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ABSTRACT

This Article investigates how and why the cultural script of inequality persists for queer identities despite major legal advancements such as marriage, anti-discrimination, and employment protections. By regarding LGBTQ legal advancements as part of the American settler colonial project, I conclude that such victories are not liberatory or empowering but are attempts at colonizing queer identities. American settler colonialism's structural promotion of a normative sexuality illustrates how our settler colonialist legacy is not just a race project (as settler colonialism is most widely studied) but also a race-gender-sexuality project. Even in apparent strokes of progress, American settler colonialism's eliminationist motives continually privilege white heteropatriarchal structures that dominate over non-normative sexualities.

Through covert demands upon queer identities to assimilate with the status quo, such settler colonialist motivations are visible in the way Supreme Court gay rights advancements have facilitated a conditional but normative path to mainstream citizenship for queer identities. By employing concepts from critical race theory, queer studies, and settler colonial theory, this Article illuminates on how the Court's cases are indeed part of American settler colonialism's sexuality project and answers why such legal advancements always appear monumental, but ultimately remain in the control of a discriminatory status quo. Only if queer legal advancements are accompanied by essential shifts from the normative structures of white settler heteropatriarchy will such victories live up to their liberatory claims. Otherwise, such apparent progress will continually attempt to marginalize—indeed, colonize—queerness.

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I. INTRODUCTION

Despite mainstream validations of queer lived experiences,[1] considerable anti-queer bias still perpetuates.[2] Aptly, French

[1] For this work's critical lens, I prefer to use terms, "queer identities," "queer sexualities," "sexual minorities," and "LGBTQ identities," rather than terms, such as "gay" or "lesbian." Where possible, I do observe the distinctions between "queer" and "LGBTQ" as well. Although "queer" is historically pejorative, its reclamation in recent decades also invests the term with agency and subversive power.

[2] *See e.g.*, Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. Rev. 80, 103 (2022) (noting that "in a post-*Obergefell* world, homophobic federal laws and policies in realms like public health continue to discriminate against gay and bisexual men by projecting them as HIV positive" and "[t]hus, to fully access and enjoy the privileges of formal recognition, LGBTQ individuals are constrained in their expression of queer

writer Jean-Baptiste Alphonse Karr's notion that "the more things change, the more they stay the same" encapsulates modern queer politics.[3] In American constitutional criticism, Reva Siegel provides an equally reflexive term: *preservation through transformation*.[4] More than a half-decade since *Obergefell v. Hodges*[5] and despite some legal protections that have been touted as transformative,[6] state legislatures are still passing anti-LGBTQ bills.[7] Transgender youth cannot enter high school athletic competitions without controversy.[8] Mainstream films such as "Love, Simon" might positively affirm LGBTQ high school coming out experiences, but stories about the suppression of queer experiences in schools still emerge.[9] At each celebratory turn, anti-queer sentiments still emerge from enshrined heteronormative status quo frameworks that compromise change.

To better conceptualize this continuing anti-queer marginalization despite progress, I argue here that contemporary LGBTQ legal advancements are actually moments where the status quo attempts to colonize queerness. As much as racial and

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identity, sexuality, and relationship forms.") (referencing Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 Ariz. L. Rev. 213, 234 (2018)).

[3] Jean-Baptiste Alphonse Karr, *Les Guêpes* [The Wasps], Jan. 1849 ("*Plus ça change, plus c'est la même chose.*").

[4] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2119 (1996).

[5] 576 U.S. 644 (2015).

[6] *See e.g.*, Ian Milliser, "The Supreme Court's new decision could sink Trump's anti-LGBTQ Agenda (Jun. 16, 2020), VOX.COM, https://www.vox.com/2020/6/16/21291846/supreme-court-bostock-clayton-county-trump-administration-health-care-education (observing that *Bostock v. Clayton County*'s Title VII protection "is a potentially transformative victory for LGBTQ rights").

[7] The American Civil Liberties Union keeps a comprehensive list of anti-LGTBQ bills. *See* ACLU, *Legislation Affecting LGBTQ Rights Across the Country* (last updated Aug. 12, 2022), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country.

[8] *See e.g.*, David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States* (May 24, 2022), N.Y. TIMES, https://www.nytimes.com/article/transgender-athlete-ban.html.

[9] *Compare* Love, Simon (20th Century Fox 2018), *with* Valerie Strauss, *Told Not to Say "Gay" in Graduation Speech, He Made His Point Anyway* (May 24, 2022), WASH. POST, https://www.washingtonpost.com/education/2022/05/24/he-couldnt-say-gay-graduation-speech/.

gender subordination in this country has been noted as systemic and structural,[10] inequality targeted against non-heteronormative sexualities also stem from structural roots—and invariably, *the same roots*—of American settler colonialism. Because settler colonialism is the structure that buttresses institutionalized bias against racial minorities and promotes misogyny, this structure also retains a deeply-seated queerphobia as part of its ongoing project. By mapping the attempts to colonize queer identities within Supreme Court gay rights cases, I will show how LGBTQ legal advancements—despite their apparent progress—seem to exist conditionally off the same structure that defines normative sexualities within the American settler state. Such examination will not lead us to mainstream liberatory validations of queer identities that catchy slogans such as "#Love Wins" and the flying of rainbow flags in storefronts during Pride month might invoke. Rather such inquiry reveals that while legal victories bring much recognition for queer identities in the mainstream, these advancements often miss recalibrating our underlying values and norms toward notions of true and substantive equality. These advances, instead, colonize queerness.

Queer subordination is colonially systemic. Recognizing queer lived experiences within American settler colonialism enables a fuller, more exacting reflection of the state of LGBTQ rights politics in the United States. Such recognition aligns with scholarly observations that the narrative of subordinating non-heteronormative sexualities and genders in the U.S. is systemically and historically entangled with the racialized othering of Indigenous peoples, enslaved Blacks, and non-Anglo foreigners traceable to the pre-industrialized era of American colonialism.[11] Indeed, subordination was not merely racial but intersectional.[12] Also, by placing the LGBTQ movement's recent

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[10] *See e.g.*, Palma Joy Strand, *American Dreamin': Law's Limitations and the Promise of Civity*, 61 Washburn L.J. 509, 518 (2022).

[11] *See* Joey L. Mogul, Andrea J. Ritchie, & Kay Whitlock, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 1-9 (2011) (discussing how sexuality was a component of the racialized marginalization of Indigenous peoples, enslaved Blacks, and immigrants in the American colonial period).

[12] Walter L. Hixson, AMERICAN SETTLER COLONIALISM: A HISTORY 9 (2013); Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for*

pro-gay developments within the narrative of settler colonialism, this juxtaposition more lucidly illuminates the temporality of modern queer rights advancements and politics.[13] Ultimately, an expressed alignment of both queer and settler colonial legacies draws a more incisive and nuanced interpretation of the major recent developments within LGBTQ politics. Realizing this connection allows us to interrogate how deeply LGBTQ advances exist within that systemic subordination, rather than transcend it.

Beyond this Introduction, Part II summarizes settler colonialism and its eliminationist drive, and then examines how the early settler status quo "queered" non-heteronormative sexualities to reproduce normative settler structures. Parts III and IV will map the settler colonialization of queerness by re-examining major Supreme Court cases—with Part III exploring colonization through assimilation in the sodomy and marriage cases, and Part IV examining the Court's recent Title VII precedent as an example of the colonization of modern queer workers. Such exploration will show how contemporary legal victories that brought LGBTQ identities into the mainstream also further the American settler colonial project, undercutting any transformative potential. Before this Article concludes, Part V raises normative considerations for confronting settler colonialism's structural influences. Unless changes in law accompany shifts away from underlying values that privilege a discriminatory settler status quo, modern queer advancements will always remain colonially restrained.

II. SETTLER SOVEREIGNTY & QUEERNESS

Imperialism dominates the present narrative of the modern world.[14] Indelibly, the United States is included in that global

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Comparative Studies of U.S. Race and Gender Formation, 1 Soc. of Race & Ethnicity 54, 55 (2015).

[13] *See generally* Alissa Macoun & Elizabeth Strakosch, *The Vanishing Endpoint of Settler Colonialism*, 37/38 Arena J. 40-53 (2012) (observing that the narrative of settler colonial discourse as not having a point of decolonization as compared to other classical models of colonialism and that such "vanishing endpoint" is the teleological timeline of settler colonialism).

[14] *See* Robert J. C. Young, Postcolonialism: A Historical Introduction 5 (2d ed 2016).

story, although our colonial legacy stands apart from other imperialist projects because of its settler legacy.[15] Whereas colonial projects elsewhere have involved incidents of foreign political occupation and extraction of resources and human labor, paired eventually with formal decolonization, American settler colonialism entails physical invasion by European settlers coupled with their continuing occupation over already-inhabited land. Importantly, this difference means decolonization has never occurred in the United States.[16] This distinction illuminates the nuances of subordination in America. In many postcolonial states, despite decolonization, Western imperialist political forces and Eurocentric norms—the residue of western colonization—drives the continued subjugation of former colonies. Because "[r]acism remained an important force with murderous effects in ugly colonial wars and rigidly unyielding polities," Edward Said suggests that, even despite the decolonization of former European colonies, "[t]he experience of being colonized therefore signified a great deal to regions and peoples of the world whose experience as dependents, subalterns, and subjects of the West did not end."[17] Cultural freedom does not correspond neatly with political liberation. "To have been colonized was a fate with lasting, indeed grotesquely unfair results," as Said puts it, "especially after national independence had been achieved."[18] He lists "[p]overty, dependency, underdevelopment, various pathologies of power and corruption, plus of course notable achievements in war, literacy, economic development" as a systemic "mix of characteristics" that "designated the colonized people who had freed themselves on one level but who remained victims of their past on another."[19]

Said mostly associates these issues with colonial racial subordination.[20] However, similarly in terms of advancing queer rights globally within the postcolonial condition, Western epistemologies of normative sexuality also oppress and even

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[15] Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 Fla. A&M U. L. Rev. 1, 21-22 (2014) (ital. added) (citing Hixson, *supra* n. __, at 1-2) [hereinafter Saito, *Tales of Color*].

[16] *See id.*

[17] *Id.* at 207.

[18] *Id.*

[19] *Id.*

[20] *Id.*

dominate in projects that attempt to resolve queerphobia in former colonies. Thus, even postcolonially, compared to western sexualities, "all Other forms of sexuality and sexual practices are marginalized and cast as 'pre-modern', 'barbaric', 'savage' and 'unliberated.' "[21] Such epistemologies revive and perpetuate Orientalist discourses that undergird the racialized colonial relationships between the colonizer and the formerly colonized.[22] What results is homonationalism that "operates as a regulatory script for normative gayness or homonormativity, and the racial and national norms that reinforce this (homo)national subject."[23] Again, subaltern cultural freedom is still conditional in the postcolonial world.

By contrast, in the U.S., the spatial occupation and temporality of settler colonialism have not been affected by any decolonization. While settlers exploited natural resources or human labor on new spaces, their desires focus on occupying Indigenous territories to ostensibly replace Indigenous populations with a permanent self-legitimized, self-governing sovereignty.[24] Thus, extrapolating from anthropologist Patrick Wolfe's formative observation about settler colonialism, the condition of subordination here is not a mere event, but inhabits a continuing "structure."[25] Such distinctions between settler colonial and extractive colonial states aid in our understanding of inequality and subordination specifically in the United States.

According to those who study settler colonialism, our colonial history extends to the present as an ongoing legacy—one in which settler colonialism is regarded as a structure and not an event that is over and done.[26] Without knowledge that we have yet

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[21] Muna-Udbi Abdulkadir Ali, *Un-Mapping Gay Imperialism: A Postcolonial Approach to Sexual Orientation-Based Development*, 5 Reconsidering Development 3 (2017).

[22] *Id.* at 9-11.

[23] *Id.* at 10 (referencing J.K. Puar, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007).

[24] Saito, *Tales of Color*, supra n. __, at 25.

[25] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. Genocide Res. 387 (2006).

[26] Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 Fordham Urb. L.J. 548, 550 (2019)

to decolonize, our colonial situation resurges and regenerates continually.[27] In this fashion, Natsu Taylor Saito observes that recognizing the pattern of settler colonialism is crucial for comprehending the racialized hierarchies in America that undergird domestic progress for civil rights presently:

> Understanding the structural dynamics of the United States through the lens of settler colonial theory can provide us with analytical tools that facilitate a realistic assessment not only of the conditions *currently faced* by Indigenous peoples, but also peoples brought to this country as enslaved workers, incorporated by virtue of territorial annexation, or induced to migrate without the option of being part of the settler class.[28]

For instance, consideration of the United States as a settler colonial society encourages us to tie the inequities faced by marginalized groups domestically during 2020's Covid-19 public health crisis to the strand of White supremacy originating from our colonial era.[29] Knowing about our settler legacy helps us trace the pandemic's systemic inequalities to institutionalized racism and economic disparities embedded in social policies decades in the making.[30] Expanding observations even more broadly, American settler colonial experiences do not just affect our lives domestically. Historian Walter Hixon has also proposed that our settler colonialist legacy helps explain the brutal exceptionalism of America's affairs abroad: "[T]he long and bloody history of settler colonialism laid a foundation for the history of American foreign policy—especially its penchant for righteous violence."[31] In Hixon's view, America's exceptionalism is a trope that has been reproduced by the specific vicious brand of its settler colonial experience:

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[27] *See* Aileen Moreton-Robinson, *Introduction: Critical Indigenous Theory*, 15 Cultural Studies Rev. 11 (2009).

[28] Saito, *Tales of Color*, *supra* n. __, at 22.

[29] *See generally* Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of Covid-19*, 11 Cal. L. Rev. Online 517 (2020).

[30] *Id.* at 518-19.

[31] Hixson, *supra* note __, at ix.

> American history is the most sweeping, most violent, and most significant example of settler colonialism in world history. American settler colonialism evolved over the course of three centuries, resulting in millions of deaths and displacements, while at the same time creating the richest, most powerful, and ultimately the most militarized nation in world history.[32]

This is our present settler colonial reality. The specifics of the American colonial experience have always been obscured underneath a more seemingly-progressive premise.

A. AN EMPIRE STATE OF MIND

Like many Western colonial expansions, settler colonialist experiences are often rooted to some extent in capitalist enterprise. According to Lorenzo Veracini, "[t]he list of settler colonial endeavours characterised by a corporate foundation is quite extensive, and involves projects operating in a variety of frontiers at quite different times."[33] Other than a settlement seeking the Promised Land and sheltering away from religious persecution in England, the Massachusetts Bay Colony, for example, was also a joint stock operation for fish and fur trading. But here is where extractive colonialism and settler colonialism diverge: "By contrast, settler colonists plan not only to profit from, but also to live permanently in the lands they occupy."[34] Radiating from this permanent residency is the eventuality of self-rule, the establishing of a body politic that recognizes an inherent sovereignty apart from the metropole's grasp: "Settler projects are recurrently born in a vacuum of empire that is intentionally sought, and in a displacement that is associated with a determination to establish unique political settings."[35] And "it is the beginning of a distinct political tradition and its sovereignty."[36]

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[32] *Id.* at 1-2.

[33] Lorenzo Veracini, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 59-60 (2010) [hereinafter Veracini, SETTLER COLONIALISM].

[34] Saito, *Tales of Color*, *supra* n. __, at 25.

[35] Veracini, SETTLER COLONIALISM, *supra* n. __, at 58.

[36] *Id.* at 58-59.

This development of independent settler sovereignty manifests in settler preoccupation with land. Wolfe describes transitively how "[l]and is life—or at least, land is necessary for life. Thus contests for land can be—indeed, often are—contests for life."[37] If sovereignty bolsters existence, then acquiring new territories is paramount. Consequently, distilled from such notions, "[t]erritoriality is settler colonialism's specific, irreducible element."[38] Veracini argues that "settlers interpret their collective efforts in terms of an inherent sovereign claim that travels with them and is ultimately, if not immediately, autonomous from the colonizing metropole."[39] In this way, settlers are "those who have come to stay, those who will not return 'home,' "[40] and the conquest of new lands and the accompanying territoriality externalizes settler sovereignty.[41]

Driven to occupy new spaces and bearing a sense of potential in their hearts, American settlers envisioned the desired land invariably as *terra nullius*—even if such spaces already belonged to others.[42] Exploring settlers' Promised Land themes, Andrea Smith describes how "colonizers expected to find 'Eden' in the Americas," which religiously invigorates the sense of territoriality with a "colonial and patriarchal lens."[43] For settlers, this territoriality allowed them to conveniently disregard Indigenous peoples' presence in order to eliminate them and develop a collective self-legitimizing sense of belonging to captured spaces.[44] The most drastic and apparent form of elimination is, of course, genocide. As Wolfe observes, "[s]ettler colonialism destroys to replace."[45]

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[37] Wolfe, *supra* n. __, at 387.
[38] *Id.* at 388.
[39] Veracini, SETTLER COLONIALISM, *supra* n. __, at 53.
[40] *Id.*
[41] *See* Mahmoud Mamdani, *When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa* (May 13, 1998).
[42] *See* Priya S. Gupta, *Globalizing Property*, 41 U. Pa. J. Int'l L. 611, 639 (2020).
[43] Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, 16 Gay & Lesbian Quarterly 41, 51 (2010).
[44] *See* Hixson, *supra* n. __, at 11.
[45] Wolfe, *supra* n. ___, at 388

But genocide is not the only method settlers used for elimination. The settler drive to establish sovereignty also engendered structurally and culturally pernicious means to remove Indigenous groups as well.[46] In famous examples such as the Cherokee Trail of Tears, American settlers displaced various Indigenous populations from their tribal lands in extensively devastating ways, equating more or less "[m]ass incarcerations" that compulsorily uprooted tribal and cultural legacies and ways of life of all Indigenous nations involved.[47] As settlers saw land as *terra nullius*, they believed deeply that they were on a "civilizing mission."[48] By feeling so, they sustained ways of "othering" based on perceived differences and broadened efforts from genocide to domesticating non-settlers.[49] Settlers must accomplish both the capture of territory while justifying their self-imposed "civilizing mission"—or colonization—of land and people whom settlers regard as inferior.[50] As Hixson notes, a curious psychology is what pushes settlers toward supremacist thinking: "Historical distortion and denial are endemic to settler colonies."[51] For example, "[i]n order for the settler colony to establish a collective usable past, legitimating stories must be created and persistently affirmed as a means of naturalizing a new historical narrative."[52] This observation squares evenly with Ashis Nandy's famous observation that ultimately "[c]olonialism colonizes minds in addition to bodies."[53] Concurring with this notion, Smith illustrates the amnesic, psychological dimensions of settlers, observing that

> [c]onsequently, they viewed the land and indigenous peoples as something to be used for their own purposes; colonizers could not respect the integrity of either the land or indigenous peoples. "The resulting tensions, then could be resolved . . . only by being played against . . . the natural world and natural

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[46] Veracini, SETTLER COLONIALISM, *supra* n. ___, at 16-17.
[47] Saito, SETTLER COLONIALISM, *supra* n. __, at 68-69.
[48] Veracini, SETTLER COLONIALISM, *supra* n. ___, at 28-29, 33.
[49] *Id.* at 16 (domesticating quote)
[50] *See also* Hixson, *supra* n. __, at 6-7, 10-11.
[51] Saito, SETTLER COLONIALISM, *supra* n. __, at 67-70.
[52] Hixson, *supra* n. __, at 11.
[53] Ashis Nandy, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISm x (2d. ed 2009).

