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EVE SEDGWICK, CIVIL RIGHTS, AND PERVERSION

KATHERINE M. FRANKE*

It is hard to imagine where queer theory would be without Eve Sedgwick. Indeed, I can't imagine where my own thinking would be had it not been informed, enriched, challenged, repulsed, and seduced by Sedgwick's writing. *Between Men: English Literature and Male Homosocial Desire*¹ and *The Epistemology of the Closet*,² the early work, gave me the tools to think about the fundamental landscapes of my intellectual world in ways that decoupled and reconfigured the binaries of male/female, heterosexual/homosexual, friend/lover, and public/private. Sedgwick gave us the idea of homosociality and a critique of identity and identification that exploded the male/female and homo/hetero divide. From that point forward our previous work undertaken without the benefit of these ideas seemed pathetically naive and, well, modernist (not that!) for their absence.

Stopping myself from lapsing into the bromides of hagiography, I'll resist elaborating further on the debt I owe to Eve Sedgwick's intellectual estate, except to offer some thoughts on her short essay, *A Poem is Being Written*,³ when held up against Freud's important tract on female psychic development, *A Child Is Being Beaten*.⁴

As a lawyer and law professor, I must confess great delight in returning to Freud's *A Child Is Being Beaten*, even though it is *à la mode* to mock Freud's rigid, structural approach to psychic development in which the father figures, somehow inevitably, as the hero in every story. In so many familiar ways, *A Child Is Being Beaten* reads like a legal text. Its rigid formalism, its three-part structure, and its master narrative in which law—the law of the father, which produces the Oedipal complex—is used to explain and give order to the problem at hand. This approach struck me as a kind of adjudication of female disorder that is methodologically familiar turf to a lawyer.

Freud's essay recounts the diagnosis and treatment of a female patient who suffers from sexual neurosis, which he traces back to childhood sexual

* Professor of Law and Director of the Center for Gender and Sexuality Law, Columbia Law School © 2009 by Katherine M. Franke. All rights reserved. I want to thank Janet Halley and Jeannie Suk for inviting a group of us to read these two texts together when we gathered at Family Law Summer Camp in July of 2009. Reconceptualizing the Affective Family: A Tribute to Eve Kosofsky Sedgwick, Family Law Summer Camp, Harvard Law School (July 14–15, 2009).

¹ EVE KOSOFKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985).

² EVE KOSOFKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1991).

³ EVE KOSOFKY SEDGWICK, *A Poem is Being Written*, in *TENDENCIES* 177 (1993).

⁴ SIGMUND FREUD, "A Child Is Being Beaten," *A Contribution to the Study of the Origin of Sexual Perversions*, in *FREUD ON WOMEN: A READER* 215 (Elisabeth Young-Bruehl ed., 1990).

fantasies of being beaten by her father. Hence the title *A Child is Being Beaten*. Often criticized for being too phallic and male-centered in his clinical and theoretical work, in this essay Freud foregrounds the development of girls and uses this case as an opportunity to offer an extended discussion of the difference between the beating fantasies of boys and girls. The essay makes the case that as girls develop from childhood to adulthood they repress certain Oedipal desires in ways quite different from boys.

What intrigued and delighted me about the essay on this reading was its structure. He starts with a description of the neurotic patient whose psychic health has been jeopardized by excess and, more importantly, disorder. For Freud, the conundrum of adult obsessional neurosis is best addressed by a kind of ordering and resolution brought about through psychoanalysis. The neurotic patient has work left undone that should have been cleaned up at an earlier stage of development.

Freud helps us understand the source of the problem here by telling us a story, a story in three parts. In the non-neurotic child, he tells us, beating fantasies are "normal," and they go, indeed should go, through three variations on the beating theme. In the first stage during early childhood, the girl fantasizes that a child is being beaten but it is revealed that what is *really* being represented is: "My father is beating the child," and the child is one whom the girl dislikes.⁵ These fantasies are thus sadistic in nature. In the second phase, in part induced by a sense of guilt about the first phase of the beating fantasy, it transforms into "I am being beaten by my father," taking on a more masochistic form in which the child experiences "a high degree of pleasure."⁶ The taboo nature of this pleasure results in its repression as the child progresses to the third and final phase of the beating fantasies. Here a male adult, not the girl's father—a teacher, perhaps—is beating one or more other children, typically boys, and the girl having the fantasy is looking on.⁷ Freud tells us that the symbolic and libidinal structure of this third phase is sadistic in form yet masochistic in satisfaction since the boys being beaten are mere phantasmatic substitutes for the self.

