Crawling Out of Fear and the Ruins of an Empire: *Queer, Black, and Native Intimacies, Laws of Creation and Futures of Care*

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Introduction.

Queerness is a generative desiring; it is an evoking of the playful, unpredictable, capacious possibilities of being in bodies, expressing selves, and exploring intimacies.[1] In a society of definitive meanings, where identities signify specific and predictable positions, queerness insists on the incompleteness of any *one* structure of organizing individuals and relationships.[2] While the social order is diluted by narratives instructing how relationships form, evolve, and get hierarchized, queer relationalities reject the simplicity of common-sense assumptions; in their place creating a playground of love, care, and dependencies. Against the fantasy of the monogamous couples and their biological families, for example, queer peoples have developed hand-made relational configurations. They intermingle friendships, families, lovers, and partners; they render these categories flexible and allow the individuals to give them meanings based on their unique patterns of connection, communication, and communion.[3] Queer peoples have metamorphosed sensuality, from a private act of coupled

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[1] *See* JOSE E. MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 1 (2009).

[2] The divide between the mainstream account of LGBT identities and queer narratives has structured distinct visions for what would constitute liberation, at least since the 50s. Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 SOCIAL PROBLEMS 390, 395 (1995). The fault line has separated ideologies that are defined as assimilationist on the one hand, seeking normalcy through recognition within the existing societal structures, and separationist, on the other, denouncing the concept of normalcy and urging undoing of the society and its institutions. *Id.* The first camp can be thought as the ground on which legal strategies have been nourished. At the other end, the queer critique of identity formations is first an assertion of a false cohesion of how gendered and sexual desires are articulated among queer peoples. These strategies are further critiqued as being assimilationist. *But see* Douglas NeJaime, *Differentiating Assimilation*, 75 STUD. L. POL. & SOC'Y 1 (2018). The stabilized identities are constructed in line with the majoritarian sexual and gender narratives, in order to make the claim that homosexuals and transgender people are *normal*, and accordingly, deserving of equality. *See, e.g.*, *Elizabeth J. Baia Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021 (2018).

[3] *See* Elizabeth Freeman, *Queer Belongings: Kinship Theory and Queer Theory*, *in* A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES 295, 304-05 (George E. Haggerty & Molly McGarry eds., 2007); *see also* Sandy Allen, *Between the Binary: On the Gratitude I Feel to My Chosen Family*, THEM (Apr. 3, 2020), https://www.them.us/story/gratitude-for-chosen-family-during-coronavirus [https://perma.cc/T3SE-QX4W] (reminding that queer-chosen networks of love teach family to be "less a noun, and more a verb, a practice, something we do, together").

intimacy, into what can pervade across social relations and positions.[4] Intimacies take shape between individuals who may not know each other's names, and in public spaces where privacy is carved out; sensuality becomes a part of body language between those who may not engage in sexual acts — it structures one's disposition and gendered presentation. Intimacies turn into enactments of losing and gaining control, which stretch the definitions and functions of bodies.[5]

As an invitation to *creation*, queerness places a fundamental contradiction within the law, which seeks to "provide[] the context for ending the story successfully."[6] Whereas the legal order is built upon the premise that a *truth* is necessary for ordering society, and functions through centralizing that truth, queerness "refuses to organize [ ] desire[ ] . . . [even] refusing to speak in a single voice."[7] The tension between the fluid and constructive tendencies of queer worldmaking, against the stabilizing and regulatory matrix of the legal order, offers a beginning point for this article.[8] From within this incommensurability, I will pull forth a conversation on the meaning and ideal of *equality*, particularly as it shapes the relational order of the society — implicating how individuals perceive themselves and one another.

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[4] *See* Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 558 (1998).

[5] For example, Susan Stryker speaks of her experiences in S&M play parties of San Francisco where individuals could explore their bodies in new dimensions, becoming *things* and *masters*, whipping, tying, inviting to shame and be shamed, holding, healing, releasing trauma, in exploratory patterns of consensual interactions. Susan Stryker, *Dungeon Intimacies: The Poetics of Transexual Sadomasochism*, 14 PARALLAX 36, 38-42 (2008).

[6] Katherine M. Franke, *Eve Sedgwick, Civil Rights, and Perversion*, 33 HARV. J.L. & GENDER 313, 316 (2010).

[7] *Id* at 319. In her work tracing how the legal order regulates desire, Yvonne Zylan ultimately concludes that queer peoples are better off if they stray away from the disciplining force of the law — the law makes desire into something *undesirable*: "In setting out rules of desire, identity, and the body, law authorizes expressions and experiences that are profoundly limiting and narrowly constructed, yet which appear to be the very substance of freedom (if they appear at all)." YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY, AND THE SOCIAL CONSTRUCTION OF DESIRE 274 (2011).

[8] Janet Halley remarks that Eve Sedgwick, whose work offered many scholars opportunities to move from a skeptical to constructive, paranoid to hopeful terrains of thinking, still regarded law "as the baneful pole of a baneful dualism that cannot be unlocked." Janet Halley, *Paranoia, Feminism, Law: Reflections on the Possibilities for Queer Legal Studies*, *in* NEW DIRECTIONS IN LAW AND LITERATURE 123, 139 (Elizabeth S. Anker & Bernadette Meyler eds., 2017). My thinking and work are indebted to Sedgwick's care, thoughts, and narratives, and this piece is one attempt at "search[ing] for that proliferation of possibilities" where she experienced a baneful opposition. *Id.* at 141.

The law enshrines and entrenches a unified narrative, a singularized network of meanings, as shared principles of the society. This is an ideal of american citizenship,[9] a socialized identity based upon overarching value structures and ethical principles, anticipated to override all particularities.[10] Specifically in the context of rights and liberties, the law relies upon the centralized narrative of citizenship.[11] To make a claim for equality, a minoritarian group must create an image of themselves employing these normalized conditions of the society. In other words, the group seeking equality must bring themselves in a continuous formation with the dominant narrative of american citizenship — what cannot be captured in this linguistic simplification is buried under a political silence; it can only be an excess but it will not be operational in the structuring of reality.[12] The construction of identity-based claims with a reliance on the shared *values* of citizenry represent a fantasy of equality as *sameness* — "pretending that [differences]

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[9] This text focuses on the national legal regime, founding mythologies, and the citizenship narratives of the land mass that was violently named as the united states of america. While doing so, I am aware of the troubling centrality of the west and western nations as the locus of analysis for much academic, political, and sociocultural work. I thus do not claim that the analysis in this text is a prototype for analysis everywhere, nor is it an analysis that is applicable to the entirety of the so-called nation's geography. That being said, a central argument of this work draws from Slyvia Wynter's scholarship, claiming that the universalizing western hegemony spreads its mythologies and ideologies, with localized variations reproducing patterns of dispossession for founding, violence for power. *See, e.g.*, Greg Thomas, *Inter/Views: Sylvia Wynter*, *in* PROUD FLESH 1, 10-13 ([Darlene V. Russell] ed., 2006) (expressing that the globalizing war for freedom is one of "consciousness" and of betraying the founding mythologies engrained in our consciousness for a new *poesis* of the human). Accordingly, this work could be a map for a broader analysis, but as it stands, is limited to an account of the narratives that structure the westernizing Turtle Island.

[10] *See* Gerald Torres, *Critical Race Theory: Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993, 995, 997 (1991).

[11] *See, e.g.*, ZYLAN, *supra* note 7, at 38-39; DEAN SPADE, *What's Wrong with Rights*, in NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW [38], 38-42 (2011).

[12] Reflecting on the reasons and effects of this diminished engagement with difference, Gerald Torres writes, "[s]uch a move, of course, protects the dominant cultural grouping from confronting a destabilizing 'other,' and forces the subordinate group to adopt the dominant groups' definition of themselves if they wish to share in the distribution of social goods." Torres, *supra* note 10, at 999. Various anti-colonial scholars have written on the implications of conditioning political engagement to adapting into identities produced by the dominant powers. For a famous example, see Edward Said, *Orientalism Reconsidered*, 1 CULTURAL CRITIQUE 89, 93 (1985), which describes the construction of the *Oriental* as a mute object of colonial fantasies).

can be translated with no damage to the structure of meaning underlying the disputes."[13] Under this hegemonic approach to equality, there is a singular *truth*, the truth of the dominant civil society, and all variances are narrative modifications that can expand, but never undo this truth.[14]

Even as the introductory remarks show, an understanding of *equality* that relies upon a singularized narrative cannot sustain the possibilities of existence generated among queer collectivities. Instead, in a queer world order, *equality* would require allowing *difference* to produce its own meanings. This is not denouncing the impacts of the social and collective; on the contrary, creation always begins from the vocabulary, grammar, networks, and ideas that populate the social imaginary.[15] Yet, rather than taking the *particular* ordering of these facets as immutable or essentially desirable, queerness recognizes their historical specificity and malleability. In turn, individuals shift away from being passive observers or reproducers of the social order, and take the stance of being "willful subjects," those who can claim an agency to shift the forms and concurrently the names given to their bodies, relationships, and the purpose of their lives.[16] Queer worldmaking is an act of survival embedded in creation.[17] Where the dominant order has shunned away, if not actively violated, the existence of queer peoples,[18] finding new names for bodies, coming together in dependent

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[13] Said, *supra* note 12, at 1002-1003.

[14] *Id.* at 997 ("Our identity (and thus our interests) is rooted in some broad culture defined by the political contours of our present nation state.").

[15] Judith Butler asserts that against the common conception of *agency* as an unincumbered, individuated zone of action, we can create selves when we recognize being placed in a particular social condition, then claim the power to reorganize the normative condition towards "ethical" futures. *See* JUDITH BUTLER, GIVING AN ACCOUNT OF ONE'S SELF 17, 22, 23 (2003). Jose Muñoz similarly speaks of queer self and world-making through the term "disidentification," which is a practice of "recycling and rethinking encoded meaning." JOSE E. MUÑOZ, DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS 31 (1999). He illuminates disidentifactory practices of queer artists of color that "crack[] open the code of the majority . . . and use this code as raw material for representing a disempowered politics or positionality that has been rendered unthinkable by the dominant culture." *Id.*

[16] SARA AHMED, WILLFUL SUBJECTS (2014).

[17] For example, Muñoz speaks of disidentificatory practices as emanating in response to "the conditions of (im)possibility that dominant culture generates" within the lives of queer peoples of color. MUÑOZ, *supra* note 15, at 6.

[18] Dehumanization of transgender people generally, and Black transgender women and femmes in particular is an example to this violation. Black transgender women are killed, incarcerated, discriminated against with near to no impunity. For an account of this endemic violence as well as steps towards change, *see Black Trans Women and Black Trans Femmes: Leading & Living Fiercely*, TRANSGENDER L.

relationships, and visioning *other* orders through playing with sensualities is an insistence upon remaining alive, declaring one's worth, and retaining hope for futures of *freedom*.[19]

With the centrality of survival to queerness in mind, the unified narrative of the law comes across as inherently violent to those whose *being* and *loving* stray away from its demands.[20] While *liberties* may be extended to those priorly denied their rights, the existences which lose their essence when translated into the central narrative will remain at the fringes and continue to be *dehumanized*.[21] Approaching this persistence of *inequality* as not an unavoidable reality of living in a constitutional polity, but a *choice* we make in how we think about and organize the law, this article seeks to create a critical inquisition into the centralized relational order, including its forms and specifically its guiding values.

In subsequent parts, the article will attempt to tear away the layered, historicized, and cultural assumptions that persist the societal narrative — through its tensions with queer desires and dreams, and by unearthing its violent implications on Black communities, and its entrenched roots in colonial dispossession of Native communities. Racialized violence persists across the everyday of the american citizenry.[22] Racialized inequality is never separate from the constructions of deviance and abnormality, which most directly bring to mind gendered, sexualized, hence relational variations.[23] For

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CTR., https://transgenderlawcenter.org/black-trans-women-black-trans-femmes-leading-living-fiercely [https://perma.cc/3R22-XCPP].

[19] Jose Muñoz speaks of queer worldmaking as a utopian, generative practice that offer possibilities of an order beyond the hegemony in which we live. *See* MUÑOZ, *supra* note 1, at 1. For Muñoz, hope itself is a critical methodology of desiring in the face of suffering. *Id.* at 9.

[20] *See* JUDITH BUTLER, UNDOING GENDER 3 (2004) ("The terms by which we are recognized as human are socially articulated and changeable. And sometimes the very terms that confer 'humanness' on some individuals are those that deprive certain other individuals of the possibility of achieving that status, producing a differential between the human and the less-than-human.").

[21] *See, e.g.*, Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 442-43 (1997); Lisa Duggan, *Queering the State*, 39 SOCIAL TEXT 1, 5 (1994).

[22] Black Lives Matter (BLM) protests that have spread across the nation, in response to the unabated, incessant killing of Black people in the hands of the police, is a most recent reminder to question the implications of racism, and center Black lives in the work that we do — whatever that work may be.

[23] In fact, colonizers and imperialists-of-today levy sexual deviance against the feared, uncivilized others, to mark *whiteness* as the harbinger of *purity* and progress. *See* Anne McClintock, IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST 22 (1995). For a foundational analysis of how *gender*, as it is normatively understood in the modern society, grew, and became ossified through

a constructive critique, this paper will tie racialized violence to the encounters and values guiding the nation's formation and persistence, in which race has functioned "as the baseline historical sign of injury and its reparation," which structures "the condition of possibility" for modern identities and rights.[24] In addition to the analytic and political convergences of queer, Black, and Native histories, just as queer peoples, Black and Native peoples insist on their existence against a social that do not wish for them to survive. They have possessed and have continued to grow their own cultures, their own ways of existing together, which as I will come to argue, transgress the unified fiction upheld by the law. To this end, they offer knowledge, wisdom, and hope to reach beyond the stifling constitutional polity.[25]

Starting these conversations from a point of *relationships* is nurturing, because they are personal, as much as always political. We rely upon relationships for sustaining ourselves, building our lives, and reaching towards our dreams. How we come together in intimate relationships and passing connections is the backbone of the society. And where the law can be taken as the story *the nation* tells of itself, organization of relationships in light of these stories implicate where we think we stand and who we think we can become.[26] There is thus a deep intimacy between the values guiding the legal order and those guiding our lives, and a central work of this article is to explore these values as means of understanding how their reorganization can shift what we perceive to be *possible* — as legal and social actors. In my analysis I will touch upon three layers of the relational order as responsive constructs: (i) *forms,* that is how we name our relationships and hierarchize them in a particular manner, (ii) *values*, that is the ethical and moral principles that reason the organization of relationships, and (iii) *feelings*, that

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dehumanization of Black people, see Hortense Spillers, *Mama's Baby Papa's Maybe: An American Grammarbook*, 17 DIACRITICS 64, 67 (1987).

[24] Jodi A. Byrd, *Loving Unbecoming: The Queer Politics of the Transitive Native*, *in* CRITICALLY SOVEREIGN 207, 211 (Joanne Barker ed., 2017).

[25] Racialized and colonial discourses affect all *non-white* collectivities, in differing forms and scopes, with distinct histories and effects. Generalization into *Black* and *Native* wholes is one central limitation of this work. This paper also overlooks Asian, Hispanic, and Middle Eastern peoples, cultures, and their stories. And while the specific focus is lacking, the worlds of care created by disability justice communities share deep parallels with the intimacies explored in this work.

[26] Robert Cover describes the law as a set of narratives that give meaning to the nomos, or the "normative universe" in which we live. Narratives are not "truths" per se, but they are buttressed by a set of morals. Cover recognizes that the centralized legal machinery is one producer of law, hence narrative, among countless others that make up the society. The premise of this article is built upon Cover's teachings and call to reorganizing how we approach *the law*, in order "invite new worlds" rather than "circumscribing the nomos." Robert Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1984).

is the emotional underpinnings that stabilize certain value structures as necessary or desirable for the continuity of the society. Seeing these layers will require bringing disjointed archives and scholarship together, and drawing connections that I will not claim to be *the truth*, but rather a possible reinvestigation of what we have learned to take for granted.[27] My overarching aim is to reflect upon how a law that conditions equality upon sameness structures and is in turn sustained by the relational order. Through foregrounding relationships of queer, Black, and Native peoples, this paper will simultaneously explore the possibilities of *queering* the law. In particular, I would like to invite us to think whether changing feelings, values, and forms of relationships can foster the possibility of laws that encourage branching and multiplying the ordering principles of collective togetherness.

With these ambitious and introductory goals, this paper will trail off as follows. Part I will unpack *Lawrence* and *Obergefell* to reveal the *romanticized* narratives that organize connection and intimacy in the broader society. I will focus on the *private/public* divide, as a fiction that is insistently deployed to establish the idealized relationships of marriage and family. Part II will carry the conversation into the layer of values, specifically thinking about *privatization of dependencies* as a national value that defines not only the *american* family, but also creates alienated publics. I will build these claims and explore their effects through centering the families and publics nurtured by Black peoples, which the dominant sociopolitical narratives mark as failures based on their *difference from* the national norm. To ground these assertions in a historical continuum, Part III will investigate the colonial moment and display how the settlers have deployed the *forms* of romanticized relationships as well as their accompanying *value* structures to justify destruction of Native cultures. This Part will further elaborate on the contemporary echoes of this colonial paradigm, ultimately asserting that the centralized relational order persists *white supremacy*. Collecting the tendrils of these conversations and focusing on how the regulatory force of the law has been justified across time and place, Part IV will elaborate on *fear* as a

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[27] Legal thinking and writing are obsessed with the truth. We are anticipated to provide *objective* evidence drawn from established authorities, evaluate and rebut counter arguments, and arrive at firm conclusions. Our words become *effective*, to the extent they are supported by the conventions of legal argumentation. Following a queer tradition, I believe that making a claim to *truth* is nothing but a paternalistic reflex that ends up persisting silence; it prevents us from listening to many voices that may never employ the registrars of *truth-telling*. This paper is thus not concerned with making *flawless arguments* to convince legal audiences. Instead, it seeks your open mind to look at what particular, paralleling patterns may tell us about the law as well as ourselves. My hope is that the reader may be able to spot connections, either from the examples provided or from their own lives that I might not have seen, in order to expand, build, change, and grow these exploratory conversations.

public feeling that urges preservation of the relational order and equality based upon sameness. Thinking together with the teachings of Black queer feminists and Native peoples, this Part will end with reflections to move away from *fear* and towards alternative configurations of laws, which do not homogenize into a singularized ideal, but instead encourage collective living, and make possible accountability and justice.

At the heart of this work lies a desire to produce and promote hope. Particularly within a legal structure that insists upon the repetition of the same, this paper urges a remembering of our own power and creative capacities. To originate laws from *our bodies*, rather than a *nation*, is to be guided by these capacities that are already manifested in our loves, dependencies, and intimacies; foreshadowing societies structured not through exploitation, but trust and care.

Part I. Relational Possibilities Under the Siege of Equality: Privatized Romances of Sensuality and the Family

Day-in day out, on the streets, on TV screens, in journal entries, maternal prayers, or in a simple conversation where "how have you been" is followed by "is there a person in your life," we are saturated by a longing for love. This circulating desire for love, however, rarely houses a willful, personal, and growing meaning of love.[28] In her much-cherished guide to becoming free again through love, bell hooks connects this persistent lack of intentionality with "choos[ing] relationships of affection of care that . . . feel safer," where "[t]he demands are not as intense as loving requires" and "[t]he risk is not as great."[29] For loving is scary; it involves breaking yourself and your desires open to another, without a guarantee of being understood or held in return.[30] This baring of the self, with an attempt to curate a caring connection is quintessential for hooks' definition of love, which houses a "purpose of nurturing one's own or another's spiritual growth."[31] A queer interpretation of love could accommodate such a premise of *change*. When identities and relationship models do not follow their pre-ordained trajectories, individuals need to search into their desires, attempt to

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[28] There is necessarily a difference between the circulating, idealized narratives, as opposed to the complexity of people's lives and relationships. This paper focuses on the *ideal*, as I argue that this ideal at least delimits the capacities of how people envision their relationships. Moreover, legal decisions and the common-sense they work with draw from the generalized accounts, rather than the individual stories.

[29] BELL HOOKS, ALL ABOUT LOVE: NEW VISIONS 10 (2001).

[30] *See* LAUREN BERLANT, DESIRE/LOVE 89-90 (2012).

[31] HOOKS, *supra* note 29, at 4. (citing M. SCOTT PECK, THE ROAD LESS TRAVELLED).

communicate what could be considered shameful or hesitant, and in indeterminacy find ways of caring for one another. In this light, queer-er relationships born out of a queer-er love work with the risk of failure of love and loving, and let love have new possibilities of articulation.