> peoples . . . the way the people of Christian Europe ultimately could live with the reality of the Noble Savage in the Golden World was to transform it progressively into the Savage Beast in the Hideous Wilderness." Within this colonial imagery, the Native is an empty signifier that provides the occasion for Europe *to remake its corrupt civilization.*[54]

The internalized and collective settler psychology of supremacy motivates settler colonial projects, and the ensuing violence and marginalization of various non-settler groups.[55] The generating and continual renewal of these narratives in American settler colonialism matter. They encompass the imaginative—and often nationalistic and patriotic—techniques for indefinitely sustaining an American empire state of mind.

B. SETTLER COLONIALISM'S SEXUALITY PROJECT

1. White Settler Heteropatriarchy

In part, this empire state of mind is preoccupied with normalizing sexuality. The American settler state has always been a heteropatriarchal one that presides over a race-gender-sexuality project. White heteropatriarchy serves as the substantive organizing grammar of elimination itself.[56] Its maintenance is at the ends of settler sovereignty and settlers' civilizing mission.[57] Historian Evelyn Nakano Glenn notes, "[m]asculine whiteness . . . became central to settler identity, a status closely tied to ownership of property and political sovereignty."[58] This sovereignty "in turn articulated with heteropatriarchy, which rendered white manhood supreme with respect to control over property and self-rule."[59] To be sure, heteropatriarchy and its subordinative practices of gender and sexual behaviors were imported from longstanding European cultural norms. Expressed in how American settler societies conceived of the family unit—which was both central to the

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[54] Smith, *supra* n. ___, at 51.
[55] Hixson, *supra* n. __, at 20.
[56] *Id.* at 6-7
[57] Glenn, *supra* n. ___, at 60.
[58] *Id.*
[59] *Id.*

fundamental make-up of settler colonies and to settler survival[60]—white heteropatriarchy framed gender roles and legal statuses of settlers, and self-legitimized the logic of elimination.[61] Settler wives, for instance, were legally subordinated by the status of their husbands, had no separate legal independence apart from their husbands, and were relegated to supporting male colonizers.[62] When settler women did insert themselves directly into the operations of colonization, they did so typically in the civilizing sphere, "gain[ing] agency by taking part in the colonial encounter, for example as missionaries or in promoting policies of child removal."[63] Reiterating the observations of others who study settler colonialism, Glenn notes "it was presumed that 'heteropatriarchal nuclear-domestic arrangements, in which the [white] father is both protector and leader should serve as the model for social arrangements of the state and its institutions.' "[64] From there, heteropatriarchal norms and narratives radiated across settler societal beliefs and behavior.[65]

Examples of white heteropatriarchy as the organizing principle underscore Glenn's remark that American settler colonialism was substantively a "race-gender project" that "transplanted certain racialized and gendered conceptions and regimes from the *metropole* but also transformed them in the context and experiences in the New World."[66] As "exogenous others seeking to claim rights to land and sovereignty over those who already, occupied the land," settlers harnessed both racist and gendered discourses to "conceiv[e] of indigenous peoples as less than fully human" in order to "justify disposing them and rendering them expendable and/or invisible."[67] Concurrently and reflexively, such discourses also allowed settlers to "conceive[] of themselves as more advanced and evolved, bringers of progress and enlightenment to wilderness."[68] Out of all this, "[w]hat emerged of

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[60] Glenn, *supra* n. __, at 57-58.
[61] *Id.* at 60.
[62] *Id.*
[63] Hixson, *supra* n. __, at 10 (footnote omitted).
[64] Glenn, *supra* n. ___, at 60.
[65] Hixson, *supra* n. __, at 10.
[66] Glenn, *supra* n. __, at 60.
[67] *Id.*
[68] *Id.*

the settler colonial project was a racialized and gendered national identity that normalized male whiteness. . . . [Settlers] harnessed race and gender to construct a hierarchy of humankind."[69]

2. Sexual Deviance and Settler Constructions of Sexuality

Settler hierarchy, however, runs deeper than masculine-versus-feminine privileging. Scholars who align with Glenn on this race-gender project have also observed that the nation-building drive of settler colonialism not only begets constructions that intertwined race and gender, but also *included constructions of sexuality* to propagate white heteropatriarchy.[70] Indeed, sexual behaviors and performative gender deviations from heteropatriarchal norms came under target for elimination:

> From the first point of contact with European colonizers—long before modern lesbian, gay, bisexual, transgender, or queer identities were formed and vilified—Indigenous peoples, enslaved Africans, and immigrants, particularly immigrants of color, were systematically policed and punished based on actual or projected "deviant" sexualities and gender expressions, as an integral part of colonization, genocide, and enslavement.[71]

Working within post-structuralist biopolitical theorizing,[72] Scott Lauria Morgensen posits that "[i]n the Americas and, specifically, the United States, the biopolitics of settler-colonialism was constituted by the imposition of colonial heteropatriarchy and the hegemony of settler sexuality, which sought both the elimination of Indigenous sexuality and its incorporation into the settler sexual modernity."[73] Others note that in relation to normalized sexualities under white heteropatriarchy, so-called "deviant

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[69] *Id.*

[70] *See* Hixson, *supra* n. __, at 10-11.

[71] Mogul et al, *supra* n. ___, at 1.

[72] Scott Lauria Morgensen, SPACES BETWEEN US: QUEER SETTLER COLONIALISM AND INDIGENOUS DECOLONIZATION 32 (2011).

[73] *Id.* at 34.

sexualities were projected wholesale onto Indigenous peoples" and that such deviancy was associated with "sexual sin."[74]

To essentialize or "naturalize hierarchy," rigid patriarchal gender binaries were imposed to distinguish settlers from Indigenous people and their more fluid gender self-embodiment and presence: "Although Indigenous societies are widely reported to have allowed for a range of gender identities and expressions, colonization required the violent suppression of gender fluidity in order to facilitate the establishment of hierarchical relations between two rigidly defined genders, and, by extension, between colonizer and colonized."[75] For instance, the presence of berdache in Indigenous societies represented immoral sexual primitivity in settler imaginations. They allowed settlers to believe that all Indigenous people must have embodied such immorality, adding yet another reason beyond racial constructs for elimination while legitimizing Eurocentric heteropatriarchal sexual hegemonies: "Knowing European manhood's boundaries to be porous and needing reinforcement, and meeting indigenous possibilities that threw such boundaries into question, early conquerors invoked berdache as if assigning a failure to differentiate sex to Indigenous people, but they did so to define sexual normativity for them *all*."[76] The sexual immorality implicated in such primitivity and deviancy, compared to practices within heteropatriarchal normativity, seemed to elevate normative settler sexuality above Indigenous sexualities: "By imputing sexual primitivity to racialized targets of conquest, early-modern narratives of berdache affirmed the fulfillment of natural sex and desire by conquerors."[77] Non-normative sexual practices that fell under this deviancy, such as sodomy, " 'very often became a useful pretext for demonizing—and eliminating—those whose real crime was to possess [the land that] Europeans desired.' "[78] Instrumentally, religion then served as a means for reifying settler heteropatriarchy, helping to actively police "deviant" sexualities and sexual behaviors.[79] Religion, of

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[74] Mogul et al, *supra* n. ___, at 2.
[75] *Id.* at 3.
[76] Morgensen, *supra* n. ___, at 37.
[77] *Id.*
[78] Mogul et al, *supra* n. ___, at 3 (footnote omitted).
[79] *Id.* at 4.

course, continues to be a salient force modernly for marginalizing queerness.[80]

The use of sexuality in the settlers' civilizing mission did not simply and exclusively justify violent, punitive instances in which Indigenous individuals were perceived as challenging heteropatriarchal norms and practices. Settlers projected sexual deviancy on the Indigenous to both wholesale subordinate them—or as Morgenson and others have noted, to "queer" them—and to reinforce the sexual norms and practices of individuals who belonged within settler societies.[81] Beyond using sexuality to otherize Indigenous people, and other peoples of color, the settler colonial state is often interested in regulating intra-settler sexual deviance as well. In this way, just as with gender, heteropatriarchy motivated the elimination of what its norms regarded as "deviant" sexual behaviors, and ultimately in more contemporary settings, "deviant" sexualities. Policing Indigenous people through racialized sexuality also distinguished those within settler societies who may also deviate from heteropatriarchal norms regarding sexual behaviors and expressions: "The queering of Native peoples defined not only settler sexuality, broadly, but also the definition of queer subjects *among* white settlers: as a primitive, racialized sexual margin akin to what white settlers attempted to conquer among Natives."[82] This observation, of course, does not substantiate that the practice of normalizing sexual behaviors and sexuality started only with the American settler society; nor does it indicate that this normalization was on a strictly identified heterosexual-versus-homosexual binary, as such identity categories had not yet emerged. Rather, sexual deviancy in Indigenous practices as observed by settlers was phenomenologically aimed at distinguishing between the civilized and the primitive/uncivilized; as "[p]ersons marked as berdache became targets of violent efforts to reconfigure Indigenous society in colonial and masculinist terms," the settler interpretation of

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[80] *See generally* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 Yale J.L. & Feminism 249, 313-18 (2020) (arguing that the Supreme Court used religious hostility as a "specious" reason to exclude protection of a queer married couple's request for a custom wedding cake from a Christian baker).

[81] Mogul, *supra* n. __, at 2.

[82] Morgensen, *supra* n. __, at 32.

Indigenous sexualities and practices through projected heuristics upon berdache became, according to Morgensen, "a logic of sexual primitivity and civilization that created Indigenous people and colonists in relation to each other."[83] In other words, "if colonial observers invoked berdache to mark Indigenous difference, the aim was to teach both colonial *and* Indigenous subjects the relational terms of colonial heteropatriarchy."[84] Henceforth, "in settler societies in the Americas, sexuality served as a primary locus in projecting settler colonial power."[85]

Yet, such production of heteropatriarchy at the time has an accumulative effect on our contemporary sexual hierarchies. Settler colonialism is a condition to how we organize modern sexualities. Morgensen posits that "[i]n the United States, the sexual colonization of Native peoples produced modern sexuality as 'setter sexuality': a white and national heteronormativity formed by regulating Native sexuality and gender while appearing to supplant them with the sexual modernity of settlers."[86] From here, "[q]ueer modernities in a settler society are produced in contextual relationship to the settler colonial conditions of modern sexuality."[87] Perhaps this observation extends the transformation that Glenn mentions of heteropatriarchy as it was replicated by settlers on conquered lands.[88] Again, "[t]he sexual regulation of Native peoples by the biopolitics of settler colonialism in the United States was a proving ground for producing *settlers as subjects of modern sexuality*."[89] In contrast to primitivity, white heteropatriarchy, which represented "modern" civilization, became not just a way to "other" and regulate Indigenous people but also to nationalize settler identity—"a method *to produce* settler colonialism"[90] and legitimize continued occupation.

3. Earlier Sodomy Criminalization

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[83] *Id.* at 37.
[84] *Id.*
[85] *Id.* at 35.
[86] *Id.* at 31.
[87] *Id.*
[88] *See* Glenn, *supra* n. __, at 60.
[89] Morgensen, *supra* n. __, at 42 (ital. added).
[90] *Id.*

We can trace this production by examining how early settler states policed behavior that contradicted the promotion of heteropatriarchy and settler sovereignty—particularly in the context of the legal maintenance of the settler family structure. As Anthony Michael Kreis has shown, "[m]arriage and family formation were vital for economic survival and states adopted laws to channel sexual conduct into marital relationships and reinforce patriarchal life."[91] For instance, Kreis and others have noted how "New England colonies, for example outlawed individuals from 'solitary living' so that every colonist was 'subject to the governance of family life.' "[92] Similarly, Sylvia Law also mentions how "[f]amilies of colonial America were deeply patriarchal,"[93] and adds a congruent legal spin to Glenn's observations about settler wives: "By custom and law, married women were civilly dead and subject to the control of their husbands."[94] Both observations underscore settler patriarchy's promotion of men as heads of families and its significant cultural and legal resonances: " 'The individual as a conception in Western thought has always assumed that behind each man—that is, each individual—was a family. But the members of that family were not individuals, except the man, who was by law and custom its head.' "[95]

In terms of regulating the sexual conduct of colonial settlers, maintaining the settler family was the goal. Correspondingly, Kreis summarizes that "[l]aws in the colonial and federalist periods regulated sexual conduct typically as general prohibitions for crimes against nature."[96] If, during this period, "the family structure is a core function of ethics, mores and the law," then in terms of regulating sexuality, such crimes against "nature" preserved and promoted the settler family as status quo.[97] In this vein, sodomy criminalization during this earlier settler period had the purpose of regulating conduct within settler societies rather

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[91] Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 Cardozo L. Rev. 399, 409 (2019) [hereinafter Kreis, *Policing*].

[92] *Id.*

[93] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 199 (1988).

[94] *Id.*

[95] *Id.* at 199-200 (1988) (quoting C. Degler, *supra* n. __, at 189).

[96] Kreis, *Policing*, *supra* n. ___, at 409.

[97] Law, *Gender*, *supra* n. __, at 199.

than eliminating non-normative sexualities.[98] For instance, in noting that sexual deviancy during the earlier settler era was policed with consequences, such as "death for sodomy," historian John D'Emilio attributes in part such grave policing of non-heteronormative sexual practices to the default single-viewed purpose of sex and sexuality of the colonial world—*for creating families*: "For the North American settlers who migrated from England in the seventeenth and eighteenth centuries, the imperative to procreate dominated the social attitude toward and organization of sexuality."[99] Like Glenn and others, D'Emilio notes the heteropatriarchal family was at stake:

> The production of children by each conjugal pair was as much a necessity as the planting of crops in the spring, since the cooperative labor of parents and their offspring generated the material goods that sustained life. Fertility in colonial America was extraordinarily high; the average pregnancy rate for white New England Women was more than eight.[100]

As D'Emilio notes that at this time, " '[h]eterosexuality' remained undefined, since it was literally the only way of life,"[101] sodomy crimes were not then used to target non-normative sexual identities, which were still undefined categories. Such crimes would do so subsequently, but for now, they aimed toward preserving settler family structures.

Also noting the high birth rate that occurred in the American colonies, Jonathan Ned Katz has remarked similarly that sexual behavior and the ordering between the sexes within New England colonial societies was framed under a "reproductive imperative."[102] Thus, laws delineated sexual deviancy and punished non-procreative sexual behaviors, such as sodomy and

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[98] *Id.*

[99] John D'Emilio, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970 10 (2d. ed. 1983) [hereinafter D'Emilio, SEXUAL POLITICS].

[100] *Id.* at 14.

[101] *Id.*

[102] Jonathan Ned Katz, THE INVENTION OF HETEROSEXUALITY 37 (2007).

masturbation.[103] And this "reproductive imperative" conveniently reinforced a gender hierarchy that carved out binaries between men and women, and privileged men over women within heteronormative, reproductive terms.[104] Such "procreative order[ing]" essentializes male and female genders within a heteropatriarchal framework resembling—if not identical to—American settler colonialism's race-gender-sexuality grammar.[105] Through heteropatriarchy, this rigid division between male and female genders invigorates elimination and simultaneously produces settler sovereignty. In this way, the policing of sexual behavior and gender roles was not exclusively against Indigenous people but also coded within settler societies as well—*against white settlers themselves*. Here, observers from queer historical studies confirm what Morgensen notes more directly in settler colonial discourse. Indeed, "[s]ettler colonialism is a primary condition of the history of sexuality in the United States."[106] Like D'Emilio's observation that heterosexuality remained undefined as a default perspective, Morgensen remarks similarly that within the realm of sexuality in the U.S., "[s]ettler colonialism is present precisely when it appears not to be, given that its normative function is to appear inevitable and final."[107] By regulating sexuality, what is inevitable and final at this historical juncture was settler heteropatriarchy hidden behind a promotion of the white settler family.

