Queering Indigenous Legal Studies

Emily Snyder
University of Waterloo

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Indian and Aboriginal Law Commons, Legal Education Commons, and the Sexuality and the Law Commons

Recommended Citation
Emily Snyder, "Queering Indigenous Legal Studies" (2015) 38:2 Dal LJ 591.
A handful of scholars have examined sex, gender, and sexuality in relation to Indigenous laws; yet their work is infrequently taken up in the field, and there is a broader need for conversations about what it means to “queer” Indigenous legal studies. In this paper, I centre and examine work that contributes to this queering so as to promote inclusive critical legal education and engagement. I also discuss the implications of not attending to sexuality and develop preliminary propositions for queering Indigenous legal studies.

Un petit nombre d’universitaires ont étudié les questions de sexe, de genre et de sexualité en lien avec les lois autochtones. Pourtant, leurs travaux ne sont pas souvent mis en contexte dans la pratique, et il est fort nécessaire de discuter de tout ce qui entoure le fait d’intégrer la question de l’homosexualité (« queer ») dans les études légales autochtones. L’auteure examine les travaux qui contribuent à cette intégration (« queering ») afin de promouvoir la formation critique inclusive en droit et l’engagement. Elle discute également des conséquences qu’entraîne le fait de ne pas se préoccuper de sexualité, et elle formule des propositions préliminaires pour introduire la question de l’homosexualité dans les études légales autochtones.

* Lecturer, Department of Sociology and Legal Studies, University of Waterloo. The research in this article was supported by a SSHRC Postdoctoral Fellowship, which was done in affiliation with the Indigenous Law Research Unit, Faculty of Law, University of Victoria. The author would like to thank Val Napoleon, John Borrows, and Brock Roe for their comments, as well as the anonymous reviewers for their feedback. The author is also grateful to colleagues who gathered at Dalhousie University and the University of Victoria where presentations of earlier drafts of this paper were given.
Introduction

When reflecting on Indigenous studies, Chris Finley argues that while gender analysis has somewhat made its way into the field, sexuality is especially under-discussed and silenced and she argues for the importance of queering Indigenous studies.¹ Finley’s analysis is important and there is a need to expand this conversation to explicitly address Indigenous laws and to queer Indigenous legal studies. It is necessary to consider Indigenous laws (Indigenous peoples’ own legal orders)² because they are a central aspect of Indigenous self-determination and sovereignty.³ Indigenous legal studies includes analyses of Indigenous laws themselves,

---


² I use “Indigenous law” to refer to Indigenous peoples’ own legal orders for managing conflicts in their societies, and for contending with inter-societal relations. Whether used in the plural or singular, it should always be assumed that a multitude of Indigenous legal orders exist, each with various means of engaging, enacting, and interpreting law.

but also steps back and examines how Indigenous laws are engaged in academia—through theories, research, and pedagogy.4

It is all too common in academic (and non-academic) discussions about Indigenous law that gender is under-discussed.5 Sexuality (sexual orientation, preferences, and divergent sexual practices across gender and sex) is typically absent and there is very little discussion about 2LGBTQ social and legal issues as they relate to Indigenous laws.6 Furthermore, few have discussed how heteronormative oppression can be both perpetuated through, but also challenged by, Indigenous laws. Indigenous legal education is an important site for engaging critical discussions about sexuality and power, and there is a need to consider the following questions: What would it look like to queer Indigenous legal studies? What might this mean? What might this queering entail? Does Indigenous legal studies need to be queered? What are the implications of doing so? What are the implications of not doing so? These questions are not central in the field and I argue that queering Indigenous legal studies is necessary and urgent for inclusive legal practice and education. The overwhelming lack of discussion about sexuality and Indigenous laws needs to be addressed. Examining this problem through a queer framework interrogates how ideas about sex, gender, sexuality, and power are operating in and through Indigenous law and legal education.

This paper proceeds in four parts. First, I argue that it is important to bring various perspectives together to foster this conversation about queering. Second, I do not assert that no one writes about sexuality and Indigenous laws; rather the problem is that work in this area is scarce, and what has been produced is infrequently taken up in the field to think more broadly about the politics of queering. I focus on three pieces (by Andrew Gilden, Jennifer Denetdale, and Val Napoleon) to consider the

---

4. The term “Indigenous legal studies” is used to legitimize research and teaching pertaining to Indigenous laws as an area of study in its own right. Indigenous legal studies should be understood as distinct from anthropological work on “customs.” I do not mean to suggest that anthropologists as a whole do not study law however, see for example the work of Bruce Miller in the area of legal anthropology. My focus on Indigenous legal studies, while informed by my own experience within this field in Canada, draws more broadly on Canadian and American literature throughout this article. There are so few resources about 2LGBTQ issues and Indigenous laws that it is important to work broadly here, though an analysis about distinctions that might exist between the field in Canada and the U.S. could be worthwhile in future work.

5. See Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26:2 CJWL 365 [Snyder, “IFLT”].

6. 2LGBTQ: two-spirit, lesbian, gay, bisexual, trans, and queer identifying people. I am using the “2” at the beginning of the term so as to not treat Indigenous conceptualizations of sex, gender, and sexuality as a tag-on to an already existing term, though not all Indigenous people identify as “two-spirit,” and thus this move is a potentially problematic way of centering indigeneity (see also the discussion in part III pertaining to identity hierarchies).
contributions of their work on 2LBGTQ issues in Indigenous law for queering Indigenous legal studies. Third, I contend that their common effort to take sexuality and Indigenous laws seriously has had little traction and I consider what some of the challenges are for centring sexuality in Indigenous legal studies. Lastly, I present preliminary propositions for queering Indigenous legal studies. The focus of my argument is to demonstrate the need for queering Indigenous legal studies and a framework for how to do this is only introductorily engaged here.

“Queer” is used in different ways. It is sometimes used to speak generally to non-normative politics. I use “queer” in this article to focus on sex, gender, and sexuality, given my concerns noted above, although I do at times also use queer to unsettle that which is normative—for example, to trouble my own social location as a white, heterosexual woman writing in the area of Indigenous law. In drawing on the theories below, I aim to denaturalize the ways that I (and others) experience privilege and oppression. Queering Indigenous legal studies is valuable for Indigenous legal revitalization, and it is also important for non-Indigenous people to participate in the dismantling of heteronormative, patriarchal, and colonial oppression.

I. Interdisciplinary conversations

Queer theories are not discussed in relation to Indigenous legal studies, yet they have much to offer to one another and to critical legal education. There is much to be gained by bringing various perspectives together to foster a dynamic conversation about queering Indigenous laws. In this section, I place (1) queer Indigenous studies, (2) queer legal studies, (3) Indigenous legal studies, and (4) Indigenous feminist legal studies into conversation. The discussion that follows introduces the different approaches and explicates dominant patterns instead of the exceptions (examples of exceptions are analyzed in the next section). Bringing these approaches together illustrates how we are at the cusp of queering Indigenous legal studies.

