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From Law Reform to Lived Justice: Marriage Equality, Personal Praxis, and Queer Normativity in the United States

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 Professor of Law, University of Miami. Many thanks belong to the organizers of the 2016 South-North Exchange, where these ideas were initially presented, and to the editors of this volume. Many thanks also go to the many and diverse pioneers whose labor and vision are invoked here, whether explicitly or implicitly. Vision, without history, may doom us to repeat in ignorance the problems of the past that we seek to transcend today; history, without vision, may doom us likewise to recycle the traditions of injustice that shaped the past, and shape the present. All errors, as always, are mine.

I. INTRODUCTION

Legal reforms are not always the best prism through which to view, understand, or channel social change. Sometimes, however, looking toward law's realms and rhythms for signs or trajectories of deeper or broader social progress can clarify or advance the substantive goals of formal reform. During such times, legal fronts or trends can signal or even open overlooked or newfound opportunities for social meaning, highlighting gaps, tensions or contradictions between legal change and social consequence. In such times, law serves chiefly as a means, and society as the end. Yet, during such times, looking to law hoping to understand or influence society can be a perilous move. For multiply-diverse Queers living in the United States, now, it seems, just may be one of those times.

Begin by recalling U.S. society and law from a sexual minority perspective a mere twenty years ago. Back then, marriage equality seemed at best like a distant legal fantasy, much less a negotiable social reality. The homophobic animus of *Bowers v. Hardwick* still reigned supreme both as law and culture.[1] And *de jure* straight supremacy was deemed normatively unassailable, constitutionally enforceable, structurally essential, and democratically sustainable.[2] With *Bowers'* juridical blessing, the military policy of exclusion known euphemistically as "Don't Ask, Don't Tell" was formally legislated for the first time ever by Congress and signed into law by Bill Clinton,[3] while teenager Matthew Shepard had only recently been laid to rest after being brutally beaten to death in Wyoming just for being gay.[4]

Today, two historically unprecedented judicial pronouncements in 1996 and 2003—the first in *Romer v. Evans* and then in *Lawrence v. Texas*—have silenced *Bowers*, while the formal policy of military exclusion has been repealed by legislative action and Presidential signature, anti-queer violence is a legally cognizable hate crime. Today, and incredibly to many, even marriage equality is formal law.[5] In an era

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1. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

2. Indeed, the "system of straight supremacy is so pervasive that parents turn on their own children." SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY 22 (2011).

3. *See* Public Law 103-160; Richard L. Berke, *President Backs a Gay Compromise*, N.Y. TIMES, May 28, 1993, at A-1.

4. *See* James Brook, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES (Oct. 12, 1998), http://www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html.

5. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell,'* N.Y. TIMES (Dec. 22, 2010),

oftentimes marred by hysterical anti-equality backlash and mean-spirited socio-legal retrenchment,[6] what could explain the relative and continuing success of sexual minority struggles and campaigns toward sexual legalization and formal equality in the nearly two decades since *Romer* in 1996?

Perhaps more importantly, what might *Romer* and all the legal reforms transpiring since come to mean not just for law, but also for Queers, and even for U.S. society as a whole?

On that unprecedented and belated occasion, the U.S. Supreme Court saw fit for the first time ever to strike down rank *de jure* homophobia as formal public policy in the form of Colorado's Amendment 2 to its state constitution. This Amendment had barred counties and cities from adopting anti-discrimination protections for sexual minorities, marking them specifically as open targets for majoritarian discrimination and imposing a blanket state of social and legal subordination on LGBTQ communities, a structural and normative condition that long had characterized American democracy and culture. After *Romer*, U.S. sexual minorities were no longer excluded by formal law from the equal protection of the laws. In 1996, *Romer* decriminalized us sexually as a matter of constitutional principle.

That truly unique moment was followed less than a decade later by the second such ruling, in *Lawrence,* striking down in 2003 sodomy statutes designed ostensibly only to regulate conduct but inspired and applied mostly to strip same-sex desire of all opportunity for social dignity. In doing so, the *Lawrence* judges repudiated the dogmatic, moralistic, homophobic opinion issued just a decade earlier by five activist judges in *Bowers* attempting to foreclose permanently—constitutionally—all possibility of sexual minority legal equality and cultural normalcy, much less personal liberty or communal liberation. But for those who had lived it, that opinion had incited a new reign of legalized heteronormative tyranny in the United States that overlapped with the HIV-AIDS pandemic, and which served to demonize sexual minorities, especially gay men, in every social setting and intimate moment of human life spanning from cradle to grave in new, righteous, intensified ways. Colorado's Amendment 2 had exemplified the zeitgeist

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http://www.nytimes.com/2010/12/23/us/politics/23military.html?_r=0#; Jim Abrams, *House Votes To Add Sexual Orientation to Law on Hate Crimes*, WASH. POST (Oct. 09, 2009), http://articles.washingtonpost.com/2009-10-09/politics/36776167_1_crimes-statutes-defense-bill-federal-involvement; *see infra* notes 65-72 and accompanying text (on unique aspects of marriage equality progress).

6. *See infra* note 59 and sources cited therein (on legal and social backlash against equality laws and gains).

of *Bowers*' legal era. *Lawrence* legalized us, both sexually and socially, again as a matter of constitutional principle.

And then, within a decade, law had moved from decriminalization in 1996 and legalization in 2003 to the very edges of formal marriage equality. In 2013, *Hollingsworth v. Perry*[7] and *United States v. Windsor*[8] confirmed that basic equal protection principles required equal legal treatment of all legal marriages, whether involving same-sex or cross-sex couplings. Just two years later this process of legal reform culminated in 2015's *Obergefell v. Hodges*,[9] which finally clarified that access to the formally fundamental right of marriage applied to individuals of the same sex applying for state marriage licenses as much as to individuals of "the opposite" sex doing the same. In the near two decades between 1996 and 2015, U.S. sexual minorities had traveled the road from formal decriminalization by *Romer*, to formal legalization by *Lawrence*, to formal equality by *Obergefell*.

Clearly, law matters to and for social change. No one seriously disputes this bottom line. But law's social impact is never a guaranteed blessing.

Indeed, even as we witnessed decisions like *Romer* in 1996 and *Obergefell* in 2015 breaking unexpected new ground in sexual minority legal rights, we have seen an equally astonishing contemporaneous retrenchment from the same judges in race discrimination cases like *Richmond v. Croson*,[10] *Adarand Constructors, Inc. v. Pena*,[11] *Gratz v. Bollinger*,[12] *Parents Involved v. Seattle*,[13] and, most recently, *Shelby County v. Holder*[14] and *Fisher v. Texas*.[15] All of these race cases were decided by the same tribunal during the same time period as all the sexual minority cases; how can we explain relative legal progress in sexual minority contexts with fierce legal regression in racial minority contexts? How can it be possible that the very same institution, in the very same time span, could validate sexual minority rights in cases like *Romer* or *Lawrence* and, most recently, in marriage equality cases like *Perry*, *Windsor*, and *Obergefell* while simultaneously shutting down the remains of racial/ethnic affirmative action and seriously subverting the

7. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
8. United States v. Windsor, 133 S. Ct. 2675 (2013).
9. Obergefell v. Hodges, 135 S. Ct. 2584(2015).
10. Richmond v. Croson, 488 U.S. 469 (1989).
11. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
12. Gratz v. Bollinger, 539 U.S. 244 (2003).
13. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 201 (2007).
14. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
15. Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

protection of black and brown voting rights in numerous opinions like those mentioned above—and, perhaps cynically, by activating the very same doctrinal abstractions to emplace these very diametrically polarized ends?[16]

These critical queries about legal reform are not confined to race, or sparked only by race-specific regressions in law and society. Current events, as well as history, teach that these concerns apply with equal force to the social justice struggles of groups marked by a history of subordination under U.S. law. Queers would be foolish to imagine immunity from the lessons of history.

Take just one other historical and continuing instance: the current situation of women, a social group also marked by centuries of legal subordination that, today, approaches a numerical majority in U.S. society. Nonetheless, access to contraception specifically *for women* has become an object of political, constitutional, social and normative take-back nearly a half century after systemic settling of those issues as a matter of constitutional law. While access to male-oriented contraceptives makes hardly a headline, women are singled out every day in law and society for re-regulation of their bodies and intimacies in ever-more bombastic terms.

As a result, although confirmed authoritatively by a well-established line of numerous Supreme Court precedents that professedly bind today's appointees,[17] the legal and cultural politics of backlash and retrenchment have put into question whether women today and tomorrow can count on any gender-specific formal rights—ranging from contraception to abortion to equal pay for equal work—in the organization of their individual lives, whether in "private" and intimate or "public" and economic venues.[18] These recent and continuing histories underscore the

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16. In yet another display of law's double edges, the judges invoked the same amorphous concepts of "states' rights" and "federalism" to justify the results in both sets of cases. Given that states' rights and federalism historically have been concepts activated to impose and justify inequality, the only surprise in this race-sexual orientation juxtaposition is their pro-equality deployment in the sexual minority outcomes. Scholars have long noted the basic point. *See, e.g.,* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 142-45 (1964); Lawrence W. Moore, *Federalism, Racism and Yahooism*, 29 LOY. L. REV. 937, 946 (1983); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011); *see also* Steve France, *Laying the Groundwork*, A.B.A. J., May 2000, at 40.

17. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Casey v. Planned Parenthood of Se. Pa., 505 U.S. 833 (1992) (abortion).

18. For informative background readings from various perspectives, see Michele Estrin Gilman, *Feminism, Democracy, and the "War on Women,"* 32 L. & INEQ. 1 (2014); Abby

distinctions between law and life, and between change and progress. Sexual minorities should take timely heed.

Queers, friends, families and allies should take very careful note of history's many and complex lessons, even and especially as we celebrate the new-found freedoms of formal marriage rights, and before we imagine that, therefore, we now can begin to organize our personal and family lives "normally" in reliance on the recent opinions of these same judges.

In fact, alert and informed Queers already may be noting how the early indicators point toward that old adage about history repeating itself—unless we guard against it with knowledge, memory, and action. As with the backlash against race and gender progress, current events in reaction to the formal advent of marriage equality show lawmakers, governors, bureaucrats, and other public servants from various parts of the country—including those with jobs as judges—refusing to abide by their otherwise much-vaunted commitment to the "rule of law" following the conclusion of judicial process on marriage equality specifically.[19] As with reactions to race and gender progress, these self-appointed guardians of the past have thrown up newly invented "rights" claims designed to swallow up the actual social meaning of formal legal reform on this issue; perhaps most ironic and hypocritical of these is the assertion of claims to a "religious" kind of liberty exempting homophobic motives from the reach of generally applicable laws.[20] The special irony and hypocrisy of this newfound claim is that it seeks to contradict or circumvent the constitutional principle laid down by one of homophobia's most vocal legal patrons—the late Antonin Scalia—in order to bat down the religious claims of Native Americans seeking legal use of peyote in their ancient religious ceremonies despite a state law banning its use altogether.

McCloskey & Aparna Mathur, *The Real War on Women*, U.S. NEWS & WORLD REP. (June 30, 2014, 8:00 AM), http://www.usnews.com/opinion/economic-intelligence/2014/06/30/the-real-war-on-women-washington-regulation-and-taxes; Beth Baker, *Fighting the War on Women*, MS., Spr. 2012, at 27.

19. As with other civil rights issues, public officials in various jurisdictions have elected to defy even modest pro-equality judicial decrees in the name of upholding law and justice. In the ongoing case of marriage equality, perhaps the most notorious examples were provided by a marriage clerk in Tennessee and by the Chief Justice of the Alabama Supreme Court. *See, e.g.*, Alan Blinder, *Kentucky Clerk Allows Same-Sex Licenses but Questions Their Legality*, N.Y. TIMES, Sept. 15, 2015, at A12 (on the situation in Tennessee); *Alabama's Chief Justice Faces Trial on Gay Marriage Ruling*, L.A. TIMES, Aug. 9, 2016, at A6 (on the situation in Alabama).

20. *See, e.g.*, Petula Dvorak, *Virginia's Religious Liberty Bill Is Really a Swipe at LGBT Rights*, WASH. POST, Feb. 19, 2016, at B01 (analyzing the Virginia version of the unfolding phenomenon).

In that 1989 case, Scalia led a bare majority to intone that Supreme Court "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[21] Unless motivated by the purpose of suppressing religious liberty, asserted the judges, the merely "incidental effect" of a generally applicable rule of law on a religious choice of conduct does not offend the Constitution.[22] Both cases presented claims of religious liberty and, presumably, in the instance of marriage equality, the *Obergefell* Court—and the numerous other courts previously and subsequently coming to the same constitutional conclusion—were not so motivated; nor, from what we know, were the growing number of legislative bodies enacting general laws mandating marriage equality. Time will tell what comes next, but, under *Smith*, the (formally) equivalent legal claims then and now call for the incidental effects of marriage equality on the practice of bigotry to be accepted by all.

Time indeed will reveal our future—whether formal reform will lead to lived justice, and whether the fact of change is the mark of progress.

But as the reaction and resistance against formal marriage equality already demonstrates, the "culture wars" of the latter 20th century against minority and gender civil rights progress have yet to abate, both in society and in Academy.[23] Instead, as the various stages of the 2016 presidential campaign confirmed on an almost-hourly basis during the past year, the traditionalist politics of identity that covertly and overtly target overlapping communities composed mainly of Queers, people of color, women, immigrants and other Otherized Americans are at fever pitch.[24] Thus, whether it is the simple baking of a wedding cake or the

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21. Oregon v. Smith, 494 U.S. 872, 879 (1989).