The dominant love plot, however, formulates a consistent fantasy to be taken up across couples without significant variations. It is not an invitation to growth through exploration, as much as a solace for stability through unquestioning loyalty. *Love* in this context is a buzz word, which works with fantasies of finding "the one" to hold one together, to "care for" without seeking change or needing to be changed, ultimately building towards a security through marital commitment.[32] These fantasies structure how many build their lives, approach their relationships, and understand their senses of self. In this light, Lauren Berlant could conclude that "[t]he reduction of life's legitimate possibility to one plot is the source of romantic love's terrorizing, coercive, shaming, manipulative, or just diminishing effects — on the imagination as well as on practice."[33]

This incapacitating, yet infectious love plot is central to a core value structure of social, political, hence legal organization: heteronormativity. Heteronormativity registers and reproduces the elements of a *normative* heterosexual relationship as a relational, ethical, and sensual order.[34] It encapsulates "structures of understanding," values and meanings that have become common sense in the social fabric.[35] The mainstream narratives of romance, as "one true love," "till death do us part," how "dating" is understood in comparison to "friendship,"[36] or what relationships are regarded as temporary as opposed to reliable, are all stories that coalesce within heteronormativity.

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[32] Fantasy is key to love's operation in Berlant's telling: "a site in which a person's relations to history, the present, the future, and herself are performed without necessarily being represented coherently or directly." BERLANT, *supra* note 30, at 8.

[33] *Id.* at 87

[34] Lauren Berlant and Michael Warner introduced heteronormativity as "the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent that is, organized as a sexuality — but also privileged." Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 548 (1998).

[35] *Id.*

[36] *See,* Rhaina Cohen, *What If Friendship, Not Marriage, Was at the Center of Life?*, ATLANTIC (Oct. 20, 2020) https://www.theatlantic.com/family/archive/2020/10/people-who-prioritize-friendship-over-romance/616779 [https://perma.cc/29S8-HA4N].

When the gay rights movement made equal recognition claims for homosexual relationships, heteronormative presumptions needed to be reproduced to satisfy the condition of sameness.[37] Lisa Duggan identifies this diminished terrain of homosexual relationality with the term *homonormativity*. Homonormativity is a "politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption."[38] Marriage, family, and their primacy in the social order, exemplify heteronormative assumptions and institutions.[39] Through the homonormative foregrounding of these institutions, some homosexual subjects have gained legal recognition of being *equal* citizens, hence they have been accepted into the centralized narrative.[40] Queer relationships that are neither homo- nor, consequently, hetero- normative have remained outside the scope of these equality claims.

In this part, I will trace how the "achievements" of modern gay rights politics depended on reproduction of heteronormative forms: first in *Lawrence v. Texas*, the 2003 ruling that decriminalized sodomy, then in *Obergefell v. Hodges*, the 2015 ruling that legalized same-sex marriage across the nation. As I subscribe to the assumption that these outcomes depended on homosexual couples' successful integration into the dominant relational order, the opinions will provide a window to peer into the narratives defining the *legitimate forms* of sensuality and relationships for the society. I will specifically elaborate on how heteronormativity regulates boundaries between "political and personal, intimate and public, market and life world [as well as] distinguishing . . . the sexual from non-sexual, . . . or identifying the intimate with the familial."[41] These binary fictions that form the *private* and *public* divide, organize the Court's romanticized narratives that circumscribe and hierarchize relationships, with marriage as the cherry-on-top. Where relationships are central to how we give meaning to our lives, the Court's declarations deeply touch what *we* recognize as a life worth living.[42]

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[37] Byrd, *supra* note 24, at 209.

[38] Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITIC 175, 179 (Russ Castronovo & Dana D. Nelson eds., 2002).

[39] BERLANT, *supra* note 30, at 92.

[40] As Duggan expresses, "[m]arriage is a strategy for privatizing gay politics and culture for the new neoliberal order." Duggan, *supra* note 38, at 188.

[41] MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 14 (1993).

[42] Lauren Berlant speaks of a time when she asked her students "why, when there are so many people, only one plot counts as 'life' (first comes love, then...)?" In light of this *one* plot, "[t]hose who don't or can't find their way in that story—the queers, the single, the something else—can become so easily unimaginable, even

A. *Lawrence v. Texas* and Domesticated Sensualities

In *Lawrence*, the petitioner brought a due process challenge against a Texas statute "making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[43] Justice Kennedy decided the case on the principal of "liberty," finding that the Constitution "allows homosexual persons the right to choose to enter upon relationships in the *confines of their homes* and their *own private* lives."[44] While *Lawrence* was broadly celebrated for establishing constitutional protection for homosexual relationships,[45] the Court's depiction of these relationships reveal that an equality conditioned upon sameness limited their parameters to *common-sense* heteronormative assumptions. In the opinion, Justice Kennedy presented the petitioner as a specific homosexual who is in a committed relationship, whose sexual acts are a *private* manifestation of this relationship.[46] As Katherine Franke notes, however, there was no evidence that Lawrence and Garner, the two individuals charged with sodomy in the case, were in a committed relationship to begin with.[47] In fact, Garner's *boyfriend* made the call to the police, possibly in a spurt of jealousy, hence the "sodomy," if it ever took place, could have been an act of "infidelity."[48] Justice Kennedy paid no mind to the entangled dynamics surrounding the case. He developed the ruling through projecting an assumed heteronormative relationship onto the petitioners, and through them onto homosexual individuals more broadly.[49]

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often to themselves." Lauren Berlant, *Intimacy: A Special Issue*, 24 CRITICAL INQUIRY 281, 286 (1998).

[43] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[44] *Id.* at 558 (emphasis added).

[45] For example, Katherine Franke recounts that ACLU celebrated the decision as giving "us the constitutional right to form intimate relationships and to sexual expression. For that, Lawrence changes everything." Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV 1399, 1400 (2004).

[46] As Teemu Ruskola notes, "reading the opinion, one would think that homosexuals exist only in relationships, and that relationship are the only context in which homosexuals might conceivably engage in sexual acts." Teemu Ruskola, *Gay Rights v. Queer Theory: What is Left of Sodomy after Lawrence v. Texas?*, 23 SOCIAL TEXT 235, 239 (2005).

[47] Franke, *supra* note 45, at 1408.

[48] Elizabeth J. Baia, *Akin to Madmen: A Queer Critique of the Gay Rights Cases*, 104 VA. L. REV. 1021, 1039 (2018).

[49] Franke, *supra* note 45, at 1408. Yvonne Zylan argues that "evidentiary boundaries . . . drastically and specifically reduce" legal analysis of cases involving sensualities, bodies, and relationships. By constricting the story before it is reviewed by the judges, these boundaries fail to accommodate complexities of desire. ZYLAN, *supra* note 7, at 271-272.

Homosexual intimacy presumed in the opinion is monogamous, committed, and privatized; "whether or not entitled to the formal recognition of law," it is marriage-like.[50] While producing this dignified homosexual relationship, Justice Kennedy is affirming what Gayle Rubin calls "the sexual value system," an organizing principle within heteronormativity. In this value system,

> sexuality that is 'good', 'normal', and 'natural' should ideally be heterosexual, marital, monogamous, reproductive, and non-commercial. It should be coupled, relational, within the same generation, and occur at home. It should not involve pornography, fetish objects, sex toys of any sort, or roles other than male and female.[51]

The sexual value system draws a stringent line of normalcy and anomaly.[52] The monogamous, committed homosexual relationship, with a privatized and regularized sexuality, is what *Lawrence* brings across the line; from criminality and deviancy towards normalcy.[53] As a result, sensualities that take place in polygamous relationships, among strangers in public spaces, between individuals with indeterminate gender roles or those who *switch* positions of control and dominance;[54] sensualities that emphasize pleasure, curiosity, and experimentation remain outside the "liberty interest" announced in *Lawrence*.[55] The opinion then affirms sensuality as a private

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[50] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[51] GAYLE RUBIN, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in DEVIATIONS: A GAYLE RUBIN READER 137, 152 (2011).

[52] *Id.*

[53] *Id.*

[54] Homosexual relations are often placed under the scrutiny of the gender binary, as reflected in the questioning of "who's the man, and who's the woman" in the relationship. *See* Arwa Mahdawi, *"Who's the man?" Why the gender divide in same-sex relationships is a farce*, GUARDIAN (Aug. 23, 2016), https://www.theguardian.com/lifeandstyle/2016/aug/23/same-sex-relationship-gender-roles-chores [https://perma.cc/7965-LLZF]. Ruthann Robson identifies that in marital relations involving a transgender person, the courts scrutinized "sexuality capacity of the individual," requiring "the coalescence of both the physical ability and the emotional orientation to engage in sexual intercourse as either a male or a female." Ruthann Robson, *Reinscribing Normality? The Law and Politics of Transgender Marriage*, in TRANSGENDER RIGHTS 299, 300 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) (citing MT v. JT, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)). The romance narrative surrounding *sensuality* may thus be limited to the stringent male/female binary.

[55] If Supreme Court opinions are filaments of national narratives, the Court is not only speaking towards the respondents or the homosexual population, but to the society more broadly. After all, the sensual order is affirmed as a dominant, *common-sense* norm for across the citizenry and through history.

matter, ideally locked up in the matrimonial home, but regardless "on private premises, with the doors closed and windows covered."[56]

Rubin connects this stringent regulation of sensuality with the western culture's perception of "sex [as] a dangerous, destructive, negative force."[57] A politics of fear frames sexual excess and deviance as potentially destroying the social fabric, evoking a "domino theory of sexual peril."[58] In this political and cultural climate, Rubin asserts that sex becomes acceptable only through specific excuses, such as "marriage, reproduction, and love."[59] In talking about and ruling on homosexual sex, Justice Kennedy relies on the excuse of love — as the term is understood in the mainstream discourse of romance.[60] In his words, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct is but one element in a personal bond that is more enduring."[61] This framing locates and reduces sensuality to an affirmation of a "more enduring" personal bond; sensuality, on its own, is not recognized as a mode of connection, care, or dependency.[62] Kennedy's claim becomes desirable in light of the fantasy of romantic love that promises stability, predictability, and a "seemingly non-ideological resolution to the fractures of contradictions of history" and desire.[63] The "liberty interest" in

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[56] Lawrence v. Texas, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

[57] RUBIN, *supra* note 51, at 150.

[58] *Id*. This narrative of fear runs in opinions where states declare an interest in public morality to regulate sensualities. Alabama made such an argument in support of a law banning the sale of "any device designed and marketed as useful primarily for the stimulation of human genital organs." Williams v. Pryor, 240 F.3d 944, 947 (11th Cir. 2001). In this case, the State argued that:

> a ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex" and that "it is enough for a legislature to reasonably believe that commerce in the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State.

Id. at 949.

[59] RUBIN, *supra* note 51, at 150.

[60] *See* BERLANT, *supra* note 30, at 88.

[61] *Lawrence*, 539 U.S. at 567.

[62] Elizabeth Baia reveals that throughout the opinion, sex is modified through the word "intimate" — "twice fram[ing] the right at issue as the right to 'intimate conduct,' and four times to 'intimate sexual conduct' or 'sexual intimacy'." Baia, *supra* note 48, at 1035-36. She concludes that "*Lawrence* was not defending the petitioners' right to engage in sex, it was defending their right to be in love." *Id.* at 1037.

[63] BERLANT, *supra* note 30, at 92.

the opinion then extends to those normative sexual acts that cohere within the dominant fantasy of love.[64]

Katherine Franke uncovers a similar dynamic within the jurisprudence of European Court of Human Rights (ECHR).[65] ECHR faced the question of whether criminalization of consensual sadomasochism (S&M) between three gay men violated the European Convention. Fifteen years prior, ECHR had decriminalized sodomy under a justification of protecting liberty interests, in an opinion similar to Justice Kennedy's.[66] In the instant case, the defendants were not advocating for a *proper* gay sex; they wanted to be tied down, mocked, hit; engage in powerplay. Facing a sensuality that could not be contained within the narratives of heteronormativity, ECHR affirmed the conviction "on the ground of protecting [public] health."[67] In a prior case, the court "reversed the assault conviction of a man, who had, with his wife's consent, branded his initials with a hot knife on [her] buttocks."[68] To differentiate two acts of consensual, *allegedly private* S&M, the court asserted that "in the privacy of the matrimonial home" individuals can consent to various articulations of their desires."[69]

Desire is then only dysregulated once it is located in the *regulated* and legally privileged institution of marriage: the "seemingly non-ideological" center of the romance plot.[70] The excess of sexuality and sensuality that is neither hetero- nor homonormative must instead be cordoned off to protect the individuals consensually engaging in sexual acts from their *own* desires.[71] If we take Rubin's three excuses that authorize sensuality in western societies, between the married heterosexual couple "marriage and love" worked together; between the homosexual couple "love" legitimized sexuality. The

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[64] *See* Baia, *supra* note 48. At 1044-1056, for a discussion on various cases where courts refused to extend Lawrence's liberty interest for "sex without romance and respectability." *See also* Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L. J. 197, 202 (2005) (arguing that "*Lawrence* errs on the side of protecting people from some sex at the cost of putting a lot of other sex at risk of exclusion from constitutional protection.").

[65] Franke, *supra* note 45, at 1409.

[66] In *Lawrence,* Justice Kennedy referenced "values we share with a wider civilization" as affecting the decision, specifically citing the ECHR Opinion decriminalizing sodomy. 539 U.S. at 576. Because this article focuses on value structures that are rooted in the western culture, the ECHR decisions are relevant to my analysis.

[67] Franke, *supra* note 45, at 1410. *Lawrence* similarly creates a carve out for State intervention when "there is injury to a person." 539 U.S. at 567.

[68] Franke, *supra* note 45, at 1410.

[69] *Id.* at 1410.

[70] BERLANT, *supra* note 30, at 92.

[71] Franke, *supra* note 45, at 1410.

three gay men, however, could rely on no excuse to seek the court to legitimize their sensuality, whereby fear of the panic-stricken society and preservation of public order prevailed as justifications for undermining their liberties.[72]

Across *Lawrence* and ECHR rulings, the content and boundaries of heteronormativity come to the foreground. Sensuality in the normative relational order is private, monogamous, and functional. The purpose of intimacy is reduced to a reflection of commitment that builds towards family formation.[73] What *Lawrence* then reveals is the "achievement" of the modern gay rights discourse to engrain homosexual relationship in the public and legal consciousness as sufficiently heteronormative-like.[74] In light of the discursive stabilization of homosexual identity, the Lawrence Court could "purport to know the truth of homosexual intimacy: *it is just like heterosexual intimacy*, except between persons of the same sex."[75]

The insistent location of *intimacy* into the private sphere, into the closed quarters of a home, shows how the binary logics of the *private* against *public* spheres stabilize the meanings of the dominant love plot, or our fantasies for romance.[76] In this mythology, the meaning of *private* is not captured by its generalized connotation of being "withdrawn from company or observation."[77] Thinking alongside the ECHR opinion, as well as the domestic cases that affirmed prosecution of individuals engaged in S&M *behind closed doors*,[78] private for the context of sensual and relational

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[72] In her analysis of estabilished domestic cases concerning BDSM where defendants relied upon *Lawrence* to assert their liberty interest, Baia finds that the courts repeatedly denounced their claims, taking S&M as "deviant sexual behavior" and declaring that "consent could be no defense." Baia, *supra* note 48, at 1053, 1054.

[73] Michael Warner names the understanding that "our lives [are] . . . made more meaningful by being embedded in a narrative of generation succession" reprosexuality**.** WARNER, *supra* note 41, at 7, 9.

[74] As Justice Scalia notes in his dissent, this ruling "is the product of a Court . . . that has largely signed onto the so-called homosexual agenda." 539 U.S. at 602 (Scalia, J., dissenting).

[75] Ruskola*, supra* note 46, at 241. The cultural and legal discursive shift comes across when *Bowers* opinion is compared with *Lawrence.* Seventeen years prior, the Court had sharply differentiated homosexual intimacy from "family [and] marriage," and affirmed sodomy laws based on the State's fundamental interest in protecting morality. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1821 (1993).

[76] Franke, *supra* note 45 at 1403 ("The cabining of Lawrence's liberty is accomplished through its geographization. . . . Repeatedly, Justice Kennedy territorializes the right at stake as a liberty to engage in certain conduct in private.")

[77] *Private*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/private [https://perma.cc/93XT-TCY3].

[78] *See* Baia *supra* note 48, at 1053, 1054.

liberties is the space of home. This home is associated with marital or marital-like relationships, following an idealized fantasy of "till death do us apart."[79] Private sphere is thus not simply a territory out-of-sight, but a privileged domain of intimacy that works with the fantasies of love, romance, and marriage propagated across the civil society, which in turns renders relationships of individuals outside the committed-bonds a public affair.[80] In other words, intimacy that deserves recognition must comport to the delimited definition of privacy.[81] Private sphere and the romanticized construction of relationships then reference the *sameness*, the shared civil ideal, upon which equality claims are given meaning to and contested.

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[79] *See* Carlos Ball, *Privacy, Property, and Public Sex* at 10 (2008), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091526 [https://perma.cc/FE59-E6LK].

[80] Ball clarifies that when individuals reference "public sex," they are rarely speaking of sex that takes shape in the public eye, such as in the middle of a street. Instead, often, queer individuals intentionally choose locations where it is unlikely for them to be seen by others. Ball, *supra* note 79, at 18. Ultimately, these individuals exist at the risk of societal violence. They have "public sex," because they may not have access to a private home where they feel safe. It is also unlikely for them to feel any more protected at the blatant gaze of passerby. As such, queer individuals often find secluded sanctuaries, such as bathroom stalls in the middle of nowhere, or isolated corners of parks at the dead end of the night, in order to construe a sense of privacy for their sensual engagement. Yet, as Baia finds, "courts are quite willing to label public bathrooms, especially bathroom stalls, as private, but typically take the opposite view when individuals assert a privacy right to engage in sex in a bathroom." Baia, *supra* note 48, at 1049. This differential construction of privacy can be tied with the spatial demarcation of the normative relational order.

[81] When minoritized sexual publics face an urgency to make legal and political claims, they "naturalize[] the options that figure most legibly within the sexual field." Franke, *supra* note 45, at 1414-15 (citing Judith Butler, *Is Kinship Always Already Heterosexual?*, in LEFT LEGALISM/LEFT CRITIQUE 229, 231 (Wendy Brown & Janet Halley eds., 2002)). In this light, the specific narrative of romance delimits what forms of intimacies are spoken of in public and political discourses. Thinking about the characteristics of a queer sensuality in the modern times that establish the mainstream expectations, Carlos Ball notes the prevalence of anonymity and casualness among queer individuals, which "offends notions of romantic love, steady relationships, or long-term commitment." Ball, *supra* note 79, at 40 n.111 (citing Maurice van Lieshout, *Leather Nights in the Woods: Locating Male Homosexuality and Sadomasochism in a Dutch Highway Rest Area*, *in* QUEERS IN SPACE 330, 342 (Yolanda Retter, Anne-Marie Bouthillette & Gordon Brent Ingram eds., 1997). *See also* Berlant & Warner, *supra* note 34, at 558 ("Making a queer world has required the development of kinds of intimacy that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.").

B. *Obergefell v. Hodges* and Fantasizing Privatized Marriage

Whereas *Lawrence* defines the privileged, normative form of sensual and relational engagement with a romanticized *privacy*, *Obergefell v. Hodges* explicitly locates and rationalizes marriage and the biological family as the center of the civil society.[82] In the much-celebrated decision, Justice Kennedy built upon the liberty interest in *Lawrence,* finding that "the right to marry is a fundamental right inherent in the liberty of the person."[83] Considering the claims of same-sex couples whose home states denied recognizing their marriages performed in another state, *Obergefell* ultimately declared that same-sex couples "may now exercise the fundamental right to marry in all States."[84] The opinion's messaging, however, was not solely directed to same sex-couples; instead, it has announced a meaning given to marriage within and for the social order.[85]

Justice Kennedy first presented marriage as a timeless, normative ideal that is "unlike any other in its importance to the committed individuals."[86] Declaring that american existence is intimately tied with the institution of marriage, Kennedy cited the *Maynard* court in asserting that "marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"[87] From this initial declaration, the two central heteronormative institutions, marriage and biological family, are presented both as *inevitable* and natural, as well as quintessential for the survival of the society.[88] Subsequently, Kennedy presented marriage as a precondition to "two persons together [finding] other freedoms, such as expression, intimacy, and spirituality;"[89] a precondition for individuals to attain "best possible version" of themselves.[90] In this account, marriage does not only provide a

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[82] 576 U.S. 644 (2015).

[83] *Id.* at 675.

[84] *Id*. at 685.

[85] Justice Kennedy's rhetoric explicitly frames and elaborates on the role that the institution of marriage occupies for the society, rather than delimiting the focus to the petitioners. In this way, the opinion declares the normative contours and meaning of the institution.

[86] *Obergefell*, 576 U.S. at 666.

[87] *Id.* at 669 (citing Maynard v. Hill, 125 U.S. 190, 211 (1888)).

[88] Evoking a fear of societal demise, the opposing side had argued that "allowing same-sex couples to wed will harm marriage as an institution," and thus destabilize the core of the society. *Id.* at 679. Evaluating this claim, Justice Kennedy instead found that the respondents' commitment to marriage substantiates the institution's centrality. *Id.*

[89] *Id.* at 666.