As noted, Finley (among others) argues that there is a need to queer Indigenous studies. Finley and Driskill et al., demonstrate that

---

8. See Driskill et al, Queer Indigenous Studies, supra note 1.
the conversation between queer studies and Indigenous studies is vital as it brings heteronormativity and colonialism into an explicit analytic relationship with one another. Finley asks, “[c]an Native peoples decolonize themselves without taking colonial discourses of sexualities seriously?” The answer to this question, put simply, is “no.” Colonial oppression intersects with and is upheld by other forms of oppression—for example, racism and heteropatriarchy. As Driskill et al. explain, “settler colonialism is the historical, institutional, and discursive root of heteronormative binary sex/gender systems on stolen land. In this reading, to interrogate heteronormativity is to critique colonial power, which then necessarily intersects the work of decolonization pursued by queer Indigenous people.” Finley argues that “[c]olonialism needs heteropatriarchy to naturalize hierarchies and unequal gender relations” that are necessary for the attempted destruction of Indigenous social, economic, and political structures. Thus, while all LGBTQ people are faced with the ideological and material realities of heteronormativity, Indigenous people and peoples’ experiences with these problems are markedly different.

The deployment of western norms pertaining to sex, gender, and sexuality onto Indigenous peoples has been exercised in many ways, for instance through sexual violence most often targeting Indigenous women and girls (historically and presently), residential schools, the attempted destruction of Indigenous kinship patterns in favour of the nuclear family, nation-state and empire building (which relies, in part, on the nuclear family), economics (by undermining Indigenous economies and

10. Ibid at 33; Qwo-Li Driskill et al, “Introduction” in Driskill et al, Queer Indigenous Studies, supra note 1, 1 [Driskill et al, “Introduction”].
11. Finley, supra note 1 at 32.
12. Patriarchy is reliant on heteronormativity, though too often this goes missing in discussions about sexism. It is useful to take up the term “heteropatriarchy” to show how heterosexism and heteronormativity operate in relation to gender oppression.
14. Finley, supra note 1 at 34.
15. Ibid.
17. Alex Wilson, “N’tacimowin innu nah”: Our Coming In Stories” 26:3-4 Can Woman Studies 193 at 194-195.
18. Finley, supra note 1 at 32.
labour roles),

20 law, governance, stereotypes about Indigenous people, and dispossession of land.

21 Indigenous peoples not only face systemic sexism and homophobia in settler society, but also these problems also manifest in complicated ways in Indigenous communities. For example, Alex Wilson explains that most of the Indigenous people that she interviewed felt they could only be openly gay once they left their community. Further, Driskill et al. emphasize that:

Colonialism, poverty, homophobia, displacement, suicide, and rejection by our families and communities are parts of our lives. This is not said to perpetuate notions of tragic victimry that so often haunt writing about Indigenous peoples. Instead, it is said to point out the material and political conditions that Native GLBTQ2 people experience under colonization, including colonization’s accompanying systems of heteropatriarchy, gender regimes, capitalism, ableism, ageism, and religious oppression.

These problems are ongoing and overlooking them in discussions about decolonization risks perpetuating heteropatriarchal oppression. Sex, gender, and power matter and need to be a part of conversations about Indigenous laws. However, the literature on queer Indigenous studies is largely silent on the subject of Indigenous laws. This oversight is significant as Indigenous laws are central to Indigenous self-determination, and Indigenous laws can also be drawn on for considering how heteropatriarchy can be both perpetuated and challenged in Indigenous laws. Queer Indigenous studies is an invaluable part of this conversation, though there is a need for further critical reflection regarding the treatment of the past (and present). While I address this in more detail in the following sections, it is worth stating that there is a need for a conceptual shift from focusing entirely on conflict as manifested only in and by colonization to understanding how Indigenous peoples also grappled with conflict in the past. The shift here is to recognize the importance of arguments regarding the relationship between

20. See Gilden, supra note 7.
24. Finley, supra note 1 at 39, writes about Denetdale’s research on the Dine Marriage Act (Jennifer Denetdale, “Carving Navajo National Boundaries: Patriotism, Tradition, and the Diné Marriage Act of 2005” (2008) 60:2 American Q 289), though Finley’s work is not focused on Indigenous laws and I suggest that there also needs to be sustained, devoted attention to Indigenous laws, legal analysis, and legal education.
25. Borrows, Canada’s Indigenous Constitution, supra note 3; Napoleon, Ayook, supra note 3; Christie, supra note 3.
heteronormativity and colonialism, and to recognize the magnitude and historically recent manifestation of this problem, while also not treating the past as though everyone in Indigenous societies agreed and as though there were no conflicts pertaining to sex, gender, and sexuality.

Queer legal studies is helpful for thinking further about power dynamics in relation to law. Sex, gender, and sexuality operate and are constructed in law (albeit in different ways in different legal orders). Kim Brooks and Debra Parkes explain, “queer theory seeks to demonstrate that all sexual behavior is socially constructed and that sexuality is not determined by biology. Instead, sexuality is understood as a matrix of social codes; sexual difference cannot be disaggregated from culture. Queer legal theory applies this understanding of how sexuality is constructed to law.”

Robert Leckey and Kim Brooks argue that many of the discussions about sexuality and (state) law fall more so under gay and lesbian rights approaches in which discrete identity categories are asserted and inserted into existing legal structures. They explain, “such work is usually taken up through a presumptively unqueer lens of liberal legalism, including the courts’ responses to activists’ deployment of liberal rights instruments.”

Further, Elaine Craig explains that the gay and lesbian rights approach entrenches the binary of heterosexual/homosexual, whereas queer legal theory works to deconstruct this very binary. Queer legal theory focuses on “a larger transformative project” of deconstructing and challenging heteronormativity as it is perpetuated in/by law. Brooks and Parkes note that an intersectional approach (how sexuality, gender, race, class, and ability intersect) to queer lives is key and that queer legal studies “seek[s] to complicate our understanding of identity.”

One significant area where there is need for further complication pertains to colonialism and indigeneity in relation to queer legal studies. If queer studies is shaped by settler-colonial relations, then queer legal

---

27. Law is one site in which this happens.
28. Kim Brooks & Debra Parkes, “Queering Legal Education: A Project of Theoretical Discovery” (2004) 27 Harv Women’s LJ 89 at 97. In arguing that sexuality is a social construction, it is not my intention to deny the materiality of the body. Materiality and the things that bodies do are interpreted and our interpretations are connected to social contexts.
30. Ibid.
32. Brooks & Parkes, supra note 28 at 90. See also Craig, supra note 31 at 213.
34. Ibid at 101.
studies needs to recognize that analyzing heteronormativity necessitates analyzing colonialism and deconstructing state-Indigenous hierarchies pertaining to law. Leckey and Brooks’ edited collection on queer theory makes important contributions regarding questions about law and empire building. The building of nation-states aims to discipline non-normative sexualities and genders into forms that support the nation (for example, same-sex marriages that replicate the nuclear family), and queer theory itself can end up contributing to empire building if it is articulated in ways that take for granted and support “the” nation and its laws. White men are the “invisible” subjects in much of queer theory, and Leckey and Brooks ask, “[i]s [queer theory] a politically salient resource, or itself a technology of neocolonialism, captured by the interests of those most or earliest represented by it [that is, white gay men in western nation-states]? Brooks and Parkes note that Indigenous experiences—queer and non-queer—need to be part of discussions about law. They observe, “[h]owever, it is hard to know how to incorporate such a view in a legal pedagogy. This difficulty reveals that while tinkering at the edges of legal education may resolve some issues for some outsiders, it will take a much more transformative project to make legal education a locus of social justice.” Indeed, this transformation requires a major deconstruction—not just acknowledging and including Indigenous people, peoples, and laws, but centring them so as to fundamentally change the conversation. Indigenous legal studies is invaluable in this regard, as it already centres Indigenous people and laws. However the revitalization and practices of Indigenous laws will be partial and queer citizens will be sidelined if sex, gender, and sexuality are not taken seriously. Napoleon argues that “[i]n the Aboriginal political landscape, there is an absence of voices advocating that sexual orientation and transgenderism are significant Aboriginal issues” and energy is expended elsewhere, for instance, in fighting for Aboriginal rights and title. Sexuality thus gets detached in these legal discussions and the problems that exist in Indigenous communities with homophobia, transphobia, and sexism are overlooked. What is troubling is that these problems are not centred—that is, fundamentally altering the