22. *Id.* at 878.

23. *See infra* note 59 and sources cited therein (on backlash and retrenchment); *see also* Sylvia R. Lazos Vargas, *"Kulturkampf[s]" or "Fit[s] of Spite"?: Taking the Academic Culture Wars Seriously*, 35 SETON HALL L. REV. 1309, 1310-48 (2005) (focusing specifically on the culture wars' impact on academia).

24. The election in 2008 and re-election in 2012 of the country's first person who was neither white nor male triggered much speculation about the possibility of a "post-racial" United States, but continuing reactionary campaigns to de-legitimize President Obama have revealed the deep roots and firm grip of white supremacy and heterosexism in U.S. law and society; today, the ongoing presidential campaign of 2016 continues to underscore the salience of traditionalist identity politics designed to privilege and subordinate individuals on the basis of supremacist ideologies. For just one of many examples, see Yamiche Alcindor, *Trump Rallies White Crowd in Wisconsin for the Police*, N.Y. TIMES, Aug, 17, 2016, at A9.

very issuance of the marriage forms, this self-righteous kind of widespread heterosexist backlash against the slightest formal progress of sexual minorities confirms that Queers are in for the same kind of bumpy, hate-pocked, post-reform ride that racial minorities and women still are on, as current socio-legal events also continue to put on full display.[25] If history does in fact tend to repeat itself unless we guard against it, critical and self-critical Queers should be celebrating equality rights, but with a shaker or two of salt.

Given historical and current experience, what does this juxtaposition of recent and continuing legal histories regarding race, gender and sexual orientation reveal, modify or confirm more broadly about critical understandings of formal equality and its social edges? What does this socio-legal matrix teach about the roles and prospects of social and legal identities in the politics of comparative in/equality, personal emancipation and social reconstruction? Which normative lessons should social justice agents, whether in law or not, draw about legal reform and social change in light of this decidedly mixed record? What forward-looking takeaways for social progress should Queers, in particular, draw from recent experience with legal reform?

To engage queries like these in critical and self-critical terms, we first must note, and proceed mindful of, an unprecedented historical fact: no longer is sexual legality (and perhaps also cultural normalcy) formally or effectively coterminous only with hegemonic heterosexual nuclearity. Queers, long accustomed to the exigencies and improvisations of undue outlawry, now can help affirmatively to blur the socially and legally familiar socio-sexual dichotomies of goodness and badness from *within* the institution of marriage. Under *Lawrence*, our relationships can provide opportunities for the incubation of socio-sexual arrangements that defy dominant traditions of nuclearity as well as other traditionalist imperatives or parameters, including identitarian structures, that tend to steer the dynamics of bonding and family in the United States, both historically and currently. Under *Windsor* and *Obergefell*, our marriages, so long as they satisfy the basic technical criteria, can offer Queers powerful new platforms from which to innovate normatively with familial constructions that likewise defy traditionalist molds across the lifestyle board. With formal equality increasingly in place, sexual minorities today therefore have some new, basic, self-defining choices to make; for the first time ever, these choices present practical opportunities

25. *See supra* notes 19-20 and accompanying text (on social and legal reaction to formal marriage equality).

beyond the recent gains of legalized assimilation, or our long history of involuntary outlawry.

At a minimum, the social and legal changes refracted in *Romer, Lawrence, Perry, Windsor,* and *Obergefell* represent not only a formal recognition, but perhaps also a cultural normalization, of same-sex loving. In this instance, legal change and social progress seem to intersect, at least potentially. Despite their limitations and dangers, these opinions open up new, concrete spaces and personal possibilities for Queers of all stripes to scramble acculturated delineations of "good" and "bad" socio-sexual practices, relations and arrangements. From a culturally mainstream—and thus heteronormative—perspective, these legal and social framings long have been dichotomized into the now-familiar, and essentialized, socio-sexual categories of good-committed loving and bad-promiscuous loving.[26] In the United States, of course, the former always has been culturally conflated with "traditional" cross-sex marriages, and, now, also increasingly associated with same-sex marriages—especially under the current legal construction of marriage equality.[27] In basic operating terms, this tenuous new socio-sexual status quo thus represents an unprecedented qualitative shift from the default outlawry to the default legality (and perhaps also the cultural normalcy) of same-sex relationships, and of the growing number of legally cognizable and socially diverse families being organized around them from coast to coast.

In the context of newfound marriage rights, this self-critical focus must push us to ask how Queers, together, can re-define marriage and family, as well as intimacy and commitment, in concrete everyday terms that act on these inter-connections. Today's unprecedented landscape invites us to band together in myriad ways as individuals, couples, families, groups and communities to form or support the socio-sexual infrastructure of an ethical life in both personal and communal levels: housing, schools, supermarkets, clinics, churches—pockets, and micro-pockets, of civil society that will be striving in fact, even if imperfectly, to live ethically in both the "private" and "public" spheres of socio-sexual life despite a wildly deranged world.[28] These socio-sexual archipelagoes of localized Queer life can help incubate normative innovation both

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26. *See infra* notes 74-78 and accompanying text (on the historical dichotomization of good/bad sex-love).

27. *See infra* notes 47-53 and accompanying text (on the marriage equality legal campaign).

28. This point is illustrated by our own recent history. *See infra* notes 87-93 and accompanying text (on 1970s marriage equality litigation and activism).

within and beyond them. This new historical opportunity allows all Queers to envision, and begin to enact personally and communally, social lives bookended or blueprinted neither by normalized sexualities nor outlawed sexualities. This historical moment beckons the use of legal change to induce (more) social progress.

As sketched below, sexual minorities during the latter 20th century produced catalyzing calls to personal action in the form of coming out and living proudly "wherever you are" that effectively focused on building identity, visibility and dignity on relatively emancipatory terms, which next were followed by the fearless activism of HIV-AIDS groups embracing an expansively liberatory project of normative decolonization, innovation and reconstruction. Consequently, in the 21st century, with formal equality a dawning normative reality, the next sexual minority move just might be relatively mundane to some: building families, communities, cultures and societies from the bottom up—and with the focus increasingly centered on structural emancipation, on cultural transformation, on normative innovation. Although perhaps mundane, these steps recognize the inter-connections that link the sexual to the social, and the personal to the political. Over time, these steps can and should be part of a normatively transformative liberation project.

Without doubt, then, in this emergent era of legalization and equality, Queer choices are greater—and maybe more consequential—than ever, even if they remain tentative or unclear. At a minimum, sexual minorities now can begin incrementally and *legally* to innovate social arrangements and sexual lifestyles, both within and beyond marriage traditions, in previously unmolded terms that may, in time, transcend both identitarian boundaries and nuclear imperatives. From an antisubordination perspective, this unique historical moment might allow unique normative opportunities for unique socio-sexual innovations. This unprecedented context allows Queers, for the first time ever, effectively to re-define socio-sexual "normalcy" from within the system, both in private and public terms—and, in time, perhaps, even to queer the social construction of normalcy itself.

In other words, developments since *Romer* now position Queers to convert legal change into transformative normative progress. Never before in the United States have Queers been able—or had—to give social or sexual meaning to formal equality. Never before have Queers been able—or had—to become personally normative from social positions of formal legality.

In this Essay, I therefore aim to strike a timely note of critical and self-critical caution designed to re-contextualize, re-ground and re-boot

Queer justice and normativity in the incipient framework of formal legalization and marriage equality, and, more importantly, also beyond it. It is up to us—more so than to law, or to lawgivers—to make the "Queer" normative difference count in personally, socially, culturally salient ways. So I argue, and so I hope you agree.

In the wake of momentous cross-developments on the law of race, gender and sexual orientation, and with a forward-looking, action-oriented viewpoint, this Essay asks: How might we now begin to march, together, under this new banner of formal "marriage equality" toward a freer future—as a Queer army of newly-legalized lovers—to help liberate, and to reconstruct, a collapsing yet resilient normative scheme founded on heterosexualized traditions and identitarian subjectivities undergirding unjust material, socio-legal hierarchies?[29] Given the historical moment, what today's multiply-diverse Queers need and want is, perhaps more so than ever before, a relevant social question with increasing practical urgency. With legal equality a dawning social reality, the opportunities as well as the stakes literally are unprecedented.

Exploring the possibilities of "Queer" justice, progress, and normativity at this historical juncture consequently requires a bit of stepping back—a return to some background and basics, as well as a search of emancipatory opportunity in the midst of new horizons. Might legalization and equality offer historically new possibilities for liberatory social action, including through sexual agency, to all Queers that are not rooted in, nor recycle, the past? Might legalization and equality provide a platform from which to practice a decolonizing Queer normativity—or normativities—that scramble/s good and bad categories of socio-sexual choice in ways that embrace and project neither the histories or legacies of heterosexual normalcy nor of homosexual (and especially gay male) outlawry?[30]

From this self-critical and antisubordination perspective, the pro-marriage equality campaign of the past quarter century or so has been so perennially controversial within and among sexual minority communities in part because "marriage equality" has not been consistently constructed or forcefully presented by its advocates as a positively normative or

29. The phrase "army of lovers" invokes the self-characterization of early activist generations portrayed in the film, Army of Lovers/Rise of the Perverts. *See* ROSA VON PRAUNHEIM, ARMY OF LOVERS (1980) (based on the film, and presenting a collection of essays by famous and not-famous Queer warriors of the liberation era). The "army of lovers" rubric since then has been invoked periodically, as here, to link same-sex desire with critical social awareness and action.

30. *See infra* notes 74-78 and accompanying text (on sexual normalcy and outlawry in Queer politics and praxis).

counter-normative project.[31] The cultural politics of legal doctrine make that choice strategically and tactically understandable. Yet, it also is the case that as constructed and presented, marriage equality has not necessarily entailed the queering of marriage. Normatively, as well as legally, marriage equality thus far perhaps has been mostly a formal equality project.[32] Some of us need, or want, more than that; knowing and warning from the get-go that the achievement of formal marriage equality, while wonderful in itself, was structurally insufficient to the material needs of multiply-diverse sexual minorities.[33] More than change, we want progress.

Thus, to be pro-marriage equality is not to be pro-marriage. There *is* a distinction. Many of us might believe in legalization and marriage equality because we believe in sexual minority liberty and equality, and can share in the joys of formal union experienced by same-sex couples in these recent years. But marriage itself, as an institution, is another matter, substantively, structurally, and normatively.[34] Exploring the difference between equality and marriage from a critical and self-critical antisubordination perspective is worthwhile for a number of reasons, to which this Essay is substantially dedicated.

Yet, let's be clear from the start: for better or worse, marriage equality *has* arrived as a formal legal and social reality, even if the traditionalist backlash and cultural violence appear to be picking up steam with no abatement in sight.[35] For the first time ever, same-sex couples officially can avail themselves of this legal form for personal, economic, cultural, *and* political wellbeing. So, if sexual minorities are going to walk through these opening doors, if we are going literally to step up to the proverbial altar, should we not consider how we might, *en masse*, change the terms of marriage itself, in progressive terms? Should we not consider and pursue opportunities to transform the institution and

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31. For selected early warnings, see Paula L. Ettelbrick, *Legal Marriage Is Not the Answer*, 4 HARV. GAY & LESBIAN REV. 34 (1997); Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); *Cf.* David J. Mayo & Martin Gunderson, *The Right to Same-Sex Marriage: A Critique of the Leftist Critique*, 31 J. SOC. PHIL. 326 (2000).

32. For a deep and forceful exposition of the point, see GILREATH, *supra* note 2, at 207-32.

33. *See infra* notes 100-101 and accompanying text (on power dynamics within sexual minority communities).

34. For compelling expositions of the critique, see Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & POL'Y 107 (1996); Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010); *see also* Spindelman, *infra* note 36 (advancing similar points).

35. *See supra* notes 19-20 and sources cited therein (with examples of backlash to marriage equality in the United States).

culture of marriage even further, and more deeply than is already the case? If we "look into the political distance" do Queers really see "nothing beyond marriage for lesbians and gay men as far as the eye can see"?[36]

Is that progress?

If we take self-determination and sexual autonomy seriously, is it not up to us—especially at this precise historical juncture—to ensure that legal reform leads to lived justice rather than to a new politics of conformance prodding Queers to choose between assimilation and domestication as legalized same-sex versions of nuclear, heteronormative "families" on the one hand, or, on the other, the unthinking, un-critical, and un-self-critical purveyors of historical practices generated from the bottom up by unjust, *de jure*, and hence involuntary, outlawry?

Pursuing progress organically and deliberately, Queer families can re-engage ancient choices relating to monogamy and plurality in newfound ways, relatively unmoored from identitarian influences or imperatives correlated conventionally with race, gender, class and similar constructs. In time, Queer experience with new practices and possibilities might begin to tame the power of identity politics over the subjective sense of erotic desire. With time and experience, intimacy and identity may become less tightly twined, helping to liberate society from internalized bigotries tied to identity systems in private and public spheres, as well as on conscious and unconscious levels. If so, identitarian prejudices will police our personal lives, as well as our social lives, progressively less. Nothing could free Queers more; from an expansively anti-subordination normative perspective, nothing less should count as progress.

To help explore the potentially historic possibilities (and call) of this compelling historical moment, below I briefly define the term "Queer" as employed here, before then outlining some recent notes and critical lessons from our historical and social experience with law, equality and marriage to date. Having set the stage, I then turn to some open questions, and the kinds of post-law reform personal politics suggested by the social, legal and political developments that have unfolded during the two decades since *Romer's* landmark ruling in 1996—and, importantly, *despite* the impressive, unprecedented, formal legal victories since then. Here, I ask us to reflect critically, and self-critically, on the cultural, systemic and identitarian lessons that *Shelby* and cases like it

36. For more in-depth critiques, see Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361 (2005) (noting also the possible exception of transgender activism to this diagnosis); Libby Adler, *The Gay Rights Agenda*, 16 MICH. J. GENDER & L. 147 (2009).

might present—perhaps even more so than *Romer, Lawrence, Perry, Windsor*, and *Obergefell* but in conjunction with them—for a Queered and queering version of pro-equality politics as a vehicle of social justice more broadly, structurally and *normatively*.

