from religion and, in doing so, privatise one at the expense of the other for the purpose of determining who has access to public space. Critical race scholarship emphasises the value of bodily autonomy as a response to the painful and fear-inducing dynamics of public space. This work notes the role of public institutions (slavery, prisons, schools) in transforming Black and other racialised bodies into objects of fear who are then subjected to privatising logics of confinement (policing and punishment) (Davis 2016; Gilmore 2022; Nwanne 2020). What is important to note here

⁷ Joseph Fischel elaborates, and queries, the 'unimpeachable' logic of consent in delineating legal sexual encounters. He argues against institutionalised forms of harm (using the example of American football) – even if someone 'chooses' it – in situations where institutional conditions are disabling of a person's autonomy (Fischel 2019, 31–63).

is that bodily autonomy from a critical race lens is an attempt to resist this institutional or interpersonal desubjugation (reducing a person to an object) at an individual level by challenging the grammars of fear that treat racialised minorities as predatory, abusive or lazy (Ioanide 2015, 2). Making room for minoritised bodies to exercise agency means contesting the bordering logics of race, gender and sexuality (Gilmore 2022, 107–31). In doing so, bodily autonomy recognises fears and anxieties over the possible harms that might emerge from abolishing institutions built on surveillance and punishment, such as prisons, gender and borders. Bodily autonomy forces us to rethink our desires to pursue carceral measures, as evidenced in prohibitions on conversion practices, that place racialised groups of people at greater risk of stigma, surveillance, punishment and deportation. These emotional conflicts underpinning bodily autonomy hold space for everyone (regardless of gender or sexuality) to exercise decision-making over one's body with individual, interpersonal and institutional supports.

Social Belonging and Accessibility

Alongside bodily autonomy, we might conceive social belonging and accessibility as a right to repair the inequalities faced by LGBT people. Social belonging is a right that forms relationally: individuals receive social recognition of their differences through interpersonal exchanges or relationships, and those differences are given space to coexist within institutions (Ahmed 2017, 232; Nussbaum 2011, 64). Such a right in law aspires towards substantive equality by recognising the infrastructural and ideological barriers that inhibit participation in social life and seeks to dismantle these by making room for social differences while enhancing participation of minoritised groups (Fredman 2016). This social recognition process and coexistence are not neatly realised or free from discomfort – in fact, social belonging necessitates inconvenience as the 'familiar friction of being relation' (Berlant 2022, 2).

As discussed above (and in Chapter 1), questions of belonging and access are intimately tied up with conflicts over racial, gender, sexual, class and other social differences. Critical disability studies, feminist and queer scholarship observe that spaces are physically demarcated and socially organised in ways that refuse access to some bodies while alienating or stigmatising others (Ahmed 2012; Halberstam 2011; Kanter 2011; Raj and Dunne 2020a). Contesting this alienating social organisation is not a romantic matter of promoting greater empathy, cultivating love or demanding more tolerance (Brown 2006; Davis 2023; Douglas 2023). Rather, addressing these alienations or exclusions requires a turn to more critical forms of compassion – what Hannah Arendt (1963) describes as 'fellow feeling' to 'suffer with others' – to recognise the conditions that shape how individuals experience trauma (81).

This involves a humble and curious sensibility to better make sense of how vulnerabilities are produced affectively in ways that render sexual, gendered, racialised and disabled 'others' susceptible to abuse (Clough 2017; Fineman 2017). This is how legal rights to social belonging and access materialise for LGBT people. In Chapter 2, I noted how access to public accommodations was differentiated by markers of sexual orientation where some could be lawfully refused service on the basis that the good or service they requested constituted a resented imposition on a service provider's religious belief or speech. In Chapter 3, I described how access to self-declared gender was anxiously rebuked by those who felt sex-segregated services would risk greater violence and trauma to cis women. In Chapter 5, I detailed how concerns about increasing non-cis/heterosexual visibility cabined discussions about LGBT life in schools.