36. Leckey & Brooks, Law, Culture, Empire, supra note 19.
38. Leckey & Brooks, supra note 29 at 7.
39. Ibid. Regarding the white male subject as central, see also Suzanne Lenon, “White as Milk: Proposition 8 and the Cultural Politics of Gay Rights” (2013) 36:1 Atlantis 44.
41. This centring is akin to what Brooks and Parkes suggest with the centring of queer people and experiences in legal pedagogy (ibid at 119).
42. Napoleon, “Raven’s Garden,” supra note 7 at 149.
Queering Indigenous Legal Studies—In Indigenous legal studies. I have argued elsewhere that Indigenous men are often positioned as the universal subject in discussions about Indigenous law, and this subject is also heterosexual. When only these subject positions are centred, then articulations of Indigenous law can be a mis-fit for other citizens—overlooking, denying, and even solidifying marginalization.

Feminist theory and queer theory are often treated as being at odds with one another, yet to treat the two approaches as incompatible not only oversimplifies the diversity of feminist and queer approaches, but also ignores the intersections of sex, gender, and sexuality. Indigenous feminist legal studies encourages questions about gender and power and considers how sexism can operate and be perpetuated in Indigenous laws, at the expense of full legal subjecthood and civic engagement for Indigenous women and people with non-normative gender expression.

These questions about power also need to be asked of homophobia and transphobia. While queer issues are frequently absent in discussions about Indigenous feminism, there are scholars who create meaningful conversations between queer Indigenous studies and Indigenous feminist studies. For myself, queering Indigenous legal studies is intimately connected to, and expands on, work that I have done (alone and with

43. Snyder, “IFLT,” supra note 5 at 366-367.
44. Craig explains: “Queer theorists have critiqued feminist theories for being anti-sex, overly moralistic, essentialist, and statist. Feminist theorists have rejected queer theory as being uncritically pro-sex and dangerously protective of the private sphere” (Craig, supra note 31 at 210).
45. Ibid at 211.
46. Snyder, “IFLT,” supra note 5. The tenets of Indigenous feminist legal theory include: an understanding of Indigenous laws and societies as gendered; a commitment to intersectional analysis; an attentiveness to power that includes examining how gendered power dynamics play out in the meanings, perceptions, and practices of Indigenous laws; an approach that is anti-essentialist and understands gender, sex, and sexuality as plural and complex; and a spirit of critique that challenges rigid and romanticized notions about tradition, gender roles, and law (ibid at 388).
47. See also Napoleon, “Raven’s Garden,” supra note 7 (discussed more below).
48. Snyder, “IFLT,” supra note 5 at 382.
49. See for example, Finley, supra note 1 at 40; Driskill et al, “Introduction,” supra note 10 at 8-9; Driskill et al, “The Revolution,” supra note 13 at 219.
others) on Indigenous feminist legal theory, and indeed it raises broader questions about omissions and gaps in my own work as well as the pressing question about how best to address this intersection. When I use the phrase “queering Indigenous legal studies,” Indigenous feminist legal theory should be read into this approach (and vice versa). Craig, although writing about Canadian common law, makes the important point that “activists, advocates and litigants are all well served by approaching complex legal problems involving sex, sexuality and gender with as many ‘methods’ for pursuing and achieving justice as possible” and that doing so is “more likely to cut a judicious path.” Similarly, queering can help to cut a more judicious path in Indigenous legal studies.

II. Examining existing paths

I turn now to examples where scholars in the area of Indigenous law have written about sex, gender, and sexuality. A handful of people have taken up this work and I focus on three arguments: Gilden’s, Denetdale’s, and Napoleon’s. Although they do not write explicitly about queering Indigenous legal studies, they each take 2LGBTQ realities and Indigenous laws seriously. Gilden argues that Navajo laws are welcoming to those who are queer, while Denetdale contends that Navajo laws can get interpreted in ways that work to oppress those who are queer. Napoleon looks more broadly at Indigenous peoples in Canada and argues that Indigenous laws can be used to respond to 2LGBTQ-based oppression.

1. Putting the “pieces back in place”? Gilden examines how sex and gender fluidity (which he calls “berdachism”) were historically a part of Navajo society, were (and are) targeted for elimination via colonization, and contends that principles pertaining to gender fluidity have now been reintroduced in Navajo tribal courts. He

51. Craig, supra note 31 at 212.
54. Gilden, supra note 7 at 267.
55. Ibid at 238.
Queering Indigenous Legal Studies

asserts that “[b]y tracking the interplay between the traditional values of child autonomy, gender equality, and tribal collectivism, the rise, fall and potential reemergence of the berdache tradition can be analyzed as resulting from shifts in its determinative cultural elements.”

The principle of child autonomy recognizes children as having their own agency in making decisions about their identity and who they want to be, meaning that children can choose their own gender identity (regardless of their sex).

Regarding gender equality, he contends that equitable gender relations in which female and male roles are both valued means that it does not matter which gender you take up. Lastly, he argues that gender fluidity is welcomed through principles pertaining to tribal collectivism—that the productivity of people’s talents should trump having to perform the labour of a certain gender role because of one’s sexed body.

While Gilden concedes that “the Navajo courts have not published any opinion directly dealing with berdachism,” he maintains that the “numerous opinions that address the underlying cultural characteristics which enabled such gender fluidity to exist in traditional Native American cultures” are enough to create a welcoming legal space for 2LGBTQ people. The latter half of his argument will be dealt with momentarily, but overall, Gilden argues that the Navajo courts have set the stage—by embracing cultural principles that support sex and gender fluidity—for 2LGBTQ people to move back into their rightful place in Navajo law after years of marginalization resulting from colonial oppression.

Gilden acknowledges some critiques of his work: that there are “substantial obstacles to a true re-emergence of traditional gender diversity”; that the asserted balanced labour configuration that promotes equity will be hard to achieve in today’s economy; that although women are supposed to be respected in Navajo society, what actually happens is otherwise; and that settler norms regarding gender are still strong. However, these critiques are voiced at the end of Gilden’s analysis and therefore do not reveal the larger problems in his approach.

As a starting point, it is necessary to interrogate Gilden’s usage of “berdache.” He explains:

[a] large proportion of Native American tribes acknowledged a gender role that did not conform to Euro-American notions of male and female.