C. SETTLER SEXUALITY PROJECT IN BOWERS

When sexual expression and behavior merged with the concept of sexual identities—more formatively shaping status-based sexual identities familiar to us today—sodomy became more directly used by the heteropatriarchal status quo against sexual minorities.[108] The shift in underlying gender roles and the changing nature of family in the American settler state during the industrialization era and urbanization conflicted with settler

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[103] *Id.* at 38.
[104] *Id.*
[105] *Id.*
[106] Morgensen, *supra* n. ___, at 42.
[107] *Id.*
[108] Kreis, *Policing*, *supra* n. ___, at 411.

heteropatriarchal practices and values.[109] Threatening the family-oriented structure of settler sovereignty was the rise of non-normative sexual identities that challenged notions of settler masculinity and femininity.[110] Criminalizing sodomy then polices both sex acts and the existence of non-normative sexual identities.[111] Such criminalization externalizes heteropatriarchy's role in American settler colonialism's sexuality project. As some have noted, "[p]atriarchy denigrates genders . . . and often criminalizes behavior that deviates from the patriarchal conception of masculinity."[112] With a gendered male-dominant and female-subordinate lens, Western heteropatriarchy has stereotypically read the act of consensual sodomy between two men so that "a person of the male sex who engages in a sexual practice that is labelled 'feminine' will be gendered 'feminine' and thus subjected to subordination like the female sex."[113] Thus, in some legal systems historically, "[a] man who practices sex in the female manner (by being penetrated) has his litigation rights abridged just as if he were a woman."[114] In this vein, Cary Franklin has noted that discriminatory laws against queer identities in the United States, including "[l]aws and policies that banned same-sex intimacy," essentially "enforc[ed] traditional, normative conceptions of sexuality and gender. A central aim of such laws was to channel men and women into a single, normative family form: the heterosexual marital family."[115] Consensual male sodomy disturbs settler heteropatriarchal sensibilities not merely because of the act itself is non-procreative; but also because, with the rise of modern queer sexualities, same-sex sodomy infringes upon mainstream male-female gender norms—the crux of settler power and sovereignty. As noted by Law,

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[109] *See* D'Emilio, SEXUAL POLITICS, *supra* n. ___, at 11-12.
[110] *See id.* (describing the rise of homoerotic relationships).
[111] Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1722 (1993).
[112] Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 Mich. J. Gender & L. 195, 247 (1995).
[113] *Id.* (footnote omitted).
[114] *Id.* (footnote omitted).
[115] Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 827 (2014)

> the censure of homosexuality cannot be animated merely by a condemnation of sexual behavior. Instead, homosexuality is censured because it violates the prescriptions of gender role expectations. A panoply of legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression. The presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity.[116]

Heuristically, the assumption arises that "[r]eal men are and should be sexually attracted to women, and real women invite and enjoy that attraction. Though complex rules govern the ways in which heterosexual attraction may appropriately be expressed, the allure of the opposite sex is pervasively assumed. Conversely, the culture and law presume and prescribe an absence of sexual attraction between people of the same sex."[117] Thus, anti-sodomy laws punish modern queer identities while structuring settler sovereignty and maintaining its sexuality project into our contemporary settler era.

1. Settler Heteropatriarchy in Bowers' *Majority*

In the late-twentieth century, *Bowers v. Hardwick*[118] exposes this ongoing maintenance in the American settler state. Justice Byron White's majority opinion reifies settler heteropatriarchy while criminalizing queerness. The modern queerphobic alarm against sodomy appears readily in *Bowers* when the Court upheld Georgia's anti-sodomy law. When Michael Hardwick challenged Georgia's anti-sodomy statute, his challenge was not merely motivated by a personal sense of injustice from his arrest for engaging in oral sex with another man in his own home, but rather motivated by a pursuit to question the constitutionality of sodomy laws.[119] On that level, we can begin to understand how

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[116] Law, *Gender*, *supra* n. ___, at 196.

[117] *Id.* at 196.

[118] 478 U.S. 186 (1986).

[119] David A. J. Richards, THE SODOMY CASES: *BOWERS V. HARDWICK* AND *LAWRENCE V. TEXAS* 78 (2009).

Bowers relates to settler colonialism by seeing how the decision signifies law's complicity for reinforcing settler heteropatriarchal authority while condemning Hardwick's sexual identity—and by extension, condemning other non-normative sexual identities. The Court's recognition of Hardwick as a self-identified "practicing homosexual" likely equated his identity with sexual conduct in ways that unintentionally helped the Court's reasoning.[120] And subtextually by situating *Bowers* within settler colonialism, the Court's recognition and its anti-gay holding suggest that Hardwick's queer existence and practices violate norms enshrined by American settler heteropatriarchy; by extension, they disturb its ongoing sovereignty. In other words, *Bowers* exemplifies the settler status quo maintaining the violent aspects of its civilizing mission by rendering queer identities criminally as other.

Justice White's majority opinion reinforces the heteropatriarchal structure of settler sovereignty and validates Morgensen's observation that settler heteropatriarchy sets up the conditions for regulating modern sexualities.[121] First, after categorically essentializing Hardwick's sexual identity and using identity as a differentiating component for its decision, the *Bowers* Court emphatically drew its boundaries between intimate sexual acts of "homosexuals" versus "heterosexuals"—privileging heterosexual sex over homosexual sex because of its role and function in the heteronormative family.[122] Thus, no constitutional privacy protections could be afforded to Hardwick's private sexual conduct with another man. As Justice White writes, "none of the rights announced [in prior privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy" because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[123] The Court "queered" sodomy and de-legitimized it against settler heteronormative sex. By using the reproductive imperative to distinguish what was and was not

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[120] *See* Jean L. Cohen, *Is There A Duty of Privacy? Law, Sexual Orientation, and the Construction of Identity*, 6 Tex. J. Women & L. 47, 67–69 (1996).

[121] *See* Morgensen, *supra* n. __, at 35 ("[I]n settler societies in the Americas, sexuality served as a primary locus in projecting settler colonial power"); *see also id.* at 36-37.

[122] *Bowers*, 478 U.S. at 190-91.

[123] *Id.*

protectable sex, the Court's invocation of family harkens back to that invisible baseline of unmentioned heteronormativity that both Katz and D'Emilio have observed from pre-industrial settler America. The difference here is that the Court can now privilege heteropatriarchy specifically through a division between homosexual and heterosexual identities since heteronormativity is no longer an unstated default position of the colonial status quo; partly through the modern scientific and social categorization of sexual identities, heteronormativity has now a pronounced history of privileging.[124] In this way, whether the *Bowers*' majority was aware or not, the decision identified the modern incarnation of the settler family as the protective site of society's engagement with sex while stereotyping "homosexuals" as people outside that familial structure. Invariably then, *Bowers* "otherizes" queer identities through the same, inherited heteropatriarchal stroke that primitivized Indigenous people based on their sexual practices and family structures. Except this time, it was not merely against behavior of a racialized group but targeted more broadly and directly against modern non-normative sexual identities.

Secondly, as another way of distancing queer sexualities from the dominant status quo, the *Bowers* majority also excluded the possibility of entertaining the constitutional value of protecting sodomy practices by opposite-sex—presumably "heterosexual"—couples, but only preferred to single out homosexual sodomy instead. The *Bowers* Court summarily dismissed John and Mary Does' claim from the suit because they lacked standing, which conveniently allowed the majority to ignore heterosexual sodomy practices entirely.[125] With that, *Bowers* only placed "homosexual sodomy" under scrutiny.[126] This gesture harbors several aims for underscoring settler sovereignty. From a constitutional angle, this narrowing of sodomy easily prevents situating sodomy within the area of other constitutionally-protected sex activities between heterosexuals—again avoiding the privacy arena in which cases involving opposite-sex couples have litigated and received protection, and staving off the liberatory potential for queer identities that would destabilize settler heteropatriarchy's hold on

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[124] *See* D'Emilio, SEXUAL POLITICS, *supra* n. __, at 17-20.
[125] *Bowers*, 478 U.S. at 188 n. 2.
[126] *Id.* at 190.

gender norms. In sodomy cases, according to Kreis, "[t]he danger in recognizing that sexual intimacy between two men or two women might serve a similar purpose as a marriage exposed two problems for the supremacy of masculinity—it challenged marital-related sex stereotypes and tapped into the fears that cropped up nearly a century prior that sex and gender roles were not innate and fixed."[127] At the same time, the Court's denial to discuss John and Mary Doe also strengthens the essentialization of homosexual identities with a traditionally-regarded deviant sexual practice; by framing the sodomy act at issue as, "homosexual sodomy," the Court can deliberately float the notion that sodomy as assumed to be predominately practiced by homosexuals is problematic and so something definitely troubling exists about "homosexual sodomy."[128] The Court's avoidance to opine on John and Mary Doe's sex practices privileges mainstream heteronormative sexual identities over queer identities and differentiates between heterosexual and homosexual sodomy—and that difference is situated perhaps within an identity that disturbs traditional heteropatriarchal notions of gender roles. Another possibility could be historical; sodomy has been practiced by opposite-sex couples as a non-reproductive sex act.[129] A ruling on sodomy without "heterosexual" or "homosexual" labeling could go to a broader stance on the settler reproductive imperative. But narrowing it in the realm of homosexual conduct would, again, suggest privileging of heterosexual identities. So not discussing heterosexual sodomy leaves the Does' sex act in a differentiated limbo. Thus, again in *Bowers*, upholding Georgia's anti-sodomy law against Hardwick ultimately maintained settler heteropatriarchy's supremacy.

Thirdly, *Bowers* not only reveals heteropatriarchy at the crux of settler sovereignty and as the motivating point to eliminate—specifically criminalize—queer identities; the decision also illustrates heteropatriarchy as the structural grammar of settler sovereignty. As is, the binary classification of heterosexual and homosexual identities and privileging of heterosexual

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[127] Kreis, *Policing*, *supra* n. __, at 450-51 (referencing Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. Rev. 263, 308 (1995)).

[128] *See* Halley, *supra* n. __, at 1722.

[129] Law, *Gender*, *supra* n. __, at 201.

identities over homosexual ones reveal the prevailing control of settler status quo over sexuality in *Bowers* and the sexual-gender hierarchy that must persist. Once the Court invokes the primacy of the heteropatriarchy family and consequentially excludes queer identities from constitutional privacy protections, it also makes further arguments that reinforce why "homosexual sodomy" would not be protected. Hence, *Bowers* reveals the inherited and ongoing sexuality project of American settler colonialism.

On the surface, the Court's curious (and sometimes inaccurate)[130] appeal to history and tradition serves to erase—or again eliminate—queer identities from the settler state. Yet, there is more. The Court uses both legal authority and history to incant the systemic animus against queer identities and, inversely, retrench settlers' heteropatriarchal sovereignty. In regards to "extend[ing] a fundamental right to homosexuals to engage in acts of consensual sodomy," Justice Whites' reason to decline is all-too "obvious" because "[p]roscriptions against that conduct have ancient roots."[131] Such proscriptions are only "obvious" because of tradition—a hint summarily at structural bias. But Justice White ventures further. He recalls how sodomy was criminalized during the earlier settler era of the United States: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."[132] To add to his historical recollection of sodomy crimes in the United States, Justice White not only references legal scholarship but cites to historical criminal sodomy statutes as support. Here, this moment in *Bowers* is performative; it demonstrates queer theorist Judith Butler's observations about the power of citational legacies: "[T]he judge who authorizes and installs the situation he names (we shall call him "he," figuring this model of authority as masculinist) invariably *cites* the law that he applies, and it is the power of this citation that gives the performative its binding or conferring power."[133] Justice White's first citational footnote—footnote 5—lists eleven "[c]riminal sodomy laws in effect in

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[130] *See Lawrence v. Texas*, 539 U.S. 558, 567-72.
[131] *Bowers*, 478 U.S. at 192.
[132] *Id.*
[133] Judith Butler, *Critically Queer*, 1 GLQ 17, 17 (1993) [hereinafter Butler, *Critically Queer*].

1791."[134] If that were not enough, however, Justice White then recounts that "when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws," and follows with another supporting footnote list, in footnote 6, that exhibits 38 "[c]riminal sodomy statutes in effect in 1868."[135] By design, *Bowers*' statutory catalogues erect settler sovereignty as a present, ongoing heteropatriarchal legal structure that punishes queer identities. As Butler posits further, "[a]nd though it may appear that the binding power of [the judge's] words is derived from the force of his will or from a prior authority, the opposite is more true: it is *through* the citation of the law that the figure of the judge's 'will' is produced and that the 'priority' of textual authority is established."[136] With Justice White as the Court's heteropatriarchal voice here, his citations performatively conjure the structural sovereignty of settler heteropatriarchy. Thus, his structural reasoning are tied to settler sovereignty in both heteropatriarchal norms and state legal authorities, which legitimizes the Court's refusal to "discover new fundamental rights imbedded in the Due Process Clause."[137] In *Bowers*, the civilizing mission of American settler colonialism emerges and constructs a heteronormative and patriarchal state in which stable ideas of masculinity and femininity are entrenched in order to further subordination. Queer and non-normative sexualities undermine that order and so discovering "new fundamental rights" for homosexuals, a phrase akin to the obfuscation of special rights language,[138] would seem threatening. Here, the Court stands back upon the baseline status quo, juridically revealing the structure of settler heteropatriarchy while criminalizing sodomy, which essentially criminalizes queerness.

2. Colonizing Aspects of the Bowers *Dissents*

Though *Bowers*' dissenting Justices would reach a favorable outcome for queer sexualities by decriminalizing sodomy, their rationale also reflects the settler state's civilizing sexuality project.

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[134] *Bowers*, 478 U.S. at 192 n. 5.
[135] *Id.* at 193 n. 6
[136] Butler, *Critically Queer*, *supra* n. __, at 17.
[137] *Bowers*, 478 U.S. at 194.
[138] *See e.g.*, Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 Touro L. Rev. 347, 408 (2009).

Both dissenting opinions try to dissociate from the heteropatriarchal settler-nativist structure that Justice White conjures. But most of these dissociations from settler heteropatriarchy, however, avoid any deeper criticisms of gender hierarchies reinforced by sodomy laws, nor do they, for the most part, exist as anti-stereotyping rationales that promote queerness directly. Rather, Justices Harry Blackmun's and John Paul Stevens' strategies here accept settler hierarchy and direct attention toward settler nationalism. Both dissents remove the practice of sodomy from immediate heteropatriarchal alarm; and in turn they relocate sodomy directly within the set of normative functions for individual personhood that they believe the state lacks authority to invade. As a result, their reasoning brings sodomy under the protective realms of privacy and liberty that would make anti-sodomy laws unconstitutional. But the thrusts of the dissents leave the animating norms of settler heteropatriarchy untouched. Instead, they offer the blueprint for colonizing queerness.

Central to the dissents' discussion is what sodomy represents for an individual's self-defining potential, whether through notions of privacy or liberty. Although Justice Blackmun's dissent is steeped in Hardwick's privacy concerns while Justice Stevens' dissent is conceptually focused on Hardwick's liberty rights,[139] both dissents examine the degree of governmental intrusiveness with the purpose of reserving individuals' opportunities to make choices that underscore self-determination—what Sonia Katyal and some others have framed as "sexual self-determination."[140] Whether through privacy or liberty, the *Bowers* dissents both draw constitutional perimeters around choices regarding intimate associations in order to further individual choices that foster personhood. In this way, the dissents would have decriminalized non-heteronormative sexual conduct and consequently liberated queer identities. But such appearances on the surface mislead. By being heavily concerned with the regulatory boundaries of sex practices, using privacy to shield an individual's freedom to sexually self-determine, the dissents are

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[139] *See* Nan D. Hunter, *Living with* Lawrence, 88 Minn. L. Rev. 1103, 1106–09 (2004).

[140] Sonia Katyal, *Exporting Identity*, 14 Yale J.L. & Feminism 97, 170–71 (2002).

also working within settler dynamics. Both Justice Blackmun's and Stevens' discussions are still rationalizing within settlers' eliminationist logic. For instance, Nan Hunter remarks that, despite Justice Blackmun's universalist themes in critiquing the majority's refusal to observe that anti-sodomy laws impinge upon an individual's choices for intimate associations,

> implicit in the logic of the Blackmun dissent is the acceptance of the majority's frame. When he argues that the law touches on acts that are central to identity and self-definition, he, too, is using homosexuality as his reference point. It seems unlikely that Blackmun would have argued that sexual conduct was self-definitional if the case had been about heterosexual conduct.[141]

Similarly, others have also found that despite intentions "to show and to seek respect for those on behalf of whom he wrote," Justice Blackmun's dissent manufactures a "minoritizing discourse" on the " 'homosexual personality' " because he assumes that "[p]rohibiting 'homosexual sodomy' violates the right to privacy because it is for homosexuals expressive of a central facet of being."[142] From here, "in relying on the personhood conception of privacy, this difference approach essentializes: it perpetuates a conception of homosexuality which ascribes some sort of characterological essence to the homosexual by virtue of his sexuality."[143] The moment is slippery as Jeb Rubenfeld comments that in the *Bowers* dissents, "[p]ersonhood merely attempts to do away with the ensuing stigmatization by ensuring that each group has identical legal standing and rights."[144] But differences also lead to hierarchy: "[T]he impulse toward hierarchy actually precedes and produces the differentiation in identities."[145] And in this fashion, Rubenfeld posits that "personhood, at the instant it proclaims a freedom of self-definition, reproduces the very constraints on identity that it purports to resist. Homosexuality is but one

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[141] Hunter, *supra* n. __, at 107.
[142] Cohen, *supra* n. __, at 80.
[143] *Id.*
[144] Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 781 (1989).
[145] *Id.*

instance of this phenomenon."[146] Clearly, "to protect the rights of 'the homosexual' would of course be a victory" but to claim that "homosexuality is essential to a person's identity is no liberation but simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies 'faggots.' "[147] Though liberatory in rights, Justice Blackmun's dissent returns us back to settler hegemony in practice.