[90] Roderick A. Ferguson, *A Question of Personhood: Black Marriage, Gay Marriage, and the Contraction of the Human*, 9 PHILOSOPHIA 1, 14 (2019).

social good, but allows for an individual to claim their agency and attain greater worth.[91]

Where Kennedy insists upon the "transcendent importance of marriage," its "centrality . . . to the human condition," and identifies marriage as "a union unlike any other in its importance to *committed* individuals," relationships that reside outside of this order necessarily bears a mark of inferiority.[92] Melissa Murray encourages us to pay attention to this comparative denomination of intimacy. Murray notes that because *Obergefell* "builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution," individuals, "who by choice or circumstance, live their lives outside of marriage" are reduced to a position of social, political, and legal inferiority.[93] Accordingly, the opinion, as an address towards the society writ large, emphasizes that individuals may *choose* to remain outside of marriage, yet this *choice* will temper with their personal worth and development.[94] And when marriage is associated with the survival of the society, the implications of this *choice* extend beyond the individuals — and can instead be regarded as a threat to the social fabric.[95] While *Obergefell* extends the right to marry to homosexual couples, it tampers with the "right not to marry" by relegating non-marriage as an individual failure with societal consequences.[96]

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[91] This claim comes into a conflict with critiques that take the "'unchosen' family obligations" that normatively emanate from marriage as restricting individual autonomy under the singularized definition of being a couple. *See* Emily J. Stolzenberg*, The New Family Freedom*, 59 B.C. L. REV. 1983, 1987 (2018).

[92] *Obergefell*, 576 U.S. at 656-57, 666. Justice Kennedy even identifies *the shame* born by homosexuals whose intimate relationships had been casted outside of marriage. This shame is not limited to the couple, but is carried by their children who "suffer the stigma of knowing their families are somehow lesser." *Id.* at 646.

[93] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210 (2016).

[94] *Id.* For a discussion on how marriage, as a disciplinary force, has been deployed at least since slavery to mark Black people, their culture, and relationships as inferior to the dominant society, *see infra* notes 159-173 and accompanying text.

[95] For a conservative, fearful conversation on how reduction in committed, long-lasting marriages may be perceived as a crisis for the society, *see* James Q. Wilson, *Marriage, Evolution, and the Enlightenment*, AM. ENTERPRISE INST. (May 3, 1999), https://www.aei.org/research-products/speech/marriage-evolution-and-the-enlightenment [https://perma.cc/7BQB-YANR] .

[96] Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1539 (2016). As Martin Manalansan explains, under the prevalent understanding of intimacies, being single is "marked by failure, characterized by an almost unassimilable oddity." He further observes that Obergefell decision is "used to shame and bully the queer uncoupled and further buttress a world utterly devoted to the attached, the companioned and the married." Martin Manalansan, *Solitary Readings About Being Single After* Obergefell, ILL. PROGRAM FOR RES. IN THE

Throughout the opinion, the trope of romance that particularizes intimacy shines forth. As Elizabeth Baia recognizes, it describes "marriage as a two-person union ten times, and references couples forty-nine times — almost once for every paragraph in the opinion."[97] Intimacy is thus always envisioned as taking shape between two committed individuals; love, dependency, and subsequently personal fulfillment, is restricted to the form of the couple who comes together to realize the ideal of building their own biological family. In Kennedy's words, marriage "responds to the universal fear that a lonely person might call out only to find no one there;" accordingly, without entering into the marital union, individuals are "condemned to live in loneliness."[98] These declarations track the mainstream romantic fantasy that establishes marriage as the site of reliable and lasting intimacy — a continuation of the "enduring bond" voiced in *Lawrence*. All non-marital relationships are then marked as temporary, at most a space to be occupied between the formation of one's own biological family and leaving the family of origin.[99]

Beyond *Obergefell* and within family law, the fictional construct of privacy once again organizes the meaning of intimacy, identifying friendship as a lesser, unreliable relationship. In her article that challenges family law's persistent characterization of "the [private] home [as] the organizing structure of the family," Laura Rosenbury asserts that disregarding the care and dependencies that are constructed outside the marital home first marks the failure of family law to recognize varied relationships that are formed across the social body.[100] Concurrently, through asserting the primacy of the private sphere for who might count as family,[101] friendships, as well as other networks of care, are marked as "insufficiently intimate" to be worthy of legal recognition.[102] Observing the changing definitions of marriage and family in the law, Rosenbury identifies that if "a friendship [] takes on the qualities of marriage-like relationship through sexual cohabitation," if the *coupled* individuals form "marriage-like domesticity within home," the law

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HUMAN. (Sep. 17, 2015), https://iprh.wordpress.com/2015/09/17/solitary-readings-about-being-single-after-obergefell-by-martin-manalansan [https://perma.cc/5J6U-YDG5] .

[97] Baia, *supra* note 48, at 1042.

[98] *Obergefell*, 576 U.S. at 667, 681.

[99] Laura A. Rosenbury**,** *Friends with Benefits*, 106 MICH. L. REV. 189, 202 (2007). A common version of this narrative goes that there is a time in life when friends are family; then one forms their own family and friends fade away in their priority. For many queer people, including myself, this narrative is inapplicable.

[100] *Id.* at 191.

[101] Here, I follow Justice Kennedy in taking family to mean relations of dependable, lasting caregiving.

[102] Rosenbury*, supra* note 99, at 212.

no longer recognizes them as friends but accepts them into the privileged sphere of *family*.[103] Here again, the quality and density of intimacy and dependency are shaped by the spatial fantasy of privacy; the domestic sphere, the home of marriage or marriage-like habitation, determines the legitimacy of the relationships. Caregiving is *real*, the value of the bond is acknowledged, only if it is located within the delimited sphere of privacy.

Through the fiction of private sensuality and connectivity, the legal order is preventing individuals from "explor[ing] diverse ways of living in our society."[104] By defining family alongside the construct of the domestic, private home, by restricting acceptable forms of sensuality to those that occur in *private* spaces, the law is stifling how individuals can come together, care for one another, and develop their own dreams and values.[105] These contours of the centralized american society erases the primacy of *chosen families* in queer collectivities: "a gathering of brothers and sisters without children or parents."[106] Whereas the romantic ideal insists that care outside the family unit could only be supplemental to the central dependency of the couple, chosen families regard mutual, continuous caregiving "to be a natural part of friendship."[107] In these formations, the meaning of friendship is contested, through denouncing the ossified boundary between "who are viewed as dating and those who are 'just friends.'"[108] While dating is generally placed in a more preferential position, particularly based on its potential to "lead to the privileged state of marriage,"[109] chosen families reveal that non-marital relationships offer mutuality of caregiving, often in dynamics that are more egalitarian and autonomous that in the context of marriage.[110] Whereas the romanticized ideal qualifies *family* through a privatized togetherness, chosen families, as well as other forms of caregiving built outside the marital union, as with "single mothers and older women [who] rely on extended friendship

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[103] *Id.* at 206-07, 220.

[104] *Id.* at 208.

[105] *See* Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) ("People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process.").

[106] Nancy J. Knauer, *LGBT Older Adults, Chosen Family, and Caregiving*, 31 J. L. & RELIGION 150, 159 (citing KATH WESTON, FAMILIES WE CHOOSE 117 (1997).

[107] *Id.* at 162.

[108] Rosenbury explains that this distinction is often qualified through sexual intimacy, as well as mutual dependency. Rosenbury, *supra* note 99, at 207.

[109] *Id.*

[110] Knauer, *supra* note 106, at 161.

networks," may not necessarily involve cohabitation.[111] Accordingly, the mainstream fantasy of romance that *Obergefell* uptakes is incomplete and far from being natural or inevitable; instead, the persistent fantasy itself assures and propagates the fictional line between marriage and biological family, and "all other transactions between adults."[112]

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Lawrence and *Obergefell* can be perceived as mirrors that reflect the idealized forms for relationships engrained within heteronormativity. When the law propagates a notion of equality conditioned upon sameness with a justification of preserving the civil order, the fiction of private and public lives is enshrined as an organizing principle for the society. This Part has shown that the effects of such a construction extends beyond the theoretical domain. It sutures the kingdom of heteronormative monogamy, which echoes through the fantasy of privatized love that repeats without intermission; a Romeo for all the Juliets, promising the *one true* connection to override all fleeting friendships. Accordingly, how individuals envision their connections and responsibilities to one another, are affected by the heteronormative base of sameness cherished in *Lawrence* and *Obergefell*.

Moving from a conversation on *forms* of relationships into *values* anchoring such relationships, in the next Part, I will pinpoint privatization of dependency as undergirding the romanticized relational order. The focus on values will take the individualized romance plot, and identify its force in creating a particular *public*. Beyond thinking with queer collective creations, this Part will center kinship and publics of Black peoples, while exploring how the centralized narrative is used to persist anti-Blackness.

Part II. Privatized Subjects in Lifeless Streets: Ethical Ramifications and Denouncement of Black Kinship

Morality and dignity, the worth of an individual and their life, are contested and adjudicated within the modern gay rights jurisprudence.[113] Where both *Lawrence* and *Obergefell* idealize private, committed, monogamous

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[111] Rosenbury, *supra* note 99, at 210. Single mothering is particularly common among Black women, which has been deployed to mark *them* and *their families* as pathological. *See infra* notes 159, 210.

[112] Rosenbury, *supra* note 99, at 212.

[113] *See, e.g.*, Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1861-62 (2014) (revealing that in *United States v. Windsor*, the Court "used the word dignity eight times and other variations of the word three times"); Ruskola, *supra* note 46, at 237.

relationships that move towards forming a biological family, sensual and relational connections outside this delimited, totalizing imagery are regarded as suspect — marking the individuals partaking in such relationships as failing in their personal and collective obligations.[114] In this light, while the marital union is deeply romanticized, achieving this union is experienced as "dignity-conferring."[115] Laure Rosenbury names that within the american political formation that hardly ever recognizes affirmative rights, "[l]egal family recognition involves . . . an affirmative right to preferential government treatment."[116] The married couple has in a sense *proven* themselves as committed to upholding the values of the society and ensuring its continuity.[117] Yet, not all marriages are created equally. As the ideal of the committed relationship is built upon the established fiction of private and public spheres, the couple can attain and claim their dignity, to the extent that their intimacy and dependency do not spill outside of the private terrain. As Rosenbury summarizes, "families are largely expected to address their own needs; if they do not, the state often intervenes in a punitive fashion."[118]

The *form* of the normative union — that is monogamous, same-sex or opposite-sex coupling of two partners — is not an adequate descriptor of the ordering principles that the law presumes and persists. In addition to the form, the relationship must obey the boundaries between the private and the public spheres; its value is found in existing "in some sense apart from state activity, as a natural formation rather than only as a creation of the state."[119] Moreover, private marks the marital home as a separate terrain from the rest of the social body, excluding other relationships of care and intimacy that the couple necessarily possesses. If they are not able to "take care of their own," on their own, or at least persist a fantasy of private-sufficiency, they will face the skeptical eyes of the law and society.[120]

The boundaries that determine the *worth* of relationships reference a deeply engrained legal and sociopolitical principle of being an american citizen: "privatization of dependency."[121] While various scholars have spoken of this principle as a matter of economic independence, particularly from state

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[114] *See supra* note 96 (on not getting married); note 99 (on the perceived ephemerality of non-married relationships); note 111 (on single mothering).

[115] Rosenbury, *supra* note 113, at 1862.

[116] *Id.* at 1865.

[117] *See Obergefell*, 576 U.S. at 668.

[118] Rosenbury, *supra* note 113, at 1867.

[119] Frances E. Olson, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504 (1983).

[120] Rosenbury, *supra* note 113, at 1860.

[121] *See, e.g.*, Stolzenberg, *supra* note 91, at 1984.

support,[122] the overlay of the private-public dichotomy onto the construction of the social life, onto relational engagement more broadly, encourages to envision the implications of this principle from a cultural framework.[123] Specifically, if beyond the dependent family union, the citizens are anticipated to uphold an ethics of separation, the public space becomes a gathering of autonomous individuals who think of themselves as possessing a position of existence independent of those with whom they create a society.[124] The conversation thus cannot be limited to a traditional economic analysis, but is one of how individuals give worth to themselves and understand their dynamics with others.[125]

To build towards this broader conversation on autonomous existence, this Part will first provide an account of specific scholarly discussions that connect privatization of dependency with the worth of the marital union. The nexus of these discussions will then give way to a consideration of the broader implications of a privatized intimacy in arranging civil society. While queer sensual publics will serve as an initial point of comparison, the effects of declaredly *shared* societal values of american society are not

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[122] *See, e.g.*, Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMPORARY PROBLEMS 25, 26 (2015).

[123] Economy, as commonly understood, references an *objective* terrain of transactions that are severed from the social and cultural lifeworlds. *See* Angela P. Harris, Amy Kapczunski & Noah Zatz, *Where's the Political Economy?*, LPE PROJECT (Jun. 21, 2021), https://lpeproject.org/blog/where-is-the-political-economy [https://perma.cc/7CQC-LAHP]. As LPE project attempts to reckon, this delimited conception is both inaccurate and justifies devaluation of care-taking and community-building labor of often, women of color. *Id.* My argument is thus not that the *cultural* is separate from the economical, but that culture must be central to any critical project of revisioning the political economy.

[124] Teemu Ruskola names that in light of liberal individualism, the law equates "transparent, freestanding subjectivity" with being the "natural person." Ruskola, *supra* note 46, at 245. In this account, individuals are envisioned in severed, atomistic relationships, except the sphere of the family. *Id. See also* BERLANT, *supra* note 30, at 284 (insisting that "noninstitutionally indexed aspects of the intimate had been . . . banished from legitimate democratic publicness").

[125] Berlant argues that binary taxonomies, such as public/private, while avowedly being "fantasies," nevertheless "reverberate and make the word intelligible;" they create and stabilize the conditions through which individuals name and express their subjectivities. BERLANT, *supra* note 30, at 283. Queer theory has opened the gates to recognize how structural arrangements, ideologies, and hegemonic assumptions organize *affects* — the individuated representations of "public feelings" that guide actions, relations, and desires across the social body. *See* Jennifer C. Nash, *Practicing Love: Black Feminism, Love-Politics, and Post-Intersectionality*, 11 MERIDIANS 1, 4 (2013).

restricted based on *identity* categories.[126] In this light, and recognizing the urgent need to transform the society to affirm the worth of Black lives, this Part will specifically emphasize familial arrangements and responsive public imaginaries constructed by Black communities.[127] I subscribe to the anti-racist and anti-colonial scholarship that place anti-Blackness as a central dimension of organization within the american society.[128] From at least slavery and into the contemporary times, negation of Black people's humanity worked to ensure the stability and prosperity of the normative civil society.[129] In the face of these violent dynamics and consistent devalorization

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[126] As framed in the Introduction, this article takes *queerness* less as identity trait, and more so as relational forms of existence that essentially disrupt the civil imaginary — that which remains silenced, if not condemned, within the mainstream legal and cultural discourses.

[127] In this work, I follow Dorothy Roberts in thinking about Blackness not as a *natural* racial category—one that has been stabilized by the state—but rather through how "Black people in America share a common culture that shapes Black individuals' view of themselves; they 'have a sense of shared past and similar origins' and 'believe themselves to be distinctive from others in some significant way." Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 231 (1995).

[128] In her long critique, unpacking the construction of the western human — that is the naturalized definition of the human western culture indoctrinates us into — and western culture, Sylvia Wynter argues that marking of Black people as non-human, "as the ostensible missing link between rational humans and irrational animals," created the conceptual and material conditions. Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 NEW CENTENNIAL REV. 257, 266 (2003). Carrying this conversation into the American context, Hortense Spillers reveals that Blackness has been envisioned without a humanity at least since slavery. She portends that america has needed the "non-human" Black other, in order to claim its nationhood. Spillers, *supra* note 22, at 67. These scholarly pursuits must be complemented by the personalized, archival, and political accounts of Black writers who elaborated on how anti-Blackness oozes across lives, finds representations in the legal machinery, and implicates day to day movements in the american society. *See, e.g.*, JAMES BALDWIN, THE FIRE NEXT TIME (1968); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1992); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); CLAUDIA RANKINE, CITIZEN: AN AMERICAN LYRIC (2014); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015); SAEED JONES, HOW WE FIGHT FOR OUR LIVES (2019).

[129] Scholars, such as Ruth Wilson Gilmore, elaborated on these dynamics through materialist terms, coding "racial capitalism" as the central machinery that sustains the economic and political prosperity of the united states. *See, e.g.*, Antipodeonline, *Geographies of Racial Capitalism with Ruth Wilson Gilmore*, YOUTUBE (Jun. 1, 2020), https://www.youtube.com/watch?v=2CS627aKrJI [https://perma.cc/J6SX-9693]; *see also* Ta-Nehisi Coates, *The Case for Reparations*,

of Black life, the nourishing and varied forms of familial and public forms of *being* created by Black people have been made into a *reason* of their inferiority, which connects with the hegemonic privatization of dependency. The parallels between Black publics and queer publics, and their distinct forms of ostracization from the civil society, create a path towards understanding the law's commitment to the privatized order as reproducing anti-Blackness.

A. Families take care of their own

In Justice Kennedy's narrative, attaining the status of a "married couple" amounts to leaving behind a life of shame and loneliness, and moving towards transcendence.[130] Marriage is painted with a shining light of morality, and encouraged through "preferential government treatment." Beyond this romantic privileging of marriage, the long-cherished union simultaneously attaches "duties and responsibilities" to the couple.[131] No more private individuals, they "join in an economic partnership and support one another and any dependents."[132] In order to honor the dignity of the institution, and claim the dignity it confers onto them, the couple must become a co-dependent and otherwise self-sufficient unit: they are an *american* family, if they can muster these responsibilities and raise the next generation of autonomous *americans*.[133] Such is not simply taken as a matter of individual worth, but one of "the survival of our constitutional polity."[134]

The economic, cultural, and political principles of the american society are engrained in the construction of the privatized family. Rosenbury analyzed contesting definitions of the family in federal court opinions after *Windsor*; in which the Supreme Court ruled that Defense of Marriage Act (DOMA) violated same sex couples' right to equal protection through imposing "a stigma."[135] She identifies that "at the top of the hierarchy" of values considered by the courts, "lies neither state sovereignty nor principles of

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ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/5D3U-HQZS].

[130] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[131] Rosenbury, *supra* note 113, at 1868 (citing United States v. Windsor, 570 U.S. 744, 773 (2013)).

[132] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 947 (N.D. Cal. 2010).

[133] *See* Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 153 (2011); *see also* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 483 (2006) ("One approach to the problem of parental authority in a democracy has been to set some limits on acceptable parental values and behavior.").

[134] Dailey, *supra* note 133, at 432.

[135] *Windsor* was a decision in 2013, where the Supreme Court held that Section 3 of Defense of Marriage Act violated Due Process Clause of the Fifth Amendment. 570 U.S. at 744.

equality or dignity. Instead . . . government recognition of family ultimately appears rooted in the desire to privatize the dependencies of family members."[136] Individual liberties and dignity are the values most fervently expressed in marriage equality decisions. Rosenbury determines that federal intervention to uphold these values against claims of federalism took precedence, only when a state's definition of the family would hamper the same-sex couple's economic independence.[137] Anne Alstott corroborates this analysis, arguing that "three core" neoliberal tenants structure the meaning of family within the existing family law jurisprudence: "negative liberty, laissez-faire market distributions and the minimal state."[138] In federal constitutional law, state family law, and welfare law, the family is conceived as a *private* sphere *protected* from state intervention and disarticulated from state support.[139] The much cherished family is thus anticipated to function as a self-serving unit, erasing the social, cultural, and historical realities that structure and determine its sustenance.[140]

With a narrative-based study, Khiara Bridges brings this doctrinal and structural analysis into the sociocultural terrain. Specifically, Briges uncovers how poor families become "public families," when they receive "public assistance in the form of Medicaid and whose receipt of public assistance makes possible the violation or disappearance of privacy and parental rights."[141] Whereas the private sphere is constructed as a privileged terrain of the domestic union, the privacy of married couple is abridged, their deeply personal stories are made into a public matter when they cannot privatize their dependency.[142] According to Bridges, these individuals are considered "a random, heterogenous collection of individuals, ill-deserving of the designation of 'family.'"[143] To this end, two partners present in a committed relationship, is not sufficient to establish their worth as an *american* family. Without enshrining their autonomy, the couple remains to be morally lacking, "manifesting a lack of "American" values" in a way that "if and when those who have demonstrated this failure decide to reproduce, they are perceived as not deserving of trust to produce desirable citizen-progeny."[144]

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[136] Rosenbury, *supra* note 113, at 1860.
[137] *Id.* at 1863-64, 66, 68.
[138] Alstott, *supra* note 122, at 25.
[139] *Id.* at 25-26.
[140] *See id.* at 26.
[141] Bridges, *supra* note 133, at 119.
[142] *Id.* at 150.
[143] *Id.* at 154.
[144] *Id.* at 152.