This evolution of the female beating fantasy illuminates the "healthy" resolution whereby the repression of the Oedipal fantasy serves to forestall perversion and displace the shame that that perverse desire for the father entails. The structure, indeed the narrative, resolves and averts future neurosis by rendering orderly big, and ultimately inappropriate, feelings and desires and channeling them into their proper phantasmatic homes. The master narrative Freud provides cleans it all up by locating the emotionally tumescent child in a genealogical grid in which she finds herself in a couple, tied to her father. The family thus becomes a kind of affective container in which feelings can be experienced non-neurotically.

⁵ *Id.* at 222.

⁶ *Id.* at 223.

⁷ *Id.*

In jurisprudential form, Freud finishes the essay by addressing and easily distinguishing and dismissing two competing accounts of child beating fantasies, those of Fliess and Alfred Adler,⁸ almost as if addressing and dismissing arguments made in dissenting opinions.

The rightness of the master narrative offered by Freud in *A Child is Being Beaten* has a kind of ordering effect similar to so many canonical legal opinions. Take *Palsgraf v. Long Island Railway*,⁹ the torts case that any lawyer will remember from the first year of law school. A package is dropped by “two Italians” on a railway platform and explodes while Helen Palsgraf stands feet away with her three children on their way to the beach on a bright summer day. Mrs. Palsgraf is startled by the sound of scales that are knocked to the ground by the explosion and suffers a kind of emotional trauma—some might call it neurosis—resulting in a long term nervous “stuttering and stammering.”¹⁰ She sues the railroad for its negligent role in causing the Italians to drop the exploding packages which caused her injury.¹¹

Mrs. Palsgraf sought treatment for her neurosis, but not from a psychiatrist. After all, her accident occurred in August of 1924, just five years after the publication of *A Child is Being Beaten*, and psychotherapy surely had not taken hold in working class neighborhoods in Queens at that time. Instead she consulted a physician who prescribed bromides and nerve tonics, which did little to alleviate her symptoms.¹² Gaining no comfort from her doctors, Mrs. Palsgraf turned to the law to address her neurotic injury.¹³ For her, as for many of Freud’s patients, treatment in the form of testimony offered the only viable alternative to failed tonics and bromides.

Palsgraf’s story, like Freud’s essay, starts with a neurotic patient/victim who seeks help from an expert, an authority who will listen to her story and who is able to alleviate the disorderliness of her affective life. Judge Benjamin Cardozo, a pragmatist when it came to substance and a formalist when it came to method, organized the chaos of the dispute before him by imposing a master narrative, a structure on these facts that would lead to the right result. Just as object relations theory provided a rational explanation of the beating fantasies of Freud’s female patients, a theory of proximate causation lent the rational decisional structure that would produce the right result for Cardozo in the *Palsgraf* case. Both theories did their work by resort to a structure of relations: Oedipal relations for Freud and social relations grounded in foreseeability of harm for Cardozo. Freud’s phases of beating

⁸ *Id.* at 237–40.

⁹ 162 N.E. 99 (N.Y. 1928).

¹⁰ Record on Appeal at 15–17, *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), available at http://www2.law.columbia.edu/faculty_franke/CLT2009/Palsgraf_Record.pdf (testimony of Dr. Karl A. Parshall).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 10–11 (testimony of Helen Palsgraf).

fantasies recount the process by which the child locates herself (with the aid of guilt and repression) in the right relation to the child being beaten, and *ipso facto*, in the right affective relation to her father. Cardozo's notion of foreseeability structures human fields of action in such a way that a rational distinction can be drawn between people to whom we owe a duty of care and mere others to whom we owe nothing.