Understanding that only time will tell what the future holds, we can recognize at the outset that there is no definitive answer to such queries, nor can there be, at this point. But, ideally, we also will recognize that what happens next in and to Queer America is, perhaps, up mainly to us—both individually and collectively: perhaps increasingly, the possibilities for progress depend in large measure on the sum of our respective and ongoing choices. In this Queer spirit of open inquiry and social action, the four Parts and seven Sections of this Essay aim to provide each of us with a critical and self-critical mirror for ready use (and re-use) in a timely historical moment—and before significant time passes, or self-limiting futures emerge to take a regressively normative hold of our lives and destinies.

II. LAW AND REFORM: GROUNDING LIVED JUSTICE

A. Cultural Decolonization: Articulating "Queer" Normativities

Although the term "queer" as used in the United States is historically and culturally associated with sexual minorities, and with gay men in particular, the term, as reclaimed and deployed during the 1980s-1990s, asserted an uncompromising stance against subordination across all categories of social or legal identity. Building on that non-traditional tradition, and focusing at the time on legal theory's relationship to social action and substantive justice, I already have claimed that: "'Queer' as legal theory can and should help to signify inclusiveness and diversity . . . Queer legal theory can be positioned as a race-inclusive enterprise, a class-inclusive enterprise, a gender-inclusive enterprise, as well as a sexual orientation-inclusive enterprise."[37] This positionality entailed a key point: that, "even though most persons who self-identify as Queer today probably are gay, lesbian, bisexual or trans-bi-gendered, one *can* be gay or lesbian or bisexual or trans/bi-gendered without being Queer . . . conversely . . . one can be Queer without being gay, lesbian, bisexual or trans/bi-gendered."[38] Consequently, "the common denominator that should delineate Queerness . . . should not be minority sexual orientation

37. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and Sexual Orientation in Euro-American Law and Society*, 83 CAL. L. REV. 1, 353-54 (1995).

38. *Id.* at 354-55.

as such, but a willful (political) consciousness devoted to the containment and reformation of Eurocentric hetero-patriarchy."[39]

This definition of a queered legal consciousness appreciated the constitutive power relayed dynamically across sex, gender and sexual orientation, as well as race, class, religion and other human identities, both in law and society. This subject position therefore had to be skeptical of all equality, justice, or normative projects that do not. "Queer legal theory must position itself to promote expansive critical insights regarding the interlocking nature and operation of androsexism and heterosexism . . . [as well as] to discontinue, disrupt and condemn the replication of racism."[40] The process of queering thus led to a firm bottom line: "the Queer enterprise must take a proactive stance toward race, ethnicity and class, and toward their particularized intersection with (homo/bi) sexuality, and toward their broader relation to sex/gender issues."[41] In other words, in all instances this critical and self-critical Queer normative stance is rooted in antisubordination values that reject, and combat, all forms of subjugation: "Queer [normativity] must connote an activist and egalitarian sense of resistance to *all* forms of subordination, and it also must denote a sense of unfinished purpose and mission"[42] rooted in "postsubordination vision."[43]

Under a critical and self-critical Queer normativity, the construction and performance of identities might be welcomed as a standing invitation to thicken difference in personal and idiosyncratic terms, and help to foster a society better able and more willing to accommodate and protect individual or group innovation and non-conformance to identity-based rules, roles and regimes. Queer normativity consequently would affirmatively recognize personal liberty over identity—its formation and expression.

A critical and self-critical Queer normativity thus would seek to liberate humans from socially or sexually dominant constructions of identity, not to erase individual identity as a source of personal experience. Queer normativity would not aim to blind law and society to class, race, gender or sexual orientation, but instead to work an emancipatory social reconstruction of their normative and structural

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39. *Id.* at 354-60.

40. *Id.*

41. *Id.*

42. *Id.*; *see also infra* notes 86-95 and accompanying text (on 1970s Gay Liberation and budding notions of Queerness).

43. For elaboration of the notion, see Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000).

consequences. Queer normativity is non-identitarian, but it remains interested and involved in the experience and practice of difference on levels of life ranging from love to law. Queer normativity rooted in the critical and self-critical practice of antisubordination values can provide a personal, sexual and social subjectivity helpful toward making formal marriage equality a social good structurally, culturally, and politically.

This antisubordinationist commitment to the acceptance, accommodation and celebration of human difference across multiple axes of identity thus would include, necessarily, a concomitant commitment to the displacement of nuclear family arrangements and lifestyles as the singularly valorized epitome of social success, sexual normalcy and personal actualization—even if, no longer, the only and exclusionary way to copulate, love or marry legally. The antisubordinationist social vision of Queer normativity instead would invite, perhaps in the name of liberty and liberation, all persons and bondings to innovate in identity-neutral and nuclear-neutral terms, or in other ways, particular to them. That is, a Queer vision of society would rebuke both the privileging and/or the stigmatization of any specific socio-sexual arrangements as a normative matter. Queer normativity would seek return of socio-sexual control over the person to the self. Socio-sexual choice in fact is one key goal of Queer liberation. Queer normativity thus begins with the critical recognition that all persons are free to choose nonconformance sexually or normatively, and with the self-critical knowledge that non-conformance to *any* normative scheme necessarily is a cultural entailment of our fidelity to antisubordination values.

Whatever contents Queers might over time give to Queer normativity—or normativities—one starting point is therefore clear already: acting personally and collectively on the potentially decolonizing inter-connections that link our social lives and sexual choices. Far from just a matter of ecstasy in "privacy" our sexual choices also serve central organizing roles in our social lives—whether under or before legalization and, now, equality. For Queers, as for other humans, sexual relations oftentimes establish the grids of social relationships and even extended networks. Sexual relations oftentimes establish bonds, as well as extended bonds, which govern a wide array of social priorities and behaviors, both immediate and enduring. Queers, both before and after legalization, use sex not only for moments of pleasure, but also to seek, find, and foster roots in forms of family and society, much like other humans across time and space.

Moreover, although oftentimes cast in oppositional terms, Queer normativity fully appreciates that recreational sexuality and committed sexuality are not mutually exclusive, though of course they could be made so in any given situation or context by Queers who agree or choose to do so. But it is not, and should not be, normatively so. Neither type of bonding is, essentially, "good" or "bad" as socio-sexual practice. The Queer point of privilege therefore is personal choice, not cultural imperatives encased in the thickened socio-sexual traditions of compulsory heterosexuality. The antisubordination point, again, is Queer rejection of heteronormative imperatives, like nuclear socio-sexual arrangements, that historically have coerced and confined the "choices" of cross-sex couplings under traditional marriage. The point, again, is to begin taking first steps toward socio-sexual liberation and self-determination informed by, and beyond, the legacies of history.

To make an emancipatory difference normatively, legalization and equality therefore must mean cultural decolonization from heteronormative hegemonies or imperatives. This means Queer liberation from *both* the heterosexist and homophobic versions of sexuality and sociability that permeate the culture and our consciousness, and which divide sexuality and sociability into too-familiar, oftentimes internalized, always acculturated, good/bad dichotomies undergirding legality and outlawry, as well as normalcy and deviance. Rooted in heterosexism and homophobia, these pervasive and divisive constructions need not and should not delineate our social or sexual options and choices toward a Queer future.

This socio-sexual decolonization, as a starting point for the articulation of a Queer normativity, must therefore recognize and repudiate the heteronormative histories and legacies that remain sharply contested both in life and in policy despite legalization and equality. This historical, cultural, and legal combination of traditionalist heterosexual normativity and homophobic ideology, among other things, has justified both the exaltation and privileging of cross-sex marriage and nuclear intimacy as well as our exclusion from society both socially and sexually.[44] Within this regime, sexual minorities were to be hated and self-hating. Queer normativity necessarily rejects both, as one step toward clearing a liberatory path.

To do so effectively, to be both decolonizing and liberatory, Queer normativity must proactively comprehend, as well as transcend, these

44. *See infra* note 73 and sources cited therein (on the mixture of patriarchy and homophobia in the Euro-American suppression of same-sex desire and sexual minority identities, both by culture and by law).

pasts and legacies, both socially and sexually. Within Queer normativity, the social and the sexual are consciously and critically linked to promote liberation—personal and communal—in all spheres of human society. The personal practice of Queer normativity would thus entail the freedom to construct sexual and familial arrangements based on formal marriage in flexible ways that need not mimic or reinforce heterosexist and homophobic—as well as racist or other identitarian—supremacies. The personal practice of Queer normativity would thus also entail the freedom to build social networks, associations, networks, or bondings based on shared values and ethics. Spanning from the bedroom, to the living room, to the classroom and the conference room, the everyday practice of Queer antisubordinationist normativity recognizes and affirms not only that the sexual is the social, but also that the personal is the political.

These Queer fundamentals are perhaps most socially manifest today in the targeting of trans persons and populations for vicious mistreatment, as well as in the rising resistance of trans communities and allies to all forms of continuing subjugation, indignity, or harassment.[45] Oftentimes already vulnerable, trans people's distinct rights claims oftentimes track those of other sexual minorities, and typically receive the same rebuffs.[46] Critically self-aware Queers can, must, and do see themselves in the contemporary trans figure, as well as in all subordinated Others regardless of history, biology, demography or any other source of difference.

As the rising trans movement itself illustrates, today perhaps is still too soon to discern the wealth of possibilities for the expansive practice of Queer normativity as a project of personal and communal liberation opened by legalization and equality: we remain, after all, within the first decade of legalization, and within the first year of marriage equality. Indeed, as the backlash claims to religious liberty and other inventions indicate, today may still be too soon to know what legalization and marriage mean *legally*, much less sexually, socially or normatively.[47] No doubt, however, Queer options will come into focus with time, experimentation and experience: even though we many not yet be able to fully or clearly see the future Queers need and want, we can and should

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45. *See generally* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2d ed. 2015) (laying out a comprehensive analysis of contemporary trans subordination).

46. *See, e.g.,* Valdes, *supra* note 37, at 121-97 (tracing and explaining the social and legal interconnections).

47. *See supra* note19 and sources cited therein (on legal and social defiance to marriage equality).

take note of the now-concrete, and potentially liberating, opportunities for personal everyday action made possible by this emergent era of legalization and equality.

These still-unfolding developments, at minimum, open the door to many possibilities, as well as to many consequential queries both about the future and the past. Key among them: What is, or has been, the relationship of Queer vision, subjectivity, or normativity to law, to equality, and to formal marriage equality as events have unfolded in the U.S since the 1970s? Unfortunately, for the most part, the relationship has remained inchoate; let us hope it is now becoming incipient.

B. Beyond Formalities: Legal "Equality" or Queer Liberation?

The law and logic of formal legal equality require claimants to yoke their claims to particularized identities cognizable to pre-existing categories of law, and thereby to position themselves within a framework of identity politics that reflects socially entrenched notions mimicked in the normative architecture of the doctrine. Equality claims require claimants to ascribe and assert a legally cognizable identity in conventional terms—race, gender, sexual orientation—and then allege injury to that identity as such. Along the way, this process requires claimants to play the roles demanded by the politics of identity rooted in the ideological imperatives and social dynamics of legal doctrine. But as social and legal history teach time and again, this practice can be self-defeating: the known (or yet unknown) treacheries of the master's tools tend to arise time and again to confront and blunt socially-just legal reform across multiple categories of identity.

In this instance, the dedicated work of many advocates and activists has made a clear and crucial difference: using heteronormative doctrinal frameworks, sexual minority advocates and activist communities have posted much-heralded progress, now often called a "sea change,"[48] which manifestly is being experienced across mainstream U.S. society both in legal and political terms. Following decriminalization under *Romer* in 1996 and legalization under *Lawrence* in 2003, this formal progress

48. The use of the term has become ubiquitous since its use from the bench of the Supreme Court during oral arguments in Windsor, and then has been repeated without much apparent thought. *See, e.g.,* Transcript of Oral Argument at 107-113, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307); John Harwood, *A Sea Change in Less Than 50 Years as Gay Rights Gained Momentum*, N.Y. TIMES, Mar. 16, 2013, at A16; Thomas Tillery; *Sea Change: Planning for Same-Sex Married Couples and the DOMA Decision*, 44 TAX ADVISER 642 (2013); Lauren Markoe, *Election 2012 Shows a Social Sea Change on Gay Marriage*, HUFFINGTON POST (Nov. 8, 2012, 7:30 AM), http://www.huffingtonpost.com/2012/11/08/election-2012-gay-marriage-sea-change_n_2090106.html.

culminated in 2015 with *Obergefell's* dismantlement of *de jure* marriage inequality.[49] Law and reform *do* (or can) sometimes count for something—something important.

This formal doctrinal progress *of course* has advanced the social, economic and personal lives of millions who now can enlist legal protection against social, economic and personal violence based on sexual orientation and/or gender animus. This progress provides much to celebrate and appreciate, as well as much to build on.

Queers and allies might ask at this juncture, how much has this historic progress advanced the project of law more generally as a system of substantive social justice? More to the point, what will be the social meaning of these unfolding legal reforms, and to what normative effect? These systemic and societal projects, among others, remain pending, in part because progress comes with a price.