The image of an "all-american" family is thus moored in the couple's autonomy from the larger sociopolitical order.[145] Economic independence from public support is one aspect of this consideration; Martha Fineman further argues that the naturalized ideal of the family "coincides with the idea that it is the repository of 'inevitable dependencies.'"[146] While autonomy can be fantasized as an ideal, such a fantasy cannot occlude the reality that individuals depend on one another for their survival and flourishing. The function of dependency can thus not be contained as a marker of a lower status; it can better be "characterized as a set of 'natural' needs," and the family is conceptualized as an "'organic' unit of human organization" that is born to satisfy those needs.[147] Put differently, the national fantasy accepts dependency as a human reality, then works through a common-sense assumption that "dependency be delegated to the [privatized] family."[148] Caregiving, as an act of helping one survive, grow, become their person, and enact their lives, is then reduced to what may take shape between parents and their children.[149] Such a private organization of care, while allegedly representing "american" values, falters and leaves without recognition manifold forms of dependency and kinship that most often exist in communities of color, and in particular among Black people.[150]

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[145] *See* Jeremy A. Ho., *Queer Sacrifice in* Masterpiece Cakeshop, 31 YALE J.L. & FEMINISM 249, 273 (2020) (describing the normative homosexual couple of legal jurisprudence as, "(1) typically all-American, (2) asexual, (3) devoted to child-rearing and/or caregiving, and (4) accidentally political").

[146] Martha Albertson Fineman, *The Sexual Family*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 1, 24 (Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero eds., 2009).

[147] Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1542 (2001) (citing Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001)).

[148] *Id.* at 1541.

[149] Feminist scholars, such as Martha Fineman, argued that hiding the "public nature of dependency" and locating it as a matter to be resolved within the family continue "unequal and gendered division of family labor, which burdens women more than men." Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1405-06 (2001). Where the *domestic* serves as a central space of constructing the gender binary in the american imaginary, privatization both affirms the supposed neutrality of these positions while continuing to ignore the value of caregiving as work.

[150] *See* Sacha M. Coupet, *Ain't I a Parent: The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 605 (2010). This collective care model is also common among many Latino and immigrant families. *See* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1690 (2005).

Dorothy Roberts explains that among Black communities, "incorporation of extended kin and nonkin relationships into the notion of 'family' goes back at least to slavery."[151] This expansive ideal of family persists in the contemporary times, where it is common for grandparents or other relatives of the child to become the main care provider, while at times, it is the neighbors, friends, or other "strangers" that become the Mothers; that offer themselves as the caretaker to the child.[152] While the needs for survival within an entangled, anti-Black sociopolitical structure may foster these "othermothering" relationships, they are simultaneously a representation of "individual personalities and choices, as well as remnants of African culture," of a shared responsibility of caregiving.[153] In this way, *family* within Black communities is not restricted to an autonomous, pre-determined structure, but encapsulates "rich systems of interdependence"[154] that are "nourished and sustained by the accumulation of thousands of daily acts of support and care."[155] Rather than cherishing autonomy as supporting the healthy persistence of the american polity, Black familial relationships give priority to willful love. They adapt and expand their boundaries to sustain the lives of "legal strangers." Yet as Sascha Coupet writes, caregiving hardly resolves the legal estrangement.[156] Coupet emphasizes that while definition of parents has been changing, such as to include same-sex nuclear families, the Black Mothers who love without the proximate blood ties continue to face layers of barriers, if they seek legal recognition of their relationship to the children they raise.[157]

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[151] Roberts, *supra* note 127, at 269. Here, I am capitalizing "M" as a sign of expanding on the idea of *mother;* rather than a specific, gendered role, Mothering encapsulates practices of love and caregiving; friends who help each other can similarly be *Mothering* one another. *See* Alexis Pauline Gumbs, *We Can Learn to Mother Ourselves: The Queer Survival of Black Feminism*, *1968-1996* (2010) (unpublished Ph.D. dissertation, Duke University) (on file with Duke University library).

[152] Roberts, *supra* note 127, at 270-71.

[153] Coupet, *supra* note 150, at 605 (citing Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millenium*, 33 FAM. L.Q. 461, 474 (1999)).

[154] Coupet, *supra* note 150, at 606-07; Roberts, *supra* note 127, at 270.

[155] Roberts, *supra* note 127, at 270 (citing Mary Helen Washington, *Commentary on Ernest J. Gaines*, *in* MEMORIES OF KIN: STORIES ABOUT FAMILY BY BLACK WRITERS 38, 39-40 (Mary Helen Washington ed., 1991)).

[156] Coupet, *supra* note 150, at 608 (recognizing that while millions of children are raised by informal caregivers, the legal position of their Mothers remain "ambiguous").

[157] Coupet recognizes that "formal adoption" as one of the only avenues for informal kinship caregivers to be legally recognized as parents. Yet during these "lengthy and emotionally difficult proceedings," kinship caregivers are often disadvantageous against other relatives they are pitted against. Coupet, *supra* note 150, at 608, 609. "Blood ties" thus take precedence over ties built by care in the eyes of the law. As an exceptional case, *Moore v. City of East Clevalent*, 431 U.S. 494

The exclusion of meanings given to the family by Black people — a definition that is based upon love and adaptability — highlight once again that in the american legal imaginary, family is not defined through caregiving. Instead, it is the *autonomy* from the relations outside its boundaries that validate the worth of the given family. This strict and singularized conception of dependent relationships similarly bury queer chosen families—which are often built by persons of color—into a legal void.[158] The caregiving among friends and ex-lovers who rely on one another, as well as the neighborhood blocks who raise children together, or strangers who may Mother one another, do not satisfy the romantic ideal of lasting connection Justice Kennedy had in mind. Instead, because these relationships confound the fictious boundary between the private and public domains, because they create publics that are locus of caregiving and caretaking, they are relegated to a status of inferiority, if not marked as pathological structures that bear the responsibility of the dispossession and violence born by marginalized communities.[159]

If the national ideal leaves out various families nourished by marginalized peoples, autonomy — as pulling one's marital family by the bootstraps — cannot reflect a *neutral* standard of worth. Instead, privatized relationships offer a deeply racialized determinant of worth. At least since emancipation, the national political discourse has regularly insisted that *privatized families* would *save* Black people from their *inherent* amorality — taken as the source

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(1977), is a significant Supreme Court decision that vindicated the right of Inez Moore, a widowed Black "mother and grandmother of little means," to "raise her grandson in her home." R.A. Lenhardt & Clare Huntington, *Foreword: Moore Kinship*, 85 FORDHAM L. REV. 2551, 2551 (2017). In his concurrence, Justice Brennan accepted that the 'nuclear family' pattern is the pattern so often found in much of white suburbia," and that for many immigrant communities and among Black families, "[t]he extended form is especially familiar." 431 U.S. 494, 509 (1977) (Brennan. J., concurring). Nevertheless, the application of this opinion has remained delimited, earning a position of an exceptional case, rather than one that shifted legal norms. *See*, *generally*, Lenhardt & Clare Huntington, *supra*, at 2552.

[158] *See* Knauer, *supra* note 106, at 163-65.

[159] Daniel Patrick Moynihan's report marks a particularly famous iteration of this discourse. In his analysis of social and economic deprivation experienced by Black communities in urban centers, Moynihan declared that "the weakness of the family structure" rests "at the center of pathology." In particular, he blamed matriarchal family form, as well as families led by Black, single mothers as causing the "crumbling" of Black communities. Tellingly, Moynihan named that these family structures were damaging, because they were "so out of line with the rest of the American society" — exemplifying the legal narrative that justifies delimiting the legitimized forms of family structures. Cohen, *supra* note 21, at 455-56 (citing Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, U.S. DEP'T OF LABOR, OFF. OF POL'Y PLAN. AND RES. (1965)).

of their socioeconomic deprivation.[160] Where the institution of slavery denied Black people their humanity and relied upon their exploited labor to generate wealth and power for the white, national polity, the nation identified the economic and social standing of newly freed slaves as their *own* responsibility through the proposed "marriage cure."[161] The fiction went that the slaves would be "made whole by their entrance into matrimony;"[162] they would be "civilized" by "the nation's perceived national familial identity."[163] Emancipated slaves were not offered the *freedom* to marry per se, but were forced into marriages. Reconstruction laws declared the enslaved peoples who had been living together as married couples; the law criminalized those who chose to remain in non-marital, intimate relations.[164] In her text unpacking the structure of marriage-promotion discourse, Angela Onwuachi-Willig argues that the main concern of the state and the white public was "the inability of newly freed Blacks to support themselves . . . mak[ing] large numbers of them become public charge."[165] This potential dependency, which could have been framed as *reparations*, was instead deflected by the white society through a moralized narrative, insisting that "[n]o really respectable person wishes to be supported by others."[166] In effect, Black people now had the responsibility to adapt into the ethos of privatized responsibility, which was central to production of the "right" kind of Black citizens.[167] As a southern general declared, "[y]ou must now work . . . You have families to support . . . Freedom confers new obligations."[168] Marriage thus functioned as a disciplinary force, declaring to Black people that they were to blame for their deprivation, and their worth was to remain suspect, until they could muster a privatized life of dependencies.

Onwuachi-Willig recognizes that contemporary discourse structuring welfare, or lack thereof, uses this same logic. Poverty of particularly families led by Black single mothers is explained through their inability to sustain the nuclear family model. As such, their access to public benefits is restricted,

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[160] *See* R. A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317 (2005).

[161] *See* Onwuachi-Willig, *supra* note 150, at 1650.

[162] Lenhardt, *supra* note 160, at 1326.

[163] Onwuachi-Willig, *supra* note 150, at 1654.

[164] Lenhardt, *supra* note 160, at 1327-28. Lenhardt argues that one rationale behind enforcement marriage was to retain control over the bodies and labor of newly emancipated slaves. Marriage would tie them into controllable units and to the plantations in which they would now be worked with minimal wage. *Id.* For a discussion on the creative, caring forms of relations developed by Black people through slavery *see* Ferguson, *supra* note 90, at 10-11.

[165] Onwuachi-Willing, *supra* note 150, at 1658-59.

[166] Lenhardt, *supra* note 160, at 1328.

[167] *See* Onwuachi-Willing, *supra* note 150, at 1659.

[168] *Id.*

while they are required to take programs teaching "strategies for marrying a man and sustaining a marriage."[169] The structural dispossession of Black mothers is erased from this *common-sense* political discourse, whereby marriage is anticipated to "civilize" Black women, teaching them the worth of "self-dependency," towards an individualized "cure" for what in fact requires a redistribution and collectivized responsibility.[170]

Self-dependency, as a hegemonic norm, has been so entrenched that it could disappear centuries of violence enacted onto Black peoples, and make their *love* the reason for their demise. And considering the centrality of white-supremacy to the american identity, the bourgeoise family that romanticizes isolation is a *white* ideal.[171] It is a white social formation, which in repetition has lost its cultural specificity and donned a mask of being an enactment of collective will.[172] In turn, Black people are affirmed to be *essentiality* inferior and lacking in *civilized humanity;* a foundational dynamic of white supremacy.[173] The roots of this centuries long indoctrination in the colonial

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[169] *Id.* at 1650.

[170] *Id.* In her text exploring the contemporary relevance and echoes of the "Welfare Queen" narrative, Camille Gear Rich recognizes that while this narrative is no longer explicitly pronounced, it "achieved 'advanced hegemonic status'" imposing citizenship norms that structure political and cultural discourses. Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISCIPLINARY L.J. 257, 266 (2016). Starting the discourse from slavery suggests that the hegemonic status of this narrative is buttressed upon the *founding* norms of the constitutional polity; in particular, privatized dependencies.

[171] Coupet explains that the nuclear family model "espoused as the Anglo-American ideal . . . has never been a tradition among black families." Coupet, *supra* note 150, at 605. When we recognize the privatized relational order, declared as a shared condition in *Lawrence* and *Obergefell*, as an extension of a *white* culture, whiteness is additionally revealed as a silenced qualifier of heteronormativity. For a discussion on "white national heteronormativity" and its globalized, imperialist implications *see* Scott Laurie Morgensen, *Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities*, 16 GLQ 105 (2010).

[172] For example, Morgensen urges us to recognize how a "sustained engagement" with Native culture and histories, and deployment of *white* norms of relationships in colonialism "can aid in rethinking what constitutes heteronormativity." *Id*., at 109. Similarly, through foregrounding deployment of marriage and normative families from slavery to contemporary times, Roderick Ferguson asserts that Blackness, Black embodiment, and relationships are to be always located outside the heteronormative order. Roderick Ferguson, *The Nightmares of the Heteronormative*, 4 CULTURAL VALUES 419, 420 (2000).

[173] Lenhardt argues that "[m]arriage has long functioned as a primary mechanism of racial formation in the United States." Lenhardt, *supra* note 160, at 1324. It was not only yielded against Black people to *measure* and *report* their worth against a white ideal, but also deployed in destruction of Native and Puerto Rican

moment will be explored in Part III. Yet prior to that analysis, I will shift the flow of the conversation. While the principle of autonomy structures familial relationships in a particular grain, it simultaneously imagines a form of *public* that is responsive to the private/public divide; as care and intimacy, in their daily manifestations, reveal the ethical contours of the idealized american society.[174]

B. Privatized intimacy and disconnected publics

Queer collectivities have often been molten into existence in public terrains.[175] The *queerness* of the coming together introduces the sensual and deeply intimate possibilities of relationship building, legally regarded as a *private* affair, into the heart of the public.[176] The queer nightclub is one example, as a space that allows individuals to don fluid personas charged with myriad manifestations of gender[177] — where the club and the streets accompanying its entry become a playground of finding, attempting, affirming, and expanding relationships that muddle the lines of friend, lover, sister, brother, "girlfriends, gal pals, fuckbuddies, and tricks."[178] In their text

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peoples and cultures. *Id*. These dynamics attest to the *normative* ideal of relationships always referencing *whiteness*, and as such attaining *whiteness* is the requisite of becoming worthy in the legal and cultural consciousness. Black people's inability to ever become *white* simultaneously dooms them into a state of less-worthy and less-than-human. See, for example, Hari Ziyad, *My Gender is Black*, AFROPUNK (Jul. 12, 2017), https://afropunk.com/2017/07/my-gender-is-black [https://perma.cc/DA57-7J57], for a discussion on how normative categories of genders, sexualities, as well as relationships were "designed specifically for [the] exclusion" of Black peoples. Ziyad writes, "[i]n the afterlife of slavery, Blackness is that which is denied access to humanity, and thus Blackness is denied access to human gender/sexuality identities." *Id.*

[174] *See* BERLANT, *supra* note 30, at 282.

[175] As I am making a transition from speaking about Blackness into queerness, I would like to emphasize again that the two are not mutually exclusive coordinates of becoming. Black queer publics have produced some of the most influential and globally spreading articulations and gestures of queerness. *See, e.g.*, JENNIE LIVINGSTON, PARIS IS BURNING (1990) (documenting 80s Black ball room culture that centrally fashioned queer performance cultures across the world).

[176] Berlant & Warner, *supra* note 34, at 558.

[177] *See, e.g.*, Kendall Thomas, *Are Transgender Rights Inhuman Rights?*, *in* TRANSGENDER RIGHTS 322, 323 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

[178] Berlant & Warner, *supra* note 34, at 558. I am focusing on the queer nightclub, as it has been an organizing and creation hub that has been central in my life. For example, in Istanbul, the queer performance culture that has developed from within the nightclub spaces carved out collectivities of exploration and care against the constant threat of street and state-based violence. The performance culture brought together queers of many histories and names who may not necessarily have

that position queer worldmaking against the normative order's insistence on regulating the locus of sensuality, Lauren Berlant and Micheal Warner identify queer collectivities as sexual publics. In their depiction, freeing intimacy from the hegemonic fantasy of privatization expands capacities for relationship building and destabilizes relational hierarchies. Queer individuals are then able to "use [these relationships] as a context for witnessing intense and personal affect while elaborating a public world of belonging and transformation."[179]

Envisioning a public world of belonging is a necessity for queer peoples whose existence is casted into a silence in the normative juridic-political and sociocultural registrars.[180] A public world that fosters belonging is exceptional within the normative imaginary. As a privatized romance sutures the civil society, public sphere has become one of movement and transactions, rather than of connections.[181] The queer sensualization of public intervenes in this neutered fantasy, turning the collective space as one that supports "forms of affective, personal, and erotic living" — of rupturing the distance between who are presumed to be "strangers" that walk pass one another by placing a kernel of potential for care.[182] According to Berlant and

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gathered in a "political" organizing space. These spaces offered everyone an opportunity to try on personas, genders, either on stage or among the crowd. We taught one another how to arrive and leave the spaces safely, often forming groups, and inviting those who could not return to their family homes. The queens that sprawled out from these nights became organizing figures, while the performance spaces became integrated to rallies and marches that continue to shake the landscape of Istanbul. For a collection of images from Istanbul's performance nights, couple with a text on their performative political strategy, see Ali Murat Gali, *Journal of an Insomniac Lubunya*, COLDCUTS (July 2022), available for purchase at https://www.coldcutsonline.com/shop/p/ogmoeo5yhio756az21de5icj979xvv [https://perma.cc/LAT3-KQCY].

[179] Berlant & Warner, *supra* note 34, at 558.

[180] *Id.* As Muñoz explains through the example of Vaginal Davis, in their artistic and collective enactments, many queer peoples of color wage a "cultural battle" in order to affirm their existence, and help one another thrive. MUÑOZ, *supra* note 15, at 111.

[181] For example, Warner and Berlant explain how in the public imaginary, urban spaces are one for property owners, rather than those who actually use the space. When zoning laws are enacted to "clear" the spaces and protect the rights of property owners, on the one hand, those who many not own properities but use the streets as spaces of gathering are shunned away. On the other, houseless and impoverished peoples who survive together on the streets are banished, with no guilt or concern. Berlant & Warner, *supra* note 34, at 563-64.

[182] *Id.* at 562. A flyer designed for HIV/AIDS advocacy by John Giorno beautifully captures how sensuality can be understood as a form of communication that disrupts alienation and invites compassion. It reads, "TREAT A COMPLETE STRANGER, AS A LOVER, HUG THEM AS GOOD FRIENDS, AS THEY ARE

Warner, this public space of encounters is a much more "accurate description of how people actually live."[183] Even as individuals are conditioned by a discourse of isolation,

> [a]ffective life slops over onto work and political life; people have key self-constitutive relations with strangers and acquaintances; they have eroticism, if not sex, outside of the couple form. These border intimacies give people tremendous pleasure.[184]

Individuals thus desire and find one another in connections that always already break the privatized fantasy of dependency. Sensuality and intimacy in this regard are not simply sexual, but indicate a form of communion, and exploration.[185] Whether anonymity is broken, and whether emotional connection remains temporally contained, the vulnerable baring of one's self with an *other*, to release control and be changed by the encounter, to find support for survival, arise from public sensualities that exceed *Lawrence*'s love plot.[186] Nevertheless, when queer relations that avowedly disrupt the private sphere are criminalized, and where collective forms of care are regarded as enemies of social prosperity, the daily manifestations of intimacy is left out of the collective story.[187] As such, the force of the privatized ideal "is to prevent the recognition, memory, elaboration, or institutionalization of all the nonstandard intimacies that people have in everyday life"; it dissolves the diverse tendrils of relationship building into the one narrative of the same-old american family.[188]

OR AS 10 YEARS AGO YOU MIGHT HAVE HAD FABULOUS SEX WITH ABSOLUTE ABANDON WITH THE SAME STRANGER. NOW LIFE IS RAVAGED AND WE OFFER LOVE FROM THE SAME ROOT OF BOUNDLESS COMPASSION." *John Giorno for Visual Aids*, VISUAL AIDS (1993), https://www.visualaids.org/uploads/projects/downloads/giorno1.pdf [https://perma.cc/NK28-XJ5L].

[183] Berlant & Warner, *supra* note 34, at 560.

[184] *Id.*

[185] As Susan Stryker explains, consensual intimacies between "strangers" can create opportunities of seeing one's self and the world anew. She writes, "[e]very person became for others a unique opportunity for the universe to reveal itself from a slightly different perspective — and some of the views were stunning." Stryker, *supra* note 5, at 40.

[186] Such a definition of queer intimacies follows bell hooks' description of love as a process of enabling growth.

[187] Berlant & Warner, *supra* note 34, at 560.

[188] *Id.*

When counterpublics[189] are situated against the normative public, the latter arguably denotes a lifeless, cold, alienated formation.[190] It is a "melting pot" of strangers, whose only responsibility is the nuclear family that awaits at home.[191] Simultaneously, this *private* home sphere functions as "the endlessly cited elsewhere of political public discourse" that "consoles [individuals] for the damaged humanity of mass society."[192] For if one's sole responsibility of recognition is to those regarded as "legal dependents," one can adapt into only seeing the pains, hurts, needs, and desires of these particular dependents. They can assume a severed ethical relationship to those with whom one shares a polity.