While the oppositional claims against LGBT rights in each of these chapters relied on expressions of resentment, anxiety, pain and shame, a focus on social belonging and accessibility yields a richer assessment of institutionalised power dynamics. A right to social belonging in law makes room to recognise the resentments, pain and anxieties of individuals in conflict while parsing how those emotions shape differentiated forms of access in public life. Businesses might resent having to serve gay couples but the stigmatic harms of denying commercial services to gay couples (through institutionalised religious exemptions) alienates them from public life. This stigmatic negation acutely materialises for sexual minorities of faith (queer Muslims, gay Christians) who are denied space to express both their religious conscience and sexual identity in domestic, religious and pastoral spaces. Cis women might resent, or feel anxious about, having to share space with trans women but foreclosing legal recognition to trans women obstructs their ability to use basic public infrastructures (public toilets, airports, shelters, workplaces) without (fearing) the shame and pain of being ostracised, rejected or scrutinised because of inaccurate identity documentation. Cis/heterosexual adults might be anxious about curating discussions about gender or sexuality because they fear such content might confuse children but the consequences of not doing so means queer or trans children are structurally positioned to experience the stigma, shame and pain of having their identities and desires erased in school (Sutherland 2017).

Rather than resolve the inconveniences or tensions central to these emotional encounters, a right to social belonging and access through law makes greater room to foreground individuals' resentment, pain, anxiety, fear and shame by creating conditions for them to be heard. But the rights analysis does not stop there, social belonging attends to individuals' institutionalised vulnerabilities and differentiated forms of emotional labour (Stauffer 2015).

In doing so, we can explore whose emotions are privileged within particular spaces (those who belong) and who have their emotions managed or ignored as inconvenient, trivial and hysterical (those who do not belong) (Ahmed 2017, 145; Cruz 2017; Terry and Butler 2020). In conversion practices (Chapter 4), a focus on the right to social belonging and access recognises the individual experiences of shame and pain but does not ossify them in a way that exceptionalises homo/bi/transphobia as a discrete act. Instead, this right draws out how institutionalised vulnerability to the shame and pain caused by conversion practices is made possible by religious and social stigmatising cultures. I take inspiration from anti-harassment norms in equality laws to think about how social belonging might be cultivated if institutions and individuals had positive obligations to prevent or redress degrading, humiliating, offensive and intimidating cultures that marginalise sexual or gender differences. For trans and non-binary people (discussed in Chapter 3), the institutionalised vulnerabilities of those denied legal recognition of violence, exclusion and harassment can be challenged with a focus on social belonging that seeks to alleviate their pain, fear and anxiety by making it easier for them to change legal documentation. A right to social belonging makes room for those wanting to live visibly as LGBT without discrimination or exclusion by addressing institutionalised vulnerabilities caused by inadequate anti-discrimination laws and narrow sex education initiatives (evidenced in Chapters 2 and 5). A right to social belonging and accessibility addresses individual, institutional and interpersonal vulnerabilities without seeking to order them hierarchically.

A right to social belonging and access is not solely realisable through law. Materialising the right requires education that confronts the institutional resentments that inaccurately position religion and sexuality as antithetical (Chapter 2), misdirected political fears of fraudulent gender recognition resulting in rampant violence against cis women (Chapter 3), religious anxieties and shames over sexual difference, and social concerns about the sexual indoctrination of children and young people (Chapter 5). Educational interventions are critical to community building that seeks to promote solidarity between minoritised communities. For cis women, trans people, queers and migrants, the rights between (and within) groups may materialise in conflict when different ideas of gender and sexuality are contested amongst them. Yet, focusing on how these groups are politically or economically stratified and denied material forms of social belonging (and citizenship) creates opportunities for convergence and conversation rather than division and toleration (Becker 2009; Brown 2006; Clare 2015; Cooper 2004).

Sexual Liberty

Rights to bodily autonomy and social belonging are both tethered to a right of sexual liberty. This right is one that recognises individual desires and makes room for individuals to pursue plural sexual practices by creating institutional conditions that do not criminalise or restrain such a pursuit (Cossman 2021; Fischel 2019; Smith 2020; Srinivasan 2021). Sexual liberty countenances institutional anxiety and shame as a condition of sexual possibility. As James Hathaway (2022) writes, sex involves risk and ‘push[es] us . . . farther from the orderly confines authoritarians prefer’ (2). Feminist and queer scholars have pursued nuanced critical approaches to how law ought to reckon with sexual liberty while attending to the risk of sexual disorganisation. In Chapters 4 and 5, I detailed how non-normative sexual desires (homosexuality in homes, churches or schools) were politically and legally problematised by grammars of shame and anxiety that treated such desires as something to suppress, correct or contain (via conversion practices or abstinence sex education). Sexual liberty emerges as an individual right capable of reparatively responding to this institutional problematisation. This right contests the social policing of desire or attempts to make desire socially productive. As Amia Srinivasan (2021) argues, ‘desire can take us by surprise, leading us somewhere we hadn’t imagine we would ever go . . .’ (91). Her analysis points to how desire figures anxieties (over who we are attracted to, what kind of pleasures we wish to pursue) that we must live with in a culture of sexual plurality. Sex education or therapeutic practices that acknowledge sexual liberty portend anxiety and shame. Kinks or fetishes that challenge the normative institutionalisation of conjugal heterosexuality involve making room for the presence of individual fear (over bodily harm) and shame (over a taboo sexual practice). This means a right to sexual liberty has decriminalising effects (even if does not necessarily destigmatise decriminalised sexual practices) by loosening the regulatory impulse to punish or police those who are ‘perverted’ or seek ‘perverted’ expression in public spaces (Smith 2020, 72).