Additionally, the idea that separation from state intrusion preserves personal autonomy resonates in American settler history. The theme of self-determination, aided either by privacy or liberty in the *Bowers* dissents, resemble the drive for settler self-rule and independence that was part of white settlers' process of liberating themselves from the metropole and the beginnings of indigenizing themselves to conquered lands. Recall Veracini's observation that "[s]ettler projects are recurrently born in a vacuum of empire that is intentionally sought, and in a displacement that is associated with a determination to establish unique political settings[.]"[148] Autonomy and self-rule begins with separation from the metropole: "[O]n the one hand, it is at the origin of the settler project, the moment when a collective body 'moves out' in order to bring into effect an autonomous political will; on the other hand, it is also its outcome, the moment when a sovereign polity begins implementing actual jurisdiction."[149] In fact, "[t]he recognition of a settler autonomous capacity and a consequent need to accommodate it is a passage that would be repeated numerous times in consolidating settler contexts elsewhere, a stance that would similarly shape developments way beyond the limits of the future United States."[150] Justice Stevens' dissent directly taps into this narrative. As he ties the liberty interests of the Court's privacy cases to Hardwick's liberty interests in sodomy, he finds these cases facilitate a person's right to execute "certain unusually important decisions that will affect his own, or his family's, destiny" and that the Court's prior

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[146] *Id.*
[147] *Id.*
[148] Veracini, SETTLER COLONIALISM, *supra* n. ___, at 58.
[149] *Id.* at 63.
[150] *Id.* at 65.

discussions of these decisions "brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[151] Through Justice Stevens' elucidation, the liberty of being let alone for self-determination's sake has been part of the concept of American freedom and exemplifies settler nationalism in his *Bowers* dissent.[152]

To be sure, self-determination is conceptually formative and empowering—especially in light of historical subordination. When it comes to intimate associations and sex, the dissents' recognitions that self-determination ought to be universally applicable to non-heteronormative identities seem liberatory. But because self-determination conceptions are distinctly cabined within American settler exceptionalism here, the moments of recognition here are not revolutionarily decolonizing; they siphon back to reflections of settler structure and hierarchy. In Jasbir Puar's study on homonationalism, "[t]he rhetoric of freedom is also of course a mainstay in philosophies of liberal democracy and is indeed a foundational tenant of American exceptionalism."[153] Saito is similarly cautious about the settler nationalist implications of inclusion through American constitutional law, noting that

> if one accepts that the United States is—still—a colonial settler state, it follows that the primary purpose of this state's legal system would be to sustain the territorial claims and the relationships of privilege and subordination that ensure control of political, economic, and social institutions by the settler class. Simultaneously, however, the legal system must shore up the ideological justifications of settler society, framed in terms of extending the "American values" of freedom, democracy, and human rights to the world at large.[154]

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[151] *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting).
[152] *Accord* Saito, *Tales of Color*, *supra* n. ___, at 94.
[153] Puar, *supra* n. ___, at 23.
[154] Saito, *Tales of Color*, *supra* n. __, at 65.

In order to preserve an accompanying empire state of mind that extends its territorial drive, the settler state frames its territorial work modernly in the most positive, self-legitimizing, civilized light. Self-determination acheives this framing. While self-determination has an "enduring connection to national liberation," its twentieth-century incarnation, as Adom Getachew notes, also functions to preserve racial and colonial hierarchies, consequently privileging white supremacy.[155] Joseph Massaud observes more recently that "the dominant form of self-determination appear to be a principle designed to limit the claims of anticolonial nationalism and to enhance the claims of colonialism, especially the settler-colonial variety and its 'right of conquest.' "[156] Its alignment with American nationalism ideals and its general malleability presents the settler colonial state with a method of reinforcement.

After *Bowers*, when self-determination indeed became a reason for finding anti-sodomy laws unconstitutional in *Lawrence v. Texas*,[157] Puar notes that "[i]ndividual freedom becomes the barometer of choice in the valuation, and ultimately, regulation, of queerness."[158] Part III, *infra*, will explore this notion more extensively. Echoing Rubenfield's remarks about *Bowers*, Puar finds that differentiation for non-normative sexualities leads to hierarchy: "Sexual deviancy is linked to the process of discerning, othering, and quarantining terrorist bodies, but these racially and sexually perverse figures also labor in the service of disciplining and normalizing subjects worthy of rehabilitation *away from these bodies*, in other words, signaling and enforcing mandatory terms of patriotism."[159] The connection here in the *Bowers* dissents between sodomy and nationalistic self-determination limits the agency that Justices Blackmun and Stevens might have intended for non-normative queer identities. Specifically, what the *Bowers* dissents offer are blueprints for colonizing queerness, for transferring queer identities into the settler state, rather than any liberation.

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[155] Adom Getachew, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION 41-52 (2019).

[156] Joseph Massaud, *Against Self-Determination*, 9 Humanity J. 161 (2018).

[157] *See Lawrence*, 539 U.S. at 564.

[158] Puar, *supra* n. __, at 22.

[159] *Id.* at 38.

Implicitly, they reveal the settler civilizing mission despite inclusive and democratic ideals.

Between *Bowers*' majority and dissenting opinions, we see two sides of the settler structure—a nativist one that subjugates queer identities against a white heteropatriarchal supremacy and another that potentially civilizes them through settler democratic values. What is missing throughout *Bowers* for inciting the colonizing of queerness is—as we will see in Part III—some significant impetus in the settler script of colonization to begin that transfer. Thus, *Bowers* sustains sodomy crimes. But in subsequent decisions, we see precisely what ignites the transfer of queerness into the American settler state.

III. QUEER TRANSFER INTO THE AMERICAN SETTER STATE

A. CIVILIZING MISSION AND IMPROVABILITY

When land occupation is no longer contested but must be sustained indefinitely, elimination does not disappear; instead, colonization embodies a "continuity through time" that replicates the structural hierarchy of settler dominance while elongating above the historical capture of territory.[160] In this fashion, Wolfe's elaboration that in the settler colonial experience, "[t]he colonizers come to stay—invasion is a structure not an event" becomes more evident.[161] Settler preoccupation to make conquest permanent explains why and how the United States has never decolonized:

> [S]ettler societies, including the United States, cannot continue to function as such without continuously enforcing their jurisdiction, political and military, over their claimed territories and doing everything in their power to ensure that their assertion of sovereignty is accepted as legitimate within the larger global order, notwithstanding any

[160] Wolfe, *supra* n. __, at 390.
[161] *Id.* at 388.

> illegalities involved in the acquisition of the lands at issue.[162]

The projects of elimination on a perceived *terra nullius* is regenerative and continual.[163] The suppression of non-settlers broadens from outright violence toward regulation and colonization.

Within colonial systems internationally, Antony Anghie considers the "civilizing mission" as fundamental to colonialist ideologies, describing it as "the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe."[164] Although settler colonialism differs from extractive colonial systems in terms of the complexity of colonizing relationships,[165] we have seen through regulating sexuality that settlers regard "civilizing" as their colonial project as well.

Indigenous and exogenous "Others" are subjects of this civilizing mission: "A successful settler society," according to Veracini, "is managing the orderly and progressive emptying of the indigenous and exogenous Others segments of the population economy and has permanently separated from the abject Others, drawing internal and external lines that cannot be crossed."[166] Within law and politics, Saito agrees: "Settler states establish, maintain, and protect their hegemony by exercising complete control over Indigenous peoples, non-Indigenous Others, and 'deviant' members of the settler class."[167] Surprisingly, however, this hegemonic process does not always appear externally oppressive, but is framed within rationalized desires for democratic progress that legitimizes settler sovereignty: "Their exercise [of complete control] remains in constant tension with the

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[162] Saito, *supra* n. __, at 28 (referencing Natsu Tayler Saito, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW 136 (2010)).

[163] *See* Veracini, SETTLER COLONIALISM 3.

[164] Antony Anghie, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3 (2007).

[165] Veracini, SETTLER COLONIALISM, *supra* n. __, at 16.

[166] *Id.* at 28.

[167] Saito, *Tales of Color*, *supra* n. __, at 27.

settlers' ideological justifications for that sovereignty—their superior civilization, their democratic and humanitarian values, the leading role they play in their own narrative of progressive human development."[168] Within the settler sexuality project, Justice Stevens' *Bowers* dissent exhibits such aspects when he invigorates choices regarding consensual sodomy with individual liberty concepts enshrined constitutionally.[169] As we will see in *Lawrence v. Texas*, the trajectory of such individual liberty framing can steer us back to a realm of settler heteronormativity. Precisely, this recursiveness makes the sustaining of settler sovereignty—that elimination—perpetual: "[S]ettler society is always, in Deriddean terms, a society 'to come,' characterized by the *promise* rather than the practice of a truly 'settled' lifestyle."[170] Thus, domestication, or this civilizing mission, requires settlers to continually court non-settlers but never fully include them at the expense of settler dominance or supremacy. "On the one hand," Saito describes, "settler society is presumed sacrosanct and the inclusion of Others cannot be allowed to corrupt it; on the other, it needs to demonstrate, continuously, that humanity at large will benefit from accepting its social and political structures and internalizing its worldview."[171] The phenomenological tension between perceived sameness and difference of settlers and non-settlers has allowed settlers to open and constrict the pores of this concurrent process in order to always keep the non-setters under settler paradigms but also sufficiently distanced.[172] From this directed tension, settlers are able then to colonize others and extend their civilizing mission indefinitely.

Crucially, the civilizing mission is motivated by perceptions of non-settlers' improvability. "[A]s the indigenous/exogenous opposition becomes meaningless, the representational regimes of settler colonialism see either 'improvable' or 'non-improvable.' "[173] The settler state must recognize improvability in non-settlers and the narrative of improvability functions as a redemptive one.

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[168] *Id.*
[169] *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).
[170] Veracini, SETTLER COLONIALISM, *supra* n. __, at 23 (footnote omitted).
[171] Saito, *Tales of Color*, *supra* n. __, at 28.
[172] *See id.* at 23.
[173] *Id.* at 29.

Outsiders to the settler world—i.e. "[p]eople needing reform"—invariably "would access the population . . . provided that they are deemed capable of eventual admission within the settler section of the population economy."[174] Conversely and predictively, however, "[e]xogenous Others that are perceived as unimprovable are permanently restricted entry: settler nativist agitation sees to it."[175] From a civilizing perspective, this kind of selection criteria—such ability to improve (or perhaps, the ability to be redeemed)—is what settlers impose on who can transfer into the settler state. What was missing in *Bowers* but appears saliently in post-*Bowers* pro-LGBTQ decisions is how the Court began to perceive that sexual minorities are indeed improvable—are capable to be civilized according to settler values, which is the inciting requirement for colonization. In the American settler sexuality project, that improvability can be characterized by degrees of LGBTQ alignment with the white, heteropatriarchal settler class.

B. *RECOGNIZING QUEER IMPROVABILITY IN* ROMER

Buoyed by the legal and political changes in LGBTQ visibility after *Bowers*, the Supreme Court's 1996 decision, *Romer v. Evans*,[176] evinces settler mainstream's recognition of improvability in sexual minorities that conditioned the civilizing and colonizing of certain queer identities. The rise of gay and lesbian political issues in the national consciousness during the 1990s and the increasing mainstream visibility of LGBTQ people helped decrease national intolerance for non-heteronormative sexualities. Political scholar Stephen Engel recounts how "[t]he unprecedented visibility of gays and lesbians at the 1992 Democratic Convention and the prevalence of the 'gay issue' in the election, especially in relation to the military ban, brought the movement into the realm of mainstream politics."[177] Of course, so too was the political capital raised from gay constituents during that campaign year demonstrating gay and lesbian political

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[174] *Id.* at 38.

[175] *Id.*

[176] 517 U.S. 620 (1996).

[177] Stephen M. Engel, THE UNFINISHED REVOLUTION: SOCIAL MOVEMENT THEORY AND THE GAY AND LESBIAN MOVEMENT 58 (2001).

clout.[178] In parallel, gay cultural visibility in film, television, popular music, and theater expanded and coalesced during this time with some positive effects.[179] These shifts mirrored changing public attitudes toward sexual minorities: "[V]isibility promotes and reflects greater tolerance of homosexuality; homosexuality is considered a legitimate topic of exploration, as demonstrated by the proliferation of gay and lesbian studies at the university level as well as the increased portrayal of gays on the small and large screen."[180] Some of this visibility was tied to activism and media coverage of the HIV/AIDS crisis of the mid-1980s to the 1990s as well.[181] To some degree, the thought of including queer sexualities in public life sustained more robust conversations in issues such as open military service, marriage, and anti-discrimination ordinances during the 1990s. Though the results were decidedly mixed, the cultural and political visibility of queer lived experiences evolved and endured in the post-*Bowers* years so that "gays and lesbians may have received new prominence in national electoral politics."[182]

In *Romer*, the Court's finding of improvability in queer identities coincides with this period of changing national gay tolerance. Working within *Bower*'s shadow but also with new-found political and cultural buoyancy for sexual minorities, the *Romer* Court examined the constitutionality of Colorado's referendum Amendment 2. Voted into effect by Colorado citizens in 1992, Amendment 2 officially denied any status-based legal protections associated with "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[183] Amendment 2 had been campaigned into law in critical response to various municipal ordinances that had protected against sexual orientation

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[178] *See* Urvashi Vaid, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 126 (1996).

[179] *See* Engel, *supra* n. __, at 58-59.

[180] *Id.* at 58.

[181] *See* Craig A. Rimmerman, THE LESBIAN AND GAY MOVEMENTS: ASSIMILATION OR LIBERATION? 46-49 (2d ed. 2015) [hereinafter Rimmerman, THE LESBIAN AND GAY MOVEMENTS].

[182] Engel, *supra* n. ___, at 54.

[183] *See Romer*, 517 U.S. at 623-26.

discrimination.[184] But writing for the majority, Justice Anthony Kennedy gauged that the status quo elimination of sexual minorities in Amendment 2 was constitutionally "far reaching."[185] Judged "[s]weeping and comprehensive," Amendment 2 was campaigned into law based on a "special rights" argument that was misleading.[186] Thus, Amendment 2 could not survive rational basis.[187]

Amendment 2's prohibitions against protecting sexual minorities externalizes the "ancient," spiteful moralizing against homosexual sodomy that Justice White had referenced *Bowers*. Amendment 2's proponents distorted the sex practices of LGBTQ identities as morally deviant, paralleling the primitivized sexual othering of Indigenous practices settlers used to justify elimination.[188] In their mischaracterizations, gays were dehumanized, appeared sexually monstrous, and were pathologically entrenched in self-destructive behavior.[189] However, the *Romer* majority identifies this rhetoric as animus: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[190] In his view, all of the mischaracterizations of sexual minorities leads to Amendment 2 as "a classification of

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[184] *See id.* at 623-25; *see also* Craig A. Rimmerman, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 141-44 (2002) [hereinafter Rimmerman, FROM IDENTITY TO POLITICS].

[185] *Romer*, 517 U.S. at 627.

[186] *Id.*; *see* Rimmerman, FROM IDENTITY TO POLITICS, *supra* n. __, at 144 (noting that the campaign for Amendment 2 was crafted with "special rights" argument).

[187] *Id.* at 635.

[188] *See* Martha C. Nussbaum, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 102 (2010) (observing that despite campaigning on a slogan of "Hate is not a family value," Amendment 2 campaigners also made sure that "material about the degenerate lives and horrible sex practices of gays and lesbians were always present").

[189] *Id.* at 94 (excerpting Amendment 2 campaign pamphlet, which included statements such as "You may already know that the sexual practices of gays differ drastically from those of most Colorado's population" and "Gays have been unwilling (or unable) to curb their voracious, unsafe sex practices in the face of AIDS.").

[190] *Romer*, 517 U.S. at 634.

persons undertaken for its own sake," which violates equal protection.[191]

The political and national visibility of LGBTQ identities likely helped Justice Kennedy propose a convincing articulation of harm. Signaling perceived improvability—even in the shadow of *Bowers*—*Romer* is a moment in which sexual minorities are *slightly* humanized. Here, *Romer*'s signaling is subtle—if not subterranean—but its pro-gay holding coincides with a socio-historical context where national gay and lesbian activism had created some progressive advances that appealed to strong democratic sensibilities. Even controversies that did not eventually bring about major change to queer lived experiences during the 1990s—such as Don't Ask, Don't Tell—seem to evince moments where "Democrats and liberals tended to become more pro-gay."[192] Observing "elite-driven" components of this shifting tendency, some scholars have found that elite influences led to greater public evolution on LGBTQ issues during this time, especially as issues were being framed around egalitarian and moral traditionalist values.[193] Here, the assimilationist tactics of LGBTQ movement activism could have framed such visibility in ways that also positively undergirded issue evolution and underscored the improvability of queer identities consistent with *Romer*'s holding. For instance, during the 1990s, assimilationist tactics existed in some areas of gay rights activism, quite notably in the AIDS movement with the "de-gaying" of the crisis,[194] and with those who represented such activism whether behind-the-scenes or as targeted supporters.[195] William Eskridge has noted that "social prejudice against a religious or sexual minority aims at suppression or erasure of the minority" and that in response, assimilation is not an atypical tactic.[196] While the drive to eliminate is "extreme," the "more moderate goal is assimilation,

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[191] *Id.* at 635.

[192] Jeremiah J. Gerretson, THE PATH TO GAY RIGHTS: HOW ACTIVISM AND COMING OUT CHANGED PUBLIC OPINION 39 (2018).

[193] *Id.* at 39-43.

[194] *See e.g.*, Rimmerman, FROM IDENTITY TO POLITICS, *supra* n. ___, at 96-98.

[195] Engel, *supra* n. ___, at 61.