In urban spaces, countless individuals passing by houseless people without a second glance, without a guilt visiting their chests — perhaps whispering to one another that they do not want to give any money because these irresponsible people would just buy drugs — attest to the distance generated between bodies who may be next to one another in light of privatization of dependency.[193] The formation of the "white suburbia" in the 1970s, as the pristine, "all american" landscape of the "perfect" heterosexual couples and their children, removed from the impoverished urban centers left to be populated by Black, brown, and migrant communities, is another spatialized demonstration of the relational order allowing for amnesia and alienation.[194] In the culmination of such a distance, institutions of enormous wealth, such as law schools, can *sensibly* teach their privileged members that the

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[189] MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS (2002).

[190] Here we can once again think back into Justice Kennedy's framing of life outside of marriage as one of "loneliness;" in the normative imaginary, there can be no reliable, consistent, sufficiently exhilarating and caring engagement built from the public sphere. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[191] The detachment of the collectivity is ignored or surpassed, often through a reliance on nationalized sentiments, such as "patriotism."

[192] Berlant & Warner, *supra* note 34, at 553.

[193] Another manifestation of these sentiments is captured in NIMBY, or "Not in my Backyard" politics, where residents contest building of affordable housing or shelters in their local areas. *See NIMBY (Not in My Backyard)*, HOMELESS HUB, https://www.homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard [https://perma.cc/22VG-Q7X4]. NIMBY-ism strikingly demonstrates the effects of the private and public divide, where often affluent communities can regard provision of housing to houseless people as tampering with their private spaces. When it comes to the comments on "drug use," the fantasy of autonomy plays a central role, where an individual's deprivation is made into their own failure. This is similar to how non-privatized family structures are regarded as revealing the irresponsibility, moral or personal failing of the family members.

[194] For a discussion on the contemporary implications as well as persistent practices of "white flight" *see* Alana Samuels, *White Flight Never Ended*, ATLANTIC (July 30, 2015), https://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980 [https://perma.cc/YRD2-EDEE].

communities, often of color, who exist outside their boundaries are threats to be avoided. At the wake of collective forgetting, the "elite" institutions can omit that these communities have been impoverished by the millions of dollars of taxes avoided, public and private lands taken over by their predatory practices.[195] These normalized distances speak of a "privatized ethics of responsibility," where individuals can disregard one another, the complex stories that are held in each person.[196]

Just as the ideal of the privatized family is culturally specific to whiteness, so is the disconnected publics a fantasy of a white tradition of existence, which has been made into a national identity. The care structures among Black people that have been delegitimized based on their incongruence with this identity, find a corollary in Black kinship that expands onto the public domain. These bonds are consciously curated, within a choice that is "partly cultural, partly political, but it is mostly affectional."[197] In this light, Black space-making produces urban collectivities "of mutuality, community, and 'radical solidarity' . . . that foster communal survival as opposed to individual privilege."[198] In her book tracing gentrification of H-Street in D.C., a traditionally Black neighborhood, Brandi Thompson Summers expresses the tension between Black communal existence and the hegemonic, national fantasy cherished under the ideal of "development"; despite the economic deprivation surrounding the neighborhood, Black people had infused the streets with movement and togetherness, giving birth to street-based cultures,

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[195] For example, according to New Haven Rising, Yale University received an estimate of $157 million tax break in this year. The University continues to reap service benefits, obtain more and more land in and beyond and New Haven, while a stark economic and health inequality persist in New Haven among those neighberhoods primarily occupied by University members, and those that are occupied by locals, who are predominantly individuals of color. *See* Davarian L. Baldwin, *Higher Education Has a Tax Problem and It's Hurting Local Communities*, TIME (Apr. 7, 2021), https://time.com/5952901/universities-tax-exemption/?fbclid=IwAR3rJDDgOqlGQ7pRcEHjCGYlH0f9vtppSqcmZuNJokyx57xyRunW0vkrnx8 [https://perma.cc/F3W8-M5JG].

[196] Berlant & Warner, *supra* note 34, at 553.

[197] Roberts, *supra* note 127, at 233 (citing Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, *in* LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 55, 64 (Allen Lane ed., 1994)). Roberts further notes that Black people refer to one another through "brother," "sister," and "blood," energizing kinship terms with meanings of political solidarity and collective care. *Id*. at 232.

[198] BRANDI THOMPSON SUMMERS, BLACK IN PLACE: THE SPATIAL AESTHETICS OF RACE IN A POST-CHOCOLATE CITY 14 (2019). This section grew out of discussions and reflections from Professor Monica Bell's Law and Sociology class at Yale Law School. For a discussion on how Black music is an inventive form that moves outside the oppressive conditions of the dominant society, *see* Katherine McKittrick, *Rebellion/Invention/Groove* 49 SMALL AXE 79, 80-81 (2016).

such as "the go-go culture," and defined "backyards, street corners, and parks" as locations of intimate gathering.[199] However, with the enforced arrival of the "white" spatial imaginary, the streets are no longer spaces of gathering and creation. Public spaces are transformed into "consumption spaces," whereby hanging out on the street is only possible if mediated through an activity of consumption.[200] The streets have become "a locus for the generation of exchange value."[201] While Black businesses, such as hairdressers and barbershops, were valorized for creating togetherness, gentrification plans explicitly banned these services. In their place, the white order privileged allegedly entrepreneurial, innovative businesses that provide "lifestyle ammenities."[202]

After the onslaught of privatization, H-Street was no longer an accessible and shared community, but a transactional hub which individuals frequented to attain services that would "better" their own selves — be it through the appropriated yoga studios to foster longevity, or high-end restaurants with foods to be shared on Instagram that would affirm social capital.[203] As this one example among countless narratives of gentrification attest,[204] while Black culture envisions publics that are familiar and induce recognition and caregiving, the common-sense ideal produce geographies where "things [are] not to be looked at; they [are] to be possessed — space [is] not to be created but owned."[205] Neither dislocation of Black communities nor rupturing of their culture were regarded as violence in this transition. Instead, relying upon the ethical assumptions of privatization, the developers could frame the

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[199] THOMPSON SUMMERS, *supra* note 198, at 4, 55.

[200] *Id*. at 119-20, 140.

[201] *Id*. at 46.

[202] *Id*. at 16.

[203] *Id*. at 119.

[204] Establishments and streets of many queer communities of color, across the country, have been destroyed through gentrification. Juana Rodríguez writes about this violent process in San Francisco, where not only "the bars . . . have been renamed and rebranded," but also "the bodies that once wandered these streets have been erased and replaced with younger, cleaner, and more affluent versions of our sad queer Brown selves." Juana María Rodríguez, *Public Notice from the Fucked Peepo*, *in* QUEER NIGHTLIFE 211, 215 (Kemi Adeyemi, Kareem Khubchandani, Ramon H. Rivera-Servera eds., 2020).

[205] bell hooks, *An Aesthetic of Blackness: Strange and Oppositional*, 1 LENOX AVENUE 65 (1995). Among these contrasting dynamics, Black publics should not be reduced into an image of mindless optimism. For in the words of Katherine McKittrick, Black spaces are of "survival, resistance, creativity, and the struggle against death." THOMPSON SUMMERS, *supra* note 198, at 176 (citing Katherine McKittrick, *Plantation Futures*, 17 SMALL AXE 1, 7 (2013)). This is similar to how Muñoz had named creative practices of queers of color as both world visioning and as acts of survival. MUÑOZ, *supra* note 15, at 18.

change as beneficial for the entire city, even presenting themselves as committed to preserving a nostalgic ideal of Black history.[206]

The prevalent narrative of development that homogenizes public spaces across the nation parallels the notion of equality that compels unified principles for the constitutional polity.[207] The resulting node of privacy may not, strictly speaking, reflect how individuals interact with one another and find intimate connections of varying forms.[208] The boundaries nevertheless inform personal and collective identities; they preach distance rather than connection and autonomy fantasized as a function of independence as the central veins of the normative public.[209] In effect, the mythology of privacy delimits humanity to a particular construction of the *human*, as a way of *being*, *relating*, and *becoming*. And Black people are asked to relinquish their *Blackness*, to *adapt* their living arrangements into the white ideal, in order to be regarded as human beings.[210] Otherwise, Black life remains outside the

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[206] For example, speaking of the new branch of Whole Foods that opened up in the H-street, the regional president declared, "[t]hat neighborhood reflects a lot of what Whole Foods is about — diversity, passion for food, history . . . We are so in tune with that. That sense of community and pride." THOMPSON SUMMERS, *supra* note 198, at 111.

[207] The law similarly justifies its homogenizing function through referencing a past of instability and continual state of insecurity. *See* LISA LOWE, THE INTIMACIES OF FOUR CONTINENTS 8 (2015).

[208] Rosenbury notes that one aim of family law is "to reflect and support the ways people actually live their lives." Rosenbury, *supra* note 113, at 208. In this regard, the law's exclusionary definition of the family is a shortcoming that works against the doctrinal aspirations of family law. My focus article, however, remains the ethical and sociocultural implications of the idealized family, rather than the doctrinal ones.

[209] In the liberal, western culture, *sovereignty* is an idealized fantasy of self and collective formation. *See* Judith Butler, *Rethinking Vulnerability and Resistance, in* VULNERABILITY IN RESISTANCE 12, 12-18 (Judith Butler, Zeynep Gambetti & Leticia Sabsey eds., 2016). Lauren Berlant believes that "love always means non-sovereignty." Heather Davis & Paige Sarlin, *No One is Sovereign in Love: A Conversation Between Lauren Berlant and Michael Hardt*, NOMOREPOTLUCKS (2011), http://coalition.org.mk/archives/646?lang=en [https://perma.cc/2V46-XWJQ]. It is "one of the few places" where individuals release "the posture of control," Butler, *supra*, at 14, and "admit they want to become different." Davis & Sarlin, *supra*. If we take this idea of love as a space of relinquishing the fantasy of autonomy, a normative public built upon *independence* necessarily marks territories devoid of life; those of individuals constantly posturing in control, rather than allowing themselves to be seen, held, and changed by others.

[210] In An American Dilemma, a study of race-relations that was to direct state's response to "Negro problem," the renowned economist defined Black culture as a "distorted development, or a pathological condition, of the general American culture." GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 928 (1944). Roderick Ferguson notes that "emotionalism" of

evolutionary story of progress that the law tells for the american society.[211] The outcome is not only guarding of a *white* constitutional polity, but a declaration of its *others* whose subjugation takes on the function of societal preservation and prosperity.[212]

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From *Lawrence* and *Obergefell* into the definition of a *legitimate* family within family and welfare laws, the monogamous, privatized romance and its corollary of alienated publics arise as the *american* dream. This privatized humanity that the law equates with citizenship, and that the political narratives rely upon to construct *undeserving* minorities and migrants as "public charges," is neither natural nor neutral. The ideal of the *human* is a white, heteronormative subject, whose specificity disappears within an over-cited narrative of "nonpolitics — a way of being reasonable and of promoting universally desirable forms of economic expansion."[213]

Black publics, including Black churches, was consistently referred to by Myrdal, as a sign of lack of reason and regression. RODERICK FERGUSON, ABBERATIONS IN BLACK: TOWARD A QUEER COLOR OF CRITIQUE 91 (2003). Wherein the collective spaces of celebration marked a "developmental retardation," Myrdal believed they also offered signs for the white public to justify racism. *Id.* at 92.

[211] As referenced earlier, *Obergefell* is an example of this narrative, where over time the meaning of the constitutional liberties grows to extend equality, hence recognition as citizens, to those who were priorly left outside its bounds. Obergefell v. Hodges, 576 U.S. 644, 664 (2015). Of course, the individuals invited into the order were those homosexuals who reproduced privatized relationships. In this way, the "progress" is not necessarily a *change* of the central values or principles organizing the constitutional order, as much as translation of minoritized relations to a pre-existing narrative. If as I had argued, anti-Blackness is a central dimension of this narrative, such an "evolutionary progress" can never create a true recognition of and justice for Black peoples.

[212] *See, e.g.*, Rich, *supra* note 170. The word "other" does not necessarily define those that need to be gotten rid of — for example, rendering of Black people as *non-human* has served a necessary function within the exploitative white culture; Black people has both provided the exploitable life necessary for the sustenance of the national polity, while their status as the *other* has justified their subjugation. *See* Wynter, *supra* note 128, at 266. Violence against queer peoples, those whose gendered and sensual embodiment and sensual publics are registered as *threats* to the morality of the society, can similarly be thought as *moral lessons* to the polity writ large; guarding and ensuring the boundaries of essentialized sensual order and gendered positions. This is a construction of subjects in a "biopolitical relationship," whereby the supremacy and normalcy of the dominant subjects are constructed and affirmed through the Othered subjects' precarity to death. *See* Morgensen, *supra* note 171, at 110.

[213] Duggan, *supra* note 38 at 177. For a conversation on how whiteness has become the universal, "norm," hence *define* without being stated, see, for example,

Grounding and expanding this premise, the following Part will turn the gaze onto the colonial moment that birthed the constitutional polity and the normative *human* making up this order. While the conversation on privatized dependencies suggests the particularity of this idealized citizen, the colonial moment witnessed its inception and enforcement through the law as a means of stabilizing the national order. Cultural genocide of Native peoples was legalized through the deployment of the privatized ideal of relationships, narrated alongside the nuclear family. Many native cultures persist, continuing to mark an existence where there can be no private envisioned separate from the public.[214] And the premise of equality as sameness continue to brand these collectivities as inferior and damaging. In this light, tying the origin story to the present will help explain how narratives taken to be *common-sense* came to be, and understand the construct of national polity as a vision of white supremacy.

Part III. Civilization through Genocide: Role of the Private/Public Divide in the Colonial Paradigm

Queerness, as a mode of critical engagement, works against the *taken-for-granted*. Where the Court may authoritatively frame marriage and privatized citizenry as seeds of civilization, queerness energizes questions.[215] It "does

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Ghassan Moussawi & Salvador Vidal-Ortiz, *A Queer Sociology: On Power, Race, and Decentering Whiteness*, 35 SOC. F. 1272, 1273.When Justice Kennedy glorifies marriage as an opportunity for children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," he can thus be thought of painting an image of next generation growing up to internalize white ideals as inevitably desirable and necessarily shared. *Obergefell*, 576 U.S. at 668 (citing United States v. Windsor, 570 U.S. at 772).

[214] Even after centuries of colonization, Native cultures and peoples are alive and continue to fight for their sovereignty. *See*, for example, NDN Collective, *Landback Manifesto*, LANDBACK (Last accessed: July 3, 2021), https://landback.org/manifesto [https://perma.cc/52HL-6BAP], for the continual demands of Native peoples for their land to be returned to Indigenous stewardship. Because colonization *cannot* be complete without the envisioned erasure of Native peoples, it can be better thought as an ongoing process, rather than a distinct event. *See* Lowe, *supra* note 207, at 7 (**"**The operations that pronounce colonial divisions of humanity . . . are ongoing and continuous in our contemporary moment, not temporally distinct nor as yet concluded."); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006).

[215] "Subjectless critique" is one possibility of queer reading, which "disallows any positing of a proper subject of or object for the field by insisting that queer has no fixed political referent." David L. Eng, Judith Halberstam & José Esteban Muñoz, *Introduction to "What's Queer about Queer Studies Now?"*, 23 SOC. TEXT, 1, 3 (2005). In this way, rather than remaining focused on individuated identity positions

not accept given categories and concepts as fixed or constant, but rather takes as its work the inquiry into how those categories became established as given, and with what effects."[216] As such, a queer reading is an invitation to work against the normalized heteronormative privacy. It is to pose how a particular understanding of the past grounds meanings in the present, and how reorganization of the archive may surface different implications of the preserved order.[217] In this process, the future is not an inevitable territory the present is moving towards — one guarded with modifications, attaining only "preservation-through-transformation."[218] Instead, we can construct the future in light of the shifting desires, priorities, and values to guide our relationships.[219]

The heteronormative organization of collective and personal identities, public and private spaces, intimacies and distances, contained within the construction of the normative sensuality and the ideal of the nuclear family, are framed as the backbone of the american society. A queer reading of associations and overlay[220] reveals that neither this society nor its values are pure, natural, or necessarily shared; they have been "established as given" through the colonial history of the constitutional polity.[221] Dispossession of

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to analyze the functioning of power, "[a] subjectless critique establishes . . . a focus on a 'wide field of normalization' as the site of social violence." *Id.*

[216] Lowe, *supra* note 207, at 3.

[217] This analysis incorporates a practice of queer time that works against the western epistemology of a linear time — which approaches the present as being detached from the past. Remembering circularity and synchronicity are not only a teaching of queer temporalities, but reference ancestral and continual knowledge of Black and Indigenous peoples, and various traditions that conceptualized time outside the simplistic trajectory. *See, e.g.*, Rasheedah Phillips, *Constructing a Theory & Practice of Black Quantum Futurism*, in BLACK QUANTUM FUTURISM: THEORY & PRACTICE 1, 1-10 (Rasheeda Phillips ed., 2015).

[218] Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing*, 49 STAN. L. REV. 1111, 1113 (1997). The conversation Siegel starts on the persistent limitations of the Equal Protection Doctrine, hence the idea of *equality* as reflected in the constitutional jurisprudence, is a concern that resonates in this article. While providing doctrinal considerations is not my intention, I do inquire whether reorienting the notion of equality in light of new ethical relationships could move us away from preservation into the necessary state of transformation.

[219] *See, e.g.*, EVE KOSOFSKY SEDGWICK, *Paranoid Reading and Reparative Reading, or You're So Paranoid, You Probably Think This Essay is About You*, *in* TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY 123, 146 (2003).

[220] I derive this description from Jose Muñoz who offered "an associative mode of analysis that leaps between one historical site and the present" to counteract linear methodologies of knowledge-making that work within the empire. MUÑOZ, *supra* note 1, at 3.

[221] Lowe, *supra* note 207 at 3.

Native peoples, disruption of their connection with Indigenous lands, and destruction of Native culture were both witnesses to and necessary for the establishment of the american sovereignty.[222] This colonial violence was not accounted for, but instead *justified* through a legal discourse that presented Native peoples as savages — lethal danger against the "peaceful," enlightened settlers and an impediment against civilization.[223] This oppositional construction of the settler identity against Native existence continues to echo within the silences of common-sense — remarking "the permanence of invasion as a racialized feature of the state formed after the empire's withdrawal."[224]

The conversation in this Part builds upon the discussion on Blackness, because "dehumanization" of Black people, alongside erasure of Native peoples are the founding dynamics of the constitutional polity. In Part II, with an eye on contemporary legal discourse, I argued that the privatized relational order and its ethics have been deployed to justify subjugation of Black communities. Specifically, the nation affirmed Black people as its outcasts, due to their inability to adapt into an order that hampers Black flourishing.[225] In this Part, I will explore how juridic-political narratives of the colonial state, as well as the contemporary order,[226] present the privatized ethics as a

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[222] In Eve Tuck and K. Wayne Yang's telling, the "entangled triad structure of settler-native-slave" made possible america's claim of sovereignty over Indigenous lands and prospering on these lands through the slave labor. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 1 (2012). The colonial paradigm required *erasure* of Native Americans such that the settler could make their *justified* claims over the land. Black people, on the other hand, were turned into "deathlike monsters in the settler imagination;" devoid of humanity, their exploitation was *justified*. *Id.* at 6.

[223] In her monumental work that inquires the uses of race, gender, and sexuality in the project of imperialism, Anne McClintock provides a historical account of how the settlers projected a *monstrous* sensuality onto Native and Black peoples, which offered a ground for the narrative of their lives being threatened. *See* McClintock, *supra* note 23, at 22. McClintock finds that this narrative was not invented then, but drew from "a long tradition" that could be drawn to "[a]s early as the second century." *Id.* While this article does not explicitly focus on normative gendered and sexual *embodiment* essentialized in the western tradition, they are the building blocks through which the relational order is constructed.

[224] Joanne Barker, *Introduction*, *in* CRITICALLY SOVEREIGN 1, 23 (Joanne Barker ed., 2017).

[225] *See* Ziyad, *supra* note 173.

[226] As the law presumes Native people as "domestic dependent sovereigns," they are supposed to be provided an unincumbered space to enact their own culture. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831). Nevertheless, Federal Indian Law *controls* the meaning of Native identity, often requiring tribes to have remained the same over the centuries in order to validate their claims. *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 943 (1978). Native peoples are banished to a territory

civilizational necessity, against the collectivist culture of Native peoples. In both instances, *whiteness* is revealed as the silenced epicenter of the constitutional polity, while assimilating into whiteness is the condition that the law dictates through its fantasy of privatized families.[227] In light of these dynamics, I hope to establish that preserving the central sociopolitical order not only prevents accountability towards racialized dispossession, but frames a constitutional polity built upon white supremacy as *equitable* and *just*.[228]

A. Native Cultural Genocide in the Colonial Paradigm

The colonialist project of destroying Indigenous existence and claiming the European colonizers as the *rightful* inheritors of the land have depended on creation of a hierarchical civilizational relationship. In the american

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of a past, whereby any adaptation they may show into the dominant culture is made into a sign of their disappearance. As Joanne Barker summarizes,

> whether or not a group or an individual identifies or is identified as legally and socially Indigenous implies all kinds of jurisdictions, citizenships, property rights, and cultural self-determinations that are *always already* entrenched within the legal terms and conditions of Indigenous relations to the United States and Canada as imperial-colonial powers.