Sexual liberty necessitates a loosening of sexual surety or sexual positivity at an individual, interpersonal and institutional level. To speak about sex in these terms means ‘dirtying’ our expectations without projecting stigmas onto others (Irvine 2014). We might read these forms of non-normative (‘counter’) sexuality as ‘an attempt to become foreign to your own sexuality and to lose yourself in sexual translation’ (Preciado 2018, 8). Queer writing on desire invites us to think about how we ‘become foreign’ to ourselves by recognising how we ‘fail’ as individuals because we challenge heteronormative sexual success and, in doing so, seek to disrupt the organisations heteronormativity inspires (Fischel 2019; Halberstam 2011; Johnson and

Vanderbeck 2014; Preciado 2018). This focus on failure as a queer ethic is deconstructive: it aspires to undo heteronormative modes of sexual governance without imposing a new set of sexual norms that channel our queer desires (individual) or transform gay sex (interpersonal) into productive social sites like marriage (institutions).

This right is not simply a matter for individual or interpersonal negotiation. It involves institutional recalibration. When discussing prohibitions on conversion practices in Chapter 4, I emphasised how shame might productively encourage institutions to resist classifying sexual orientation as fixed or immutable to foreclose conversion practices. Rather, a right to sexual liberty permits desires to be elusive, messy and disruptive – even if they make institutions blush – without predetermining the form such desires should take and shaming forms of desire that do not adhere to privatised, marital or heterosexual norms. In Chapter 5, I foregrounded institutional anxiety as a condition for enabling sexual possibility where young people engage with (non-abstinence, non-maritally focused) sex education that supports their bodies and desires while discomforting their parents or politicians. This is not about embracing sex in all its forms or insisting on sexuality as a liberatory virtue. Rather, a right to sexual liberty that holds space for institutional anxieties while challenging sexual shame makes it possible to speak about non-desire (asexuality), sexual pleasures that do not always rely on possessing normative genital features (intersex bodies), and differentiated sexualised labour (domestic work) (Benoit 2024; Morland 2009; Nedelsky 2012).

Sexual liberty is not an unencumbered right. When read alongside bodily autonomy and social belonging, a right to sexual liberty necessitates consideration of sexual harm. The discussion of conversion practices in Chapter 4 illustrated how the pursuit of a (hetero)sexual liberty led to harmful practices designed to enforce sexual celibacy or repression. The sex education discussed in Chapter 5 explored the harms young people encounter from pursuing sexual choices or the sexual choices of others that might lead to their exploitation (such as online bullying) and sexually transmitted infections (such as HIV). As Joseph Fischel (2019) suggests, we might respond to these concerns by emphasising ‘capability’ (as knowledge and capacity to reason) and ‘co-determination’ (as contributing to the design of a practice or meaning of a pursuit). This demands ‘better-resourced and better-educated sex’ which ‘redistributes sexual access and cultivates sexual autonomy’ (Fischel 2019, 171). In Chapters 4 and 5, I discussed how reflexive forms of LGBT education that were not statutorily prescribed but produced with those directly affected could challenge sexual harms (conversion practices and homo/bi/transphobic bullying in schools). A right to sexual liberty holds

space to navigate differentiated individual anxieties towards sexual risk while remedying institutionalised sexual shame.