56. Ibid.
57. Ibid at 242-244.
58. Ibid at 244-245.
59. Ibid at 245-246.
60. Ibid at 258.
61. Ibid at 268.
This gender role, generically referred to as berdache, represents an extreme departure from Euro-American gender construction. Berdache were usually biological men (or, less often, women) who assumed culturally-defined traits of the opposite gender.\textsuperscript{62}

This definition is dangerously pan-Indigenous, and does not seem to be as fluid as he claims. He acknowledges that this configuration of sex and gender is “heterogendered” in that people of the same sex could be in a relationship together but would be expected to perform opposite gender roles.\textsuperscript{63} Questions about a dual configuration of gender and questions about exclusion as he retains his overall argument about fluidity remain unaddressed.

Gilden attempts to make the term “berdache” Navajo-specific, noting the term nádleeh, which he curiously refers to as “Navajo berdache.”\textsuperscript{64} Driskill et al. explain that berdache is an anthropological term that was used to describe the sexual differences of Indigenous people compared to European settlers. The term “two-spirit” is now more commonly used (at least in North America). However, Driskill et al. note that many non-Indigenous scholars have misunderstood that “two-spirit” is not intended to just replace “berdache”; rather, “two-spirit” signals a fundamental shift from indigeneity being defined and analyzed by others to centring Indigenous experience and self-definition.\textsuperscript{65}

Gilden takes Indigenous self-determination and tribal courts seriously, though he frequently reverts to referring to law as just culture, or sometimes “customs” and “traditions.”\textsuperscript{66} Napoleon and Hadley Friedland argue that it is imperative to treat Indigenous laws “as law.”\textsuperscript{67} However, another challenging aspect of Gilden’s research is his focus on tribal courts, which, he explains, largely follow a state model and are subject to state regulation.\textsuperscript{68} He still frames tribal courts as empowering and overall Navajo in their approach to law,\textsuperscript{69} although tribal courts would be just

\begin{itemize}
\item \textsuperscript{62} \textit{Ibid} at 239. Gilden argues that women were well-respected in Native American societies, particularly Navajo society, and as a result, it was desirable to be berdache, as it typically meant taking up a female (i.e. respected) role.
\item \textsuperscript{63} \textit{Ibid} at 241, 270, n 134.
\item \textsuperscript{64} \textit{Ibid} at 241.
\item \textsuperscript{65} Driskill et al., “Introduction,” \textit{supra} note 10 at 10-11.
\item \textsuperscript{66} Gilden, \textit{supra} note 7 at 267.
\item \textsuperscript{68} Gilden, \textit{supra} note 7 at 256-257. For a discussion on band governance in Canada and Indigenous laws, see, Napoleon, “Raven’s Garden,” \textit{supra} note 7 at 158.
\item \textsuperscript{69} Gilden, \textit{supra} note 7 at 256-257.
\end{itemize}
Queering Indigenous Legal Studies

one site in which Navajo law is discussed and exercised. Furthermore, Gilden problematically conflates the assertion of positive principles in law (particularly in tribal courts) with overall acceptance and a welcoming climate for 2LGBTQ people. That which is stated in the law does not necessarily translate into practice, and, as with all legal orders, we cannot and should not assume that tribal courts (and other legal mechanisms through which Navajo people practice their laws) are empowering for everyone. A vital part of queering Indigenous legal studies necessitates asking questions about power and the ways that homophobia, transphobia, and sexism can operate in interpretations about Indigenous laws and in legal decisions. Gilden’s analysis becomes paralyzed in the commonplace narrative about Indigenous difference in which sex, gender, and sexuality are perfectly fluid, functional, and equitably interpreted for all. He gets caught up in perpetuating this romanticized narrative at the expense of meaningfully engaging questions about internal dissent and debate.

Gilden claims, “it does appear that the courts have put some of the most important pieces back in place.”71 This statement problematically frames Indigenous laws as unchanging relics from the past that just need to be accessed and “re-infused,”72 rather than treating Indigenous laws as ongoing living concepts with which Indigenous people work and deliberate.73 This idea of “setting the stage” for 2LGBTQ people is intriguing. Does Gilden’s analysis hope to simply insert queer Navajo citizens into Navajo law? Or does he explain instead that a fundamental shift has taken place that centres sex, gender, and sexuality in Navajo law through amenable values and principles that uphold queer citizens? How might Gilden’s analysis shift if Indigenous laws were treated as more dynamic? How can one go about queering Indigenous laws if “the right” social and legal climate is not in place?

2. Power and interpretation

Gilden neglects to attend to the banning of same-sex marriage in the Navajo nation. He comments on this prohibition that “the berdache tradition was explicitly heralded by the legislation’s opponents.”74 This

71. Gilden, supra note 7 at 267.
72. Ibid at 258.
73. See John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 SCLR 351 [Borrows, “(Ab)Originalism”]; Napoleon, Ayook, supra note 3.
74. Gilden, supra note 7 at 270.
remark is important—it shows that Navajo citizens (like all citizens) debate and interpret tradition in various ways and disagree about decisions made in their community. The contestation shows that much is at stake with sexuality and Navajo law and that there is a group of people fighting against the denial of sex and gender diversity. Yet Gilden neglects to deeply engage these conflicts and fails to address how the position of those who were fighting for same-sex marriage was marginal and lacked political and legal power.

In Denetdale’s piece on the Diné Marriage Act of 2005, she takes a different approach from Gilden. She examines instead how sex, gender, and sexuality can be constructed in disempowering ways in law and how sexism, homophobia, and transphobia can be perpetuated by some interpretations of Navajo law. She argues that post 9/11, many Navajo people were getting on board with intensifying American nationalism. By examining the convergences and conflation of militarized Navajo and American assertions of nationhood, she shows how colonization, including the oppression of women and 2LGBTQ people, is erased by interpretations of Navajo tradition that align with U.S. imperialism. Rather than acknowledging and tending to issues of colonization and dispossession at the hands of the U.S., she argues that many Navajo people were (and are) instead aligning with a “multicultural” U.S. family—fighting to protect “freedom.” Aligning with U.S. nationalism has especially harmful effects on Navajo women and 2LGBTQ people whose bodies are policed in the name of the Navajo (and U.S.) nation. Denetdale draws on Indigenous feminism to show “the ways in which Navajo national boundaries are redrawn around patriarchy that promotes Western binaries of feminine and masculine.” She explains that the banning of same-sex marriage through the Diné Marriage Act aligned with the broader movement in the U.S. to ban same-sex marriage so as to protect the nuclear family and the “family values” that are central to American nation-building.

75. Though both turn to Navajo law for addressing discrimination.
77. Ibid at 131, 139.
78. Ibid at 136.
79. Ibid at 142. Fights for same-sex marriage, while they are arguments against discrimination, can still end up perpetuating heteronormative marriage structures (i.e., two people, nuclear family, “committed” relationships) that are central to empire building (Seuffert, supra note 19 at 182). What is telling of this same-sex marriage example is that, regardless of what the Navajo do, they will be normatively read alongside deeply ingrained stereotypes about sex, gender, and sexuality—if they ban same-sex marriage, then they might be read as uncivilized (compared with “progressive” nations that allow it; see ibid at 180); if they embrace same-sex marriage then they might be read as queer (in a negative way) for their different (compared with settlers) norms regarding sex, gender, and sexuality (see generally Finley, supra note 1).
The Diné Marriage Act “discriminates against and calls for the exclusion of gays, lesbians, trans-genders, and bisexuals in same-sex partnerships in Navajo society.” While 2LGBTQ people who want to get married could do so off-reserve (in states where same-sex marriage is legal), this does not solve the problem of discrimination within Navajo law, and such a newly married couple “will not qualify for home-site leases, property rights or the opportunity to adopt a Native child” within the Navajo nation. The Diné Marriage Act was passed unanimously, though not without wider opposition from Navajo citizens, then and now. The Navajo Nation Human Rights Commission, for instance, identifies gender and sex-based oppression in the Navajo nation as a human rights concern. The commission explains, [t]his Act has raised questions about civil rights and human rights violations for those Navajos who are lesbian, gay, bisexual, transgender, and queer....Given that Navajo citizens insist upon equality and equal treatment for all Navajo citizens, it becomes necessary to critically reflect upon the intersections of Navajo traditional, customary and common laws with gender in ways that ensure the civil and human rights of all Navajo citizens.