Barker, *supra* note 224, at 10.

[227] Race is a central organizing principle of the american reality. It is not simply a matter of categorization, but references entangled relationships of power that determine what lives are revered and declared as worthy of protection, and which ones are marked as exposable and exploitable. *See* Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM 225, 225-230 (Gaye Theresa Johnson & Alex Lubin eds., 2017) (defining racial capitalism as "group differentiated vulnerability to premature death").

[228] This argument has been illuminated, grown, and spread by scholars within the canon of Critical Indigenous Studies (CIS). For a discussion on the intellectual, cultural, and political movement, its pioneers and influences, see generally Barker, *supra* note 224, at 7-28. Barker identifies that gender and sexuality as critical domains of the empire's formation was largely left out by early CIS scholars. *Id.* at 11. She further expresses that many feminist and queer scholars either ignored the specificity of Native cultures and relationalities, or meshed them into a comparative variable within the already existing schemas. In her words, "[t]hese representational practices suppress Indigenous epistemologies, histories, and cultural practices . . . while also concealing the historical and social reality of patriarchy, sexism, and homophobia." *Id.* at 14. In the new turn where CIS *critically* engages with feminist and queer theories, Barker recognizes an intention of "work[ing] together at re-creating the world we live in." *Id.* at 22. As a non-Native writer, working with CIS, my intention is joining this story of creation as decolonization, while ever learning what it means to *write alongside*, rather than *to colonize* the wisdom of Native creators.

visioning of this relationship, Indigenous collectivities across the united states were molten into a singular title of *Indian*, which was declared to be inferior to the western civilization.[229] The Marshall Trilogy legalized colonialism through offering a pre-constitutional, political basis for american sovereignty over Native lands. To justify the genocidal violence, the opinions marked Indigenous peoples both as dangerous savages, and as sub-humans in need of the protection and correction of the colonizers.[230] In this way, while violence was named, there was no attempt towards *accountability*. Instead, violence was legalized and framed as a necessity in the idealized evolution towards *becoming white, becoming western*.[231] This re-framing of violence offered western civilization a tool to preserve the "democratic ideals" of the forming nation-state, at the ever-present shadow of genocidal violence.[232]

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[229] *See, e.g.*, Fred Lomayesva, *Indian Identity--Post Indian Reflections*, 35 TULSA L. J. 63, 63 (2013) (explaining that Indian "mistakenly describes the entire indigenous population of the Americas as a singular population").

[230] *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting the country were fierce savages, whose occupation was war . . . To leave them in possession of their country, was to leave the country a wilderness."). While Justice Marshall had to reckon with the violence of the colonial reality, the inferior status of Native peoples offered an explanation to think of their lives and culture as disposable to achieve civilization. *Id.* This logic of defense against the violent savages was at the heart of English settlement laws, pronouncing that "everyone has a right . . . to preserve the innocent and restraint offenders." Lowe, *supra* note 207, at 9.

[231] *See Cherokee Nation*, 30 U.S. at 10 ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."); Lowe, *supra* note 207, at 7.

[232] During the trade and intercourse era that preceded the decisions, the nation sought to distinguish itself from the "past" of genocidal coloniality to "conform to the American idea of itself as a just and lawful nation." ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY R BERGER, AMERICAN INDIAN LAW: CASES AND COMMENTARY 44 (2020). Yet this national policy is best defined as "iron fist in the velvet glove," where the velvet glove of *legality* covered a permanent attitude towards Native erasure and eradication. *Id.* at 49. *See also* Gary Boire, *Symbolic Violence: Law, Literature, and Interpretation — An Afterword*, 61 ARIEL 231, 236 (arguing that the colonial law not only mystif[ied] the brutal massacre of indigenous peoples and cultures, but also . . . mask[ed] [] its own internal fissures and pressures."). The term *genocide* as deployed in this context does not only reference constructed deaths of Indigenous peoples; it is also the destruction of Indigenous cultures. As Rennard Strickland argues, "the legal genocide, cultural as well as physical" of Native Americans was taken on with "singular felicity, tranquilly; legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world." Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 719 (1986). 719, 718 (citing A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 336, 355 (H. Reeve trans., New York: Alfred A. Knopf 1945)). Instead of the open bloodshed that may have tempered with the civilizational

The disjunction between Native understanding of kinship and the constitutional polity's fantasy of privatized dependency centrally structured the genocidal practices. While tribes have distinct cultures and organizing principles, Rennard Strickland asserts that a shared value connects Native Americans: "an understanding and appreciation of the timeless-of family, of tribe, of friends, of place, and of season."[233] Native existences do not presume a negation of the individual or their specificity; rather the individual is recognized in a continual relationship with the rest of the tribe, as well as the inanimate world that nourishes the existence of both.[234] Whereas in the american understanding, privatizing dependencies affirms autonomy and allows for the growth of the individual, and subsequently the society, Native collectivities recognize freedom and prosperity as being made possible in *togetherness*. And just as the white ethics suture the private family, the circular and continuous societal organization of Native peoples has been represented in the kinship formations of many tribes.[235]

Mark Rifkin explains that among Dakota peoples, kinship did not define a predetermined sphere of the family, but instead "an array of active processes of interdependence that provide the shape and substance for collective

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ideals the law locates in the constitutional polity, "legally enacted policies" grounded the obliteration of "a way of life." *Id.* The innocence of the *american* civilization was then preserved, while the principles of the constitutional polity were made into evolutionary ideals of a prosperous society.

[233] *Id.* at 718.

[234] *See* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 7-8 (1990). In an interview with Goldsmith, a tribal member "explained that individuals in Indian culture are like facets of a crystal, each one unique, yet contributing to the strength of the whole." *Id.* at 7 n.34.

[235] In her deeply personal, intergenerationally enriched commentary on Santa Clara Pueblo v. Martinez, Rina Swentzell argues that the adversarial structure of "uncompromising opposites" is a western cultural invention. Binaries such as private/public, female/male attest to the construction of a city in a light of western principles that rely upon exclusion. Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97, 101 (2005). The social order in Santa Clara Pueblo was not built upon an "either/or" understanding, "to know and acknowledge both [was] encouraged . . . because ultimately, the goal [was] to embrace the whole." *Id.* at 98. In this way, binary logics that have become common sense in the western culture are products of a particular ethical paradigm, which Swentzell connects to the functioning of the western law — which locates individuals *against* one another while making claims. *Id.* at 99. As I will come to name, Swentzell regards the contemporary construction of equality as essentially delimiting, while advocating for a "focus on relationships" and interdependent ethics as what can bring us to "different solutions." *Id.* at 101.

identity."[236] Kinship was a wide range of connections that trailed from the tribal members' commitment to one another and their collective formation. As such, "all Dakota people were held together in a great relationship that was theoretically all-inclusive and co-extensive with the Dakota domain."[237] While the parents and their children formed one sphere of unity, it was "not final and isolated." Rather, the larger array of kinship brought together these familial relationships; "rules imposed by kinship," commitments of care and dependency reached across the collectivity.[238]

Dakota understanding of kinship and connection imagined creation through interdependence. The land was lived upon collectively with no individuated ownership model, or a presumed need for self-serving labor to ensure the sustenance of the collectivity.[239] Instead, the ethics of togetherness, among peoples and the world, preserved the balance of life and continuity of the tribe.[240] This *giving* and *caring* perception of being together was targeted by the colonial narrative of civilization. In the eyes of the *white*, *western* order, an ethics of togetherness could only be an impediment to progress.[241] The colonial order equated collectivized living with *savagery* — deploying this difference as a sign of the inevitable inferiority of "Indians," which justified the cultural genocide. As one of the commissioners asserted without shame, "[s]avage and civilized life cannot live and prosper on the same ground. One of the two must die."[242] In the Allotment and Assimilation Era of the federal Indian policy, the enforcement of the nuclear family model, and concurrently the privatized ethics of dependency, was then deployed to "[k]ill the Indian, and save the Man."[243]

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[236] MARK RIFKIN, *Allotment Subjectivities and the Administration of Culture*, *in* WHEN DID INDIANS BECOME STRAIGHT?: KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY 181, 206 (2011).

[237] *Id.* at 205 (citing Ella Deloria, SPEAKING OF INDIANS (1944)).

[238] *Id.* at 206.

[239] *See id.* at 210.

[240] Rifkin quotes Ella Deloria who contrasts the *american* ethical and concurrently economic order of "'get, get, get now' with traditional Dakota ethos of 'give, give, give to others." *Id.* In a homogenizing world order where the american ethos dominates, Dakota notion of giving becomes an impediment to exploitative growth. *Id.*

[241] As one of the senators in the Allotment Era named in the Lake Mohonk Conference "the defect" of Native existence was clear: "[t]here is no *selfishness,* which is at the bottom of civilization. Till this people . . . divide [their land] among their citizens . . . they will not make much progress." ANDERSON ET AL., *supra* note 232, at 105.

[242] Strickland, *supra* note 232, at 726 (citing Hiram Price, unpublished typescript).

[243] *Id.* at 729 (citing GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY 110 (W. Moquin & C. Van Doren eds., 1973)).

Native American boarding schools were a locus of dislocation and cultural rupture during the Assimilation Era that persisted until mid-20th century. Native children were stolen from their kin to be *saved* from their culture.[244] In his analysis of boarding school policies, Mark Rifkin explains that "education policy [was] . . . structured as a romance plot in which abandonment of indigenous kinship networks, patterns of residence, and forms of communal identification appears as a self-evidently desirable exchange . . . for the marital bliss and private homeownership portrayed as constitutive of civilized life."[245] Native children were separated in accordance with the gender binary, and educated into specific roles they ought to take on to produce the domestic imaginary. The cohorts were brought together for strictly monitored engagement that built towards a westernized, romanticized courtship — an idealized *nuclear* bond that reflects Justice Kennedy's narrative in *Lawrence* and *Obergefell*.[246] In contrast to the expansive kinship perspective of Dakota peoples, boarding schools idealized "[t]he central relationship between 'men and women' [as] that of husband and wife."[247] The penal establishment thus recognized reconfiguration of relational norms as crucial to "'de-tribalizing' native peoples."[248]

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[244] *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995). Boarding schools were not *exceptional* institutions. As historian Ann Laure Stoler writes, "[c]olonial regimes policed the cultural protocols and competencies . . . and in monitoring those boundaries they produced penal and pedagogic institutions that were often indistinguishable — orphanages, workhouses, orphan trains, boarding schools, children's agricultural colonies — to rescue young citizens and subjects in the making." Jennifer Nez Denetdale, *Return to "the Uprising at the Beautiful Mountain in 1913"*, *in* CRITICALLY SOVEREIGN 69, 73 (Joanne Barker ed., 2017) (citing ANN LAURA STOLER, TENSE AND TENDER TIES: THE POLITICS OF COMPARISON IN NORTH AMERICAN HISTORY AND (POST) COLONIAL STUDIES 43 (2006)).

[245] Mark Rifkin, *Romancing Kinship: A Queer Reading of Indian Education and Zitkala-Sa's American Indian Stories*, 12 GLQ 27, 29 (2006). There are striking parallels between Rifkin's depiction of this idealized "transaction" and Justice Kennedy's portrayal of marriage as the backbone of the civilization. *See* Obergefell v. Hodges, 576 U.S. 644, 669 (2015).

[246] "Hetero association is positioned as the primal scene of socialization, and cross-sex connections with nonkin are implicitly cast as the center of one's social world." Rifkin, *supra* note 245, at 34.

[247] *Id.* While Justice Kennedy does not explicitly *gender* the romantic ideal, following the Court's contemporary trend of denouncing "traditional" gender roles, his narrative and the structure of boarding schools present monogamous, committed coupling as the center of a desirable life.

[248] *Id.* at 27. For a similar discussion on colonial imposition of the bourgeoise family to attune Hawai'i into the *world* order, see J. Kehaulani Kauanui, *Indigenous*

This violent enforcement of the privatized model of kinship came together with the allotment policies that parceled out Native lands and encouraged individuated ownership of these lands.[249] While tribes hunted, gathered, cultivated, and collected together, the enforced model promoted production as an individual affair towards feeding one's *private* family. As Rifkin explains, "[a]llotments were parceled out to each 'head of family,' thereby soldering occupancy to a particular vision of what constitutes a family unit."[250] Cultural destruction was thus taking shape on an epistemological front of demanding a change in the meaning of kinship — from collective into the nuclear family—and subsequently in the overarching ethics of social organization — from togetherness to privatized dependency. In the eyes of the constitutional order, the cultural assimilation would "free" the individuals from "tribal dictation," relinquish them from the "habit" of forming "into gangs," and move towards achieving a "higher social and political status, a feeling of manhood, a consciousness."[251] The civilized ideal that persists in the current construction of private/public spheres was thus a part of the colonial dialogue — mending privatized ethics as the essential fabric of the society.

Cultural reorganization is violent and disorienting. In her text documenting the centrality of kinship to Native existence, Ella Deloria explains that "many Indians cannot yet feel complete with just their little family, their spouse and children." For the privatized family, and the severed domicile of the marital home, demands "a radical and uncomfortable diminishment of the scope of the emotional attachments;" of affective connections that vary and grow between generations, of kin with different names, of care that surpasses alienating boundaries.[252] For Native peoples who understood kinship in its broader enactment, disconnected public of the western imaginary was at the very least, strange. While tribes were broken down in allotment policies, a clash of worldviews were taking shape. A tribal member described this tension that was not limited to individuals but to all that they have been a part of, stating that,

> [i]t took years to learn to settle down on a farm and work alone and see one's neighbors only once in a while. Neither we nor our dogs

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Hawaiian Sexuality and the Politics of Nationalist Decolonization, in CRITICALLY SOVEREIGN [FIRST PAGE], 49-50 (Joanne Barker ed., 2017).

[249] "The General Allotment Act of 1887, otherwise known as the Dawes Act, sought to divide native territory into privately owned plots, which would cease to be under tribal control of any kind." Rifkin, *supra* note 245, at 34.

[250] *Id.* at 35.

[251] *Id.* at 40.

[252] RIFKIN, *supra* note 236, at 207-08.

> nor our ponies understood this new way of white people. To us it seemed unsociable and lonely, and not the way people were meant to live.[253]

Yet the federal government induced "unsociable" publics through legalized means, even outlawing the dances and rituals of the tribes.[254] While the constitutional order named these practices as paganistic heresies, for the tribes, they "promoted and helped concretize a feeling of collectivity."[255] Similar to the contemporary sterilization of traditionally Black spaces under the auspices of inviting and inducing development,[256] the tribes' collectivized public spaces were illegible threats that had to be disappeared; they were "a structural impediment to the implementation of the privatizing imaginary."[257]

When the social and legal narratives take the privatized human as a given, as a civilizational necessity, it is thus referencing a narrative that has been brewing for centuries: A narrative that was deployed in dispossession of Native peoples, then justified this dispossession as a collective good for the constitutional polity. To this end, the romanticized narrative cherished in

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[253] Strickland, *supra* note 232, at 727-28.

[254] Strickland powerfully explains this process:

> To assure that white values lived and Indian civilization died, the federal government used the full power of the law. They established "courts of Indian offenses," the goal of which was to eliminate "heathenish practices." As Secretary of the Interior Henry M. Teller noted in 1883, one of the major criminal offenses to be wiped out was the "continuance of the old heathenish dances, such as the sun-dance, scalp-dance."

Id. at 728.

[255] Rifkin provides that for the tribes, "[d]ances, like communal labor, promoted and helped concretize a feeling of collectivity." Rifkin, *supra* note 245, at 41. Yet, just as the communal labor was destroyed through the allotment policies, dances were targeted by the white order. In essense, the ethics of collectivity they upheld and represented were impediments to *becoming white*, as they "militated against the material reorganization of production, homemaking, and land tenure and that undercut attempts to euphemize this process as the acquisition of a sense of individual identity." *Id.*

[256] As I am drawing these comparisons, I do not wish to reduce experiences of racialization or violence into one another. On the one hand, it would be reductionist and minimizing of historical particularities to "obfuscate the distinctions between the two systems of dominance and the coerced complicities amid both." Lowe, *supra* note 207, at 10. Simultaneously, while patterns of domination may show cycles, individuals' personalized experiences with these encounters, as well as their cultures of resistance, are not the same.

[257] Rifkin, *supra* note 245, at 41.

Lawrence and *Obergefell* contain the after-lives of colonialism,[258] while the emotional *stickiness* of these narratives allow the legal order to justify its relational hegemony. For a justification for the legal order, and its claim to rule for the *entire* polity, is to protect the society from faltering back into violence: just as the constitutional order *saved* the Indigenous lands from Native savagery.[259] Therefore, conditioning equality upon sameness is a fiction of its own right, deploying the *settler fears* of the *other* that perhaps covers up a *settler guilt*, by reframing violence as progress.[260]

The paradox of a narrative of progress, which promises freedom through loss of difference, is "the structuring force through which the [u]nited [s]tates establishes its own legitimacy for the continued occupation of Indigenous lands."[261] In this light, there is an inherent tension between calls for modernization that imagine, among other things, gay marriage as equality, and claims for a Native sovereignty beyond the western empire. The next subsection will briefly visit these contradictions to exemplify how the premise of equality as sameness continue to foster Native erasure.

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[258] SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2006).

[259] Reflecting on classical liberal legal and political theories, Lisa Lowe expresses that "the move from the state of nature to political society is justified by the need to contain the natural condition of war in which human life and property interests are threatened by violence." Lowe, *supra* note 207, at 8. The law then has attained the status of a master-narrative in order to "'protect' the subjects within the civil society." *Id.* On the one hand, the law authorizes itself "through a story of what it was like *before* the advent of the law." JUDITH BUTLER, GENDER TROUBLE 48 (1990). On the other, the existing *unity* must always be at risk **"**it must be presumed that things are not secure, in and of themselves, in order to justify the imperative to *make things secure*." SARA AHMED, *The Affective Politics of Fear*, *in* THE CULTURAL POLITICS OF EMOTION 62, 76 (2004).

[260] Eve Tuck and K. Wayne Yang speaks of "settler moves to innocence" as a response to "the relentlessness of settler guilt and haunting." Tuck & Yang, *supra* note 222, at 9. The fact that Native peoples have been dislocated from their lands and the american reality is built over their stolen land is a weight the settlers cannot rid themselves of. Moves to innocence than incorporate an "easier path to reconciliation," a claim to forgiveness without visioning decolonization, which ultimately requires rupturing of the american state. *Id.* at 4. We can similarly think about the constitutional order as not being able to *reconcile* with its roots in colonialism, as well as slavery, and thus having to reiterate its "innocence" and "necessity," by painting the centralized authority as benefiting the entire society.

[261] Jodi A. Byrd, *Loving Unbecoming: The Queer Politics of the Transitive Native*, *in* CRITICALLY SOVEREIGN 207, 211 (Joanne Barker ed., 2017).

B. Erasure of Native Existence in american Modernity

While the american order depends upon dispossession to enshrine its privatized growth, declarations of *equality* and *freedom* are flowers thrown onto graves to pretend they are in fact gardens. Making violence visible requires focusing on the unsaid, as well as bringing together the moments of (in)coherence to track alternative explanations. Jodi Byrd exemplifies such a method in taking together two Supreme Court decisions from 2013. In the same moment that the Supreme Court struck down DOMA as a violation of Equal Protection, the Court also "attacked tribal sovereignty and the Indian Child Welfare Act (ICWA) in *Adaptive Couple v. Baby Girl*."[262] Whilemany were cheering Justice Kennedy's opinion that built from *Lawrence* and paved the way towards *Obergefell*, the simultaneous disempowerment of Native peoples was rarely rationalized alongside this process.

In *Baby Girl*, the Court declared that ICWA did not require the non-custodial, biological, Native father's consent to the adoption process of his daughter. ICWA was enacted in 1978, responding to the outcries among many tribes to the violent patterns of dislocation enacted by state child protective services. In the background reasoning of the Act, the Congress recognized the eminent concern of cultural incompetence and hostility of state actors. Whereas many tribes continued to define kinship and childrearing in extensive, interdependent formations, "[n]on-Indian child welfare agents [] interpreted [the] practice of extended family care as parental neglect and cited it as a reason for removing Indian children from their parents and putting them up for adoption."[263] ICWA was supposed to ensure tribal authority over determining the outcomes of custody decisions, while prioritizing relocation of the children within their tribes, rather than with non-Native families.[264]

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[262] *Id.* at 207-08.