[196] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2421 (1997) [hereinafter *"Coming Out"*].

where the minority renounces its distinctive nomic values and conforms at least in part to majority beliefs and practices."[197] As Engels and others have noted, national organizations that achieved notoriety on gay rights issues during this time, "did not necessarily have staffs or constituents which represent the diversity inherent in the sexual minority communities. Demographically speaking, individuals involved in political lobbying efforts have tended to be highly educated, middle- and upper-class, and white."[198] Whether intended or not, the effect is assimilative or mainstreaming. According to Engel, "the national voice(s) of the gay and lesbian community, or at least those that mainstream media venues will hear, tend to reinforce this atypical image of the community along class, gender, and racial lines" and "[t]he constrained image of the gay subject as white and middle-class also enables the heterosexual community to ignore those individuals who do not fit this stereotype. Visibility is gained at the exclusion of potential members of the movement."[199]

In *Romer*, the most telling sign that pairs assimilation with improvability appears not in the majority opinion but in Justice Antonin Scalia's dissent. Anthony Kreis remarks that Justice Scalia's dissent "reflect[s] the rhetoric of the 1990s that sexual minorities are a privileged elite class" and that the initial reference to the elite class at the outset of the dissent was "an insightful interest-convergence argument as to why [the majority] felt comfortable overturning Amendment 2."[200] Thus, Justice Scalia's opposition to *Romer*'s pro-gay holding draws out the majority's motivations—what the majority realizes about sexual minorities here despite affirming sodomy criminalization a decade prior. Eskridge recounts Justice Scalia's reference to *Kulturkampf* in his *Romer* dissent as figuratively portraying "a culture clash between fundamentalist religious and pro-gay nomoi"[201] and more broadly indicating "a state struggle to assimilate a threatening minority,

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[197] *Id.* at 2421.
[198] Engel, *supra* n. ___, at 60
[199] *Id.* at 60-61.
[200] Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 Law & Inequality 117, 147-48 (2013).
[201] Eskridge, *"Coming Out," supra* n. __, at 2413-14.

or to force conformity upon it."[202] Indeed, Justice Scalia vents that the *Romer* majority "ha[d] no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil."[203] His acerbic references to "elite class" insinuates that the majority perceives gay identities can be favored by raising some inciting degree of alignment between sexual minorities and the status quo. Read against *Bowers*, that complicity indicates perhaps a perceived improvability of sexual minorities based on assimilation: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."[204] Once again, he exposes the views of that elite class: "How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools."[205] He likens progressive issue evolution on sexual orientation discrimination to the thoughts and positions of a narrow but exclusive lawyer class:

> [I]f the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.[206]

Thus, his affirmations about "special rights" are amplified, suggesting preferential treatment for gays and lesbians, especially as *Bowers* had not been overturned.[207]

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[202] *Id.*

[203] *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (internal citations omitted).

[204] *Id.* at 652.

[205] *Id.*

[206] *Id.* at 653 (referencing Bylaws of the Association of American Law Schools, Inc. § 6–4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools).

[207] *See e.g.*, *id.* at 641.

Notably, Justice Scalia references the kind of predominant gay visibility of that era, which scholars have described as an assimilated "mainstream" gay image that "tends to be that of the middle-class white gay male."[208] This image had profound effects of changing how settler sovereignty likely regarded sexual minorities because "[t]he image of the middle-class white gay male is that precise level of visibility which the heteronormative patriarchy can accept without becoming threatened."[209] Additionally, such alignment also uplifts. Kreis elaborates that "[Scalia's] intent was surely to highlight that the LGBT community is a powerful and visible force within the legal community and that visibility makes it easier for his fellow justices to grant rights to a group of people with whom lawyers typically associate."[210] Assimilation minimizes the primitivizing sexual deviancy that Amendment 2 proponents tried to conjure in sexual behavior between gay men. They, and other sexual minorities, can now visibly join the American lawyer class and teach without fear of discrimination at reputable American law schools; in essence, they are now uplifted and improved because of some alignment with the status quo: "Bringing Scalia's point to its logical end, LGBT people typically look and behave just as privileged, well-to-do lawyers look and behave."[211] In essence, they do not threaten the settler class but can be brought into its elite sectors and professions. Sexual minorities may no longer threaten the status quo as much because they can become civilized within mainstream American society, which occasions constitutional protections that further democratic progress. They are accordingly perceived as improvable.

C. *COLONIZING QUEER INTIMACY IN* LAWRENCE

In part, Justice Scalia's *Romer* dissent identifies, what Kreis calls, "the merger of elite legal interests and the White privileged LGBTQ community's interests" that eventually overturned *Bowers*.[212] In the settler colonialist context, that merger was a recognition of queer improvability that incited *Lawrence*'s

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[208] Engel, *supra* n. __, at 59.
[209] *Id.* at 61
[210] Kreis, *Gay Gentrification*, *supra* n. __, at 148.
[211] *Id.*
[212] *Id.* at 149.

decriminalization of consensual same-sex sodomy in 2003. Extending the liberty and individual self-determination conceptualizations from Justice Stevens' *Bowers* dissent, Justice Kennedy's *Lawrence* majority opens with a libertarian recalibration of the queer sex issue that establishes a more civil and considerate regard for such non-heteronormative sexual practices: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."[213] Referencing how the *Lawrence* plaintiffs were arrested for same-sex intimacy in the home also harkens to Justice Blackmuns' privacy arguments in *Bowers*.[214] Something has now improved to justify this re-envisioning of same-sex intimacy. *Lawrence* is now ready to explore how "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"[215]—including consensual same-sex sodomy. But the overturning of *Bowers* does not decolonize. Rather, as this section will explore, *Lawrence* plays into the colonizing trappings of self-determination exhibited previously in the *Bowers*' dissents. Indeed, with democratic values projected, the protection of queer sex initiates as part of settlers' contemporary sexuality project.

Essentially reminding us of queer improvement, Justice Kennedy identifies "an emerging awareness" developing within law regarding privacy, sex, and same-sex behavior.[216] A rising trend has begun to evince how "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[217] The American Law Institute and some states have, since the mid-twentieth century, disfavored criminally penalizing private, consensual sexual acts.[218] Even internationally, a new regard toward decriminalizing same-sex conduct has emerged—especially in western, European venues. After exploring United Kingdom and European human rights precedents that favorably treated consensual same-sex sodomy,

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[213] *Lawrence*, 539 U.S. at 562; *see also Bowers*, 478 U.S. at 217-18 (Stevens, J., dissenting).
[214] *See id.* at 206 (Blackmun, J., dissenting).
[215] *Lawrence*, 539 U.S. at 562.
[216] *Id.* at 572-73.
[217] *Id.* at 572.
[218] *Id.*

Justice Kennedy's suggestively circles back to the United States to indicate that only four of 13 states that criminalize consensual sodomy enforce only against same-sex behavior, and that generally in most states where same-sex and opposite-sex sodomy are still penalized, "a pattern of nonenforcement prevails"[219] Even Texas, he notes, has conceded that since 1994 no one has been prosecuted for such acts.[220]

Such references to Western international courts and changing legal attitudes have a cosmopolitan, civilizing effect because, according to Katherine Franke, "[*m*]*odern* states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. *Pre-modern* states do not."[221] Under Stewart Chang's reading of *Lawrence*, Justice Kennedy's reach toward European examples demonstrates in part that the "recognition of gay rights has often been framed as an issue of modernity and progress."[222] From a settler colonial perspective, both Chang and Franke seem to illustrate Veracini's theory that part of the settlers' colonialism project involves "the Europeanization" of themselves on *terra nullius*—that inward drive to replicate a superior notion of themselves by modeling a civilized template.[223] Concurrently, *Lawrence*'s references to international human rights cases from Europe also indicates perceived improvability. While international examples may internally pressure the Court to "catch up" to other modern courts regarding same-sex sodomy, they also seem to conveniently suggest that queer sexualities also embody humanizing potential—unlike the settler status quo's historical and morally-driven desires to subordinate queer sexualities. This new "emerging awareness" invigorates a revision for tolerating non-heteronormative sexual conduct in the United States by marking queer identities more redeemable than previously imagined.

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[219] *Id.* at 573.
[220] *Id.*
[221] Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 Colum. Hum. Rts. L. Rev. 1, 5 (2012) [hereinafter Franke, *Dating the State*]).
[222] Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. Int'l L.J. 309, 312 (2014).
[223] Veracini, SETTLER COLONIALISM, *supra* n. __, at 21-22.

In his *Lawrence* dissent, Justice Scalia also alludes to this emerging awareness, but acerbically, as assimilative gesturing in *Lawrence*. Extending his harangue from *Romer*, he reduces the *Lawrence* majority to a "product of a law-profession culture":

> I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.[224]

Of course, that earlier opinion was *Romer*. Reading together *Lawrence*'s majority and Scalia's dissent here, what emerges is the majority's civilizing motivations in re-envisioning same-sex sodomy.

Once Justice Kennedy has neutralized the primitive associations with consensual same-sex behavior and elevated its regard in a modernizing context, consensual same-sex sodomy can now receive protection from *Casey*'s privacy jurisprudence.[225] *Lawrence* enacts the type of colonizing noted by Veracini as a "transfer by assimilation."[226] With Indigenous populations, assimilation describes "a process whereby indigenous people end up conforming to variously constructed notions of settler racial, cultural, or behavioural normativity."[227] Going deeper into this idea, Veracini describes that "it is the settler body politic that needs to be able to absorb the indigenous people that have been transformed by assimilation."[228] In that way, the transfer is always at the hands of the settler majority because "successful assimilation is never dependent on indigenous performance."[229] As Veracini and Saito have both demonstrated, settlers' need to

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[224] *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (citing *Romer*, 517 U.S. at 653 (Scalia, J., dissenting).
[225] *Lawrence*, 539 U.S. at 573-74.
[226] Veracini, SETTLER COLONIALISM, *supra* n. __, at 37-39.
[227] *Id.* at 38.
[228] *Id.*
[229] *Id.*

include others is part of their drive to dominate and civilize.[230] Indeed, assimilation never achieves inclusion but serves ultimately to subordinate. Veracini confirms this aspect when revealing that "[t]he need to assimilate indigenous people can . . . coexist with the aim of unassimilable difference," which "explain[s] why assimilation is never ultimately successful."[231] In this way, assimilation permits colonization. In *Lawrence*, transfer by assimilation is precisely how queerness is colonized.

To be sure, the decriminalization of consensual sodomy in *Lawrence* is an important LGBTQ holding. Yet assimilationist tactics from *Romer* extend to *Lawrence* to civilize and align consensual same-sex behavior with settler society. Such conduct is now civilized enough to exist alongside other behaviors pertinent to an individual's decisions regarding "marriage, procreation, contraception, family relationships, child rearing, and education."[232] *Lawrence* now finds that the choice to engage in consensual same-sex sodomy is imbued with personal dignity and autonomy.[233] But eventually this alignment is colonizing.

Most telling about how *Lawrence* effectuates such a colonizing transfer through assimilation is the way its rhetoric normatively re-imagines queer sex. Here, Justice Kennedy imbues queer sexual activity with the strings often tied to mainstream normative sex and expectations in relationships, marriage, monogamy, and family—all heteropatriarchal ideals inherited from the early American settler era practices.[234] Throughout *Lawrence*, the normative pattern of monogamous relationships is universally assumed upon queer sex practices: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[235] If that's the case, then anti-sodomy laws would "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to

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[230] *Id.* at 38-39.
[231] *Id.* at 39.
[232] *Lawrence*, 539 U.S. at 574.
[233] *Id.* at 573-74.
[234] *See* Glenn, *supra* n. ___, at 60.
[235] *Lawrence*, 539 U.S. at 567.

choose without being punished as criminals."[236] Without pushing same-sex monogamous relationships into the marriage realm, Justice Kennedy heightens liberty interests in the choice to engage in same-sex sodomy by shaping its significance within the contours of heterosexual marital activities. *Lawrence* epitomizes preference for a heteronormatively assimilative version of consensual same-sex acts. In what Marc Spindelman calls the "like-straight" analogy, *Lawrence*'s assimilationist vision normatively situates queer sex within a gendered, heteronormative realm while disregarding its non-normative practices.[237] Thus, the rhetoric is assimilative and effects a settler colonial transfer. Part of this assimilative tactic, as Spindelman surmises, resulted from over-romanticized gay rights advocacy leading to the *Lawrence* decision itself: "To show how good gay could be, the lesbian and gay rights briefs in *Lawrence* went out of their way to praise heterosexuality over and over again."[238] In fact, in their filings, constitutional law scholars sentimentalized same-sex relationships as similar to heterosexual ones.[239] Perhaps it worked. After *Lawrence*, what becomes sanctionable is queer sex that normatively aspires to resemble sexual expressions of heterosexual relationships.

Noting alignment with the status quo, Angela Harris finds the way *Lawrence* treats consensual same-sex sodomy indicates "anything other than the reconsolidation of preexisting relations of privilege and subordination."[240] Gay liberationist activists in the 1970s were amongst a broader cultural movement that "began to provide increasing alternatives to heterosexual monogamy."[241] Monogamy reflected familial institutions dependent on heteropatriarchal gender norms—against which, groups whose familial organizations and sexual behaviors threatened settler society, were judged and othered.[242] Recent legal challenges in the

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[236] *Id.*

[237] *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 Mich. L. Rev. 1615, 1619 (2004).

[238] *Id.* at 1619.

[239] *Id.* at 1619-20.

[240] Angela P. Harris, *From Stonewall to the Suburbs?: Toward A Political Economy of Sexuality*, 14 Wm. & Mary Bill Rts. J. 1539, 1541 (2006); *see also id.* at 1543.

[241] *Id.* at 1567.

[242] *Id*

2000s, during *Lawrence* and the rising push for marriage equality, "are linked to an emergent crisis in 'the family' itself."[243] Similar to the way Justice Kennedy mischaracterizes queer sex practices in a monogamous, heteronormative light, he also does so with the actual facts of *Lawrence*. The two men, Lawrence and Garner, who were charged under the Texas law, were likely not in an exclusive relationship and their sexual encounter probably did not go beyond casual, no-strings-attached sex.[244] Justice Kennedy's convenient amnesia mutes the facts plainly in this decision, avoiding problematic connotations of gay promiscuity that could lead back to a pre-modern, uncivilized version of homosexual sex; the script of heterosexual domestic bliss is the prescriptive one to play. In this fashion, the like-straight analogy in *Lawrence* imbues consensual same-sex sodomy with heteronormative, "civilized" ideals and effaces queer ones to strengthen a liberty-based holding. But doing so also entangles consensual same-sex sodomy in prescriptive aspirations of heterosexual relationships, monogamy, and family.

Also assimiliatively constraining in *Lawrence* is how consensual same-sex sodomy is normatively yoked under a racially-white pretense of queer sex practices. The interracial dynamics of the case are muted—and by extension, the practice of sexualizing racial minorities to distance them from the mainstream. Here, what appears is "reverse" racial sexualizing. Although *Lawrence*'s central issue is about the constitutionality of criminalizing consensual same-sex sodomy, racialization through sexuality—particularly and frequently through non-normative sexual conduct—has taken place in settler society to strengthen whiteness through heteronormative masculinity.[245] But as Jasbir Puar astutely observes, "[t]he interracial pairing of Tyron Garner, a younger black man, and John Geddes Lawrence, an older white man, are not details remarked upon in any court documents of the case" until after the Court decided the case.[246] Exploring the

[243] *Id.*

[244] Dale Carpenter, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 45 (2012).

[245] *See generally* Mark Rifkin, WHEN DID INDIANS BECOME STRAIGHT? KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY (2011).

[246] Puar, *supra* n. ___, at 118-19 (citing to Siobhan B. Somerville, *Queer* Loving, 11 GLQ 335, 346 (2005)).

complexities of race, gender, and sexuality that the Court ignores in *Lawrence*, Dale Carpenter interprets that "a mix of homophobia and racism may have been at work" in Garner and Lawrence's arrests.[247] During the arrests, Garner's perceived effeminacy "clearly bothered" law enforcement and that likely the offense of sodomy "may have been aggravated because [or so it was said] the black man was playing the receptive (passive, subordinate, female) role to the white man during sex."[248] If true, this plays right into expected gender norms: "At the scene of the arrest, Lawrence was aggressive and belligerent (masculine); Garner was passive and cooperative (feminine)."[249] Garner possibly violated masculine norms, which also at the same time "othered" him as a black man—even to one of the arresting officers, who was also black.[250] Yet, Justice Kennedy bypasses these factual dynamics.

Under Russell Robinson's assessment, "if Justice Kennedy had candidly acknowledged these facts [in *Lawrence*], it would have been harder to describe gay relationships in uniformly transcendent terms."[251] As with using heteronormative family and relationship values as leverage, ignoring the depiction of homophobic sexual depravity as a structural tactic to racialize non-whites leverages the mission to civilize same-sex sodomy. Discounting the racial dynamics trades race for sexuality, which furthers the hierarchy of whiteness within the case but also in sodomy's transcendence in *Lawrence*. Without talking about race, Justice Kennedy implicitly leaves whiteness as the norm—as it always is in the settler state—and effectively sanitizes queer sex. Because "in our contemporary milieu, the growing visibility and 'inclusion' of gay and lesbian subjects into the national legislative fold of the United States (not to mention market interpellation) appear to be at the expense of racialized subjects," Puar urges that *Lawrence* "must be examined in this intensely charged racial atmosphere, which repetitively defines the slippery contours of racial markings not only in relation to a dominant white American

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[247] Carpenter, *supra* n. ___, at 103.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 Ariz. L. Rev. 213, 223 (2018).

formation, but also among people of color themselves."[252] In disregarding Garner's race, *Lawrence* dodges an opportunity to address racializing tactics that intersect with homophobia, while it arguably safe-harbors non-normative sexualities who are white. In both instances, the shamefulness of non-normative sexual conduct was entangled with racialized portrayals of these incidents.