Denetdale’s analysis of the Diné Marriage Act importantly engages questions about sex, gender, sexuality, interpretation, power, and Indigenous law. However, it is important that the queering of Indigenous legal studies, while attentive to issues concerning same-sex marriage, does not get caught up only in these issues, and does not fall into a rights-based approach in which 2LGBTQ people are inserted into existing legal structures rather than asking questions about how oppression operates and is perpetuated in those structures. This example is again further complicated, as with

---


82. See Silversmith, supra note 80; Landry, supra note 81.

83. Navajo Nation Human Rights Commission, Navajo Women & Gender Violence is a Human Rights Issue, (2014), online: <www.nnhrcc.nhn.gov/WomenGenderViolence.html>. The NNHRC was established by the Navajo Nation Council. At the time of writing, the Diné Marriage Act is still in effect.

Gilden’s, in that Navajo law is being expressed, claimed, and articulated through governance structures that resemble those of the U.S.

Denetdale’s examination shows that the discrimination that exists in Indigenous and non-Indigenous communities can, and does, play out in some articulations of Indigenous law. She shows that interpretations of tradition that are “for the nation” can sometimes cause harm and come at the expense of some Indigenous citizens over others. These are vital arguments. However, there is still something troubling about her analysis, and it returns to the issue of interpreting oppression, colonialism, and the past. Queering Indigenous laws is complex: if queer (Indigenous) (legal) theory analyzes heteronormativity, and if heteronormativity is intimately tied up with colonialism, how can one address internal power dynamics in Indigenous laws in a way that recognizes this outside/internalized force but also recognizes the general complexities inherent in any legal order regarding questions about normalcy, constructions of identity, and power? That is, how can one account for the important analyses above but not get subsumed by them at the expense of overlooking challenges that Indigenous peoples have faced within their own societies?

The use of tradition to ban same-sex marriage is grounded in colonial beliefs, rather than traditional Navajo beliefs, Denetdale argues.85 This raises many questions that are important to the queer use and study of Indigenous laws: What constitutes traditional Navajo (or other Indigenous) beliefs and practices (there will and should be many answers to this)? According to whom, and to whose benefit or disadvantage? How are Indigenous laws being imagined? As static artifacts found only in the past? Or as dynamic, living, intellectual tools that have continuity but can change?86 If oppressive interpretations of Indigenous law are framed as colonial, how can these interpretations be engaged with using Indigenous laws in a way that does not treat Indigenous laws and people as incapable of oppression?

In an Indian Country online article about the Diné Marriage Act, Alray Nelson, a Navajo 2LGBTQ activist, contends that “[h]atred is foreign to [the Navajo] as a people.”87 It is not just 2LGBTQ Navajo identity that is at stake in these debates, but Navajo identity generally. There is a need to work in between conceptualizations of Indigenous peoples as brutes (sexist, homophobic, hateful) and depictions of Indigenous peoples and

86. Napoleon & Friedland, “Roots to Renaissance,” supra note 67; Napoleon, Ayook, supra note 3; Borrows, “(Ab)Originalism,” supra note 73; Borrows, Canada’s Indigenous Constitution, supra note 3.
87. Landry, supra note 81.
laws as already undoubtedly perfectly queer (inclusive of everyone, agreed upon by everyone, and equitable in every regard), so as to deepen the discussion and more realistically engage with Indigenous laws.

In the *Navajo Times*, Nelson suggests three options for changing the *Diné Marriage Act*: using the Navajo court system and arguing that the Act is discriminatory; trying to get council to change the Act to be inclusive; or putting the issue to a vote across the Navajo nation.88 Denetdale contends that while people disagree on the meaning of multiple genders in Navajo society, people do acknowledge the existence of multiple genders,89 and she suggests that people turn to creation stories to better understand the place of 2LGBTQ people in Navajo society.90 Both Nelson and Denetdale suggest turning to Navajo laws to address questions regarding discrimination. Discussions about creation stories, legal arguments in the tribal court system, debates at the level of council, and voting amongst the people will no doubt involve various interpretations of sex, gender, sexuality, tradition, law, and identity, and will require an attentiveness to power dynamics and how these constructs operate in and through law is key to queering Indigenous law and legal studies.

3. *Using Indigenous laws to challenge oppression*

Some Aboriginal societies historically were sexist and homophobic, and many still are. They face the same challenges as do all the groups that now comprise Canadian mainstream society....However, there is an underlying assumption in mainstream society that Aboriginal societies are hopelessly paralyzed in a kind of time warp—that without the civilizing restraints of Canadian law, they would immediately revert to oppressive sexist, homophobic, and who knows what other practices. The racist, colonial subtext is that Aboriginal people can only overcome paralyzing social dysfunction by adopting the western liberal framework.91

In a National Aboriginal Health Organization (NAHO) booklet on suicide prevention for 2LGBTQ youth, it is noted that one of the ways that service providers can help Indigenous youth in distress is by familiarizing themselves with the *Canadian Human Rights Act*.92 The suggestion reads, “[the Act] has been in effect on reserve since June 2008, and it prohibits discrimination on the basis of sexual orientation.”93 Although reserves are state-imposed structures, one cannot help but wonder why

88. Silversmith, *supra* note 80.
89. *Ibid*.
91. Napoleon, “Raven’s Garden,” *supra* note 7 at 158.
Indigenous laws are overlooked as means for resolving conflicts. Indeed, the suggestion to turn elsewhere for help might, in some cases, be desired. However, Canadian society more generally and the Canadian legal system specifically also contend with and perpetuate homophobic, transphobic, and sexist oppression (alongside issues of systemic racism) and this call to use state law reinforces the problem that Napoleon’s above quote speaks to—the treatment of state laws as providing solutions for problems in Indigenous communities. Many 2LGBTQ people (and other Indigenous people) are unlikely to perceive state law as a safe resource given its role in supporting and enforcing colonial oppression and denying Indigenous laws and self-determination.94

In fairness to NAHO, their booklet is oriented to drawing internally on Indigenous solutions to social issues in Indigenous communities, and the problem in directing service providers to the Canadian Human Rights Act seems to perhaps revolve more around NAHO’s approach to “law.” The internal resources available to Indigenous peoples are treated as “culture” (and “tradition”), and while there is an intimate connection between culture and law,95 it is also vital, to reiterate Napoleon and Friedland’s point, to treat Indigenous laws “as law.”96

Napoleon argues that Indigenous legal orders should be drawn on to challenge the homophobia that exists in Indigenous communities.97 She explains that “[f]inding ways to recognize and protect rights within Aboriginal nations and legal orders is about nation building and social change for Aboriginal communities.”98 However, how to go about doing this is an entirely different question (and one with many answers).99 In her article examined here, Napoleon draws on the work of Celestine Nyamu’s “three-stage ‘critical paradigmatic approach’” and suggests the following:

(1) Challenge any constitutional framework and other social processes and mechanisms that protect customary and religious laws from questioning, so that room is created for diverse voices and changes to community norms. (2) Generate empirical evidence of varied and alternative local cultural practices (e.g., Aboriginal sexual orientation, transgenderism, and alternative approaches to identity and gender equality) to counteract negative, ossified cultural rhetoric. This type of

96. Napoleon & Friedland, “Roots to Renaissance,” supra note 67 [emphasis in original].
97. Napoleon, “Raven’s Garden,” supra note 7 at 158.
98. Ibid at 167.
evidence could be used in developing new case law within Aboriginal practice as well as in developing self-government programs. (3) Identify the concepts of fairness and justice within the culture, and then figure out how to apply these principles to issues of sexual orientation, transgenderism, and gender equality. In other words, what are the underlying principles or values of the oppressive cultural practice, and how might these be interpreted so as not to oppress women, gay men, lesbians, and transgendered people?

Elsewhere in the paper Napoleon contends “that the legal principles within pre-contact Aboriginal legal orders affecting individual and collective rights can be articulated and extended to apply to current-day sexual orientation and transgender issues in Aboriginal communities.”

Since this piece was written in 2002, one can see shifts in Napoleon’s work. She would now likely use a different legal methodology for using Indigenous laws to engage problems pertaining to LGBTQ oppression, and her work also emphasizes the importance of understanding Indigenous laws as dynamic and used over time—there are resources in pre-contact configurations of Indigenous law and there are also resources in Indigenous societies that are born of both historical and contemporary circumstances.

No one method exists for working with and queering Indigenous legal studies and laws. Napoleon’s work invites consideration of how to draw on Indigenous laws in ways that are ongoing and open to discussion. While I have questions about how sex, gender, and sexuality are framed in relation to economics in the 2002 article, these issues can be critically engaged. For instance, Napoleon observes that “[t]he living arrangements for same-sex couples or gay men and lesbian women appeared to depend on the extent to which they could obtain economic autonomy and generate wealth. Access to and control of land, resources, and food supplies within


103. Napoleon, Ayook, supra note 3. Though Napoleon has not since written explicitly about sexuality and Indigenous law, her critical engagement with Indigenous laws supports queering Indigenous legal studies.

104. For a discussion about divergent methods generally in the field of Indigenous law, see Friedland, “Reflective Frameworks,” supra note 99.
the economic framework determined the extent to which any individual member could be relatively autonomous in the society.\textsuperscript{105} If, for example, a woman could not hunt (and thus did not have economic stability), then maybe she would not take a same-sex partner (if that woman could not hunt).\textsuperscript{106} This raises questions about the interpretation of economic stability then and now, and the relationship between family arrangements, economics, and sexuality. What is the relationship between sex, gender, sexuality, economics, and Indigenous laws today?\textsuperscript{107} How can these be, as Napoleon herself would ask, “interpreted so as to not oppress” 2LGBTQ people?\textsuperscript{108}

III. Challenges of queering Indigenous legal studies

There are many challenges generally in queering legal education,\textsuperscript{109} and specific challenges in queering Indigenous legal studies. One of these challenges includes a shortage of scholarly work about 2LGBTQ issues and Indigenous law, though I hope this paper has begun to show that despite this problem, there are some people working in this area, and conversations to be had across critical frameworks—but these conversations need to be taken up.

There is a serious omission in Indigenous legal studies regarding sex, gender, and sexuality—which are part of all of our identities and shape our lives in various ways. Perhaps one of the most basic, and complicated, explanations for the lack of attention paid to 2LGBTQ concerns regarding Indigenous law is that because heteronormativity, homophobia, transphobia, and sexism are major social problems in settler society and Indigenous nations, it is unsurprising and quite logical that heteronormativity (which silences and invalidates 2LGBTQ issues) predominates.

Brooks and Parkes contend that “[b]ecause queer legal theory is still in its relative infancy, we have the advantage of not having to break old molds. Instead, we are free to continue to explore how queer legal pedagogy may affect our strategies for the broader goal of social justice.”\textsuperscript{110} Can we say this about Indigenous legal studies, which is an emergent field in academia? Some weighty identity politics will need to be addressed head-on in the work of queering Indigenous legal studies. In addition to entrenched oppression, there are also significant hurdles concerning

\textsuperscript{105} Napoleon, “Raven’s Garden,” supra note 7 at 155.
\textsuperscript{106} Ibid at 155-156.
\textsuperscript{107} See also Gilden, supra note 7 at 253.
\textsuperscript{108} Napoleon, “Raven’s Garden,” supra note 7 at 169.
\textsuperscript{109} See generally Brooks & Parkes, supra note 28.
\textsuperscript{110} Ibid at 135.
fundamentalist and romanticized narratives about Indigenous identity,\(^{111}\) which intersect with sex, gender, and sexuality, and can translate into limiting narratives about tradition, culture, and law. Indigenous laws, traditions, spiritualities, or cultures are not inherently fundamentalist. Rather, an analysis of fundamentalisms as outlined here necessitates examining fundamentalist interpretations of law—interpretations that narrowly define the possibilities of law and peoples, and which can be found in both Indigenous and non-Indigenous legal practices.

One potential rebuttal to queering Indigenous legal studies is that the task itself is entirely unnecessary—when Indigenous people are talking about law and legal subjects, they already imagine gender fluidity to be a part of that conversation—norms in Indigenous legal orders, informed by cultural values, already “queer” law and legal agents are also already “queered.” This might be the case for some people when they talk about Indigenous law, and it certainly speaks to the arguments above that there are resources in Indigenous laws for engaging questions pertaining to sex, gender, sexuality, and power.\(^{112}\) However, people who are already queering Indigenous people and laws are not necessarily doing this in similar ways and there are variations across legal orders and from person to person. It is critical to be cautious of the ways that these rebuttals against queer theory could be stated in more fundamentalist, romanticizing, and generalizing terms, rather than nuanced ones.

There are striking similarities between rebuttals against Indigenous feminism and rebuttals against queering indigeneity. For example, one common rebuttal is that feminist and queer Indigenous politics are individualistic and divide (collectively oriented) Indigenous nations.\(^{113}\) Another rebuttal is that feminist and queer theories are western frameworks that should not be used by Indigenous people. These sentiments are evident from responses to Indigenous feminists who, for example, get labeled as “traitors” or as colonized,\(^{114}\) though a robust body of literature on Indigenous feminisms works to problematize this critique.\(^{115}\) One possible


\(^{112}\) See Napoleon, “Raven’s Garden,” *supra* note 7.

\(^{113}\) *Ibid.*


explanation for the resistance to queering and queer theories more broadly could relate to the western deployment of queer theory in academia and to the hegemonic relationship between queerness and whiteness (which is also a problem in mainstream feminism). Suzanne Lenon critiques the whitening of LGBTQ politics in which too often, race and queerness get separated—queerness gets whitened (and thus de-racialized as whiteness is made “invisible”) and LGBTQ issues get contrasted with and differentiated from race-based politics and issues.\textsuperscript{116} However, she explains that

[q]ueer/critical race scholars have long theorized and critiqued such a single-axis understanding of identity and power: it essentializes identities, privileges a forgetting of contemporary racial injustices, recentres whiteness, denies homophobia among white people [as LGBTQ advocates are often depicted as white], and relieves lesbian/gay/queer movements from accountability to anti-racist agendas.\textsuperscript{117}

The ways that queerness gets “whitened” are problematic; however, queer theory (as with feminist theory) has been and continues to be used by people of colour in ways that challenge white, western, colonial deployments of the term.