Unsurprisingly, the formal success of the past quarter century or so has required legal and political advocates to adopt tactics and strategies designed to minimize the perceived normative disturbances of socio-legal change that might (or should) disestablish traditions of hegemony enabling compulsory heterosexuality. This strategy was on full display in primetime television when the Supreme Court in the first week of its 2014 Term declined to disturb numerous lower court rulings applying *Windsor* to strike down anti-equality marriage laws. Asked for reaction on the Rachel Maddow Show, Windsor attorney Roberta Kaplan posited that U.S. society, including its judges, correctly were viewing same-sex couples as "married people who happen to be gay, which is the way it should be."[50] Exactly—if litigation is our (only) path and formal legalization or equality our (only) goals.

As this quotation only begins to illustrate, sexual minority legal and political campaigns have striven to minimize the perceived normative disturbance entailed by "gay marriage" and "same-sex marriage" and, now, formal "marriage equality." To succeed from case to case, sexual minority advocates have searched for the "right" plaintiffs not only or mainly in legal or factual terms, but in social and cultural terms: do potential plaintiffs "look" normatively acceptable to Americans casually watching their televisions and semi-consciously making cultural decisions about sexual minority equality, do they speak in ways and accents designed to emphasis commonality with the sensibilities of the sexual majority, do their personal identities based on class and race make

49. *See supra* notes 5-9 and sources cited therein (on marriage equality jurisprudence).
50. MSNBC, RACHEL MADDOW SHOW, Monday, Oct. 6, 2014.

them "relatable" to the straight-laced judges with the institutional power to decide social human fates?[51] To succeed in this legally and socially oppressive context, marriage equality efforts by and large strategically and tactically have *not* been employed actively or methodically as unique opportunities to queer American social life normatively.

In this context, legalization and equality affirmatively and effectively promise to change nil of consequence normatively.

Instead, the triumph of marriage equality has re-valorized the institution of marriage writ large more than re-tooled it. While marriage equality advocacy argued the positive uniqueness of "marriage"—even the word itself, as in California's *Perry* litigation—other, viable alternative forms of human bonding for love and mutual sustenance increasingly have been left in the socio-legal gutter, even if only by default. If "marriage" is essential to dignifying human bonding, as marriage equality legal advocacy has had to maintain, what does that say to, and about, the rest of us?[52]

At bottom, then, the normative architecture of equality law requires social sameness, relational conformance, and institutional complicity. The requirements of prevalent legal doctrine and mainstream cultural politics demand constructions of sexual minority identities to match those of chiefly white, straight, middle-class America. We are the same, but for that minor, normatively inconsequential, socially and legally irrelevant, itty-bitty difference of a minoritized sexual orientation—or so we have had to argue too often. These assimilationist pressures, as the strategic price exacted for uncertain and incremental reform, entail potentially colonizing or re-colonizing consequences in normative and structural terms. Standing where we do today, one fundamental concern therefore must be whether these potential effects will in time define the social meaning of these recent legal reforms, and render Queer marriages and families a same-sex facsimile of traditional ones.

In other words, could the proverbial white picket fence become *the* symbol and signal of "success"—*the* point of Queer life, something *very* high up on our personal and communal bucket list? If so, the result of

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51. For one in-depth examination of these considerations and calculations focused on *Lawrence* itself, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 154 (2012) (on the politics of law).

52. For an incisive, in-depth articulation of these general points, see NANCY D. POLIKOFF, BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (The legal bottom line, therefore: "Laws that make marriage—only marriage and always marriage—different from all other relationships must be reevaluated." *Id.* at 126.); *see also supra* note 31 and sources cited therein (illustrating early warnings of the marriage equality's limits and potential dangers to long-term prospects of Queer normative freedom).

legalization and equality might be a Queer normativity, and way of life, functioning no better than a sex/gender/sexual orientation equivalent of a "post-racial" socio-legal order.[53] Making difference operationally invisible, or sexual minorities normatively conformist, have never been Queer goals, however.

Of course, material comfort is no sin, and material security is a human right. Opportunities for living the good life are, and should be, one equality reform goal, as we have learned on the slow and fitful journey toward formal legal reform of racial and gender social injustice during the past century or more.[54] The many pecuniary and technical perks of formal marriage *should* be accessible to same-sex relationships—as well as to other relationships historically excluded from them by law.[55] And the freedom of multiply-diverse Queers to organize their bonding and loving as they see fit also should not be taken to be in question here. But the ultimate price of human rights cannot be the surrender of difference, nor the abandonment of the antisubordination values underpinning sexual minority struggles for recognition and autonomy in the United States during the past century.[56]

As we have seen, we cannot expect legal advocates to make the normative argument for us. The substantive and strategic imperatives of litigation do not permit it. Moreover, doing so affirmatively would doom them: it would seem to confirm the anti-equality canard claiming that "traditional" (cross-sex) marriages need "protection" from marriage equality. Yet, the drive for marriage equality has been more a legal

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53. For a critical examination of the phenomenon, see Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2008-2009); *see also* Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neo-liberalism*, 43 CONN. L. REV. 1513 (2010-2011) (setting forth a forward-looking U.S.-based but global framework for antisubordination legal work).

54. The material dimensions of justice, equality, and equal justice continue to draw the attention of scholars from various perspectives. *See, e.g.,* Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1 (2012); Rebecca Smith, *Human Rights at Home: Human Rights As an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (2007); Brittany Scott, *Is Urban Policy Making Way for the Wealthy? How a Human Rights Approach Challenges the Purging of Poor Communities from U.S. Cities*, 45 COLUM. HUM. RTS. L. REV. 863 (2014).

55. As acknowledged by the judges in their recent opinions, the benefits of formal marital status can be counted literally in the thousands. *See supra* notes 5-9 and sources cited therein (on the recent marriage cases); *see also* M.V. Lee Badgett, *The Economic Value of Marriage: The Practical Side*, 58 DRAKE L. REV. 1081 (2010); Christopher J. Portelli, *Economic Analysis of Same-Sex Marriage*, 47 J. HOMOSEXUALITY 95 (2008).

56. *See infra* notes 86-95 and accompanying text (on modern U.S. sexual minority civil rights history).

campaign than a social movement. The legalization effort is, by definition, marked and shaped by the demands of law.[57]

Consequently, formal marriage equality is no social or legal threat to cross-sex marriages, whether "traditional" or not. However, and crucially, the point of articulating Queer normativity as a lever of cultural decolonization is that both legalization and marriage equality *should* be threats to the privileged status of marriage itself, at least as we have known it to date. It is up to us to make the Queer difference, both in word and in deed. Given where we are, it now is up to us, personally and communally, to actualize the inchoate or incipient Queering of sex and marriage as points of cultural leverage for broader social progress based on antisubordination values.

The critical lessons and forward-looking notes explored below therefore have no quarrel with material justice as a goal of legal reform and Queer normativity, but do have an absolute objection to a wholesale melting of Queer difference into the traditionalist heteronormative pot of mainstream U.S. culture. If a white picket fence for every same-sex household becomes *the* goal, the consequential substantive slippages inevitably would result in countless lost opportunities for normative reconstruction by personal and political action, or by personal action as normative, or counter-normative, agency in the furtherance of antisubordination values and practices across social life in the United States.

C. Antisubordination Values and Critical Lessons: Forward-Looking Bottom Lines

From an antisubordination perspective, the critical notes and self-critical lessons with which Queers in the Unites States might begin toward a normative queering of sexual minority consciousness and socio-sexual politics may be found more in *Shelby* than in *Perry* or *Windsor*, or even than in *Romer* or *Lawrence*. The five sexual minority opinions of the U.S. Supreme Court, all since 1996, illustrate and underscore the success of recent efforts and strategies across the country, but they also reflect the cultural power and political success of Harvey Milk's "come out, come out, wherever you are" strategy, which emergent sexual minority communities in the United States deployed in an increasingly organized manner during the 1970s.[58] Since then, as more and more

57. *See supra* notes 47-53 and accompanying text (on the legal nature of the marriage equality campaign).

58. *See infra* notes 86-95 and accompanying text (on the early post-Stonewall decades of sexual minority activism).

lesbians, gay men, bisexuals, and other sexual minorities responded and took affirmative individual actions to self-out and become visible to family, friends, neighbors, and co-workers, the nation found itself awakening from a long heterosexist torpor despite determined moralistic campaigns to the contrary. Our recent history, coupled with the results in sexual minority cases from *Romer* to *Obergefell,* thus affirm that multifaceted legal strategies are crucial, but also that personal everyday praxis is a powerful normative lever for cultural change—if enough individuals commit to personal engagement enough of the time.

Still, when considered in conjunction with *Shelby* and other contemporaneous race equality cases, what do the sexuality opinions as a whole indicate about formal legal equality as a social strategy of emancipation going forward?

In the midst of sustained and vicious backlash taking back even the modest formal equality gains of the Civil Rights Movement and the second Reconstruction,[59] the comfort and security of legal gains from such a project like marriage equality for sexual minorities understandably also should open to critical and self-critical questioning. And, not coincidentally, women's rights under the constitution and other laws are likewise under the pressure of backlash and retrenchment.[60] Contrary to what many had thought, nothing fundamental really was settled *socially* as a result of formal legal "progress" toward racial and gender justice during the prior century.

Equality's persistently and uniquely vexed U.S. experience thus provides the first, and perhaps most sobering, critical lesson for Queer politics going forward: public assurances of inclusion and equality extended today can be reversed tomorrow, even those thought enshrined as the "Supreme Law of the Land." The hard (and sad) lesson is that legal reform and formal rights, while necessary, do not, and perhaps cannot, as such, provide a safe or secure harbor for historically marginalized minorities and other subjugated outgroups to find and practice personal or social liberation. Sometimes, legal "equality" is a social mirage.[61]

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59. To appreciate the ongoing zeitgeist of anti-equality backlash, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective,* 24 U.C. DAVIS L. REV. 677 (1991); Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash,* 81 IOWA L. REV. 1467 (1996).

60. *See supra* note 18 and accompanying text (on successful ongoing efforts to roll back gender rights).

61. Thus, the "preservation-through-transformation" problem; the more things change

To draw critically sobering lessons from historical experience with equality reform on account of race and/or gender of course is not to suggest that legal reform on account of sexual orientation and/or gender identity necessarily will follow the same history in every identical detail. Learning basic lessons from the dashed hopes and diminished rights of women and blacks during the past century does not and should not entail eliding the distinctions of experience or aspiration guiding each during that time, nor going forward. Nor should we assume that the various identitarian constructs at play in and across each of these socio-legal categories are "the same" in their legal functions or social implications.[62] Nor, furthermore, should we mistake the judges—or other lawmakers—as the central characters in the story of *our* march toward social justice on *our* terms.

To draw usefully critical lessons from the overall experience with identity, law and inequality in U.S. history requires instead that we examine both the continuities and the discontinuities that comparative analysis might yield. To learn the critical lessons embedded in still-accumulating legal experience, and to create ever-more durable social change on the ground, requires us both to embrace the potential of reform and rights as well to decenter judges and law from our envisioning of Queer justice in structural, normative, and antiessentializing frameworks. Plainly, neither judges specifically nor law generally can guarantee lived justice on Queer terms. Getting there is up mainly to us.

Yet, as *Shelby* and other recent race and gender legal devolutions particularly confirm, an unforgettable bedrock lesson of equality's unfinished U.S. history should be that minoritarian or outgroup repose in

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superficially, the more they stay the same structurally. *See* Reva B. Siegel, *"The Rule of Law": Wife Beating as Prerogative and Practice*, 105 YALE L.J. 2117, 2178-87 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation,"* 16 FLA. J. INT'L L. 615 (2004).

62. The sameness-difference question also has occupied the attention of critical and outsider scholars. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); *Regina Austin, Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-616 (1990); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33 (1995); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. 1 (1998).

public assurances of equal protection, whether judicial, executive or legislative, ultimately is imprudent.[63] Yes, rights *do* matter, and fighting for and protecting them *is* important. The critical lessons and open questions sketched here do not suggest, nor require, a return to the questioning of rights writ large, or of their essential relationship to social justice, that unfolded in legal scholarship during the closing decades of the past century,[64] while blacks, women and other targets of socio-legal inequality were beginning to experience in increasingly regressive ways the cognitive dissonance sometimes associated with the gap between law and justice in identitarian terms. Instead, for Queers to go beyond formal legalization and marriage equality in social and cultural terms, these historical lessons and pending issues should nudge us toward asking critical and self-critical questions, specifically about personal and collective praxis, geared to our current context and our preferred trajectories; the action lies more with us and our choices, than with law and its promises.

In addition, it remains true that the structure and substance of legal doctrine rewards tactics and strategies arguing that we are just like the sexual majority except for a socially irrelevant and literally "immutable" detail that we cannot help, or change, anyway. This structural and operational necessity in the narrow context of legal reform on a single issue through litigation is a fact of life, as we have seen.[65]

But, now, we need not allow tactical or strategic assimilationism needed for past gains to cloud our broader vision of social politics dedicated to emancipatory normativities going forward. Now, and going forward, we must not internalize individually the tactics and strategies that we needed collectively to make social progress on hostile legal terrain as a group, nor allow them to become a creeping form of unconscious assimilation that confuses our politics or domesticates our normativities, whether individually or collectively, and whether unconsciously or not.[66] Instead, having developed a successful

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63. *See supra* notes 7-20 and accompanying text (on the contradictions between formal reform and lived justice based on identities like race, gender or sexual orientation).

64. For a sampling, see Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Amy Bartholomew & Alan Hunt, *What's Wrong With Rights?*, 9 LAW & INEQ. 1 (1990).