Returning home to the domestic framework that houses consensual same-sex sodomy in *Lawrence*, we see how Justice Kennedy's domestic connotation civilizes queer sex and also geographically colonizes it. In Franke's view, *Lawrence* "domesticates" queer sex as sex that can be practiced but only in private, trapped in the home sphere: "[T]he liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."[253] Ostensibly, this private arena where sex takes place undercuts his assurance that "freedom extends beyond spatial bounds" if Justice Kennedy's references to where sex takes place, according to Franke, is notably in private.[254] The domestic sphere is invariably where settler heteropatriarchal norms and values about gender and family have been preserved.[255] This privatization of sex is another part of *Lawrence*'s colonizing transfer of queerness. *Lawrence*'s private "territorializing" of same-sex activities transmits the message that only certain acts—those practiced by monogamous homosexual couples domestically in private—are sanctionable: "*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex/intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex."[256] Such "domestic bliss" is deceptively precarious because "[i]t can be used to float political projects that render certain normative heterosexual couples as its primary reference points and ethical paradigms."[257] Consensual same-sex sodomy is condoned only if the public does not have to see it or know about it but only

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[252] Puar, *supra* n. ___, at 119.
[253] Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 Colum. L. Rev. 1399, 1401 (2004) [hereinafter *Domesticated Liberty*].
[254] *Id.* at 1403.
[255] *See* Harris, *supra* n. ___, at 1567.
[256] Franke, *Domesticated Liberty*, *supra* n. ___, at 1415.
[257] *Id.*

abstractly imagines it as a part of a monogamous normative relationship.[258] The Court's re-envisioning of queer sex exposes the transfer by assimilation in *Lawrence* that civilizes same-sex sodomy in order to protect it as a fundamental right that furthers self-determination ideals. But to get to that reimagination and protection, ideal expectations about heteronormative sex had to be grafted onto the Court's imagining of queer sex acts. Meanwhile, the opinion also leaves structural settler norms of white heteropatriarchy—even those underscored in *Bowers*—alone. No critique of the gendered normativity that anti-sodomy laws reinforced ever enters the conversation in *Lawrence.* Instead, Franke has astutely observed that the stigma that Justice Kennedy raises in *Lawrence* is not inflicted upon queer identities because of the mere existence of anti-sodomy laws, but rather the convictions received under such laws—a narrow critique of the results of such laws based on the invasion of personal liberty, rather than a critique of what structural marginalization these laws represent.[259] The opinion's restraint was what allowed some post-*Lawrence* cases to probably "understand *Lawrence* to impose absolutely no check on the legal enforcement of heteronormative preferences."[260] Rather than establishing a more transcendent rationale, *Lawrence* relies on heteropatriarchal structural norms to legitimize consensual same-sex sodomy for constitutional protection. Like *Bowers*, *Lawrence* preserves existing settler hierarchies. The kind of queer sex worth the settler state's protection is a sanctioned consensual same-sex sodomy practiced monogamously in private by couples who are ideally white, male, economically privileged, and otherwise aligned with mainstream settler values. Along with sexual minorities of color, lesbians, as Ruthann Robson has observed, are conspicuously kept out of *Lawrence.*[261] This is the queer intimacy that American settler values and principles of fundamental rights can condone—the kind that resembles the normative sex of the quintessential settler family. Decriminalizing sodomy in *Lawrence* does not destabilize settler heteropatriarchy, nor does it liberate queer sex. Instead,

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[258] *Id.* at 1416.

[259] Franke, *Domesticated Liberty*, *supra* n. ___, at 1405.

[260] *See id.* at 1412-13.

[261] Ruthann Robson, *The Missing Word in* Lawrence v. Texas, 10 Cardozo Women's L.J. 397, 399 (2004).

Lawrence assimilates consensual same-sex sodomy within the existing mainstream norms. *Lawrence* ultimately colonizes.

D. COLONIZING QUEER RELATIONSHIPS

Lawrence may have settled the legal issue over consensual same-sex sodomy by civilizing it into mainstream settler consciousness, but the question over recognizing same-sex relationships within marriage remained unresolved at the Court for the next decade. Litigation over same-sex marriages has existed since the 1970s,[262] but lacked any revolutionary legal progress.[263] Even the Court's first courting with same-sex marriages in 1972 with *Baker v. Nelson* ended summarily "for want of a substantial federal question."[264] The rhetoric was tautly exclusionary. The push for marriage, however, never relented. In the 1990s, the momentum for marriage equality suddenly ignited as the issue percolated onto the national political and legal stages with LGBTQ political influence and visibility galvanizing the image of non-normative sexualities.[265] This was the same period that the Court decided *Romer* and advancements for sexual minorities led some states to recognize same-sex relationships in alternative arrangements such as civil unions and domestic partnerships.[266] But of course, the same decade also witnessed Congress's enactment of the Defense of Marriage Act ("DOMA").[267]

Significant progress on the marriage front came soon after *Lawrence*. Less than a year after *Lawrence* decriminalized consensual sodomy, the Massachusetts Supreme Judicial Council allowed same-sex couples to marry, relying heavily on the *Lawrence*'s liberty and privacy reasoning.[268] Other states followed

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[262] *E.g.*, *Singer v. Hara*, 522 P.2d 1187 (Wash. App. Div. 1 1974).

[263] *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 Colum. J. Gender & L. 21, 31 (2010).

[264] 409 U.S. 810, 810 (1972),

[265] Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 Harv. J. L. & Gender 269, 293-95 (2015).

[266] *See, e.g.*, *Baker v. State*, 744 A.2d 864 (Vt. 1999).

[267] *See* Daniel J. Galvin, Jr., There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue, 25 Wm. & Mary J. Race, Gender & Soc. Just. 405, 420 (2019).

[268] *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

and within a few years a "patchwork" of state marriage recognition appeared.[269] However, the influence of *Lawrence* only extended so far. Despite the private domestication of gay sex and its civilizing implications, many other states still reserved marriage only for opposite-sex couples.[270] *Lawrence*'s sanitized elevation of same-sex sodomy seemed insufficient for a uniform acceptance of same-sex marriages. Arguably the most turbulent example of this indecisiveness over same-sex marriages appeared in California in 2008. The state supreme court's ruling in *In Re Marriage Cases* to recognize same-sex marriages then prompted a public referendum later that year to undo that recognition.[271] Some of the substantive campaigning for that referendum relied on generating a sense of threat to heteronormative families.[272] Eventually through the late 2000s, the social acceptance for marriage equality began to turn more favorably. But without a promising federal response to same-sex marriage, the marriage issue was left as a disjointed mosaic amongst states with DOMA federally in the background. To effectuate the transfer of queer relationships federally into the settler state's marriage institution, same-sex relationships—rather than sex—had to be civilized. Again, the first requirement for such transference is improvability. The Court's *Windsor* decision identifies precisely just that.

1. Windsor *and Improvability*

Beyond its rationality resolution in equal protection, *Windsor*'s signaling of perceived improvability in same-sex relationships echoes *Romer*'s. But with *Windsor*, now the terrain involved the most sanctified institution in settler heteropatriarchal existence: *marriage*. Such values regarding family and domesticity appeared more directly at stake in *Windsor* rather than *Romer*, and *Windsor* opens by reciting the facts with a familiar sense of

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[269] *E.g.*, Jeremy W. Peters, *Federal Court Speaks, But Couples Still Face State Legal Patchwork* (June 26, 2013), N.Y. TIMES, https://www.nytimes.com/2013/06/27/us/politics/federal-court-speaks-but-couples-still-face-state-legal-patchwork.html.

[270] *See id.*

[271] *See Hollingsworth v. Perry*, 570 U.S. 693, 701 (2013) (narrating the history of Proposition 8 in California).

[272] Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 Stan. J. Civ. Rts. & Civ. Liberties 357, 359 (2009).

civilized domesticity that was left from *Lawrence* a decade prior. Justice Kennedy externalizes the domestic monogamous relationships that he alluded to in *Lawrence* in Edith Windsor's seemingly-domestic, married-then-widowed circumstance, emphasizing on the ordinary and mundane:

> Two women then residents of New York were married in a lawful ceremony in Ontario, Canada in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses.[273]

With this plain, nondescript depiction of the Windsor-Spyer marriage, the humanizing discourse begins. Having "met in New York City in 1963" and marrying in Canada in 2007 because of their "[c]oncern[] about Spyer's health," they are just like any loving married couple subject to death, health, and taxes—and that is Justice Kennedy's point.[274] The only minoritizing difference is that Windsor was excluded from a tax refund by DOMA because she and Spyer were a same-sex couple.[275] And therein lies the inequality. Something is now changed about same-sex relationships that vividly leverages a sense of inequality. The notion that DOMA created constitutional inequality is undergirded by assimilative sameness that the Court recognizes in the Windsor-Spyer marriage: same-sex couples, as represented by Windsor and Spyer, are now perceived as improved. Henceforth, improvability appears thematically in *Windsor* and assimilation again underlies the leveraging force that eventually hands Windsor her estate tax remedy and sets same-sex relationships onto the path of settler redemption for marriage.

The sense of improvability of same-sex couples was likely established in *Windsor* through the identity traits that Edith Windsor and Thea Spyer specifically shared with the settler status

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[273] *Windsor*, 570 U.S. at 749–50.
[274] *Id.* at 753.
[275] *Id.* at 751.

quo. As Alexander Nourafshan and Angela Onwuachi-Willig have observed,

> [u]nder the theory of interest convergence, Edith Windsor, a wealthy, white woman in a long-term committed relationship in New York City, was in many ways, the perfect plaintiff to challenge DOMA because she could be sold as part of a respectable, assimilation-based gay image to the general public and, more importantly to those in power.[276]

Certain attributes about Windsor and her long-term relationship to Spyer conjured familiar status quo depictions about marriage to produce a sense of civilized improvability, while also helping Justice Kennedy's rationality reasoning. Windsor's public persona "closely hues to the image of homosexuality that has been consciously crafted in the public sphere."[277] Her wedding to Spyer announced in *The New York Times* wedding section suggested sufficient mainstream respectability to garner a feature.[278] Both Windsor and Spyer held "elite pedigrees in terms of education."[279] Both were white women. And as women were notably amiss in *Lawrence*, Windsor's "respectability-based identity as a lesbian represented a departure from the stereotype of hyper-sexuality that is often affiliated with or imputed to gay culture."[280] Also just as in *Lawrence*, race subtly skewed the portrayal as well: "[Windsor's] racial identity as a white woman reified the primacy of whiteness in the gay community and gay rights movement."[281] Meanwhile, her regionalism did not hurt her either: "[Windsor's] identity as an educated Northerner reinforced notions of sophistication and assimilation in the gay and lesbian community."[282]

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[276] Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 Fla. St. U. L. Rev. 521, 522 (2015).
[277] *Id.* at 522 n.7.
[278] *Id.*
[279] *Id.* at 523.
[280] *Id.*
[281] *Id.*
[282] *Id.*

Moreover, as plaintiff, Windsor's "conform[ance] to society's perceived normative ideal in all ways except for her sexuality" was paired with an estate tax case involving significant financial injury. This bit of materialism "was highly salient to white elites, both gay and non-gay alike," capable of evoking a sense of liberal injustice because all of this injury was not of her doing, but hinged on federal law's treatment of her sexual identity.[283] Windsor lost $363,053 because DOMA prevented her from accessing the marital exemption from federal estate taxation.[284] The interplay between the assimilated image of Windsor, her long-term marriage to Spyer, and the tax forfeitures of resolving Spyer's estate generates a depiction of same-sex couples that resonate off the normative and assimilative set-up of "domesticated" same-sex intimacy in *Lawrence* and hones it even further. Though alluded to in *Lawrence*, same-sex relationships were a blurry and abstract notion. But now they come into better focus in *Windsor* only to confront spousal death and a whopping unfair federal tax consequence. The Court's subtextual recognition of improvement conjures an unconstitutional sense of injustice. Consequently, DOMA's restrictions appear driven by unconstitutional animus. Through the characterized unfairness of Edith Windsor's situation, the Court recognizes same-sex couples' capability for civilized improvement that permits redemption.

2. Colonizing Transfer of Queer Couples in Obergefell

If *Windsor* brought same-sex relationships more vividly to the Court's imagination, then *Obergefell*—and later, *Masterpiece Cakeshop*—sharpen the focus even further. The colonizing of same-sex relationships in *Obergefell* matches the assimilationist transfer from *Lawrence*. But both post-*Windsor* decisions, *Obergefell* and *Masterpiece*, delineate more explicitly the kind of queer identities selected for inclusion and protection in the settler state and those whom the settler project will continue to excoriate. In *Obergefell*, relationships that can be uplifted into marriage are consistent with the developing template of assimilationist gay visibility. Various scholars have denoted the assimilationist tactics and respectability politics of marriage rights advocacy leading up to *Obergefell*,

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[283] *Id.*

[284] *Windsor*, 570 U.S. at 753.

critiquing how the movement's lawyers emphasized alignment with the mainstream status quo. But most exactingly, Cynthia Godsoe has noted that the *Obergefell* plaintiff couples typically (1) seemed "all-American," with upper middle-class professions and were racially white; (2) were family-oriented with either childrearing or familial caretaking duties; (3) appeared performatively asexual; and (4) were non-militant or apolitical except for this litigation.[285] Alongside other scholarly critiques of assimilationist strategies in *Obergefell* and marriage equality litigation generally, the interest convergence that elevated same-sex relationships illustrate the perceived alignment of certain same-sex couples with mainstream settler heteronormativity that convinced the Court that particular queer relationships would not threaten marriage but rather fortify it.[286]

Justice Kennedy's *Obergefell* opinion is highly performative as it transfers same-sex relationships into the settler marriage state. Within the opinion, this colonizing transfer takes place in three parts. First, Justice Kennedy reminds us of the improvability of same-sex relationships previously noted in *Windsor*. To demonstrate, he draws upon three model same-sex couples- James Obergefell and John Arthur; April DeBoer and Jayne Rowse, and Ijpe DeKoe and Thomas Kostura—who seem to embody some or all of the assimilated mainstream status quo characteristics that Godsoe identified. The three couples presented as racially white and none of them are portrayed with some sense of political militancy.[287] Some have caretaking functions—either with each other or because they have children.[288] While Justice Kennedy's portrayals of these couples, as likely model same-sex couples, align very much with establishment ideals about relationships and marriage—in their domestic commitment to each other and/or their families, their respectable professions, their patriotism, and even their whiteness—their queer sexualities, however, are restrained. Justice Kennedy utilizes this anti-stereotyping tactic here to push away from any historical primitivizing of queerness or same-sex relationships, only to merge

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[285] *Id.* at 145.
[286] Ho, *supra* n. __, at 278-79.
[287] *See Obergefell*, 576 U.S. at 658-59.
[288] *See id.*

same-sex couples with heterocentric ideals about couplehood, relationships, family, and domestic married life. Moreover, in the case of James Obergefell's marriage to John Arthur, one must not fail to observe the resemblance between the Windsor-Spyer marriage as the *last* time the Court observed a same-sex couple in a major marriage context, and the Obergefell-Arthur marriage as the *first* couple to be depicted in the *Obergefell* opinion. Both couples had been in seemingly committed, long-term relationships with each other.[289] Both relationships involved a partner with a debilitating health issue that prompted each couple to marry urgently out-of-state.[290] Both marriages faced legally-sanctioned injustices upon the death of the respective ailing same-sex spouse.[291] Aside from the genders of the respective same-sex couples, their stories—or how Justice Kennedy's crafts them—are profoundly similar. Essentially, *Obergefell* picks up where *Windsor* left off.

After recapitulating improvability, Justice Kennedy then, secondly, embarks on a historical narrative that situates that improvability to explain how it invigorates the transfer of same-sex relationships into marriage already taking place societally and in some states.[292] Justice Kennedy recalls historically how the primitivizing of consensual same-sex intimacy led to sodomy criminalization and how such criminalization essentialized non-heteronormative sexualities so that "many persons did not deem homosexuals to have dignity in their own distinct identity."[293] But then echoing his "emerging awareness" rhetoric from *Lawrence*, Justice Kennedy notes here that a change has occurred to shift public opinions about sexual minorities—for instance, when the American psychiatric community de-pathologized homosexuality.[294] The new, emerging insight about same-sex relationships burgeoned so that "same-sex couples began to lead more open and public lives and to establish families."[295] The new

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[289] *Compare id.*, *with Windsor*, 570 U.S. at 753.

[290] *Compare Obergefell*, 576 U.S. at 658-59, *with Windsor*, 570 U.S. at 753.

[291] *Compare Obergefell*, 576 U.S. at 658-59, *with Windsor*, 570 U.S. at 753.

[292] *See Obergefell*, 576 U.S. at 659-63.

[293] *Id.* at 660-61.

[294] *Id.* (referencing BR. FOR AMERICAN PSYCHOLOGICAL ASSN ET AL, as *Amici Curiae* 7-17).

[295] *Id.*

awareness grows with political significance and it is curious that he deliberately mentions how such public tolerance of sexual minorities is equated here directly with the visibility of same-sex couples and their creation of families. At the same time, Justice Kennedy also observes that various changes to the traditional practice and regard for marriage in recent societal memory have also been conditioned on "new insights," which "have strengthened, not weakened the institution of marriage"[296]—implying that such "new insights" about same-sex relationships might strengthen marriage and well-enough justify extending marriage rights to same-sex couples. Effectively Justice Kennedy relies on the improvability of same-sex couples as the crux of changing social acceptance of same-sex relationships—improvability that seems to harbor the willing embrace of domestic, committed, family-oriented type relationships that would not threaten the heteronormative status quo.

Thirdly, the most performative and colonizing moment of transference in *Obergefell* occurs when Justice Kennedy formally justifies extending fundamental marriage rights to same-sex couples. His extension is based on "four principles and traditions" that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[297] In lofty invocations of autonomy and liberty ideals here, Justice Kennedy philosophizes—indeed, sermonizes—on how marriage provides dignity and avenues of personal destiny. But echoing the model same-sex couples he mentioned and his new historicism of same-sex relationships earlier in the opinion, his justifications all rely on perceived sameness and are centrally enabled by the interest convergence derived from the images of assimilated same-sex couples.

The first three of the four rationales reaffirm status quo values of relationships and marriage, and how the perceived sameness of same-sex couples abide by these values. First, echoing *Lawrence*, same-sex couples have committed relationships that ought to be protected under autonomy interests within marriage: "[T]hrough its enduring bond, two persons together can find other

[296] *Id.* at 660.
[297] *Id* at 665.

freedoms, such as expression, intimacy, and spirituality."[298] Then citing *Windsor*, Justice Kennedy proclaims that "[t]his is true for all persons, whatever their sexual orientation."[299] Secondly, echoing *Lawrence* again, Justice Kennedy implies that same-sex couples are capable of monogamy: "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[300] Using *Lawrence* to remind us that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association," Justice Kennedy relies on sameness and improvability to facilitate this part of the transfer of same-sex relationships into the realm of marriage: "But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[301] Residue from *Lawrence*'s civilizing of sodomy seems to permit the impression that same-sex couples are capable of the domesticated, private sexual relations valued in mainstream family-oriented heteronormative sex.