[263] Brackeen v. Haaland, 994 F.3d 249, 285 (2021). For example, in *re Adoption of Doe*, 555 P.2d 906 (N.M. Ct. App. 1976), *cert. denied*, 558 P.2d 619 (N.M. 1976), the father of the child in question left them with their grandfather, in accordance with "Navajo extended family structure." Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV 585, 612 (1994). While the court acknowledged this tradition, it nevertheless persisted in the western, privatized family tradition and "determine[d] that the father had abandoned the child." *Id.* Donna Goldsmith further names the tension between the adversarial legal system's involvement in custody cases and the tribal ethics of resolving conflicts among the peoples. For "[u]ntil recently, American Indians resolved problems within their traditional cultural frameworks. In particular, dependent children were automatically cared for within the extended family system." Goldsmith, *supra* note 234, at 9. As such, involvement of an adversarial, western legal system itself, even when the judges may pay head to tribal cultures, impose foreign norms onto Native peoples.

[264] *See* Goldsmith, *supra* note 234, at 4.

The purpose was to ensure "the continued existence and integrity of Indian tribes."[265]

These safeguards of ICWA led *Baby Girl* to be reunited with her Native father. Justice Alito, however, denied to construe ICWA as being concerned with tribal sovereignty. Instead, in a "textually strained and illogical reading of the statute,"[266] he framed the Act through a *private, familial* lens, declaring that the statute's purpose was to prevent "the breakup of the Indian family."[267] Where the father had never lived with *Baby Girl*, there was no *family* for ICWA to protect in the first place. Throughout the opinion, Justice Alito evokes a sense of sentimentality and injustice through referencing the girl's 1.2% Cherokee heritage.[268] Reducing Native identity to blood quantum, and minimizing the implications of heritage, he concludes that this decision will prevent putting "certain vulnerable children at a great disadvantage."[269] In an opinion that delimited ICWA's protections beyond the facts of this case, Justice Alito produces a comparison between being raised as part of the tribe with being raised in white suburbia, in the terms of the empire. Of course, the logics of the *american* dream would hold that Native kids running around in suburban gardens is more advantageous for their future than being raised in reservations. This comparison *only* works, however, where Native culture and its communal ethics are understood as "hopelessly irrelevant" to the established measures of growth, change, and development.[270]

Where the same Court undermines Native sovereignty through a fiction of the *american* family and takes a step towards engraining same-sex couple within the definition of this family, the contradictory logics of progress surface. Elaborating on this claim within 2013 mobilization for a bill to guarantee same-sex marriage in Hawai'i, Kehaulani Kauanui understands the *progress* through marriage equality as furthering the erasure of Native Hawaiian existence. Kauanui speaks of the advocacy of True Aloha Coalition, which was formed to address conservative propaganda that framed gay-marriage as a threat to "Hawai'i's [c]ovenant with God."[271] Instead, the Coalition insisted that gay marriage must be affirmed in light of "traditional Hawaiian practices of fluid sexuality, sexual identity, and relationship

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[265] Adoptive Couple v. Baby Girl, 570 U.S. 637, 670 (2013) (Sotomayor, J. dissenting).

[266] *Id.* at 682.

[267] *Id.* at 652.

[268] *Id.* at 641.

[269] *Id.* at 655.

[270] Carriere, *supra* note 263, at 150.

[271] Kauanui, *supra* note 248, at 58. In light of Hawai'i's colonial history, during when american missionaries used Christianity to destroy Indigenous cultures, *Id.* at 50, the state's use of "aloha ke akua (God is Love)" is at best, hypocritical. *Id.* at 58.

statuses."[272] Kauanui notes that traditional Hawaiian relations included a mélange of friendships, romantic partnerships, and caregiving circles.[273] They were nurtured in an ethics of "aloha ʻāina (love for the land) and malama ʻāina (caring for the land)."[274] While True Aloha coalition acknowledged this ethical and relational multiplicity, their political position was simplified into signs of "True Aloha is Boundless = Marriage Equality for All."[275] To move with the winds of progress, a communal love that flows with the land was reduced into the dominant love plot; and fluid, variant forms were simplified to the coordinates of heteronormativity.[276] Through the nationalist imposition of "settler sexuality,"[277] Native heritage is "co-opted into state logics in which marriage itself becomes the primary vehicle for the expression of aloha [love]." [278] The violent, colonial discipline that used this *love* to indoctrinate Native children is reproduced and made into desirable slogans for *all*, "under the cover of inclusion in a multiracial liberal democracy."[279]

The premise of equality, of attaining *equal rights* as a *citizen*, has thus continuously been conditioned upon a loss of Indigenous conceptions of care, connection, and sustainability. From Native American boarding schools to Justice Alito's *re*interpretation of ICWA, Native relations, ethics, and worldviews are banished into a territory of the past, which is overcome with the *ever-rising* progress of the civilization: history sutured through a privatized romance. What *remains* of the Indian peoples in the mainstream american imaginary is often only aesthetic markers — such as the head-dress worn in Halloween[280] — or self-help lessons for *finding happiness* through a neoliberal imagining of Native "simplicity." [281] With these discursive

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[272] *Id.* at 59.

[273] *Id.* at 49.

[274] *Id.* at 54.

[275] *Id.* at 46.

[276] Manuela Picq and Josi Tikuna frame the disappearance of bodies between the words as being "[l]ost in colonial translation." Manuela Picq & Josi Tikuna, *Indigenous Sexualities: Resisting Conquest and Translation*, E-INT'L RELS. (Aug. 20, 2019), https://www.e-ir.info/2019/08/20/indigenous-sexualities-resisting-conquest-and-translation [https://perma.cc/8JJF-7NC7]. They descend deeper to explain what makes language so impossible without time: "The spectrum of Indigenous sexualities does not fit the confined Western registries of gender binaries, heterosexuality, or LGBT codification. It is not these idioms that are untranslatable, but rather the cultural and political fabric they represent." *Id.*

[277] Morgensen, *supra* note 171, at 106.

[278] Picq & Tijuna, *supra* note 276, at 59.

[279] *Id.* at 49.

[280] Barker, *supra* note 224, at 2.

[281] Carriere explains that Native culture and spirituality is often represented as a fantasy of escape, as what might "rekindle a burn-out Euro-American ethos." *See*

moves that "kill the Native" and save a *harmless other*, difference is contained, made into an ornament that *proves* the contemporary order's valorization of "diversity."[282] In turn, ethics of togetherness have become a historical lesson, a moralized tale for the *american* public, while Native peoples who might center collectivized dependencies are regarded as the nation's wards awaiting to be corrected.

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The private/public divide, its idealized citizen subjects and disconnected publics represent white values that have been made into a hegemonic narrative through a centuries long process of colonization.[283] Just as the colonial state framed dispossession of Native peoples a necessity, if not a benefit for the disrupted tribal communities, persisting the privatized family as the heart of the social order and denouncing dependencies that extend outside this unit rely upon a *white* notion of progress. Progress is stabilized within narratives that appear *indisputably* desirable — as the *love plot* that arranges lives towards marriage, *development* that turns public spaces into transaction hubs, and *civilization* that entrenches western values as signs of modernity. The affective coherence between courts and their imagined publics in the moments of citing these narratives hide the violence that is inherent in the *love plot,* in development, and civilization. In turn, the historic and continual *dehumanization* of Native, Black, and queer peoples, on the grounds of their relational multiplicities, are reflected back on these communities without an attempt at accountability.

Carriere, *supra* note 163, at 587. This fantasy often remains as one, taking an *appropriative* form at its best. After all, the centrality of the western culture is not released in these dynamics, and Native culture is incorporated as if donning on a tribal costume. This is not an equal valorization, but exploitation.

[282] Elizabeth Povinelli asserts that "native title" often functions as a "fetish" in the western imaginary for the "law, state, and public [to] organize and displace their anxieties about the nation's political, cultural, and economic worth and identity." Elizabeth A. Povinelli, *The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship*, 24 CRITICAL INQUIRY 575, 579 (1998). In this light, the claims of "multiculturalism," "diversity," and respecting difference, function as performative statements for the liberal state and the law to declare their own worth and desirability without "experienc[ing] the fundamental alterity of . . . indigenous discourses, desires, and practices." *Id.* 581. For a *true* engagement with Indigenous culture, the hierarchical positions, or distinctions between the center and periphery must be abandoned.

[283] *See* Lowe, *supra* note 207, at 7 for a discussion of colonization as a continual process. And however brutal the means continue to be, "killing the Indian" could never reach its completion. "Much of Indian culture, like the Indian population, is very much alive." Strickland, *supra* note 232, at 718.

The fantasy of equality that adapts the nationalized, sociolegal narratives as the baseline determinants of relational engagement, stabilize the white supremacist worldview. In effect, an equality that *fears* difference that exceeds the tightly contained white, settler heteronormativity, relies upon similar lines of fear that move among citizen subjects. In the next Part, I will move into this affective registrar of *fear,* and from its circulating effects argue that *disconnected publics* and *privatized relationships* in fact induce an engagement with *difference* that is restricted through the mandates of the singular narrative. Put simply, the *fear* that the law deploys to justify conditioning equality upon sameness is an outgrowth of a culture that is based upon distances and distrust, rather than care and dependencies. This realization is a beginning point to think about laws that can both foster accountability towards racialized othering, and become generative and creative, rather than homogenizing and restrictive.

Part IV. From Fear Towards Care: Seeds of Generative Laws and Interdependent Publics

The law is a set of stories. It contains the mythology that narrates a social order with a particular history, present, and an idealized future.[284] It defines who makes up a polity, how they come together, perceive and relate to one another, and the lives they envision to be meaningful. This article takes relationships as a cite where this story materializes. After all, the individuals collectively perform the story; their encounters and connections produce the fabric, the setting of the society. The values that are woven beneath these relationships, the common-sense assumptions that guide the flow of the day to day, are the then parentheticals, the script instructions affirmed and repeated through the law.[285]

Feelings are constructive.[286] They are a central dimension of those script instructions. Within a legal order that beckons its authority and justifies its

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[284] *See* Cover, *supra* note 26, at 4-5.

[285] *Id.* at 8 (describing the law as "signs by which each of us communicates with others").

[286] Against the common conception of emotions as being internally sourced responses to the external world, Sara Ahmed invites us to think of feelings, particularly those that generate political unities and responses, as circulating "between signifiers in relationships of difference and displacement." Sara Ahmed, *Affective Economies*, 22 SOCIAL TEXT 117, 119 (2004). For example, Ahmed believes that we cannot explain *hate* that is wielded against migrant communities as personal feelings, but can better do so as collectively generated responses. The entrenched political discourse produces a fantasy of the *other* as who will "violate the pure bodies," where "purity" itself is a fantasy invented "by the perpetual restaging of this fantasy of violation." *Id.* at 118. In this light, *hate* is not held in a

incitement into *progress* through a reliance on fear — of single, Black mothers awaiting to steal *your* future; of queer perverts awaiting to demoralize *your* kids; of Native peoples awaiting to tremble *your* culture — fear becomes the central affect organizing the relational matrix.[287] As Eve Sedgwick held in the first axiom of her prominent text, "People are different from each other;"[288] difference is the *feared*, but undeniable reality of existence. Yet, we have "few respectable conceptual tools . . . for dealing with this self-evident fact,"[289] and instead, there is an elaborate legal structure to control and diminish difference. What this law achieves, is in what Lauren Berlant's words the love plot achieves: "a form for seeming to repair intractable fractures within and between people, by way of the demand for the very love that also intensifies these cleavages."[290]

In this final Part, I will elaborate on the connections between fear, ethics of privatization, and the homogenizing tendencies of the current structure of the law. I will take on this task through introducing another narrative of queer sensual publics that have been destroyed under a premise of *civility*, which connects with the patterns of racialized dispossession and dislocation introduced earlier. Thinking alongside teachings of Black, queer feminists as well as Native ethical principles, I will then point towards the seeds of generative constructions of laws that have been planted by communities exploring interdependent narratives of justice.

A. The Symbiotic Relationship Between Fear and Privatized Ethics

A fear-based public formation,[291] that of distances and alienation, implicates how individuals perceive one another along lines of difference. In particular,

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particular subject or directed towards a particular object but corresponds to the political mythologies that become common sense.

[287] In Ahmed's conceptualization of emotions, the roots of fear reach beneath the individual subject and accumulates through the histories that are constitutive of the national order. For example, Ahmed speaks of how white people learn to respond to Black people in *fear,* as if the presence of *Blackness* is a threat to their integrity. This affective fantasy both creates a ground to rationalize racism, and produce an ideal of white people as *innocent* against the threatening Black others. AHMED, *supra* note 259, at 63, 64. Ahmed believes that fear "might be concerned with the preservation not simply of 'me,' but also 'us,' or 'what is,' or 'life as we know it,' or even 'life itself.'" *Id*., at 119.

[288] EVE KOSOFSKY SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 22 (1990)

[289] *Id.*

[290] BERLANT, *supra* note 30, at 105.

[291] Building from Berlant's work, Povinelli argues that "'the politics of sentimental feeling,' is critical to 'the formation of a national-popular collective will' that the state can use to produce 'a superior, total, form of modern civilization." Povinelli, *supra* note 282, at 577. Patriotism is one example of a sentimental feeling

where dependency is constructed in a privatized schema, and all are anticipated to sustain themselves through privatized means, the public becomes both a space of transactions and a structure of threats.[292] This public is perceived as endangering the stability of the private domain when it encroaches upon the matrimonial home.[293] Therefore, it is not simply the responsibility of the privatized family to take care of itself but also to fend off from the *others* who are recognized as the threats. The "domino theory of sexual peril" that resonated in *Lawrence*[294] and the commitment to guarding the integrity of marriage evoked in *Obergefell*[295] exemplify the fear-based structuring of the relational order. The racialized discourses investigated in Part II and III similarly represent these dynamics. The common-sense narrative frames Black families and kin that create publics of care and Native people whose lifeway is essentially collective, as destructive to the social body.[296] What is *different*, to the extent it does not obey the private/public divide of the civil society, is recognized both as a threat to the community that births these dynamics and to the constitutional polity.[297]

Conditioning equality upon sameness relies upon such a discourse of fear, whereby homogenizing the polity under the public/private divide can be framed as *civilizing* the polity in order to preserve and bolster the wealth and prosperity of the society. Among these dynamics of alienation, however, both a white supremacist narrative is marked as a common good, and the creative, constructive power of difference is stifled. The resulting privatized individuals can omit the suffering and pains lived upon in the public domain, not realizing that without an equitable connection across differences, their own capacities of existence, of love and connection, are bound to be delimited.[298]

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that coalesce around an ideal of a state that must be preserved. While the modern state and law rely upon *fear* to create a nation, my hope is to inquire whether collectives can come together based upon other affective grounds, such as love or care.

[292] *See* Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1542 (2006).

[293] *See* Lawrence v. Texas, 539 U.S. 558, 571-73 (2003); Harris et al., *supra* note 123.

[294] *See* RUBIN, *supra* note 51, at 150.

[295] *See* Obergefell v. Hodges, 576 U.S. 644, 669 92015).

[296] *See supra* notes 159, 161 (on narratives shaping Blackness); 249-256 (on historic narratives shaping Native existence); 265 (on *Adoptive Couple* case and contemporary reflections).

[297] *Id.*

[298] *See* BERLANT, *supra* note 30, at 286; AUDRE LORDE, *Age, Race, Class and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER: ESSAYS & SPEECHES 114, 115 (2007) [hereinafter SISTER OUTSIDER]. As Fred Moten puts it sharply,

Law's hegemonic mission of stabilizing civilization carries echoes from the colonial moment into the contemporary policies of "urban development." As Indigenous lands were *cleared* from the collectivist ethics of Native tribes to ensure progress, the public spaces of connection Black people constructed in H-Street was washed away in order to enable economic growth. Both narratives rely upon the privatized ethics being perceived as a necessity for the prosperity and futurity of the *american society*. In his review of Times Square Red, Times Square Blue — Samuel Delany's critical work interrogating destruction of *sensual publics* in Times square in the 90s — Eric Rofes unearths how *fear* is central to the privatized ethics that naturalize destruction of collectivized publics.[299] Rofes reflects upon his experiences of frequenting leather bars of Boston and becoming intimate with the patrons of these bars as a Harvard undergraduate, leaving behind "sherry hours and literary talks," and meeting the geography of "working-class neighborhoods, industrial areas, and public housing projects."[300] He emphasizes that this "naked city" is what his "suburban, middle-class upbringing had warned" him about; in the leather culture, he was making connections across race and class, meeting men "whom [his] family and roommates had often described as the dangerous other."[301] Similar to how educational institutions create boundaries of separation with communities, often of color, surrounding their campuses through relying on narratives of fear,[302] Rofes reveals that the outcome of a privatized ethics — of having to fend off the threat of the other — is a shared education of alienation that affect how publics are constructed.

The sensual publics Rofes and Delany documented stood in opposition to the centralized assumptions of the polity. In exploring the culture of intimacies built within the desiring, queer culture in the Times Square, Delany emphasizes *contact*, as the unique and expansive interaction between individuals who otherwise rarely find opportunities to connect with one another. In his words,

> [c]ontact is the conversation that starts in the line at the grocery counter with the person behind you while the clerk is changing the

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> *it's fucked up for you, in the same way that we've already recognized that it's fucked up for us. . . I just need you to recognize that this shit is killing you, too, however much more softly . . . you know?*

FRED MOTEN & STEFANO HARNEY, THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY 10 (2013).

[299] Eric Rofes, *Imperial New York: Destruction and Disneyfication under Emperor Giuliani*, 7 GLQ 101 (2001).

[300] *Id.* at 101-02.

[301] *Id.*

[302] *See supra* note 195 and accompanying text.

> paper roll in the cash register. It is the pleasantries exchanged with a neighbor who has brought her chair out to take some air on the stoop. . . . Very importantly, contact is also the intercourse—physical and conversational—that blooms in and as "casual sex" in public rest rooms, sex movies, public parks, singles bars, and sex clubs, on street corners with heavy hustling traffic, and in the adjoining motels or the apartments of one or another participant, from which nonsexual friendships and/or acquaintances lasting for decades or a lifetime may spring.[303]

Against the fearful depiction of *nonnormative* sex in *Lawrence*, Delany thinks of sensuality as sets of intimacies where individuals learn to see one another, while allowing to be seen. In these engagements that lack a script, where supposedly collectivized moral lessons do not determine the outcomes, the individuals could create an "equitable exchange."[304] Their personal histories, where they go after the encounter, what they have access to do not disappear in this narrative; yet they are also not reduced to the presumptions that the collectivized politics of *fear* would dress upon them much before any exchange is able to take shape. Such is an engagement with difference where the other is "seen as whole people in [their] actual complexities . . . rather than one of those problematic but familiar stereotypes provided in this society in the place of genuine images."[305]

Yet, both Rufus and Delany's sensual publics have been destroyed through a moralized narrative of development. These publics of interdependence, of caregiving as situated through desire, were named as disruptions against morality and impediments to the growth of the urban spaces.[306] A politics of "purifying space and the concomitant eradication of strangeness and danger" took place, once again paralleling the colonial logic of cleaning lands from Indigenous cultures.[307] Reflecting upon these changes, David Bell and Jon Binnie emphasizes that in the place of queer publics, "more and more cities have developed their own version of themed spaces, including gay villages," as presence of these normalized gay spaces are taken as signs of *progress*[308] — just as *Obergefell* was a sign of american commitment to freedom.[309] Yet,

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[303] Rofes, *supra* note 299, at 103 (citing SAMUEL R. DELANY, TIMES SQUARE RED, TIMES SQUARE BLUE 123 (1999)).

[304] *Id.* at 104.

[305] LORDE, *supra* note 298, at 118.

[306] *See* Rofes, *supra* note 299, at 104. Rodríguez aptly defines the central character of these urban places as, "the soul-crushing beige boredom of suburban life." Rodríguez, *supra* note 204, at 215.

[307] David Bell & Jon Binnie, *Authenticating Queer Space: Citizenship, Urbanism and Governance*, 41 URBAN STUDIES 1807, 1813 (2004).

[308] *Id.* at 1814.