To push the analogy between Freud's *A Child is Being Beaten* and Cardozo's *Palsgraf* opinion even further may be more than it can bear, but I found a certain familiar comfort in Freud's reasoning that shared an aesthetic and methodological form with the reasoning in many canonical legal opinions. The formalism of Freud's three phases, the structure of the psychoanalytic method, and the power of a master narrative that both explains and organizes otherwise unruly facts, all echo the tools of a seasoned judge. But more, both texts find resolution in the discovery of a relation, a diad, a system that provides the context for ending the story successfully. For Freud it is the Oedipal relation, for Cardozo it is the relation of duty flowing from foreseeability. For both, the relation determines the terms of legibility of the one to the other, and thereby launches a normative and affective world in which we come to want and expect the right things of one another.

Then comes Eve Sedgwick, writing *A Poem is Being Written* as a counterpoint to Freud's *A Child is Being Beaten*. The familiar comfort I experienced reading the Freud was completely upended reading the Sedgwick. And so she intended. Rather than offering a linear narrative that seeks to rationally organize and reveal an intact subject, she aims to keep the reader and the narrative off balance. She begins with a poem, moves to exposition, shifts temporal settings from the present to her childhood, and implicates the reader in a struggle with misrecognition and legibility of the self. The essay at once performs and discusses resistance to the repression Freud so prizes. She succeeds, at times, in implicating the reader in the perverse, shameful, and masochistic exploration of, among other things, the anus as site of sexual desire and satisfaction, and the frank display of the fat female body.

Both Freud's and Sedgwick's essays represent a kind of testimonial genre, but the speech acts they undertake are really quite different. Freud's patients remake themselves by talking their way through a reckoning with complex desires and taboos that produce an integrated, if not repressed, but surely coherent sense of self. Sedgwick, by contrast, uses testimony to illuminate the absurdity and impossibility of the symbolic coherence Freud has on offer. Her desires and traumas remain in a complex circuitry with one another, and the self she projects is one that has several voices, resists a stable location in familiar kinship grids, and seeks not to resolve but to come to terms with the self-shattered subject. No wonder the lawyer in me felt so disassembled and without sure footing in reading Sedgwick's brilliant essay.

In *A Poem is Being Written*, Sedgwick's celebration of perversion and her effort to unearth the repressed offer an alternative, queer approach to the disorderliness of a psychic life that Freud so neatly cleaned up in *A Child is*

Being Beaten. Both seek to reveal a truth of the violence of the self and of the family through their symbolic depiction. Freud through dreams, Sedgwick through poetry. Yet these texts, read together, suggested to me something else: alternative ways of mapping the civil rights strategies undertaken by the lesbian and gay community for marriage equality over the last several years.

I find echoes of Freud's *A Child is Being Beaten* in the briefs, oral arguments, and advocacy of many of the same-sex marriage cases. There is a way in which the lawyers, by choice and as a consequence of the structure of litigation itself, find themselves narrating the injustice of being closed out of the institution of marriage in such a way that figures affective life outside of marriage as somehow traumatic, dare I say perverse, and in need of the curative structure and discipline of the institution of the normative family. In states such as California,¹⁴ Connecticut,¹⁵ and New Jersey¹⁶ that have enacted civil union statutes that afford same-sex couples the full spectrum of legal rights enjoyed by married couples, the same-sex plaintiffs can no longer posit material forms of harm as the basis of their cases. Instead they must claim a symbolic dignity harm as the injury on which their lawsuit is based. The story they tell sets up life outside marriage as shameful, and that shame can only be satisfactorily addressed by and through the institution of marriage.

While psychoanalysis amounts to a confrontation with the shame and trauma of the now repressed child, same-sex marriage litigation does one better. It makes that child a co-plaintiff in the lawsuit. In *Varnum v. Brien*,¹⁷ the Iowa same-sex marriage case, three of the plaintiffs were children of the "six committed, same-sex couples."¹⁸ Their injury, as set out in the complaint, was that they sought "the dignity, legitimacy, protections, benefits, support and security conferred on children whose parents are permitted to marry."¹⁹ The children of unmarried lesbian and gay couples "face a loss of dignity and legitimacy, in their own eyes, the eyes of many others and under law, from their parents not having the freedom to marry one another . . . [They] will internalize the message that they receive from their government that their family is not as worthy as other families."²⁰ For another adult plaintiff, the complaint continues, "being able to marry [his partner] would help others respect and accept their relationship instead of seeing something wrong with it. [He] has known he was gay since at least 8th grade and always has had a great sense of loss and feeling of being worth 'less than'

¹⁴ CAL. FAM. CODE § 297 (West 2006).