In his third rationale, Justice Kennedy summarizes that marriage symbolizes much for preserving the settler family: "It safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[302] Because "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted," Justice Kennedy notes—again drawing on perceived sameness with the status quo—"[t]his provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[303] Likely here Justice Kennedy presumes no other type of "loving, supportive families" than the default, nuclear heteronormative family, and that same-sex couples have passed the test in emulating that template and not the other way around.

In terms of colonizing queerness, Justice Kennedy's final rationale is the most demonstrative. Here, in the comparison that

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[298] *Id.* at 666 (citing *Lawrence*, 539 U.S. at 574, in terms of privacy).
[299] *Id.* (citing *Windsor*, 570 U.S. at 769).
[300] *Id.*
[301] *Id.* at 667.
[302] *Id.*
[303] *Id.* at 668.

most explicitly connotes colonization of same-sex relationships into the settler state, Justice Kennedy declares that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order."[304] He steps out of the Court's precedence momentarily to quote Alexis de Tocqueville's observation regarding marriage in early nineteenth-century United States to affirm marriage's social primacy. America reveres marriage: " 'There is certainly no country in the world where the tie of marriage is so much respected as in America.' "[305] But de Tocqueville's observation refies also a gendered impression of marriage; the respectability of married life has currency in the public social sphere because the American male with such an ordered married and family life " 'carries [that image] with him into public affairs.' "[306] De Tocqueville's quote offers an antiquated reminder that reveals settler white heteropatriarchy by skewing marriage toward a white male-dominated perspective: " '[W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace.' "[307] Justice Kennedy then layers in the Court's 1888 decision in *Maynard v. Hill* to "echo[] de Tocqueville" in describing how civilization—presumably a white settler one—and its perpetual sovereignty or "progress" depends on marriage as the pillar of both family and society.[308] The social primacy of marriage in the settler state is inescapable, which is why Justice Kennedy affirms that "[m]arriage remains a building block of our national community."[309]

And through marriage, same-sex couples can take part within this community. With all of these social and hierarchical attributes revealed here and prior justifications established, Justice Kennedy finally pronounces that "[t]here is no difference between same- and opposite-sex couples with respect to this principle."[310] Relying on sameness, he rhetorically transfers same-sex couples into the traditional institution of marriage, absorbing

[304] *Id.* at 669.
[305] *Id.*
[306] *Id.*
[307] *Id.* (quoting 1 Democracy in American 309 (H. Reeve transl., rev. ed. 1990).
[308] *Id.*
[309] *Id.*
[310] *Id.* at 670.

them into a tradition that still relies on de Tocqueville's gendered and heteropatriarchal observations to buttress itself. In this ceremonial moment in *Obergefell*, same-sex couples are now perceived to be so similar, improved, and capable of assimilation that their desires to wed and their presence within the settler social order are not seen to threaten the principles of traditional heteronormative marriage or settler society. Rather, it is democratically harmful that they are continually excluded.[311] Such exclusion is now apparently incongruent with the spirit of marriage: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[312] It is only fitting now that "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[313] With this pronouncement, the extension of marriage rights to same-sex couples is ceremonially accomplished and the transfer of same-sex relationships into the settler state is solemnized. Tethered to the settler state by an assimilative and respectable alignment with the settler status quo, same-sex couples can now marry nationwide.

3. Abject Queerness in Masterpiece Cakeshop

By focusing on sameness, *Obergefell* transports same-sex couples into the institution of marriage. Yet, as Veracini reminds us, transfers by assimilation of outsiders into the settler state never fully realizes their inclusion; rather such inclusion, conditioned on assimilation, satisfies the crux of the settlers' colonizing projects.[314] Thus in *Obergefell*, colonization, rather than inclusion, occurs. In three years' time, the Court's *Masterpiece Cakeshop* decision illustrates exactly how inclusion of same-sex relationships is contingent on the terms of the settler status quo, revealing marriage's limits and the contours of how queerness is being colonized.

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[311] *Id.*
[312] *Id.* at 670-71
[313] *Id.* at 670.
[314] *See* Veracini, Settler Colonialism, *supra* n. __, at 38-39.

Though not directly a marriage equality decision, *Masterpiece*'s state public accommodations discrimination issue involved a married same-sex couple, Charlie Craig and Dave Mullins, who was denied service at a Colorado bakery by a self-identified Christian owner, Jack Phillips. Phillips refused to make and sell a cake that would have celebrated the Craig and Mullins' out-of-state marriage.[315] Colorado's public accommodations law favored the couple because it protects against sexual orientation discrimination in a non-religious public setting.[316] Phillips did not fall within any religious exemption and Craig and Mullins' complaint won on the state level in various venues.[317] Phillips appealed at every step until the decision reached the Supreme Court.[318] When the Court, under Justice Kennedy's authorship, denied relief for Craig and Mullins and sided with Phillips—not on any substantive basis in Colorado's public accommodations law—but because Justice Kennedy had found incidentally that a lower administrative venue had exhibited religious hostility against Phillips, the assimilative premises of colonizing same-sex relationships are revealed.

The *Masterpiece* Court's sudden pivot to religious hostility gives reverence to settler sovereignty. From an interest convergence perspective, the Court's deviation from the merits of Craig and Mullins' claim is a reaction to how the same-sex couple here differed from the couples in *Obergefell* and how they lacked alignment with the settler status quo.[319] In their profiles, Craig and Mullins lacked most of the assimilated and respectable identity traits of *Obergefell*'s litigating same-sex couples.[320] Other than presenting as racially white, Craig and Mullins, seemed more "queer."[321] They were not the upper-middle class, "all-American" gay male couple who was raising a family and keeping to themselves.[322] They did not tone down their public displays of

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[315] *Masterpiece*, 138 S. Ct. at 1719, 1724.
[316] *Id.* at 1725.
[317] *Id.* at 1725-27.
[318] *Id.* at 1726-27.
[319] Ho, *supra* n. ___, at 286-97.
[320] *See id.*
[321] *Id.*
[322] *Id.*

affection in news articles and media functions.[323] Their outward personalities and insistence on their cake brought forth a political activism that might have been mistaken as angry or militant—despite sticking within their legal rights under Colorado law.[324] Without perceived assimilative qualities that other married same-sex couples have had before the Court, the couple's anti-discrimination interests likely did not converge with the Court's interest to affirm settler values. Comparatively, the couple's identity as a married same-sex couple lacked the required improvability here that the Court had detected in other same-sex couples for protections within the settler state. Quite possibly, their "queerness" seemed aberrant and threatening to the institution of marriage and status quo.[325] Thus, Justice Kennedy conspicuously nitpicked for signs of religious hostility in order to invalidate the couple's fully-meritorious claim, while vindicating the means to promote settler heteronormativity.[326] The absence of improvability or assimilated potential—the nonappearance of mainstream respectability of Craig and Mullins—motivates their denial from legal vindication of their rights in the public sphere even when the couple likely deserved to prevail substantively.[327] Such exclusion in the context of settler colonialism shows us which type of "queerness" is privileged in the settler state and which is not. Craig and Mullins are not the exogenous others that can avail themselves absorption into the settler polity through assimilation tactics. Their perceived unassimilated queerness marks them as, what Veracini labels, "abject others": those whom the settler state deems incapable of colonization.

Perhaps love won in the transfer of same-sex couples into marriage in 2015, but conditionally at the expense of continued marginalization of those sexual minorities who are not "improvable." Queerness in the settler colonial state is conditionally protected if it appears to the mainstream status quo in an assimilated, civilized—even respectable—form.[328] Reading

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[323] *Id.*
[324] *Id.*
[325] *Id.* at 322-23.
[326] *See id.* at 316.
[327] *Id.* at 318-24.
[328] *See id.* at 232.

together the Court's recent marriage decisions, the once-blurry idea of same-sex relationships finally sharpen enough, but only to resemble settlers' civilized projections. The transfer into marriage is via assimilation toward normative heteropatriarchal values. Consequently, marriage protections for same-sex couples do not decolonize but regulate queer sexualities under normative settler state ideals and values about loving monogamous relationships. Using marriage, the American settler state continues its sexuality project by prescribing which queer identities and relationships can and are deemed desirable for inclusion, and which will remain primitivized.

IV. COLONIZING QUEER WORKERS

Federal employment protection of queer identities through *Bostock* arrives only recently after the queer visibility engendered through the marriage equality cases, through sodomy decriminalization, and through *Romer*'s equality holding. But like protecting queer sex and relationships, the inclusion of queer identities into Title VII employment protections—though long-sought and progressive in some respects—also perpetuates settler colonialism's sexuality project as an opportunity to normalize queer identities in the workplace.

Despite a different context, *Bostock v. Clayton County, Georgia*[329] embodies an identical script for colonizing queerness in the workplace as for marriage and sex: perceived improvability followed by a colonizing method of transfer. We see Justice Neil Gorsuch's recognition of queer improvability through the same "emerging awareness" motif used in the prior pro-LGBTQ cases. In the first few moments of *Bostock*, after announcing that Title VII protected sexual orientation and gender identity, Justice Gorsuch implies that such a ruling resulted from an emerging awareness about sexual minorities: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely they weren't thinking about many of the Act's consequences that have become apparent over the years[.]"[330] Justice Gorsuch never substantively describes what has "become

[329] 140 S. Ct. 1731 (2020).
[330] *Id.*

apparent" since 1964; instead, he hints at this emerging awareness. Something about sexual minorities have become so clear now that "the limits of the drafters' imagination supply no reason to ignore the law's demands."[331] Consequently, "when the express terms of a statute give us one answer and extratextual considerations suggests another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[332] Although Justice Gorsuch touts the inclusion of sexual minorities under Title VII's sex provision as an application that "has been standing before us all along," we are officially being apprised of it now because of something regarding sexual minorities is now "apparent."[333]

A. IMPROVABILITY FOR TITLE VII PROTECTION

What has become apparent about LGBTQ workers is again improvement. Such improvability is observable in American corporate status quo's interest in respectable queer identities to promote workplace diversity. This interest materially aligns with settler democratic values.[334] Of course, corporate diversity initiatives also impact corporate branding.[335] In recent years, well-branded corporations have promoted openly-gay managers who have arisen above organizational hierarchies and the workplace ratings of companies have included their acceptance of openly-identified LGBTQ workers.[336] In *Bostock*, two amicus filings from corporate America supporting *Bostock* plaintiffs emphasize the value of workplace diversity and corporate America's regard for LGBTQ employees. In one brief, the "Fortune 200" tobacco giant,

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[331] *Id.*

[332] *Id.*

[333] *Bostock*, 140 S. Ct. at 1753, 1752.

[334] Jenn Flynn, *Diversity and Inclusion: A Worthy Business Investment With Strong Returns*, FORBES (Nov. 5, 2019), https://www.forbes.com/sites/forbesfinancecouncil/2019/11/05/diversity-and-inclusion-a-worthy-business-investment-with-strong-returns/?sh=5978596d2455.

[335] Theanne Liu, *Ethnic Studies As Antisubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies*, 11 WASH. U. JURIS. REV. 165, 175 (2018)

[336] *The World's Most Influential LGBT+ Business Leaders*, CEO TODAY (June 26, 2020), https://www.ceotodaymagazine.com/2020/06/the-worlds-most-influential-lgbt-business-leaders/.

Altria Group, Inc., touted its own initiative toward fostering an inclusive workplace for LGBTQ employees "because creating and maintaining a diverse and inclusive workplace benefits both the company and its employees."[337] Yet, Altria's diversity efforts also impacts its branding: "[I]nvestment in diversity and inclusion has led to Altria being repeatedly named by Forbes as one of America's best employers and being rated among the 'Best Places to Work' for 2018 and 2019 by the Human Rights Campaign's Corporate Equality Index."[338]

Even more memorably, another amicus brief filed collectively by 206 major American businesses, including Amazon, American Express, Comcast, Disney, Google, and Starbucks, argued that "[t]he U.S. economy is strengthened when all employees are protected from discrimination in the workplace based on sexual orientation or gender identity."[339] Conversely, "[t]he failure to recognize that Title VII protects LGBT workers would hinder the ability of businesses to compete in all corners of the nation, and would harm the U.S. economy as a whole."[340] Very pointedly, these business amici stressed the viability of LGBTQ purchasing power: "A diverse and inclusive workforce likewise furthers businesses' ability to connect with consumers, particularly given that the buying power of diverse groups has increased substantially over the past 30 years. In 2015, the buying power of LGBT people in the United States stood at over $900 billion."[341] These business amici also observed how "[r]ecent studies confirm that companies with LGBT-inclusive workplaces also have better financial outcomes."[342] Here, American corporate bottom lines recognize and cherish queer workers.

To further unpack corporate motivations that recognize queerness, Yurvaj Joshi's observations direct us again to signs of perceived improvability toward LGBTQ workers. As "today's gay

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[337] Brief for Altria Group, Inc. as Amicus Curiae Supporting the Employees at 1, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

[338] *Id.* at 2.

[339] Brief for 206 Businesses as Amici Curiae Supporting the Employees at 8, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

[340] *Id.*

[341] *Id.* at 9 (footnotes omitted).

[342] *Id.* at 11.

and lesbian identities are constituted less by sexual practice and rather more by consumption," the outcome "is a complex and symbiotic relationship between 'the gay community' and 'the gay market' and, that being the case, one cannot meaningfully separate the politics of being gay from the business of buying and selling gay."[343] But not all gay identities are equal in the marketplace, and Joshi identifies a status quo privileging of *which* sexual minority is prized and *which* is not: "[W]ho is viewed as a gay consumer bears on who is imaginable as a gay citizen and, crucially, who is deemed suitable for the sexual citizenship that is attended with marriage."[344] Again, assimilation and respectability reside implicitly and centrally in corporate America's recognition of improvability. Within corporate workplace cultures, "[o]penly LGBT people working in professional-managerial status occupations range from those whose sexual identity constitutes part of their professional expertise ('professional homosexuals') to those whose sexual identity plays little to no part in their professional life ('homosexual professionals')."[345] Thus, respectability underscores corporate America's diversity interests and any emerging awareness regarding queer minorities in the workplace. An overlap exists between mainstream corporate America's interests in Title VII's workplace discrimination protections for sexual minorities and the status quo policing of "good" versus "less desirable" sexual minorities. These are, perhaps, the new, "apparent" insights that Justice Gorsuch hints at in *Bostock*, but no less motivate his pro-LGBTQ textualist majority.

B. BOSTOCK*'S ADMINISTRATIVE TRANSFER*

Besides assimilation, Veracini identifies various other colonizing transfers that American settlers use to include non-settlers in its hegemony and further their civilizing mission. In *Bostock*, the Court used an "administrative transfer" to fold the protection of LGBTQ workers within Title VII's "because of sex" provision.[346] According to Veracini, an administrative transfer

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[343] *Id.* at 431-32 (footnotes omitted).
[344] *Id.* at 432 (footnote omitted).
[345] *Id.* (footnote omitted).
[346] Veracini, SETTLER COLONIALISM, *supra* n. __, at 44-45.

occurs whenever "the administrative borders of the settler polity are redrawn."[347] Here, settlers revise inclusive or exclusive definitional boundaries to assert their continuing colonizing dominance. Demonstrating with Indigenous populations, Veracini writes, "[s]ettlers insist on their capacity to define who is an indigenous person and who isn't and this capacity constitutes a marker of their control over the population."[348] Such transfers are not physical: "[i]t is rights—not bodies—that are transferred."[349] Thus, definitions matter as far as affecting rights. For example, "[p]rivileging a definition of indigeneity that is patrillineally [sic] transmitted, for example, can allow the possibility of transferring indigenous women and their children away from their tribal membership and entitlements."[350] Justice Gorsuch's textualism in *Bostock* accomplishes such a colonizing transfer in the settler colonial project.

Through textualism, Justice Gorsuch redraws the definitional boundaries of Title VII's "because of sex" provision to include sexual orientation and gender identity discrimination. Essentially, he reads Title VII's "because of sex" provision as "because of a protected characteristic like sex."[351] In determining, "whether an employer can fire someone simply for being homosexual or transgender," Justice Gorsuch finds that "[t]he answer is clear"—despite decades of noted legal speculation.[352] He holds that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[353] Boundaries for protecting LGBTQ workers are now redrawn to reflect that "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[354]

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[347] *Id.* at 44.
[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] *Bostock*, 140 S. Ct. at 1739; *see also* Jeremiah A. Ho, *Queering* Bostock*,* 29 Am. U. J. Gender Soc. Pol'y & L. 283, 347-49.
[352] *Id.* at 1737.
[353] *Id.*
[354] *Id.*

As a result, his textualist application categorizes instances of sexual orientation and gender identity work discrimination as intentional acts that accounts for an employee's sex in consideration, which—even slightly—triggers Title VII sex discrimination.[355] Justice Gorsuch defines "sex" biologically, though admitting that constructivist positions that relate sex and gender stereotyping also existed at the time of the Civil Rights Act.[356] "Sex" here strictly refers to male or female biological status.[357] A broader definition of "sex" would have encompassed gender roles and stereotyping, and likely evinced a "queerer" understanding than Justice Gorsuch's dictionary definition.[358] But within his textualist majority, Justice Gorsuch prefers reading "sex" with its essentialized, biological designations.[359] Alongside a broad but-for interpretation of the phrase "because of," his textualist reading captures sexual orientation and gender identity discrimination as sex discrimination under Title VII. Without substantive thought toward anti-queer bias, *Bostock* mechanically prohibits situations of sexual orientation and gender identity workplace discrimination purely because they are tethered to considerations of the individual's biological sex.[360] Hence, an employee who is dismissed because the employee is attracted to individuals of the same sex would have a claim under Title VII because the protected characteristic of "sex" is implicated as a but-for cause.[361] Similarly, an employee who is terminated because of a transition from an assigned birth sex could also sue under Title VII.[362]

C. HOW BOSTOCK *COLONIZES*

To be sure, Title VII protections for LGBTQ workers is significant. But what also occurs is a colonizing transfer of queer workers. Justice Gorsuch redraws the borders of the "because of sex" provision to include queer identities under Title VII's security,

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[355] *Id.*
[356] *Bostock*, 140 S. Ct. at 1739.
[357] *Id.*
[358] *Id.*; *see also see also* Butler, *Critically Queer*, *supra* n. __ at 20-21.
[359] *Bostock*, 140 S. Ct. at 1739.
[360] *Id.* at 1740.
[361] *Id.* at 1741.
[362] *Id.* at 1741-42.

entitling them to federal workplace protection. Simultaneously, *Bostock*'s textualism reveals and privileges settler heteropatriarchy over queerness. As a result, *Bostock*'s rationale also subordinates LGBTQ individuals—colonizing them as normative, productive employees—while federally protecting them.