Another rebuttal against the gendering and queering of Indigenous laws and legal studies is that Indigenous societies respect and honour women and two-spirit people. The language of honouring and respecting is particularly common in definitions of “two-spiritedness.” The NAHO booklet for example, explains that “[h]istorically, many First Nations cultures supported and honoured two-spirited people; these individuals served important community functions and held positions of high regard and prestige.”\textsuperscript{118} While this orientation towards respect is crucial when thinking about queering Indigenous legal studies, we should be cautious of how it is deployed—in ways that can mitigate the realities of homophobic, transphobic, and sexist violence happening in Indigenous communities, and in ways that can romanticize and privilege certain ways of being queer.

This latter point concerns identity struggles pertaining to Indigenous authenticity that predominate in Indigenous communities.\textsuperscript{119} Verna St. Denis argues, “‘[a]uthentic’ cultural Aboriginal identity has become high currency. Some of the markers of cultural authenticity include speaking one’s Aboriginal language, having knowledge of and participating in a

\textsuperscript{116} Lenon, supra note 39. Lenon’s analysis would benefit from the explicit inclusion of Indigenous peoples and colonial context.

\textsuperscript{117} Ibid at 50-51.

\textsuperscript{118} NAHO, supra note 23 at 3.

\textsuperscript{119} For a discussion on authenticity see Lyons, supra note 111.
Queering Indigenous Legal Studies

myriad of spiritual practices, and having knowledge of traditional stories and other practices of the past.” Her caution about fundamentalist, hierarchical claims about who the “real Indians” are in revitalization politics begs an analysis in which one deconstructs claims pertaining to “real queer Indians.” The language of “two-spirit” over “queer” can start a slippage into this problem, as “two-spirited” Indigenous people often get explicitly linked up with traditional spirituality and culture. In the NAHO booklet, “two-spirit” is interpreted in the following way:

Not all First Nations who are gay, lesbian, bisexual, or transgendered (GLBT) identify as two-spirited or two-spirit people, but for those who do, two-spirit is not just another word for GLBT. It is a new term that has been chosen to reflect traditional First Nations gender diversity, which includes the fluid nature of sexual and gender identity and its interconnectedness with spirituality and traditional world views.

Though the booklet attempts to welcome all identity categories as valid, one cannot overlook a dichotomy created between the authentic two-spirit Indian and the GLBT Indigenous people who are described with “just another” non-distinct, non-Indigenous “word.” It is troublesome that this hierarchy is created at the onset of NAHO’s booklet for helping distressed 2LGBTQ youth at risk of, or struggling with, suicide.

Similarly, Wilson contends, “[w]hen we say that we are two-spirit, we are acknowledging that we are spiritually meaningful people.” Further, “[t]wo-spirit identity is one that reflects Aboriginal peoples’ process of ‘coming in’ [as opposed to ‘coming out’] to an empowered identity that integrates their sexuality, culture, gender and all other aspects of who they understand and know themselves to be.” Those who engage in this “[c]oming in” are “being fully present as an Aboriginal person who is GLBT.” One participant Wilson interviewed noted that they personally preferred the term “two-spirit” over “bi-sexual,” as bisexual was too focused on sex, and not enough on spirituality. Driskill et al. conversely express that in some interpretations, “two-spirit” too heavily centres spirituality, which can risk creating a hierarchy of authenticity among Indigenous 2LGBTQ people. There are of course critical discussions

120. St Denis, supra note 111 at 37. See also Lyons, supra note 111 at 73-110.
121. NAHO, supra note 23 at 2 [emphasis added].
122. Ibid.
123. Wilson, supra note 17 at 193.
124. Ibid at 197.
125. Ibid [emphasis added].
126. Ibid at 196.
and usages of the term “two-spirit” and it is important to heed Driskill et al.’s caution that “Two-Spirit... was not proposed to satisfy a scientific desire for close correlation between analytical categories and Indigenous truth. Instead, it was designed as a logic and method to confound such desires.”

It is critical when queering Indigenous legal studies to also work against identity hierarchies in which easily “digestible” forms of queerness are privileged. While this could include configurations of “two-spirit” just mentioned, it could also include embracing queer Indigenous identities that closely resemble heteronormative ones, at the expense of more diverse expressions of sex, gender, and sexuality. Queering Indigenous legal studies entails moving beyond a gay and lesbian rights model of inserting Indigenous people into Indigenous laws and asks instead for an analysis in which hierarchies of Indigenous queerness would be deconstructed and the ways that sex, gender, sexuality, and power operate in Indigenous laws would be taken seriously.

IV. Preliminary propositions: queering Indigenous legal studies

Below are nine preliminary propositions for queering Indigenous legal studies. The propositions draw on the foregoing discussion and are also indebted to Brooks and Parkes’ principles on queering legal pedagogy. What follows is introductory and is just one approach. There should be many ways for bringing sex, gender, sexuality and power into discussions about Indigenous law. My approach is focused largely on theory and is also broadly similar to other “critical” frameworks. The next steps could entail more specific discussions and analyses—for instance, considering specific articulations (such as Cree queer legal pedagogy) or applying the propositions to existing or new methodologies for researching Indigenous laws and to pedagogies for teaching in the field (and beyond).

First, it is imperative to centre queer Indigenous experiences in Indigenous legal studies. As previously noted, centring queer

128. Ibid at 17 [emphasis in original].
129. See Seuffert, supra note 19 at 185.
130. This is akin to Finley’s approach more generally with Indigenous studies—aiming to deconstruct conversations, rather than inserting 2LGBTQ people into existing frameworks (Finley, supra note 1 at 34).
131. Brooks and Parkes suggest eight working principles for queering legal pedagogy, though I do not work with all of their principles here (Brooks & Parkes, supra note 28 at 117-135). It is important to not conflate pedagogy and “legal studies”—legal studies includes, but is broader than, just pedagogy. Brooks and Parkes’ work on pedagogy is a valuable resource for getting into this broader discussion about legal studies though.
132. Brooks and Parkes’ first principle of queer legal pedagogy is to centre queer experience (Ibid at 118-119).
Queering Indigenous Legal Studies

Indigenous experiences is meant to bring 2LGBTQ Indigenous people in from the margins\(^\text{133}\) to show that their experiences, and the study of heteronormativity, need to be part of the study of Indigenous laws. Queer experiences matter to, and in, Indigenous legal practice.