65. *See supra* notes 47-53 and accompanying text (on the double-edged necessities and limitations of legal persuasion based on biased doctrine).

66. For foundational insights on "unconscious" identity politics, see Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39

multifaceted socio-legal strategy in the 1970s to "come out" and having developed a successful multifaceted socio-legal strategy in the 1990s to legalize our sex and open up the institution of marriage, what types of antisubordination strategies should we start to fashion next? Having managed to change both law and society in the 1970s and up through this very moment, what might be our multifaceted socio-legal path toward shifting and changing the culture more broadly through the new lever of formal marriage rights in the 2010s, 2020s, and 2030s?

When we thus stand back and couple the historical experience with racial and gender justice through law reform in the United States to the insights and results of early sexual minority activism focused on culture change through multiple and multiplying acts of self-outing, we might come to the conclusion that social change sticks only when culture, not just law, changes. Going forward, Queer praxis to build on the liberatory potential of formal marriage equality must prioritize culture-shifting practices more than, or at least equal to, legal reform tactics. Historical and contemporary experience suggests that, to *really* stick socially, legal rights need to be more of a consciously and critically normative project; not only a project of top-down formal reform to repudiate legally ancient ideological bigotries based on traditionalist identity politics, but also a bottoms-up social project dedicated to culture shifting from a self-consciously and self-critically Queer stance. Of the many forward-looking bottom lines to be drawn from Queer experience in the United States, perhaps this last one is the bedrock take-away.

Equality's vexed and vexing history in the United States thus far, as reflected in the manifold legal cases and social (non)results involving both race and gender inequalities, foretold the backlash and reaction to formal marriage equality. Perhaps, then, this comparative framing can help to clarify the difference between marriage equality as we have known it—a project of law reform—and marriage equality as a project to Queer both marriage and equality—a project of normative reconstruction through the collective praxis of personal liberation. Perhaps this distinction also defines the difference between support for marriage equality and support for marriage itself. In other words, perhaps this substantive distinction should be the Queer difference between marriage equality thus far and marriage equality going forward. If so, making this difference count, socially and normatively, rests, again, mostly with us—with our selves, families, communities, friends and allies.

STAN. L. REV. 317 (1986-1987); *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

III. MARRIAGE AND EQUALITY: QUEERING SOCIAL LIBERATION

A. Asking Old and New Questions: Personal and Political

Of course, the resort to normativity—and the corollary goals of culture-shifting and culture-building—entail embroilment in defining substantive and social goals, articulating shared but personal principles, and, even, submitting absolute self-interest to coalitional and collaborative collective action. These are hard things to pull off. And we can never be sure what will become of shared enterprises. Diving into such deep and murky questions is a daunting and uncertain challenge that may require us to navigate shoals of profound discomfort and elusive progress.

But good, I say. It is high time that Queer advocates jump into the mud of normativity. It will do us well to begin articulating publically and pridefully a substantive vision of a just society that we might all begin to practice, individually as well as communally.[67] This juncture thus takes us back to the distinction between formal legalization and equality on the one hand, and Queer justice in the marriage context of the moment on the other. This distinction underscores the opportunities for normative vision and practice that could transform equal sex and marriage rights into a point of leverage for deeper and greater social justice and personal liberation. This distinction brings into sharp relief the centrality and utility of culture-shifting and culture-building for formal legal rights, like marriage equality, to make a Queer difference in everyday social life.

We therefore might begin by asking, broadly, how we can use marriage equality and same-sex unions to build the socio-sexual networks of individuals, couples, other bondings or associations based on mutual intimacy, varied types of families, diverse communities, and grassroots movements that will practice, build, and choose a more just society tomorrow.[68] This opening question effectively asks how we might marshal the newly-won, double-edged rights of formal equality to engage in a type of personal praxis that defies and transcends the re-colonizing furies of traditionalist backlash to promote personal and communal Queer liberation. This threshold query invites us to revisit and reinvent fundamental values and goals involving ethics and normativity capable of transforming our lives, families, communities, and cultures, and to ask and re-ask: how can we turn formal legal rights that could be merely assimilative into individual and collective action that can be personally,

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67. *See generally* Valdes, *supra* note 43 (on the role of vision in theory and praxis).

68. *See generally infra* notes 86-95 and accompanying text (on similar initiatives from the 1970s).

culturally, and structurally transformative? At a minimum, this pivotal question calls on us to navigate and negotiate our individual and collective humanity in ways that transcend both conventional identitarian formulas and traditional socio-legal categories and formations.

Another way of putting this key and basic query might be to ask: What does the practice of expansively antisubordination ethics look like (or entail) in the everyday life of a Queer marriage? How might such a thing help to make us better humans, more loving and respectful of each other, and of difference? Given all else that we profess, as critically diverse outsider scholars and academic activists, why would we not do such a thing, proactively and avidly?

Notice that these kinds of pressing questions call for a critical and self-critical Queer politics that do not limit us to sexual orientation and/or gender identity. These and similar open questions require us to recognize that Queer normativity is neither straight nor gay, black or white, male or female. Queerness is all of this, and even more.[69] In effect, these post-equality lessons and now-real questions are non-identitarian in their normative focus on broad structural change through personal everyday actions based on shared non-identitarian values, principles, goals, and practices. These open and opening questions, and their cultural implications, call upon us to imagine and foment a Queer normativity that values individual and group non-conformity as a structural path toward social justice—a Queer normativity that is conventionally non-normative.

Over time, these questions and their profound implications further beckon us to construct and articulate a positive sense of Queer justice in substantively cultural terms—freed from established cultural traditions rooted, in turn, in histories of injustice or, now, on unjust hegemonies. Yes, these complex queries call on us to exploit all legal sources, even unlikely ones, of social justice change in fundamentally emancipatory terms that do not depend on conformity or on identity, and which pivot on systematized constructs like sexuality and gender as much as on class, race and other socio-legal categories. Perhaps most importantly, these and similar critical and self-critical inquiries should nudge us to care more and more, at a personal and active level, about the myriad injustices being suffered by those who are not us.[70]

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69. *See supra* notes 37-47 and accompanying text (on definitions of Queer and Queerness).

70. The importance of this self-decentering has not been lost on critical and outsider scholars. *See, e.g.*, Jerome McCristal Culp, Jr., *Latinos, Blacks, Others and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479 (1997).

In short, perhaps the legalization of same-sex sex, including in the context of marriages, can serve in *this* historical moment as a useful vehicle for the advancement of Queer justice, capaciously—as a normative project of personal praxis. If so, the bottom-line question, perhaps, is whether marriage equality will help us take formal legal equality beyond "just" or merely a precarious (and maybe illusory) parchment right: the "right" to mimic and conform, the right to be "the same." Or whether marriage equality mostly will prop up an unreformed institution as Queers flock to it with no particular sense of justice or intentionality.

Such questions become even more urgent when we consider the stakes of the moment. No doubt, this moment is but part of a larger group journey proceeding from outlawry to legality. But this moment also is historically unique, with correspondingly unique opportunities. We are truly at a defining, even if not yet turning, point in our larger journey toward sexual minority decolonization and Queer normativity.

If Queers know, or can decide, what we need and want as individuals, families, and communities, perhaps now can be the first moment when we might emerge from both the grip of heterosexual motifs as well as the grip of sexual outlawry. Perhaps our individual imaginations, or collective vision, have not yet crystallized our new possibilities for liberation through legalization, but perhaps this time is the first opportunity for sexual minority constructions of sexual relationships that are neither assimilationist nor contrarian. If so, perhaps legalization and equality can help us prompt the reconfiguration of human sexualities that theorists and activists have not otherwise been able to bring about.

Consequently, concerned Queers should not overlook the importance of some salient basics. In key respects, for example, this moment is the first in history where sexual minorities are able to develop and express our sexualities and personalities openly, widely, and legally as members of a constitutionally recognized and socially salient community. While same-sex relationships, intimacies, and lifestyles have persisted across time and culture despite efforts to eradicate us altogether, this contestation typically found us outside the bounds of social or legal recognition: indeed, this very point was the paradigmatic pivot both in *Lawrence* and *Windsor*.[71] For better or worse, this historical moment of formal marriage equality—not long ago mostly unimaginable—*is* unprecedented. As a trio, *Romer, Lawrence*, and

71. *See, e.g, supra* note 51 and accompanying text (on *Lawrence*).

Windsor effectively and formally have set a historically unique (for the United States) stage for Queers of all stripes to scramble socio-sexual conventions in our own lives and networks under the protection of law.

Yet, decriminalization, legalization, or equalization are not liberation.

Neither decrminalization, nor legalization, nor formal marriage equality attempt to, or do, put an end to sexual hierarchy. Liberation is not in hand. Formal equality is, at best, a multi-edged gain; with it, come the dangers of assimilation, domestication, cooptation, re-colonization.

Still, the process of formal legalization from *Romer* on through today does end the absolute conflation of same-sex relations with sexual outlawry. *Lawrence* protects the "liberty" of Queers to engage in same-sex sexuality specifically outside of marriage, while *Windsor* and *Obergefell* protects the "dignity" of marital intimacies, including sexual ones, specifically in same-sex bondings. Whether in a formal marriage or not, Queers now have socio-sexual options never before formally or operationally at hand.

For this very reason, we now need, for the first time ever, to distinguish between legalization and domestication on the one hand, and decolonization and liberation on the other, in concrete, personal, and communal terms. To avoid the pitfalls of "preservation-through-transformation"[72] and thus go beyond formal rights toward lived liberation, Queer persons, couples, families, and communities need not only to comprehend, but also literally to create, the substantive distinction between *legal normalization* of same-sex relationships, including marriages, from the *social assimilation* of Queer families into hetero-normative facsimiles of dominant, traditionalist arrangements. For multiply-diverse Queers, formal legal normalcy should not lead to personal or social normalcy molded by the coercion of, or our conformity to, the very structures and imperatives that, until 2003 and 2013, were among the prime formal sources of suppression, oppression, and demonization of Queer life. For Queers, legal normalcy can, and should, become an opportunity to rewrite the social meaning of formal equality in sexual, as well as other cultural, venues. In this age of legalization and equality, it is up to us, through our everyday choices and patterns of action, to make the decolonizing difference in values, practices, and institutions that Queers want or need to (re)define both law and society.

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72. See *supra* note 61 and sources cited therein (for in-depth and original expositions of the concept).

If so, neither critical theory nor organized activism will determine what happens next, or ultimately. That, chiefly and cumulatively, will be up to the individual socio-sexual choices of Queers everywhere—informed, in turn, and hopefully, by the critical and self-critical lessons of history, activism, vision and theory. As we surely must know by now, only if we are mutually courageous and creative can we hope to meet the normative potential of this unprecedented equality moment. Only Queers can determine what *our* self-decolonization will be and mean. Only Queers, of all stripes, can give organic normative content to our socio-sexual liberation. But it will take time—time, and the personal yet collaborative efforts of many.

But if so—if we collectively seize this unprecedented opportunity for personal praxis in the context of legalized sex and marriage equality—we will not thereby suddenly awaken to a new social order. Nor will all members of our community thereby suddenly become better versions of ourselves. Instead, and ideally, we soon will find ourselves in the midst of newly-diverse family formations and arrangements that, even though constrained by the limitations of marriage law, also exploit its formidable shell of "privacy" and other benefits to re-shape both the institution and society. Over time, our subtle and not-so-subtle socio-sexual innovations should help to erode the exclusionary hierarchy among loves that marriage structurally imposes and formally culminates. Over time, our personal experiments and socio-sexual choices can help to dismantle identitarian barriers to intimacy inculcated by cultures of prejudice rooted in race, gender, religion, region, clan, or class. Like never before, our new personal choices may allow us to use new legal privileges to help dismantle the larger socio-economic hierarchies they help to prop up. Like never before, this particular historical moment beckons all Queers to ask old and new questions that frame, span, and link the personal and political dimensions of our lives and hopes.

The pathways will and should be many, but if we practice and internalize the anti-racist, anti-sexist, anti-conformist sensibilities of Queer socio-sexual normativity, we thereby might liberate our desires, and our *selves*, from the deforming and constricting effects of those identitarian ideologies. If we experiment and innovate with varied forms of living arrangements or types of loving commitments in creative and ethical terms, we gradually might liberate our lifestyles and destinies from the socio-sexual bounds set by models like the mono-chromatic nuclear family proffered us through law from the norms and preferences of mainstream U.S. society. Relatively freed of the cultural prisons and identitarian ghettoes that tend to colonize and self-colonize persons

acculturated in Euro-hetero-patriarchal systems,[73] we can begin to discern and subjectively *want* both personal and public possibilities that our current identitarian prejudices preclude, or complicate. Over time, we might not only decolonize our experience of desire itself but also make accessible provocative opportunities for human bonding that go beyond traditionalist dichotomies that frame desire and love vis-a-vis identity and society.

These dichotomized traditionalist framings of sex and sexuality often tend to evoke worlds or invoke notions that detach recreational or untraditional socio-sexual practices from the normalized realms of marriage and, now, marriage equality. Oftentimes, these framings associate sexual liberty with sexual outlawry, an association that may have made much sense historically, even if currently—because of legal normalization—perhaps not so much.[74] Going forward, it surely need not be so.[75]

In this newfound context, age-old questions of sexual "fidelity" and monogamy, or of cross-cultural desire and internalized prejudice, of course will be re-visited, as well as new or emergent practices relating to child-rearing, divorce or support, and (for gay men, at least) bare-

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73. For a more detailed and substantive discussion of Euroheteropatriarchy, see Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," Gender and Sexual Orientation in Euro-American Law and Society,* 83 CAL. L. REV. 1, 324 (1995); *see also* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation,* 37 WASH. U. J. L. & POL'Y 13 (2011).