Identity Fluidity

The above rights gesture to identity as fluid and provisional. The right to a fluid identity is one that recognises bodies are not inert or static but produced through discourses that give effect to how we perceive ourselves, and how others perceive us, in terms of gender, race, sexuality and disability (Ahmed 2006; Brown 1995; Butler 1990; Gill-Peterson 2018; Kanter 2011). To speak of identity as a condition of how we exist and move in the world – in terms of bodily autonomy, social belonging and sexual liberty – is to recognise that our identity is imbricated by relations of power and intersections of difference (Collins 2019, 26; Cooper 2019b, 55). In Chapter 3, I explored how legal recognition of trans people was made possible to the extent such identities could shore up binary sex categories, conform to pathologies of gender dysphoria and emphasise the fixity of one's gender. This mode of recognition was possible by containing social and legislative anxieties about non-binary classifications or gender fluidity. My discussion of conversion practices in Chapter 5 evoked how legislative responses shamefully delineated the harmful effects of sexual change or suppression by foregrounding the traumas associated with attempting to modify non-normative sexuality. A legal prohibition on these practices was made possible by legislators painfully fixing identity as subject to shame. I spoke of childhood expressions of gender and sexuality as dynamic and elusive, which legislators sought to erase or contain through grammars of resentment and fear. While the reforms discussed in Chapter 5 recognised childhood as a space of gender and sexual development, legislated anxieties expressed through curriculum regulation sought to channel childhood into productive forms of future sexuality (through marriage) or gender (through binary sex differentiation). This reform process relied on fixed categories of adult sexuality or gender.

Yet, in each of these reform case studies, identity resists containment and deviates along mobile lines of gender and sexuality (Ahmed 2006, 65–107). Religious gay people express pain, resentment, anxiety and shame in ways that disrupt the notion that a homosexual identity eschews faith, or a religious identity eschews homosexuality. Some trans and non-binary people express themselves – and their anxieties – in ways that resist the idea that gender is always knowable, classifiable, fixed and incapable of change. Queer and trans children expose some of their fears, shame, pain and anxieties about their bodies or desires in schools in ways that disturb the idea that their sexuality is easily modelled and their gender identity is plastic.

A right to identity fluidity enables legal recognition and affirmation of such individuals. It holds institutional space for anxiety and the possibility of pain (in terms of regret) by allowing individuals the right to shape their identities without closure. For legal recognition of trans or non-binary people, this means proliferating sex markers beyond male or female and enabling multiple changes to sex. For legal recognition of queer individuals, this means allowing plural forms of sexual identification without insisting sexual identities be fixed in order to prevent stigmatising interventions. This approach avoids the discursive traps of describing oneself using the language of 'innate preferences' while acknowledging the 'sovereignty' of individuals to self-determine their identity (Srinivasan 2021, 98). In this way, an individual right to a fluid identity holds space for individuals to take risks in fashioning themselves through social interactions and institutional habitations. This reparative approach might result in individuals feeling shame, pain and anxiety through 'surprise' as they encounter aspects of their identity that were unknown or unexpected (Sedgwick 2003, 35). Such a right recognises how individual conflicts over identity might give rise to institutional anxieties but institutions should not seek to alleviate their anxieties by fixing categories of identity difference. In doing so, the right shifts the affective burden onto institutions to create conditions of possibility while untethering queer or trans individuals from the burdens of aligning their identity to cis/heteronormative expectations of sexuality and gender.

These rights are not meant to be an exhaustive list of how we might pursue repair for LGBT people in law. Rather, these messy, dynamic and overlapped ideas are reparative concepts for working with(in) conflicts while working with(in) rights language.

Feeling Futures . . .

The Emotions of LGBT Rights and Reforms: Repairing Law has been an opportunity to produce critical emotional scholarship concerned with justice. I started this book by outlining my personal motivations for addressing socio-legal questions of repair in the context of polarising conflicts over reforms in jurisdictions held out to be beacons of LGBT rights. I wanted to take seriously the emotional dynamics of legal conflicts that emerged in places where I have worked and advocated (as a queer person, scholar, teacher and activist) and to see if I could find conceptual routes to navigate repair in ways that attend to the stigma, inequalities, violence and other harms that LGBT people endure. This book's significance lies in detailing how emotional grammar threads individual, interpersonal and institutional scales of LGBT conflicts and repair.

As I finish the book, I offer no romantic ending to the issues that inspired me at the start. Instead, I am reminded of the hostile environments which LGBT people find themselves as discourses of ‘wokeness’ and ‘gender ideology’ gain political traction to strip away the rights we have gained. Homophobia and transphobia – along with misogyny, racism, colonialism, capitalism and ableism – remain a painful reality. However, this reality is met with ongoing resistance and pursuits of repair. LGBT people continue to use social, political, economic and legal resources to challenge individuals, communities and institutions that treat our existence as something to scrutinise, cage or erase. My hope is that *The Emotions of LGBT Rights and Reforms: Repairing Law* adds to these resources by cultivating critical politics of/with/to/against/ alongside emotion. This will help us (as scholars, legislators, judges, people) with our reparative pursuits to make lives liveable for LGBT people.

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