Second, sexuality needs to be considered in relation to all aspects of law.\(^\text{134}\) It is crucial that discussions about sexuality not get relegated only to certain subjects, for example, same-sex marriage.\(^\text{135}\) Sex, gender, and sexuality are constructed in, and always operating in, Indigenous law, and as such—regardless of whether someone identifies as queer or not—these are realities to which attention should be paid. Queering Indigenous legal studies, as it is discussed in this paper, focuses on queering as a verb—an act of critically engaging social structures, rather than seeing queer legal research as something that studies 2LGBTQ people.\(^\text{136}\)

Third, queering Indigenous legal studies requires making obvious, and deconstructing, power relations.\(^\text{137}\) This proposition is connected to each proposition listed here, though it is such an important one that it requires being stated explicitly. We should be continually asking how sex, gender, and sexuality are constructed and interpreted in Indigenous law—by whom, for whom? And how law gets interpreted and practiced—by whom, for whom? These questions should be asked in each engagement with Indigenous law.

Fourth, there is a need for challenging homophobia and “denaturalizing heterosexuality” in discussions about Indigenous law.\(^\text{138}\) Brooks and Parkes advocate for a “denaturalizing” of heterosexuality in legal education, which entails challenging heterosexuality as the “preferred form of social organization.”\(^\text{139}\) Scholars in queer Indigenous studies show how this denaturalizing of heteronormativity must be a central part of decolonization and revitalization politics.\(^\text{140}\)

Fifth, intersectionality is key. An intersectional approach includes not only understanding how sex, gender, and sexuality are intimately related, but also how they intersect with other constructs, such as race, class,

\(^\text{133}\) Ibid at 119.

\(^\text{134}\) All queer legal issues should also be understood as related to race and colonization.


\(^\text{137}\) This is a variation of Brooks and Parkes’ principle to challenge neutrality in state laws (Brooks & Parkes, supra note 28 at 132).

\(^\text{138}\) This is a principle of Brooks and Parkes, supra note 28 at 122.

\(^\text{139}\) Ibid.

and ability. To approach identity in full, these intersections need to be understood and accounted for in legal practice and education.

Sixth, sex, gender, and sexuality need to be approached as time-, place-, and culture-specific. Napoleon (among many others) argues that understandings of law are time-, place-, and culture-specific. Likewise, Borrows argues that Indigenous laws must be understood as “living, contemporary systems” that will necessarily require revisions (as all legal orders do) to apply to the challenges that people face today.

Additionally, Brooks and Parkes explain that because “contexts, periods, and climates” change over time, so too must the frameworks that we use for understanding identity and law.

Seventh, it is important to work towards specificity when discussing Indigenous laws, sex, gender, and sexuality. While there are benefits in articulating broad frameworks (such as Indigenous legal theory), specificity also remains crucial and it is important to understand how frameworks will and should change when used in relation to specific legal orders. This is not to suggest that there would be only one way to engage with questions about sex, gender, and sexuality within a particular legal order. The earlier discussion about conflicting interpretations of Navajo law demonstrates that divergent frameworks pertaining to sexuality emerge in these conversations. A question arises when queering Indigenous legal studies: what if a specific legal order appears to have heteronormative traditions and it is argued that, because these norms are traditional, they should be taken up? Again, Napoleon suggests that when faced with “oppressive cultural practice” or interpretations of law that are oppressive for 2LGBTQ citizens, one should ask how legal principles within a given Indigenous legal order can be interpreted to challenge oppression. Laws should be revised if they are oppressive, and Indigenous laws (like all laws) are resources through which oppression can be perpetuated but also challenged.

---

141. Napoleon, “Raven’s Garden,” supra note 7 at 152.
142. Borrows, Canada’s Indigenous Constitution, supra note 3 at 8-9. See also Napoleon, Ayouk, supra note 3.
144. Though not talking about law, Driskill et al also argue that specificity is important with Indigenous communities, while also having connections across a broader 2LGBTQ movement (Driskill et al, “Introduction,” supra note 10).
Eighth, a queer approach to Indigenous legal studies works to destabilize and unsettle essentialist, fundamentalist, and romanticized interpretations of Indigenous peoples and laws. Such an approach includes working against identity hierarchies, as argued above. I have discussed elsewhere the difficulties with the strategic use of essentialisms and fundamentalisms to push back against colonial oppression (such as responding to colonial stereotypes about “Indigenous dysfunction” by asserting representations of Indigenous laws that are perfect). Others, such as Lyons, St. Denis, Napoleon, and Borrows have written about the challenges and repercussions of deploying fundamentalisms. Borrows, for example, has argued about the challenges that Indigenous peoples face in Canadian courts—an expectation that Indigenous peoples, their laws, and cultures, are static and unchanging (ought to be now how they were before contact). He notes that these originalist approaches (which are only applied to Indigenous people—state law is “allowed” to change) also get taken up by Indigenous people. He argues, “(Ab) originalism should not be used to sustain discrimination. Discriminatory originalism is problematic, regardless of its nature and source. Whether used by distinguished members of the Supreme Court of Canada, or by respected elders within Indigenous communities, adverse discrimination should be rejected as contrary to other constitutional approaches within each tradition.”

Ninth, and lastly, queering Indigenous legal studies supports building anti-oppressive communities. Given the pervasive problems with homophobia, transphobia, and sexism in Indigenous communities (as with other societies), Napoleon contends that

[ultimately, Aboriginal families, kinship groups, communities, and nations must identify who their vulnerable, oppressed members are, and decide whether to continue the oppression. Choosing to end discrimination and protect the rights of women, transgendered persons, gay men, lesbians, and children is the courageous political act of a strong nation.]

147. Part of Brooks and Parkes’ approach to queer legal pedagogy also includes avoiding essentialisms (Brooks & Parkes, supra note 28 at 129).
148. Snyder, Good Relations, supra note 50 at ch 7.
149. Lyons, supra note 111; St Denis, supra note 111; Napoleon, Ayook, supra note 3; Borrows, “(Ab) Originalism,” supra note 73.
150. Borrows, “(Ab)Originalism,” supra note 73.
151. Ibid at 391.
152. Brooks and Parkes suggest community building as part of one of their eight principles (Brooks & Parkes, supra note 28 at 124-125).
Given the insights from queer Indigenous studies regarding the intimate relationship between heteropatriarchy and colonialism, this difficult work is not just the work of Indigenous people. Indeed, as Driskill et al. argue, and as noted in proposition number two, queering is not just about a person’s identity: it is a framework with which all people should engage with.154 Brooks and Parkes contend that in the context of legal education, “nonqueer students and professors could definitely use some queering.”155 Calling out and attending to heteronormative privilege is part of “civic participation”—living with others in non-violent and anti-oppressive ways.156 Learning from various frameworks and disciplines can help deepen these conversations.157

Conclusion

Brooks and Parkes maintain that as legal educators, we need to be “conscious of sites and mechanisms of oppression.”158 I have argued that an approach that is attentive to power needs to be taken up in Indigenous legal studies and have argued specifically for the urgency of queering. This article demonstrates that there are resources that can be drawn on to take up critically oriented research, education, and practice with Indigenous laws—resources from various fields of study, some existing resources about LGBTQ legal issues, already existing resources about Indigenous laws that could be amenable to and supportive of queering, and deliberative engagement with Indigenous laws themselves. Yet this work needs to be taken up. The propositions that I outlined above provide an initial framework for this queering. There is a need for additional and more specific approaches, as well as a need for collective, sustained future conversations about queering Indigenous legal studies. To turn away from this work means that Indigenous legal studies will not only be partial if sex, gender, and sexuality are overlooked, but problems with homophobia, transphobia, and sexism will go unaddressed and become further entrenched.

156. Ibid.
157. Ibid at 125-127; See also Finley, supra note 1.