¹⁵ CONN. GEN. STAT. §§ 46b-38aa-46b-38pp (2007).

¹⁶ N.J. STAT. ANN. §§ 37:1-28(f) (West 2007).

¹⁷ 763 N.W.2d 862 (Iowa 2009).

¹⁸ Amended Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief at 1, *Varnum v. Brien*, 763 N.W.2d 862 (D. Iowa 2009), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-v-brien-petition-102907.pdf>.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 5.

others because of his lack of access to marriage.”²¹ These sentences could be uttered just as easily in therapy as they are in the opening lines of a complaint initiating a lawsuit. Surely for some of the plaintiffs they have been, and the turn to law takes up on the heels of the inadequacy of therapy to remedy this emotional injury.

Marriage, for the plaintiffs in the Iowa same-sex marriage case, would literally deliver a “make whole” remedy. If able to marry they would finally be made whole, be fully integrated, be cured of the stigma, the trauma, the shame, the psychic injury of being unable to marry or being the shamed children of parents trapped in the purgatory of a civil union.

Recall that Freud teaches us that the healthy resolution of the Oedipal complex for the beaten female child is sadomasochistic in form, yet masochistic in satisfaction. Yet, in a way, can’t the same be said of the same-sex marriage litigation? To some degree, the delight gained from a success in this kind of litigation comes from having an authority figure, the Supreme Court of Iowa, discipline the bigoted legislators who were refusing to extend the marriage laws to deserving same-sex couples. On a deeper level, in their testimonial confession to a dignity-deprived sense of low self esteem, these cases represent a profound form of self hatred and judgment about the perversion and shame of a sexual and intimate life outside of marriage. The masochistic impulse that undergirds the legal posture taken in these cases is troublesome to many of us who identify more with the kinds of desire and relation that are made possible outside of the governance of the state and the institution of marriage. But the plaintiffs in these cases, along with their lawyers, purport to speak for all of “us” in the lesbian, gay, bisexual, and queer communities when they testify to these injuries and pray, as we say in the law, for relief from their suffering.

Of course, the “gay rights” movement began with drag queens and sex radicals at Stonewall joining forces with radical lesbian feminists chanting “keep your laws off my body” and dreaming of a place called “Herland,” all seeking to overturn a kind of heterosexist sexual moralism operationalized, but not exclusively, through the state. We now see the movement embracing that sexual moralism as the basis of a civil rights strategy and demanding, no, begging, that its members be regulated and disciplined by the legal and moral structure of the normative institution of marriage. I won’t rehearse here the fuller elaboration of my critique of these politics, as I have done so elsewhere.²² For present purposes I have a different question I’d like to pose.

What if, rather than reproducing a Freudian resolution of sexual perversion in our civil rights strategy, we explored something more sympathetic to

²¹ *Id.* at 6.

²² Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008).

the road down which Eve Sedgwick traveled? That is, what would it mean to undertake a self-consciously queer conception of civil rights? Not one that represses the perverse, but rather embraces it and makes room for it. Sedgwick's *A Poem is Being Written* refuses to organize her desires into social identities, refuses to house her desires in gendered body parts, and refuses to speak in a single voice that would render her an adequate class representative even for herself.

This is the legacy Eve Sedgwick has left us: the tools for thinking through what it might mean to have a perverse civil rights strategy. Like Sedgwick herself, it will resist the inclination to organize our desires and forms of attachment into familiar genders or social identities, and even less so in conformance with the demands of familiar and respectable kinship grids. And it certainly will not sit in judgment of those who don't shy away from the pleasure and the danger to be found in the domain of shame, disgust, and injury. Can law handle the disorderliness of this civil rights subject? More importantly, can we?