Textualism tacitly maintains settler heteronormativity. *Bostock*'s protection of sexual minorities is solely based on a categorical, binary definition of "sex" as either male or female. This interpretation effectuates a status quo line-drawing of protected statuses under mainstream classifications of gender and sexuality while appearing as a logical and necessary result of textualism.[363] From a heteropatriarchal vantage, such a simplistic dictionary distinction is where the self-legitimizing privilege of settler heteropatriarchy cuts off any constructionist possibilities of examining gender and sexual orientation bias. For instance, by diverting his rationale toward textualism, Justice Gorsuch minimizes the relevance of performative gender characteristics that motivate sex discrimination. In his discussion of "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine," he focuses not on the gender stereotyping aspects involved but observes instead that "in *both* cases the employer fires an individual in part because of sex."[364] Title VII liability then ensues: "Instead of avoiding Title VII exposure, this employer doubles it."[365] This approach finds sex discrimination but ignores the role gender expectations play in motivating discriminating norms regarding femininity and masculinity. Wouldn't firing employees for not being feminine or masculine enough illustrate termination based on constructions of gender at least as well as biological sex?

Stereotyping bias has invigorated modern discrimination cases, including those involving gender. Yet, Justice Gorsuch disregards stereotyping bias in sex discrimination cases in *Bostock* while continually re-reading discriminatory scenarios based solely

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[363] *See* Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 404 (1998).

[364] *Bostock*, 140 S. Ct. at 1741.

[365] *Id.*

on his textualist approach. But his reference here skirts over *Price Waterhouse*'s gender stereotyping rationale, only noting a background observation from the case that "an individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.' "[366] What is only salient to Justice Gorsuch is biological sex, not its accompanying social stereotypes. This primacy toward biological sex also protects queer minorities under his textualist reading—not any biased notions about their sexual identities. Under Justice Gorsuch's textualism, sexuality and gender identity are not relevant because, in his words, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[367] In his view,

> homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.[368]

Sex and biology are all that matters here; queerness is distinct, an afterthought, and not discussed. *Bostock* de-values gender conceptions and queerness for biological sex and ignores underlying heteronormative stereotyping that animates discriminatory bias. While *Bostock*'s textualist result is incredibly beneficial to sexual minorities in its effects, it also leaves concerns for bias against sexual orientation and gender identity unexamined—specifically, what effect does heteropatriarchy and its organizing preferences have on the active production of misogyny and queerphobia in the workplace? Justice Gorsuch's textualism fails to answer this question because his reading of "because of sex" accomplishes anti-discrimination while seemingly making deeper considerations of bias unnecessary:

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[366] *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).
[367] Id.
[368] *Id.* at 1742.

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.[369]

Bostock neglects an opportunity to correct an employer's bias-motivated values toward an individual's same-sex attraction or non-conforming gender identification—values that reveal stereotypical heteropatriarchal expectations of relationships or cisgenderism. When Justice Gorsuch writes that "Title VII doesn't care" about that "something else," we ought to question this remark because examinations of heteronormative gendered biases are centrally relevant in modern discrimination cases.[370]

What does such heteronormative privileging do to LGBTQ workers who also have Title VII protection? It colonizes them as normative and "good" workers. The privileging of settler values in *Bostock* subordinates and colonizes queerness in the workplace under mainstream paradigms of sex. Despite the corporate interest and need to include LGBTQ workers, the recognition of LGBTQ workers exists within workplaces where presumably heteronormative gender roles prevail, leaving respectability as the prescription for inclusion and survival.[371] Thus, the interests of mainstream corporate America in recognizing its LGBTQ workers for inclusion's sake is profoundly tempered by the policing of LGBTQ workers. As "[s]exual norms operate at the level of aspirational fantasy and as a form of social status," this respectability-driven corporate inclusiveness places major stereotyping expectations on LGBTQ individuals.[372] Joshi notes that "[m]ost professional contexts, even those touted as being 'gay

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[369] *Id.*

[370] *See* Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 202 (2020).

[371] D'EMILIO, *Capitalism and Gay Identity*, *supra* n. __,at 473.

[372] *See* CHITTY, *supra* n. ___, at 25.

friendly,' maintain heteronormative ideas of gender and sexuality, adherence to which remains a precondition of institutional citizenship. LGBT professionals must tread carefully, and refrain from expressing their personal identities in personal and political ways that might be deemed 'unprofessional.' "[373] *Bostock* does not change this sexual hegemony but complicitly recycles it. Textualism fulfills Title VII protections for sexual minorities while allowing settler heteropatriarchy to continue promoting its gendered scripts, which includes privileging assimilated sexual minorities over others who might, otherwise, threaten status quo norms. So just as with marriage equality and sex, *Bostock*'s protection of sexual minorities in the workplace furthers the colonization of queerness. As normative queer workers are expressly transferred into the protections of the settler colonial state under Title VII, they are subject to the norms, values, and expectations of the settler status quo. *Bostock*'s textualism is by its "administrative" powers a colonization of queerness.

V. STRUCTURING QUEERNESS

A. NARRATIVE GAPS IN SETTLER DECOLONIZATION

Examining how contemporary pro-LGBTQ legal developments colonize queerness helps answer the question posed at this Article's beginning: why continuing legal retrenchments against sexual minorities emerge even after significant victories, such as marriage and antidiscrimination. Part I shorthanded such legal retrenchment by invoking Reva Siegel's "preservation through transformation" concept in the queer rights context. By framing the inquiries here regarding queer legal progress within American settler colonialism, what appears emancipatory reveal themselves as much less decolonizing and more so the opposite. As historians Elizabeth Strakosch and Alissa Macoun observe, decolonization plays a symbolic role in settler colonial narratives but is never actualized: "Settler colonialism circles around [decolonization], variously locating it in the past, the present, and the future. And yet, in settler-colonial formations, no such radical break ever seems to come[.]"[374] If decolonization is defined as the

[373] Joshi, *Respectable Queerness*, *supra* n. ___, at 432-33.
[374] Macoun & Strakosch, *supra* n. __, at 41-42.

relinquishment of power and sovereignty of the colonizing polity, then moments of liberty and equality for queer identities seem antithetical to true decolonization if liberty and equality also depend on assimilating to status quo norms and are continually cemented into dominant, settler nationalistic narratives of democracy and justice.

In this way, Strakosch and Macoun further posit that though "[t]he settler colonial project identifies its own endpoint with the moment of decolonization," in reality "[t]he vanishing endpoint that is continually pursued is, in effect, the moment of colonial completion. That is when the settler society will have fully replaced Indigenous societies on their land, and naturalized this replacement."[375] To explain further how this replacement works, Yann Allard-Tremblay and Elaine Coburn have added that "[t]he endpoint of settler colonialism is the imagined moment where the colonial relationship between settlers and Indigenous peoples are superseded, because Indigenous peoples no longer exist to jeopardize settler occupation and sovereignty."[376] In that way, "as settler colonialism aims for the naturalization of settler authority and to correct its own imperfectly realized occupation, the ongoing presence of Indigenous peoples justifies diverse eliminatory and assimilationist politics and policies—ironically, proving the incompleteness of the settler colonial project."[377] Substitute in queer identities here for the Indigenous in the settlers' sexuality project and the script remains the same. Hence, American law's "preservation through transformation" tendency is coterminous with the fundamental motivations of its underlying settler logic. Decolonization has not occurred within queer legal advancements.[378] Instead, each of the major pro-LGBTQ cases, starting from *Romer*, has contributed to a normative transfer of citizenship for sexual minorities that reify the racialized heteropatriarchal grammar of the settler polity, sovereignty, and hegemony. As these decisions reflect the settler state's civilizing

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[375] *Id.* at 42.

[376] Yann Allard-Tremblay and Elaine Coburn, *The Flying Heads of Settler Colonialism; or the Ideological Erasures of Indigenous Peoples in Political Theorizing*, Pol. Stud. 1, 5 (2021).

[377] *Id.*

[378] *See accord id.* (noting that there is no decolonial or postcolonial moment).

mission, they attempt to colonize queer identities, which explains what is ultimately preserved and who is transformed when the juridical dust has settled.

Even more perplexing is how decolonization in the American settler colonial project would occur. Imaging this process is difficult because no definitive script exists: "[T]here is no intuitive narrative of settler colonial decolonization, and that a narrative gap contributes crucially to the invisibility of anti-colonial struggles."[379] As far as offering theoretical approaches to decolonization, Veracini summarizes three: the possibility of settler exodus, elevating reconciliation with colonized groups, and denying the rejection of reforming the settler state to recode the settler state as postcolonial.[380] But the difficulty lies in settler colonialism's regenerative nature. Settlers' civilizing mission labors between asserting its own normative racial-gender-sexuality objectives and affirming its political values and ideals—all for the sake of structuring sovereignty. As demonstrated here in the journey from *Bowers* to *Bostock*, settler exclusion and inclusion of non-normative sexual identities has not had a true anti-colonial teleology. Instead, the direction has been exactly what scholars have identified in settler colonialism classically as palindromic.[381] Either exclusion or inclusion is affected by some interest convergence—some perceived queer improvability—or lack thereof that pushes circumstances to one end of that palindrome.

Likewise, Allard-Tremblay and Coburn also claim that settler colonialist "ideologies shape-shift and return to support a goal that is never fully achieved," and that they "cannot be defeated by reasoned argument alone," which includes any reconciliatory narratives between settlers and non-settlers.[382] Here, I would add law and its rationality to this category of "reasoned arguments"—or at least a means of producing these arguments within reconciliation narratives between settlers and non-settlers as

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[379] Veracini, SETTLER COLONIALISM, *supra* n. __, at 105.
[380] *Id.* at 105-08.
[381] *Id.* at 100.
[382] Allard-Tremblay & Coburn, *supra* n. __, at 2-3.

Veracini has observed.[383] Against such powerful influences, the prospects of decolonization, according to Allard-Tremblay and Coburn, would come from "a turning away from the colonial state relations that necessitate and sustain them and in a turning toward the resurgence of diverse Indigenous political thoughts that structure alternative political practices."[384] In the Indigenous context, such transformative changes beyond settler colonialism must involve "prefigurative practices," defined as "acting in the present as if the world that is imagined and wished-for was already in existence."[385] Their hope is that prefigurative practices would critically revitalize traditional structures of Indigeneity—languages, rituals, territoriality, diplomacy—"with an aim of renewing Indigenous ways of being, doing, and knowing."[386] Though reviving traditions here might bring their own marginalization issues or require negotiation with modernity, Allard-Tremblay and Coburn are not calling for replicating exact traditional structures for their own sake but "for both old and new purposes"[387] Thus, reviving such practices "from long-standing Indigenous imaginaries"[388] serves ultimately " ' to *renew* a life-giving force that sustains peoplehoods' "[389] by offering individuals opportunities to practice "side step[ping] the settler colonial present, actualizing a different, already existing world, that has been and is targeted for elimination by settler colonialism."[390] From there, perhaps "the settler colonial present may be transcended, progressively disempowered and replaced."[391] "Prefigurative practices" might produce alternative structures and accompanying narratives to offset setter colonialism's dominance, and serve as a decolonizing catalyst.

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[383] Veracini, SETTLER COLONIALISM, *supra* n. __, at 107.
[384] Allard-Tremblay & Coburn, *supra* n. __, at 2.
[385] *Id.* at 14.
[386] *Id.*
[387] Allard-Tremblay & Coburn, *supra* n. __, at 14.
[388] *Id.*
[389] *Id.*
[390] *Id.*
[391] *Id.*

B. Queer Prefigurative Practices

Because American settler colonialism is an ongoing race-gender-sexuality project, practices that lead to alternative structures for non-normative sexualities, in the same spirit as Indigenous "prefigurative practices," might also similarly empower queer identities—Indigenous and non-Indigenous ones—from settler colonialism's heteropatriarchal grasp.

Very much in line with Allard-Tremblay and Coburn, Francisco Valdes considers the efficacy of creating alternative structures to liberate minoritized sexualities from the colonizing effects of relying on mainstream doctrines. According to Valdes, queers should critically reject the prescriptive restraints that the status quo has imbued formal legal reforms for sexual minorities, such as marriage and sexual intimacy.[392] In his critique of queer legal advances—and also experiences of American civil rights and justice—"social change sticks only when culture, not just law, changes."[393] Turning toward the settler colonial context, we have seen how the progressiveness of law for accepting queerness—in areas such as relationships, sex, and antidiscrimination—always directs progress back to invigorating settler sovereignty. In this way, twining both views together, the law is limited in advancing liberatory progress. Even if it appears as a rational argument for decolonizing, it is not supported by transformative values or practices but continues to perpetuate settler structure. Hence, *Lawrence*, *Obergefell*, and even *Bostock*, are means rather than ends.[394] Along this qualifying observation about law's diminishing propensity to rectify colonization, Valdes externalizes this limitation of legal reforms if they lack accompanying cultural changes; he models an example of approaching LGBTQ victories in marriage that demonstrates both the limitation of that legal win while critically rejecting its colonizing effects. With *Obergefell*, Valdes proposes that sexual minorities could recognize that "to be

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[392] *Id.* at 9.
[393] Valdes, *supra* n. ___, at 27.
[394] *See id.* at 2.

pro-marriage equality is not to be pro marriage. There is a distinction."[395]

For pro-marriage advocates in litigating cases before *Obergefell*, this distinction would not have created the same level of perceived improvability that accessed Justice Kennedy's extension of marriage rights to same-sex claimants because it reflected a certain politics of difference. In fact, it would have diminished any motivation to establish interest convergence. But applied *ex-post* rather than *ex-ante*, it can now provide a normative compass for engaging in practices that question settler heteronormativity's cultural hold on marriage equality and allow individuals the agency to define their own marriages and relationships. Specifically, now "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" hopefully to destabilize mainstream prescriptions on sexuality.[396] Even though Valdes leaves specifics alone, what are "ancient choices" if they are not "prefigurative" ones? By practicing the distinction of being pro-marriage equality and not pro-marriage, Valdes hopes that an "antisubordinationist commitment" to pluralist notions of human diversity and lived experiences will flourish—one that in practice could dislodge what upholds the heteropatriarchal family.[397] Valdes' version of "prefigurative practices" are culture-shifting, everyday practices of sexualities and relationships directed by a sense of queerness that flips our notion of legal rights as a top-down formalist project mandated by the status quo. Instead, from the personal level and then upwards, these practices would "liberate" antisubordinative, cross-cultural negotiations of lived experiences that aggregate as alternative structures for decolonizing sexualities. In this respect, a bottoms-up approach hands legal victories back into the daily experiences of individuals to effectuate personal praxis or autonomy. This liberatory sense is shared by Saito in her discussion on settler decolonization: "If we do not intend to depend on the state, we will have to develop, or re-discover, ways of

[395] *Id.* at 12.
[396] *Id.* at 8.
[397] *Id.* at 15-16.

governing ourselves. Because self-governance is an organic process, I suspect that it simply has to grow, and change, from the ground up, and in response to emerging societal and environmental needs."[398] This takes the practice of envisioning and acting on personal agency: "Regardless of how the process develops, we can take hope from examples we see around us of people living as if they were free."[399]

What Valdes illustrates as Queer normativity hints at a hidden conceit in the way our examination of the limits of contemporary queer legal advancements has been framed. In calling these moments of mainstream legal advancements as also attempts of the settler state to "colonize queerness," a critical question ought to arise as to whether indeed queerness can be colonized, or whether that notion is merely part of the aspirational fantasy of the settler's mission to uplift the "perfect" sexual minorities for its own control and hegemony. After all, queerness in theory is a destabilizing discursive practice rather than an entity that is singularly idealized in essentialized identities. In its post-structuralist sense, queerness resists definition or capture and is devoted to multilateral rather than monolithic experiences of sexuality. Is it primitive? Is it civilized? Is it both or all? Who gets to decide? Who has praxis? In the quests for liberation, it seems that many sexual minorities have forgotten this aspect of queerness and adopted settlers' amnesia. For now, the intuitive script for decolonizing settler states might be undecided or unknown. But perhaps thinking about queerness in its theoretical potential gives a practical sense of liberation or agency to marginalized sexualities under circumstances that seek to colonize. Structurally-speaking, if settler colonialism is an invasion and not an event, then regarding queerness in this way might be the countervailing thought that ought now to invade.

VI. CONCLUSION

By recognizing how the maintenance of American settler colonialism shapes the contemporary legal challenges and victories of sexual minorities, the historical narrative of colonization reveals

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[398] Saito, SETTLER COLONIALISM, *supra* n. __, at 212-13.
[399] *Id.* at 213.

itself, in part, as a sexuality project that continues to "civilize" queerness despite outwardly proclaiming the equality and liberty of marginalized sexualities. As we have seen, settler colonialism's profound imprint is often thinly visible, and thus, advocacy that resists colonization is difficult to articulate and justify. Hopefully, this work here brings forth some critical and tangible light on why in terms of progress, things remain the same the more they appear to change. In that endeavor, at some point, perhaps marginalizing patterns will break.