74. For the quintessential expression, see JOHN RECHY, THE SEXUAL OUTLAW (1977) (documenting the author's outlawry, which since then has become iconic in gay male subcultures). Perhaps another way of expressing the notion of this romanticized outlawry based on history is with the idea of an "erotics of death," which embraces an "ideology of sexual freedom" associated, in turn, with the eroticized debasement of same-sex desire among both sexual minorities and majorities. Gay men, perhaps in particular, embrace and valorize this mainstream debasement, reveling in its practices in the name of sexual liberation and freed intimacy. For an in-depth discussion of this framing, see Marc Spindelman, *Sexuality's Law,* 24 COLUM. J. GENDER & L. 87 (2013).

75. For instance, "public sex" is one interesting example to consider in terms of liberty/outlawry framings. Like so many other socio-sexual categories, public sex can be practiced both by married partners and by non-married persons, either within (or not) the context of a sexual, formal, or legal relationship. In other words, although still outlawed, public sex in same-sex contexts, can be practiced as recreational sex *and* as part of a formal and now-legal "committed" relationship. The two are not mutually exclusive today, at least in legal terms, if ever they really were in normative terms. Because legalization and equality recently have reconfigured the traditional alignments of outlawed sex and same-sex sex, Queers must keep these still-unsettled normative and legal realignments in mind as we search for socio-sexual liberation going forward. While a full engagement of these and related questions is beyond the scope of this Essay, the thoughts presented here strive mainly to bookmark some of them for future exploration, but also to provoke greater notice and engagement of them in the context of personal praxis and Queer normativity proposed here.

backing.[76] Notions of nuclear marriage as a fixed lifetime commitment may likewise be re-thought in a world of increasing mobility, complexity and longevity. Indeed, a lifetime of nuclear-only socio-sexual arrangements may become more and more unhinged from the reality or desire of many Queers, whose needs or wants may be better served by differing arrangements at different points in their lives. Our historical, heteronormative conception of marital commitment itself may thus evolve along with new Queer needs, wants, priorities, and choices.

These are only some of the possibilities that decriminalization, legalization, and equality now permit Queers to explore in personal, concrete and evolving ways. These are some of the new questions that recast old challenges. As we go forward, the hegemonic privileging of permanent nuclear union by same-race, cross-sex couples as a cultural ideal in the form of "marriage" with special exclusive perks, as well as the larger dichotomized framings of good versus bad socio-sexual arrangements that it represents, may erode and dissolve organically as we simply ignore and move past them with a mosaic of alternatives in fact.

With the advent of legalized sex and marriage equality, these and similar normative thickets can present organic, democratizing opportunities for self-expression and community-building through social and sexual experimentation, Queer choices made not in reaction to social stigma and legal exclusion, but propelled by our own liberated sense of love (or lust). We can re-imagine socio-sexual "commitment" as well as "recreation" in a context that includes a marriage but is not configured traditionally, much like some of our 1970s predecessors did.[77] And we can re-align the socio-sexual meaning both of "commitment" and "recreation" in relationship to notions of intimacy and "family" in ever-more flexible ways that recognize our emergent or evolving sense of Queer society.[78] Starting from where we each stand today, we can strike out in any number of directions to unleash a wave of socio-sexual normative reform beneficial for society at large.

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76. Culturally, it sometimes seems this practice is thought to be most germane to men who love men. For selected readings, see TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009); DOUGLAS SADOWNICK, SEX BETWEEN MEN (1996); POLICING PUBLIC SEX (DANGEROUS BEDFELLOWS, EDS. (1996); LARRY KRAMER, FAGGOTS (1978)); *see also*, RECHY, Spindelman, *supra* note 74. For a different gay male view of gay men as a social group in the United States, see GAY SPIRIT: MYTH AND MEANING (Mark Thompson ed. 1987) (presenting a collection of essays focused on spiritual dimensions of gay male identity).

77. *See infra* notes 86-95 and accompanying text (on 1970s activism).

78. *See supra* notes 70-75 and accompanying text (on recent realignments of legality and outlawry).

The many and multi-faceted questions facing us at this unique historical juncture thus bring into sharp relief the links between the personal and the political, and between the sexual and the social. These open and opening questions invite us to query ourselves—and each other—in self-critical terms each and every day: How would I adjust my "private" life today, perhaps in the very moment, if I recalled more consciously today, *right now*, that the sexual *is* the social, and that the personal *is* the political? How might personal action become progressive social activism—perhaps just with a few relatively minor adjustments of attitude or practice that nonetheless add up to culture-shifting and culture-building, choice by choice, act by act, day by day, person by person? The alternative to this type of daily, creative, persistent mass personal praxis well might be a creeping homogenization of Queer normative potential, which in turn likely will serve to reconsolidate the unjust social, cultural and structural *status quo ante* that we all decry otherwise. The communal challenge has thus already become: Even as we continue to strive and find new ways of activating law for further advances toward Queer legal justice, how do we focus on personal socio-sexual praxis for cultural and normative progress in open-ended contexts marked by newly-vindicated, and potentially powerful, legal rights?

We will not know for many moons to come what our efforts might yield—if anything. Although nothing is guaranteed, except much messiness, our steady exploitation of legalization, and especially marriage equality, for social and sexual innovation nonetheless can help ameliorate among us all, individually and collectively, the scars of compulsory heterosexualized acculturation. Even if only by a little bit, this feat would be monumental.

No doubt, our choices will be constrained, imperfect, and always compromised. Serious questions of ethics, identity, and responsibility will erupt everywhere, and few if any will be resolved with satisfaction or finality. Zigs and zags will abound. So, no doubt, will disappointment, frustration, and hurt. For humans, this is what it means to get into the mud of normativity. We have no short cuts. And we have to start somewhere. As Queers, we, perhaps more so than most, should recognize these fundamentals and then get on with it.

In the end, we have no place from which to start but right here.

Therefore, even if the contours cannot be predicted or dictated, persistent and imaginative Queer experimentation with legality and marriage *can* help to re-code their social meaning and operation in positive ways that build on the insights and ambitions of earlier generations' efforts without mindless mimicry—that is, in ways that are

both informed by history and responsive to Queer life today, and going forward. Today's myriad of socio-sexual possibilities is for us to see and pursue, ideally informed by group experience and rooted in Queer subjectivity. With all their limitations, the pioneering vision and work of earlier generations, as discussed below, presciently recognized that legalized sex and marriage equality can, and should, provide historically unique opportunities for normative innovation toward lived justice for all Queers. Whatever else it might signify, Queer decolonization must entail at least this much, or mean nil.

For the moment, these may be just opening notes and pending queries. For today, they are food for critical and self-critical thought. But for tomorrow, and soon, the answers to increasingly pregnant queries like these, especially in the form of priorities and deeds, will help to determine the broader and longer social significance of marriage equality specifically, and of formal legality and equality more generally.

B. Collective and Personal Praxis: Working Marriage and Equality

The existing scheme of marriage laws across this country and accompanying judicial pronouncements have set up a uniquely formidable shell of normative discretion for the socio-sexual development of "family" life that is difficult for the state or others to pierce.[79] Embedded deeply in law and in culture, the construct of the family operates as a protected, and singularly privileged, incubator of culture controlled most directly—although not entirely—by the members of that family. For the first time ever, legalized Queer families are poised in 2016 to incubate legally, and to innovate culturally.

Although vexed and constrained, this deeply entrenched legal regime provides historically unique Queering opportunities today—opportunities to imagine and articulate within "family" contexts a micro-society featuring lessened afflictions of racism, sexism, heterosexism, homophobia, transphobia, xenophobia and other identitarian bigotries. Though constrained by heteronormative premises and politics, this traditional and traditionalist regime can provide some unique "safe" space for Queering personal praxis as a normative and political project: like other families, Queer families now have the constitutional "privacy" to design their internal dynamics. With just a bit of imagination and

79. Judges have been making this point for nearly a century now, subjecting state intrusion into the affairs of married couples and their families to strict scrutiny directly under the Constitution. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

determination, the recent gains of legalized sex and formal marriage equality now afford sexual minorities new, and historically unprecedented, opportunities to convert the power of the public/private divide that structurally and normatively has enabled the institution of marriage to operate as an establishment of stratification and assimilation[80] into, instead, an instrument or lever of personal and collaborative antisubordination praxis in both social and sexual relations.

This unique historical moment therefore asks of us whether we will use the "private" sphere of married family life to reshape incrementally notions both of the private and the "public" sphere? Now that we legally can, will we engage in personal socio-sexual praxis under the protection of formal marriage equality to erode and dismantle this very distinction in our personal and communal lives? Our query should not be if, but how, we consciously and critically should be deploying this additional unlikely source of liberatory personal action to help reshape law and society from the bottom up for coming generations both of Queers and non-Queers?

Fortunately, this type of work already is underway from coast to coast and everywhere in between at the most personal, granular level. This work is generally evident in the ways that couples in every region of the country are composing their unique vows, arranging their lives in ways that oftentimes discard gender roles and sexual, racial and other identitarian biases, and raising their children to respect difference and defy prejudice across multiple identity axes.[81] Thus far, this work already has accomplished much toward eroding and transcending the boundaries and legacies of rigid identitarian frameworks associated with mainstream normativities. This mostly atomized grassroots work thus provides a solid point of departure for Queer justice advocates to organize and undertake next steps.[82] And, importantly, we need not judge any of that work in order to chart further and deeper progress.

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80. For background readings, see CAROLE PATEMAN, THE SEXUAL CONTRACT 154-188 (1998); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988); Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 UNIV. CHI. LEGAL F. 295 (2004); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

81. For one positive account, see Stephanie Pappas, *Why Gay Parents May Be the Best Parents*, LIVESCIENCE (Jan. 15, 2012, 10:01 AM), http://www.livescience.com/17913-advantages-gay-parents.html; *see also* ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 97 (2010).

82. The main objective of this ratcheting therefore would be to prompt the move from atomized couples and families engaged respectively in their own self-decolonizing practices to a more politically-conscious, normative-minded, coalitionally-inclined grassroots campaign to build the society we want despite the toxic dysfunctions of systemic politics and moralistic

Nor need we accept, pursue or fear the imposition of a new ideology to discipline desire or identity. Queer normativity is not a vehicle for any type of code of socio-sexual correctness. The point is to liberate the practices of desire and intimacy, not to re-channel them. Making it so also is up to us, personally and communally. The concrete point of praxis now before Queers individually and collective is: How should we work marriage, now both from the inside and the outside, intentionally to liberate the institution ideologically, to decolonize our selves normatively, and to liberate society culturally?

The need for, and call to, collective personal praxis[83] in the marriage context of this moment therefore is not, and emphatically cannot be, a step toward a new political orthodoxy patrolling personal lives, intimacies and relations. Instead, in some key and basic ways, the move toward personal praxis should be seen, in historical context, as a ratcheting of the continuing activist strategy to "come out" pursued across the United States since the 1970s;[84] as discussed in more detail below, this ratcheting ideally will be another key move toward personal and communal decolonization on the historical journey of sexual minorities toward a positively self-determined and culturally liberated socio-legal future. By definition, the practice of a Queer normativity—or normativities—must be a move toward the socio-sexual liberation of desire from the grip of traditionalist identity politics and related social constructs, as well as from any new grips of ideology, among other important personal and social gains.

But to get from here to there, we finally must find ways to ground the struggle for the long run, and to guard perpetually against incremental slippages into internalized assimilation, conformance, or worse. To stay critically and ethically grounded in a world such as ours is now, to help us get from here to there in solidarity, diversity, and freedom, one must ask every day: how would *I* do "this"—whatever it might be—differently, right now, if I viewed this act or choice more consciously as a political act of Queer socio-sexual decolonization and normative innovation?

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backlash. In many ways, this ratcheting aims to push forward the types of multiplicitous efforts that have helped to create today's momentum toward formal marriage equality nationwide, but adding an extra note of emphasis to the *non*-legal, *non*-doctrinal features of socio-legal change.

83. For a more detailed explanation of "collective personal praxis" and its roots in LatCrit theory, see Berta Hernandez-Truyol, Angela P. Harris & Francisco Valdes, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L. REV. 169, 194 (2006).

84. *See infra* notes 86-95 and accompanying text (on post-Stonewall sexual minority activism).

This grounding, in time, could and should help to open socio-sexual possibilities for desires, relationships and families of all sorts to flourish alongside each other—none with privilege, none with stigma. In time, Queer decolonization and normative innovation can help produce "new" formations of intimacy which, like some traditional families, help humans to sustain themselves and each other in multiple ways. Whether involving currently stigmatized formations like non-married lifelong lovers and plural bondings or still-formative arrangements related to emergent technologies, Queer normativity in the new and unfolding context of marriage equality opens up new possibilities of personal action toward a more egalitarian, emancipatory social order that includes, but also goes beyond, the caging of desire by internalized identitarian biases. Rather than simply seek inclusion in, and access to the perks of, traditional marriage as-is, we can additionally deploy the empowering privileges of marriage to make them accessible to, and enjoyable for, "other" types of loving as well.[85] In time, this ongoing, organic democratization should help to make marriage less and less a source and bulwark of symbolic as well as material socio-sexual hierarchy.

Perhaps the times in which we live make this quest seem daunting. But our histories show otherwise. Our *recent* histories, in particular, provide concrete examples of continued relevance today. Our histories, especially since the mid-20th century, provide specific and substantive points of departure for Queer visions, practices, and normativities as we work marriage to produce culture shifts that decolonize Queer lives and destinies in the United States from the traditions and legacies of heterosexual and heterosexist hegemony.