[309] *See* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

be it the parades or the themed villages, *difference* looks similar across geographies, and the resulting spaces are hardly those of togetherness but instead individuated transactions. "What is being promoted is a very safe form of 'exotic difference,'" or a *difference* diluted through the value structures of the constitutional polity, whereby it is no more a *feared* threat but a safe, temporary encounter within the disconnected publics.[310]

The alienated publics is a collection of *fearful*, privatized familial units, whereby laws and policies can draw upon those fears to justify taming difference and affirming amnesia of social and cultural destructions that are unavoidable costs of homogenization. In asserting that a master-narrative of values must be guarded to protect the constitutional polity, the legal order is relying upon this *fear* of difference; what is a white, cultural organizing principle that is now webbed as a shared affect.[311] In valorizing the *privatized human* as the ideal subject of the constitutional polity, in whose image family law and civil rights take shape, the law is legitimizing this fear, while invalidating care, love, and intimacy that must mix with public spaces in order to produce any form of understanding, accountability, and transformative change. Following the teachings of Black queer feminists[312] and Native scholars, this final subsection will make a plea for how the law

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[310] Bell & Binnie, *supra* note 307, at 1816. The diversity and inclusion rhetoric populating university campuses is an example of such a flattening engagement with difference. Institutions assert their commitment to racial equity through their admission numbers, new faculty hires, and often performative gestures, such as brochures that present mostly minority students. On the one hand, diversity becomes a redundant conversation, stifling transformative demands of students, and placing the burdens on committees that get bureaucratized and barely achieve change. *See* CRASSH Cambridge, *Sara Ahmed – Uses of Use – Diversity, Utility, and the University*, YOUTUBE (Mar. 5, 2018), https://www.youtube.com/watch?v=avKJ2w1mhng. [https://perma.cc/5AKA-DYD5]At the same time, the universities do not attempt to change their central cultures—just as the law insists on preserving the defining narrative of the 236merican polity—even when both of these cultures have been formulated in light of *whiteness*. As such, adding non-white bodies into the space, without taking on the work of essential restructuring the institutions, perhaps even changing the meaning of *education*, arguably remains insufficient. For a discussion on the limits of "integration," see Brief for the Congress of Racial Equality (CORE) as Amicus Curiae at Appendix A (A True Alternative to Segregation: A Proposal for Community School Districts), Swann v. Charlotte- Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[311] *See* CRASSH Cambridge, *supra* note 310. For a discussion on affective policing of "colonial morality" in the empire, see David L. Eng, *Colonial Object Relations,* 34 SOCIAL TEXT 126 (2016).

[312] For an archival account of how a politics, based upon an expansive notion of love, is a central teaching of Black feminists with roots in African diasporic traditions, see Nash, *supra* note 125, at 4, 8, 14.

could become different if it starts from a point of *togetherness* and *care*, as opposed to *distances* and *fear*.

B. Foregrounding Generative Laws through an Ethics of Interdependence

Audre Lorde recognizes distortion of difference as a central limitation of the *american* culture and values. In her words, "[w]e speak not of human difference, but of human deviance," and the law assumes the position of *correcting* deviance in light of a singularized narrative in order to *protect* the society.[313] Lorde believes that the efforts spent on negating difference disrupts the work of "exploring difference" in order to "develop tools for using human difference as a springboard for creative change within our lives."[314] In her understanding, difference is not to be ignored or corrected, but held in an equitable exchange; in which one must *accept* to be changed by what is different, while changing the *other* along the way.[315] Such is a *queer* vision of world-making that is of adaptations and transformations, rather than the legalized precept of a constitutional polity that must retain a singular name. Such is also the transformative *love* of *bell hooks* that demands adaptation and growth, rather than the self-enclosing premise of the love plot that must survive "for the survival of life as we know it."[316]

Disciplining difference is a colonial logic; it is a mode of engagement that has marked Black lives and Native peoples without worth or humanity — ultimately denouncing accountability for racialized violence by equating enforced assimilation into *civilization* as the *just* solution. In these exchanges, the *white* polity has defined itself against the culture of Black and Native peoples; as such affirming its outer boundaries rather than allowing a process of growth.[317] The alienated publics reproduces these surface engagements

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[313] LORDE, *supra* note 298, at 116, 119 (recognizing that in our society "[t]he need for unity is often misnamed as a need for homogeneity").

[314] *Id* at 115.

[315] *Id.* at 118; *see also* OCTAVIA BUTLER, PARABLES OF THE SOWER (1993) ("All that you touch, You Change. All that You Change, Changes you. The only lasting truth is Change. God is Change").

[316] BERLANT, *supra* note 30, at 100.

[317] In her text providing an account of the formation of the Western culture and civilization, Sylvia Wynter expresses an ideological and material dependency of defining Black and Native others as *inferior*. Through this hierarchical relationship, the Western culture has been able to claim a position of superiority, while the outcomes of socioeconomic dispossession were taken as a *proof* of Black and Native inferiority. Sylvia Wynter, *Ethno, or Sociopoetics?*, ALCHERINGA 3, 4, 6 (1976). To this end, "[b]oth *We* and *Other* were now bound in a concrete relation," meaning and boundaries of the dominant culture only holds through the exclusion of the peripheral cultures. *Id.* at 3.

without connection, omitting the possibility that disjointed groups may need one another in order to attain *just* and *equitable* futures.

Native people held internal laws that prioritized living together in harmony.[318] As Ella Deloria notes, the "law" of Dakota people "was quite simple: One must obey kinship rules; one must be a good relative."[319] In her beautiful text on Indigenous wisdom, Robin Kimmerer expands this kinship from within a tribe into all living and non-living "gifts" of the world through the principle of "the Honorable Harvest."[320] Her call is clear: "Respect one another, support one another, bring your gift to the world and receive the gifts of others, and there will be enough for all."[321] In this ethical formulation, individuals do not melt into a *mass*. On the contrary "[i]ndividuality is cherished and nurtured, because, in order for the whole to flourish, each of us has to be strong in who we are and carry our gifts with conviction, so they can be shared with others."[322] To recognize the *individual* as such, difference must not be feared but cultivated; the collective must be trusted rather than avoided.

How would the constitutional polity become reorganized if it was based upon an ethics of togetherness? From a conceptual standpoint, *fearfully* upholding the "law of the land" cannot encourage an ethics of *care*; rather, the laws and principles, stories and values of collectives must remain in a co-extensive exchange. There cannot be an exclusive, *national* ideal that serves as a common language to which cultures, values, ways of *being* a human must be translated to.[323] Instead, as Audre Lorde teaches, justice requires finding modes of engaging across difference that does not rely upon hierarchies, that starts from a point of *caring about* and *recognizing the worth* of the other. While the contemporary political dialogue would chastise such a vision as "separatism," where the unified ideal is a violent fantasy of white supremacy, and where the resulting *publics* are disconnected spheres without intimacies,

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[318] PATRICIA MONTURE-ANGUS, JOURNEYING FORWARD 5 (1999) (naming law instead as "living peacefully").

[319] RIFKIN, *supra* note 236, at 181 (citing ELLA DELORIA, SPEAKING OF INDIANS (1944)).

[320] ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHING OF PLANTS 190 (2013). Kimmerer's bridging of indigenous wisdom with her studies in ecology to produce a *gift* for all, exemplifies a fecund engagement across difference.

[321] *Id.* at 132.

[322] *Id.* at 134.

[323] This is not to claim that collectives cannot locate unifying principles to live together; we need laws to form societies. Yet the task is to unify in ways that promote difference — which I claim cannot be achieved through the existing, white logics of the society.

allowing collectives to *gain* their own names and to grow alongside might in fact point to a *real* notion of togetherness.

From the standpoint of the existing legal machinery, the law can still *bend* its tendencies to encourage care and understanding. If the path towards accountability, equity, and justice requires exploring dependent intimacies, the law can become a positive force to encourage these encounters. Specifically, through a redistributive, anti-subordination vision, welfare laws can be amended to provide accessible and timely social services for *all*.[324] If individuals are valorized for their existence, healthcare, housing, and education must be recognized as essential rights. If we believe that *all* individuals make our lives worthy, providing a baseline income to all would not be an *irresponsibility*; it is a manifestation of love — of wanting the *other* to live. Relatedly, *care work,* the labor of keeping others alive, as well as the labor of community building, "such as Black women's community activism," should be valued and supported as the heart of the imagined society.[325] If we recognize ourselves as persistently effecting the lives of others, and if each one of us must take responsibility for the lives of others, criminal law must be transformed to eliminate imprisonment and other forms of carceral control, including the terror spread onto the borders.[326] And these proposals must work in tandem with relinquishing the nationalized control over *families*, by ending the legal, economic, and political privileging of heteronormative, marital unions. Collectives can then be encouraged to form hubs of care in ways that promote unique and capacious forms of being and loving. *Believing in others, trusting their gifts* are the guiding principles to make these changes common-sense.

Where these proposals are deflected through neoliberal convictions of independence, blame, and scarcity,[327] *fear of the other* underlies their political coherence. Legal actors are indoctrinated into this fear through an

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[324] For a proposal "embrace and support black loving . . . as it is currently experienced, without being preoccupied with how well it fares against the marriage yardstick," see Lenhardt, *supra* note 160, at 1321, 1356.

[325] Harris et al., *supra* note 123.

[326] Allegra McLeod provided an influential account for "[a]bolition as an ethical and institutional framework," whereby "[a] shift toward abolition would involve transforming ourselves and some of our most deeply held ideas and practices about blame, responsibility, and desert." Allegra McLeod, *Prison Abolition and Grounded Jusitice*, 62 UCLA L. REV. 1156, 1238, 1239 (2015).

[327] Following Kimmerer, I understand scarcity as a construct, a fallacy that promotes a sense of powerlessness and a heartless comprise with the status quo. In a decade where billionaires have hoarded capital, where tech booms have created absurd richness, and worlds of finance, law firms, and consulting make the rich and their employers richer, we *know* very well that the society *has* the resources to sustain all.

essentially conservative legal structure, which stifle their imaginations.[328] Yet, building new *laws* does not require changing the face of legal institutions. Co-existent laws and interdependent collectives are reflections upon publics that have *already* been generated by Black peoples, Native peoples, and queer peoples.[329] These are the passing contacts that bring pleasure to life; the friendships that become families; the strangers we learn to love and change with along the way.[330] These connections are what is being practiced in Transformative Justice spaces, where collectives, often of color, of queer people, of disabled people, are coming together to learn to take care of one another, and create a grounded sense of safety, rather than relying upon state actors, such as the police.[331] These principles are remembered and cherished by Healing Justice practitioners who seek to alleviate *disconnection* integral to the constitutional polity by reminding how we are always a part of each other, and the world in which we flourish.[332] These practices have been represented in the innovative "mutual aid" networks built to support those who are vulnerable during the pandemic.[333] They form the heart of cooperative economies and urban farming initiatives that imagine cities for all.[334] Justice is thus already given other names than the fictious

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[328] *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. L. EDU. 591 (1982).

[329] While we are surrounded by narratives of *powerlessness* against the dominant machineries, Michel Foucault insists that "we are not trapped . . . there are always possibilities of changing the situation." MICHEL FOUCAULT, ETHICS: SUBJECTIVITY AND TRUTH, 167 (1997). As a horizon, he calls forth "fight[ing] against the impoverishment of the relational fabric." *Id.* at 158.

[330] *See generally,* Muñoz, *supra* note 1.

[331] *See, e.g.*, Barnard Ctr. for Rsch. on Women, *Transformative Justice in the Era of #DefundPolice*, YOUTUBE (Oct. 21, 2020), https://www.youtube.com/watch?v=JTpHcV-8dFA [https://perma.cc/NJX4-BRMY].

[332] Healing Justice as term was coined by Cara Page and Kindred Southern Healing Justice Collective, centering "collective practices that can impact and transform the consequences of oppression on our bodies, hearts and minds." *See Our History*, KINDRED SOUTHERN HEALING JUSTICE COLLECTIVE, http://kindredsouthernhjcollective.org/our-history/ [https://perma.cc/523T-YCZS]. For a conversation connecting Black abolitionist futures with healing justice, see Goethe-Institut New York, *Healing and Transformative Justice: Imagining Black Feminist/Abolitionist Futures*, YOUTUBE (Jul. 31, 2020), https://www.youtube.com/watch?v=3fDHrgaTmpo [https://perma.cc/3S4Z-FYNV].

[333] *See, e.g.*, DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 17 (2020) (defining mutual aid as '"collective coordination to meet each other's needs, usually from an awareness that the systems we have in place are not going to meet them").

[334] In Detroit, Black peoples are bringing together food justice, collaborative economies, and cultural production to produce a new infrastructure that can sustain life. Oakland Avenue Urban Farm and Detroit Black Community Food Security

unity that the legal machinery declares to be necessary. The work for legal actors is then to denounce the boundaries that privilege their *knowledge*, their *authority* for defining values and declaring norms, above the marginalized *lawmakers* in the polity.[335] Where these boundaries are ossified by *fear*, the work will require moving into what is feared with a recognition that these encounters will *change* the normative that has been insistently singularized and stabilized.[336]

Shaking off the singular story can begin from recognizing how interdependence already structures our lives.[337] For there is no self without the other, but against the teachings of the white supremacist culture, the self does not have to be made through deprecating the *different* other.[338] Instead,

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Network are two examples among a network of organizations that are growing this nest. Visions arising from the "solutuaneries" of Detroit arise alongside the teachings of the local revolutionary, Grace Lee Boggs. In her own words,

> "[True revolutions are] are about redefining our relationships with one another, to the Earth and to the world; about creating a new society in the places and spaces left vacant by the disintegration of the old; about hope, not despair; about saying yes to life and no to war; about finding the courage to love and care for the peoples of the world as we love and care for our own families."

Grace Lee Boggs, *A Conspiracy of Hope: The Beloved Community of Martin Luther King,* YES MAG. (May 21, 2004), https://www.yesmagazine.org/issue/hope-conspiracy/2004/05/21/the-beloved-community-of-martin-luther-king [https://perma.cc/75JA-DBUM].

Her passionate belief in *us* comes together with this paper's emphasis on law-making as a grounded, collective activity; of "each one of us becoming the change we want to see in the world." *Id.*

[335] *See* Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988).

[336] Donna Goldsmith cites words of Frederick Douglas that speaks to inevitability of walking into the feared, in order to envision freedom: "Those who profess to favor freedom and yet deprecate agitation . . . want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the roar of its many voices." Goldsmith, *supra* note 234, at 11 n.58 (citing Matsuda, *supra* note 335, at 4 n.15).

[337] Grounding ourselves in the primacy of *interdependence* is an Indigenous teaching, see Swentzell, *supra* note 235, at 101, that has also been reminded and grown by Black, queer feminists. *See* Gumbs, *supra* note 151.

[338] As Rena Swentzell explains in her testimony, *western culture* approaches binaries as exclusionary oppositions, which are then placed in hierarchical relationships, such as male and female. Swentzell, *supra* note 235, at 101. These oppositions are necessary in a culture where power and wealth are accumulated through exploitation. Swentzell names that in Pueblo Culture, on the other hand, which depended on harmony and balance for survival and growth, difference did not form oppositions, but instead signified what would come together in a whole. *Id.* at

we can grow together; we can web new names, new narratives of worth, new pasts and futures.[339] We can create reflections of desires for which we have no words; desires that may shake, break, and reorient our bodies, take us into intimacies with depths dark and unknowable.[340] Intimacies that may spill outside the familial, that may turn the walls inside out, and remind that we have a responsibility for one another, simply because we make our existence possible.[341] And to begin we need to nurture *trust* and *care* in the place of fear, to *trust* we must listen, and to *listen* we must accept to change.[342] As the world crumbles, as our lives suffocate in never ending waves of violence, the transformation can begin in the intimate connections we forge. There we can find "the energy to pursue genuine change within our world, rather than merely settling for a shift of characters in the same weary drama."[343]

July 2021, on Lenape Land

Conclusion for an Ever-Growing Us

I am concluding this article in the May of 2022, when *fear* is publicly waged against queer and trans peoples and against women and non-binary people's bodies and their intimate relationships.[344] States after states have been

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98. Audre Lorde similarly remarks that in a culture where "any difference between us means one of us must be inferior," we are conditioned to approach difference with *guilt*. LORDE, *supra* note 298, at 115. A central work towards *interdependence* thus requires a negotiation and eventual negation of essentialized hierarchies, and instead understanding all difference as carrying its distinct worth.

[339] *See* Sedgwick, *supra* note 219, at 146.

[340] *See* Audre Lorde, *Poetry is Not a Luxury*, *in* SISTER OUTSIDER 35, 36.

[341] *See* adrianne maree brown, *The Pleasure of Deep, Intentional Friendships, in* PLEASURE ACTIVISM: THE POLITICS OF FEELING GOOD 581, 581-86 (adrianne maree brown ed., 2019).

[342] In the homogenized reality forged with fear, and in a social formation that is built upon selfishness, we are conditioned to distrust each other — to take the Other as a *stranger*, a potential threat to our existence. To shake off this narrative of distance, we will need to gather other parables of who we are to one another.

[343] *See* AUDRE LORDE, *Uses of the Erotic: The Erotic as Power*, *in* SISTER OUTSIDER 87, 91.

[344] With this latter statement, I am particularly thinking about the recent Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which not only overturned *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), but also places other sexual liberties in jeopardy. Justice Alito *shamelessly* justifies this position by pressing that right to abortion is not "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Dobbs*, 410 U.S. at 2242. Based on this paper's illumination of history and tradition, as well as the *whiteness* of the ordered

enacting "anti-trans" legislations, particularly targeting trans youth and seeking to end policies aimed at affirming and facilitating their existence.[345] In the circulating media accounts, trans teens become predators, trans-ness an attack against the *american* family and the morality of *american* children. This *fear-based* framing of *hate* as *self-preservation* is not at all surprising, but simply attests to the continuation of white, colonial logics. They are the *calls* of a fearful, white nation that can recognize the cultural, political, and economic demise of its much-cherished order; scrambling to find new enemies to blame for their suffocating lives. And trans people, whose loving self-making challenges the coherence of heteronormativity, as well as women and queer peoples whose *sensuality* is made into a public affair, are the fronts of a war to protect the children — the progeny of the empire.

Among these attacks against our lives, we may become fearful, bury ourselves under the weight of hopelessness, and wait for a hero to rise. Yet, as an Oakland-based trans collective that builds up resistance and mutual aid expresses: "We are the ones we have been waiting for."[346] We are the law-makers. Our daily hustles, creative endeavors, care for our loved ones and those we learn to love; our sprawling, dazzling bodies, and confusing, yet exciting sensual relationships; our gatherings of play, discussion, and action — they all speak of laws imagined and realized. We are the power, and thus, we are *feared;* and this power is not dependent on cash, degrees, or *being taken seriously*. Our power is innate and it grows with love, and it charts the future no *white man* would dare envision. And *we* are not an exclusive whole; our circle grows to bring in all who fight to make life again in the world's very language of care. Now is the time to recognize that another world is among us, and hold onto those who help you believe in change — change, that is "*the only lasting truth*."[347]

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liberty, the opinion provides the connection between white supremacy, anti-abortion movement, and their relations with fear.

[345] *See* Matt Laviates & Eliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC (Mar. 20, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/T5R8-LUQZ]; *Legislative Tracker: Anti-Trans Legislation*, FREEDOM FOR ALL AMS. , https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation [https://perma.cc/8S5W-98WB].

[346] *We Are the Ones We've Been Waiting For*, WE ARE THE ONES, https://www.wevebeenwaitingfor.us [https://perma.cc/EZ65-ZDB6].

[347] Butler, *supra* note 315, at 3.

Position Statement

As this article moves across time and communities, as it makes claims *through* communities that are not mine, I want to provide this position statement to locate my presence and express my intentions.

I am a queer, non-binary human, raised within a middle-class family in Turkey, largely desensitized to politics and change. I have come to america for college in 2013, presuming that I was arriving at the *land of freedom*. Queer organizers and teachers in these early years turned me into questioning the given narratives. They helped me understand *intersectionality* as a practice and not a code word, and paved the way for my work as an organizer with queer and trans communities. Starting around the same time, I have found my queer family who encouraged me to see myself again, to take the reins of defining my body and my life, and to *love* fully, openly, with risk. These personal and political, and more often than not "personal as political" changes have defined the ground on which I rise — the people I have created with and those I love have affirmed my tendency towards hope.

While law school sought to indoctrinate an institutional love, combined with a sense of hopelessness, I had to remain attached to my stories to survive. For in queer worlds, I have learned that we were *already* making the future; and no law could tell me otherwise. This conviction blossomed into a practice, as I researched into the works and visions of Black queer feminists including, Audre Lorde, Alice Walker, Alexis Pauline Gumbs, adrienne maree brown, and bell hooks. Their spiritually grounded words, their visions to change with love and pleasure, and their poetic guidance towards how we get free, make my directions possible. While many of the visions of Black, queer feminists are tied to indigeneity, to an African diasporic imagining of *being*, I have also encountered Native American teachers, such as Robin Kimmerer, Joy Harjo, Leanne Betasamosake Simpson, and Natalie Diaz, who taught me that on the land I write, another peoples have been dreaming, loving, creating.

There was then my Black, queer teachers, and Native story-tellers, against the legal education where the *autonomous individual* was cherished at every course, in every doctrine. This incommensurability became a seed for this work, to understand how my learning from queer peoples and visions, and lives of Black and Native peoples, might web together to give new names for our futures. To do so in a relatively digestible manner, this paper relies upon generalizations — the Blackness and Indigeneity, as well as queerness, it construes could be critiqued for being too flat, or over-romanticized. And I am open to and am happy to be gifted critiques of any kind, as I am also

attempting to learn how to walk alongside, care alongside, grow alongside while seeing people as wholes.

From the love in which I stand, this is a note of gratitude for all the women of color and queers of color who have gifted me my voice.