C. Self-Critical Grounding: Queer Visions and/as Freer Futures

Simple as it may seem at first glance, one ready and salutary source of self-critical grounding for conceiving a project of Queer decolonization is our histories as sexual minorities in the United States during and since the 20th century. Although we could begin earlier, one ready and common starting point is that era of self-styled liberation during the 1970s, when the Stonewall generation was experimenting personally and collectively with Queer social identity in public, sustained, and organized terms like never before in U.S. history, following the 1969 New York Riots at the Stonewall Inn, which in turn sparked the emergence of a modern and visible sexual minority movement in this

85. *See supra* notes 47-53 and sources cited therein (on some of the basic problematics that undermine the lived justice of marriage equality as we know it).

country.[86] In the wake of the Riots, untold numbers of gay and lesbian individuals banded together to focus on personal praxis in the service of socio-sexual liberation and a Queer sense of justice. Some—many—created and pursued projects designed to reconstruct the meaning of queerness, to redefine the meaning of deviance without conforming, to imagine and invent "new" ways of relating that did not follow the normative tracks of heterosexualized identities.

To do this work, these social and sexual entrepreneurs sought formal legal change to end the legality of their social and structural torment in this heteronormative society, but they equally—perhaps more so—sought transformation of social norms in their own personal lives, relationships, families. To them, legal equality was not the goal, but a means; to them, the goal was personal and collective freedom to organize their human lives and intimacies in socially nonconforming ways that nonetheless were designed to suit the particularities of their own specific selves, bondings, and families. They therefore focused on their own choices and actions, and on their personal and collective contributions to lived justice as much, if not more, than to those of judges or other lawmakers. They did not ignore the importance of law and reform, but they understood the indispensability, if not primacy, of personal praxis in the normative procurement of Queer justice both sexually and socially. Importantly, this early work included Queer experiments with marriage itself—experiments that display this keen attention to personal praxis even as formal legal reform and rights also are being demanded. The facts surrounding these experiments indicate a prescient recognition that normative change is wrought through personal praxis, which can include legal action, but is not dependent on it. Early Queer visions were laser focused on critical and self-critical reconstruction of social futures—roots to which we might now return for normative grounding and cultural decolonization.

Fortuitously, rising generations of sexual minority scholars are advancing precisely this under-appreciated point, and thus are re-centering the distinction between "gay *liberation*" during the latter decades of past century and "gay *rights*" in the opening decades of the

86. For selected background readings, see DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004); WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 32-39 (2014); William Rubenstein, *The Stonewall Anniversary: 25 Years of Gay Rights*, HUM. RTS., Sum. 1994, at 18; Eloise Salholz, et al., *Stonewall*, NEWSWEEK, July 3, 1989, at 56; *see also* CREATING A PLACE FOR OURSELVES: LESBIAN, GAY AND BISEXUAL COMMUNITY HISTORIES (Brett Beemyn ed., 2013) (presenting a collection of essays focused on pre-Stonewall and Gay Liberation Front times).

present one.[87] For instance, Michael Boucai opens his new study of 1970s marriage equality litigation with the explanation that "marriage litigation in the wake of Stonewall had much more to do with gay liberation generally than with gay marriage specifically . . . [the earliest] cases deployed the symbolism of marriage to proclaim homosexuality's equality, legal and moral, in a society that almost ubiquitously criminalized its practice."[88] Moreover, this use of legal marriage equality claims as means toward a broader normative end was not an afterthought. On the contrary, the emancipatory re-organization of personal and social relations was the goal of the legal reforms being litigated.

Those litigants and litigations "vividly protested the traditional gender roles that gay liberationists located at the heart of their oppression and that marriage, at that time, not only fostered but legally prescribed. They provided a platform from which to critique other aspects of marriage, such as the rule of monogamy and the state's coercive, intrusive preference for particular forms of intimate association. Perhaps most importantly, these cases were sensational advertisements of gay people, gay relationships, and the nascent gay liberation movement." Within this context, the personal indeed was the political; only within this type of context can marriage equality show "a path to liberation."[89]

Within this context, the socio-sexual goal rarely was admission into the institution of marriage for its own sake—that is, for the sake only or chiefly of accessing personal rights and pecuniary or social benefits from which the unmarried are legally excluded. Instead, marriage equality was posited more as a step toward dismantling its unjust structural privileges.[90] The normative goal driving legalization and equality struggles was individual liberty and community liberation, not (just) the personal acquisition of formal or abstract legal rights.

Consequently, 1970s liberation struggles pursued legal reforms related to formal marriage equality, but they also

> exercised a newly claimed "right to form living and loving communities" beyond the nuclear family. They formed communes. They founded Gay Liberation Houses—"the ultimate goal" of many early militants—as "centers for homosexual services and activities." They started gay newsletters and newspapers. They organized gay social events on and off

87. *E.g.*, Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J. L. & HUM. 1 (2015).

88. *Id.* at 4.

89. *Id.* at 5; *see also id.* at 11-18 (detailing the basic tenets and goals associated with this early activism).

90. *Id.* at 18 (quoting advocates' mission as ranging from the "abolition" to the "withering" of marriage as an institution of exclusionary privilege).

> college campuses. They organized self-defense workshops, established hotlines and telephone directories, and offered legal services. They provided military and draft counseling, dispensing advice on "how to stay out/how to get out." Because these self-help and community-building efforts often provoked opposition from straight society, some of gay liberationists' most pressing fights after Stonewall were ones they did not intentionally pick, and were for rights—to organize, assemble, speak, and publish—more basic than those claimed in their manifestos .... Within this broad framework, liberationists were "surprisingly diverse."[91]

These are just some parts of the vision those activists exercised on our behalf decades ago. Their record of socio-sexual innovation stands among the praxis examples that our own recent histories can offer us today—if we seek to give legalization and equality a Queer socio-sexual meaning.

Furthermore, and crucially, this aspiration for structural, normative, cultural transformation did not repudiate the importance of human relationships but rather demanded an end to "compulsory monogamy and possessiveness, [and] to the assumption . . . that it is natural to divide up into couples who live isolated by and large from other couples."[92] The goal, again, was not wholesale incorporation into existing patterns of institutionalized hierarchies that reinforce each other. The goal was dismantling socio-sexual hierarchies, all of them, both in legal and formal terms as well as in personal and normative terms. Marriage equality was a tactic, a part of a larger antisubordination vision and strategy geared to lived liberation, and certainly not the goal, much less a goal rooted in identitarian or cultural essentialisms.

Manifestly, then, this liberation required more than anti-homophobic commitment and work; it equally required anti-sexist, anti-racist, anti-exploitation, and other types of action as well. In addition to the ideals of "sexual freedom, sex equality, gender nonconformity and genuinely alternative lifestyles . . . gay liberationists sought alliance not only with feminism but with the full range of causes associated with the New Left of the late sixties and early seventies." Thus, "the Stonewall generation's demands for 'freedom' and 'acceptance' purported to target the same 'politico-economic system' challenged by" racial minorities, student activists, women's groups and similar types of social justice initiatives: notably, the Gay Liberation Front, much like Act Up and

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91. *Id.* at 19-21 (citations omitted).
92. *Id.* at 18.

Queer Nation later, began this era of work expressly proclaiming solidarity with "all oppressed people."[93]

It bears emphasis that none of these exertions, or visions of future society, were perfect, and that they need not be in order for us to learn from, and build on, their gains. Each example from the past—as well as from the present and, no doubt, from the future as well—will reflect the particularities of the multidimensional human beings involved in them. We can and should trace their progress, as well as their shortcomings. And, as we consider the current moment, we should recognize equally that they tried their best. Going forward, will we do the same?

Turning thusly back to the moment, and mindful of our histories, we might begin to explore how Queer marriages of the 21st century, over time and in organic ways, may begin to engage issues of human society and identity that go beyond any specific identities, and that incrementally may combine to rework dominant normativities more broadly. Now that we have continued the marriage equality struggles they began a half-century ago, will we pick up from and transcend their normative footsteps toward a reconstruction of the social meaning of marriage, and of sexual minority identity itself, with a similar focus on personal socio-sexual praxis? Will we do with and to marriage and identity what they proposed and attempted to do? Will we innovate or assimilate? Will we exercise antisubordination commitment and vision informed critically by history's lessons to help engender a postsubordination society in concrete socio-sexual terms? Will we transform or be transformed? Will we work marriage, or will marriage work us? We cannot now know for sure, because much will depend on what we, communally and personally, actually do next.

As this nutshell indicates, the project of "gay liberation" articulated by sexual minority activists since the earliest days of that movement envisioned normative goals larger than gay identity or community. Although homosexual activism from its earliest days undeniably was an identitarian exertion, its ambitions oftentimes transcended homosexuality. The normative socio-sexual vision and socio-legal aspirations of gay liberation extended beyond sex, sexual orientation, sexuality and/or gender identity. The "queer" project of normative decolonization, innovation and reconstruction has embraced multidimensional strains of antisubordination, and has stood against all systems of subjugation, in ways that today we might designate as Queer.

93. *Id.* at 15 ("We have a commitment not just to homosexual liberation but to total human liberation. Gay liberation . . . advocates a radical change in society—its social structures, power structures, its racism and sexual dogmas.").

Though imperfect in untold ways, the Queer record of normative activism since (or even before) the 1970s provides concrete studies in the ways and means of queering both legalization and marriage today and tomorrow.

In the 1980s, this ongoing record of post-Stonewall sexual minority activism focused of necessity on the HIV-AIDS pandemic, but once again was characterized by an expansive vision of social change and Queer normativity. While organizing to demand public health action to protect entire communities and populations, activist groups like ACT UP and Queer Nation adopted broadly antisubordinationist agendas that included antiracist, antisexist and antixenophobic, as well as antiheteronormative, commitments.[94] Though also imperfect in untold ways, the post-pandemic record of Queer activism confirms and enriches the early years' emphasis on personal and normative autonomy as well as on equal legal rights.

Thus, during the pre-HIV era, as well as after, sexual minority activism in law and society has been characterized by an insistence on personal agency writ large—autonomy in identity, family and community. The rich record of normative courage and innovation established within the contexts of different decades and eras by groups like the Mattachine Society, Daughters of Bilitis or Gay Liberation Front both before and after Stonewall, and subsequently amplified by Queer Nation and ACT UP even during the height of the *Bowers* regime and HIV-AIDS pandemic in the United States, have set the bar for us today. During those latter times—reeling not only from the legal and social plagues of *Bowers* and disease, but also from the assassination of Harvey Milk in his San Francisco City Hall offices—scores upon scores of individuals renewed commitments to communally as well as personally liberatory social change, with or without formal law, with or without official permission.[95] As with the Stonewall-era generations that pioneered coming out with pride, the *Bowers*-Reagan generations took matters into their own hands, acting in personal everyday terms both as individuals and as a movement, a collective—a community of diverse individuals committed to normative transformation across race, class, sex and other identitarian fault lines, including sexuality and gender

94. For varied accounts, see Mary L. Gray, *"Queer Nation Is Dead/Long Live Queer Nation": The Politics and Poetics of Social Movement and Media Representation*, 26 CRITICAL STUD. MEDIA COMM. 212 (2009); Kevin Michael DeLuca, *Unruly Arguments: The Body Rhetoric of Earth First!, ACT UP, and Queer Nation*, 36 ARGUMENTATION & ADVOC. 9 (1999).

95. For the definitive account of Milk and his times, see RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1982).

identity.[96] While uneven and imperfect, this record of normative decolonization and social reconstruction, at both personal and community levels, should be recognized today as a key legacy of that pioneering and sustained activism—and its thick, cumulative lessons now timely registered.

As during those decades past, the moment now calls for personal, individual action on a daily basis in everyday circumstances by many, many, many of us across the social board. After all, formal rights are not ends, but means. Now that equal marriage rights formally are ours, what will we do with them? What will we do with and *to* marriage? What social meaning will we give to legal equality? What should be our generational contribution to the decades-long Queer project of personal liberty and normative freedom? What is our vision of a post-subordination society, both socially and sexually?

Building on the record of the 1970s and since, the goal cannot now be, or be allowed to become, the construction of new political regimes to regulate Queer life in new ways, but rather a critically renewed normative project to re/construct Queer social life generally beyond conventional identitarian terms and promote a culture of diversity, self-determination, imagination and nonconformance despite, not because of, identity. The future cannot include Queer acceptance of any regime of correctness designed to discipline intimacy ideologically; the goal now, in the midst of legalization and equality, is not to replay the past. The future cannot be limited to recycling the historical dichotomies between heterosexual mimicry and absolute outlawry.

Instead, our work is to imagine and help to usher in a world informed by a sense of history and rooted in a shared vision of post-subordination society. For the first time ever, we have the opportunity to launch these normative efforts from the socially formidable platform of formal marriage equality—a platform not available to our predecessors. Legalization and marriage equality now permit the possibility that specifically same-sex unions and communities will queer mainstream social institutions, including marriage, family, and society more broadly—even the socio-sexual meaning of liberty or freedom itself. In this historically unprecedented socio-legal context, how might formal legal rights become synergistic levers of antisubordination social activism to alter the cultural landscape positively in everyday life during the days, weeks, months, years, and decades to come? How might identity-based rights inform non-identitarian normativity?

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96. *See supra* notes 87-93 and accompanying text (citing and quoting the Boucai study).

In other words, this moment calls for a Queer normativity of social diversity, community solidarity, and personal freedom; an antisubordinationist, non-normative normativity that accepts and embraces the unknown, the unlike, the uncertain; a non-identitarian perspectivity that does not flinch in the face of social or cultural innovation; a critical and self-critical approach to the human condition, which displaces the centrality of a flailing and perhaps failing state and its apparati of control, including judges and their doctrines, from the ongoing construction of our individual personhood and community culture; a new and sustained accent on self-determined social constructions that begin, bit by bit, to establish the substantive and structural existence of the queered and Queer world we want.

Time and space do not permit me to spell out here the elements of a critically Queer normativity that get me excited, but I have partially done so above, as well as in various previous writings. For instance, as noted at the outset, I previously have called for a capacious Queer subjectivity grounded in the social consciousness and activism of early Stonewall-era and HIV-AIDS groups, just the year before *Romer's* landmark:

> Queer identity has spawned a cultural politics marked by a sharp-edged sense of community consciousness and personal commitment to activism. This progression also has included the construction of a culture, the cultivation of a history, the organization of communities, and the study of the tribe.... This progression, in turn, now can provide a point of transition from Queer cultural politics and studies to Queer legal theory and, ultimately, to Queering legal culture and doctrine.[97]

Although that passage was focused on legal theory and culture in a way this Essay affirmatively is not, this linkage of Queer positionality toward social action envisioned a liberational and coalitional normative project rooted in an "egalitarian sense of resistance to *all* forms of subordination" that engaged race, class, and other vectors of identity and power, as well as those represented by sex, gender, and sexual orientation, proactively, and with equal vigor.[98] As interlocking structures of subordination slowly erode, relatively liberated spaces may begin to open up for new forms of human expression and heightened levels of Queer innovation. In practical societal terms, this antisubordinationist linkage of Queer normativity, personal praxis, and legal reform remains substantially incomplete despite the decades of such or related calls going back to before the earliest days of Stonewall activism and gay

97. Valdes, *supra* note 37, at 350-51.
98. *Id.* at 354 (emphasis in original).

liberation, including the early 1970s experiments with the queering of marriage, that led up to and through the era of Act(ing) Up.

Learning from the direct actions of our predecessors in this cross-generation struggle, this non-legal, non-doctrinal emphasis should aim to focus critical and self-critical attention on unlikely opportunities for deeper social change by employing formal legal rights as lived personal experience, rather than focusing always or mostly on judges and the decipherment of their gyrating opining on the legal meaning of constitutional equality for *us*. This emphasis effectively asks us to be concerned less with what the judges, or other masters of formal law, have done or might do, or why, and more with what we can and should do, as a result, in personal, social, and community terms. Though Queers should and must learn from the critical lessons of equality's legal history, we equally should and must recognize how those lessons call upon us to become less socially reliant on judges—or, more generally, reliant on law and legal reform as such.[99] Both sides of this recognition are necessary for the steps that we must now continue or begin to take if we are to be instrumental in determining the social meaning of formal marriage equality; law, whether doctrine, statute, or otherwise, as we know too well, is a necessary, but woefully insufficient, instrument for securing what I hope that we are seeking as a multiply-diverse Queer community.

In sum, our recent group histories can become rich sources of imagination, vision and empowerment going forward. This grounding is not a call to nostalgia or mimicry, either. It is, instead, a call to learn our histories, and to learn from them, in critical and self-critical terms geared to today and tomorrow. It is a call to elaborate a vision of tomorrow informed by the critical lessons and normative aspirations of yesterday and today.

Our histories demonstrate the importance of vision in motivating and guiding action. Moreover, our histories teach that, working together, we can leverage the new cultural opportunities afforded through formal legalization and marriage equality to take personal socio-sexual praxis to new, and more structurally effective, levels. We can begin to take the next important steps toward lived social justice by recognizing actively, consciously, and critically that our everyday choices and micro-actions in the contexts of our unions, families and other relationships is the gritty stuff of culture-building, community-building, and social reconstruction.

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99. For illuminating discussion of the general point, see Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movements Agenda*, 47 UC DAVIS L. REV. 1667 (2014); Boucai, *supra* note 87.

Working together, we can be more conscious of the macro-dynamics and opportunities implicated in our daily, even "personal," actions. Working together, we can help to revive the much-needed feminist consciousness that appreciates how the personal *is* the political.

D. Politics, Progress, and Prerogative: Beyond the Self

Finally, a closing but important antisubordination note on existing patterns of distribution governing power and privilege within and across sexual minority families and communities, and their relationship to the move toward a Queer normativity as a project of broader societal reconstruction: those among us, and our friends, with relative power, privilege, and prerogative need to use them—actively and proactively. In this world, the types of relative power, privilege, and prerogative that matter include both the tangible and intangible. The power, privilege, and prerogative of income and wealth always count in a material and materially unjust social order, but the power and privilege of identity and status likewise always count in an identitarian normative order. Those among us with the power, privilege, and prerogative of race in a racist world, or of gender in a sexist world, or of class in a capitalist world, or of sexual orientation in a heterosexist world need to deploy them as personal socio-sexual praxis.

Those among us with the power, privilege, and prerogative of race, gender, class and/or sexual orientation (as well as other categories, including education, citizenship, and ability) need to activate them in our relationships, families, workplaces, neighborhoods, associations, and communities to promote anti-racist, anti-sexist, anti-classist, anti-homophobic, pro-liberation socio-legal change, both at the micro-and-macro level of contemporary society. Whether based on class, race, gender, education, citizenship, or any other construct—or their volatile interplay in everyday life—most, if not all of us, possess relative degrees of status and impact.[100] The starting point, then, is with us—those in possession of relative power, privilege, and prerogative, which *is* us—most, even if not all, of us.

It is up to us, each of us individually, to recognize and begin thinking consciously, seriously, self-critically about the personal ways and specific means that we might employ our relative privileges and prerogatives, from day to day, in the context of our variegated lives. It is

100. For insightful analyses of personal privilege in the context of race-gender structural hierarchy, see Stephanie M. Wildman, Margalynne Armstrong & Beverly Moran, *Revisiting the Work We Know So Little About: Race, Wealth, Privilege, and Social Justice*, 2 UC IRVINE L. REV. 1011 (2012).

up to us to begin acting proactively, consistently, increasingly on the micro-opportunities of everyday life. If we do, bit by bit, progress, even if fitful and uneven, discernibly will unfold. Only then will we be on the path, in non-identitarian solidarity, toward non-identitarian community.

The proactive deployment of unjust identity-based power, privilege or prerogative by those *among us* who possess them, in order precisely to undo unjust power, privilege, and prerogative incrementally but progressively, is a social and ethical responsibility that unavoidably entails personal surrender of structural power and individual perks of all sorts, both tangible and not. For humans accustomed to unearned comforts of all sorts, including psychic, the prospect is truly scary, understandably so, even. But it also is indisputably just, as well as normatively necessary. Acting ethically, incrementally, in small and various ways, and in emancipatory solidarity, we can get there from here.

While this goal might sound far-fetched, recall that once upon a time, not too long ago, and not at all far away, formal marriage equality itself was at best a hopeful mirage, if not a self-deforming delusion. The impossible *can* take place, even, sometimes, in Kansas. Let us now, at this historical juncture, take the unprecedented possibilities of formal legalization and marriage equality to vindicate the normative vision of the pioneers and generations that have made this moment possible for and on behalf of the generations next to come. While outcomes might remain contingent, the need for principled personal praxis is not in question.

Without doubt, in this dawning era of formal legalization and marriage equality, decolonized Queer families increasingly will be able to use the privileges of formal legalization and marriage equality to experiment critically and self-critically with socio-sexual variations that, even if constrained by the rules of marriage itself, incrementally can help to redefine the social meaning of marriage *and* equality in more distinctly justice-oriented ways. Freedom from both identitarian prejudice and nuclear forms of bonding can, in turn, open up countless possibilities for socio-sexual innovation across various parts of civil society as a whole, and a sense of normative vision, informed by history's critical lessons, can provide some helpful moorings.[101] Queer normativity and personal praxis during this age of legalization and marriage equality can signal the beginning of a more egalitarian social order across the cultural board.

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101. *See supra* notes 86-95 and accompanying text (providing some concrete historical examples).

If so, and over time, Queer families might lead the normative way forward toward a society of harmonious difference, a social order unthreatened by individuals with unscripted agency over their own person and persona. Ironically, the sexual majority—still captive to nuclear forms of compulsory heterosexuality and/or other identitarian cages—may become ultimate beneficiaries of Queer normativity. If so, this socio-sexual liberation will be our gift to them, as well as to ourselves, to our kin, and to our posterity.

These internally-focused closing notes are a reminder of principled and inevitable reckonings: those with the power, privilege or prerogative of one or more identities in a thoroughly identitarian system ultimately must accept their loss or diminution if the move to a fundamentally non-identitarian normativity is to have any social meaning or conceptual coherence. From a normatively Queer perspective, sexual minorities cannot at once demand repudiation of unjust identitarian hierarchies based on sexual orientation and/or gender identity and insist at the same time on retaining unjust powers and privileges based on race, class, gender, or other identitarian constructs. We cannot ethically demand socio-legal justice for ourselves requiring others to surrender power and privilege, and also pretend blindness to the justice claims of others that require the same of us. We cannot pretend to stand on antisubordination values while reifying selectively the hierarchies that comfort us idiosyncratically. We cannot settle for formal legality and abstracted equality when so many of us need—and want—so much more.

IV. CONCLUSION

Increasingly since *Romer* and *Lawrence*, and despite the regressions in race and gender, it has seemed to some, if not many, that the pursuit of formal legal reform toward formal equality, including marriage equality, presents a just and reliable cause. To less, it has seemed also a platform toward Queer social decolonization and sexual liberation. Now, in the wake of the 2015 marriage equality ruling in *Obergefell,* the "rule of law" finally seems to be reaching the sexual majority's unrestrained mistreatment of sexual minorities.

Nonetheless, the basic threshold question remains: have law or society been queered and if so, to what extent, and to what ends? What progress, if any, have we secured toward lived justice for all? The answer, as usual, depends on many details. Nevertheless, recent legal history in the United States regarding formal equality provides many critical lessons, as well as open questions, that could help take us beyond

both the legal gains and normative dangers of formal marriage equality and toward a more salutary social order.

One fundamental lesson is that the future remains always contingent, and that "progress"—if any—never is linear, or ever secure; a positively Queered socio-sexual future thus is contingent, at least in significant part, on our individual and collective priorities, choices, and actions, starting here and now, and going forward. Recognizing and acting on this bottom line, our ancestors time and again have taken matters into their own hands, none achieving the prize but all marking substantial if fitful progress toward it. As a result, today we live in an era of legalization and equality. For the first time ever, Queers thereby have the socio-sexual options of formal legality as well as formal marriage—which could but need and should not entail hetero-normalcy. Queers need not settle in the future for vexed and vexing versions of the socio-sexual past. We can now get busy constructing the freer normative future Queers say we need and want.

The decades before and since Stonewall should and do teach that Queer liberation as a normative matter is both an elusive vision and perennial goal of sexual minority imagination, innovation and emancipation. This decolonizing vision and goal has motivated scores and generations of everyday persons, social activists, and legal advocates to struggle for the astonishing yet limited and precarious progress that we enjoy today. Queers can and should appreciate legalization and equality as important and essential steps of a longer journey, recognizing at the same time that personal and communal liberation are not yet at hand.

As our social and legal histories thus indicate, the next decade or two effectively will set the trajectory for determining the social and sexual meaning of legalization and equality for decades to come. What will we do during these pivotal times? Will we settle for the seeming comforts of normative conformance? Will we entrench ourselves within the existing dichotomies of socio-sexual goodness and badness? Will we choose to replay and recycle inherited constructions of normalcy and outlawry grounded in heterosexist and homophobic traditions and imperatives? Will the white picket fence of the cultural mainstream become the Queer prize?

If so, how will Queers ever become socio-sexually free—or freer?

In the context of this historical moment, I argue, the bottom line is that we really should and must get on with it—with the longstanding project of Queer normative reform as a long-term project of personal and collective praxis toward individual and communal liberation—a

decolonizing liberation from compulsory, internalized heteromormativity itself.

If not now, why? And when?

Fortunately, we do not need to agree on everything to get started, but we *do* need to heed the lessons of history on the multi-edged meanings of equality, marriage, and marriage equality in this still-emergent era of legalization and normalization. And we likewise need to develop a sense of shared normative vision of socio-sexual liberty. We need to focus not only on rights, but also on the personal and social meaning of liberation—and how we will achieve it in fact.

To get started, then, all we really need to begin doing is to ask ourselves, and each other: Are there opportunities not yet realized to take the hard work of same-sex pioneers, couples, and families from mostly atomized struggles to an increasingly powerful social force or normative Queer liberation? If the answer is yes, the next and ethically unavoidable query must be: What will I do differently today to make that difference socially tangible? These everyday adjustments do not need to be big, or dramatic, or paradigm-shifting in order to count. But they do need to be conscious and consistent. If we act daily, personally, repeatedly, and self-critically, the increments of our individual and collective choices will add up. In time, as we saw with sodomy, anti-discrimination, and marriage, we will post socio-sexual gains even as we experience countless setbacks.

Unless we begin and persist in reclaiming the potential socio-sexual legacy of Queer liberation at this decisive juncture, we should expect an extended absence of a culturally robust, substantively imaginative, and normatively transformative vision of Queer families, communities, and life even in the midst of, and perhaps because of, formal legal reform. Unless we consciously and carefully engage in personal *and* collective praxis, the social and sexual meaning of legalization generally, and of formal marriage equality specifically, will be determined substantially by forces indifferent, or even hostile, to our personal and collective wellbeing. Now that so many of us can marry legally, let's make sure that if we do, we then really do live increasingly happily ever-after, and as a multiply-diverse and queered nation of equally lived justice for all.