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Practicing Queer Legal Theory Critically

Kendall Thomas*

Abstract

This introduction to the *Critical Analysis of Law* special issue on queer legal studies excavates three conjugal artifacts: an academic manuscript delineating interracial and same-sex marriages as loci of state surveillance and unfreedom; a TED Talk on same-sex marriage as irrefutably queer; and the United States Supreme Court decision holding same-sex marriage a constitutional right. These artifacts, along with their singular referent (state-sanctioned marriage), point to what is or should be *critical* about the interdiscipline of queer legal studies: theorization not only of the subjectification of subjects of gender and sexual regulation (spouses, singles, you and me), but also theorization of the subjectification of power (here, state power and state formation). What kind of state, and what kind of power, materialize through the governance of sex, intimacy, and coupledness? This methodological imperative complements and productively conflicts with the contributions of this issue, all of which turn their gaze away from the subjectification, domestication, or normalization of the usual, sexual minoritarian suspects, but only some of which explicitly articulate the state-making power of sex and gender.

The word “queer” . . . displaces the emphasis from persons to practices[.]
S.A. De Waal¹

[T]heory does not express, translate, or serve to apply practice: it is practice.
Michel Foucault²

* * *

How do the “branding” and market commodification of queer identity, images and existence entrench visions of sex and sexuality that are blind if not indifferent to the politics of racism, misogyny and transphobia? Is the #MeToo movement an example of queer social justice politics? What does a “queered” reading of homosocial pleasure in communities of straight, cis-gendered men teach us about the roles that visual culture and cultural politics play in constituting legal subjectivities? Can a queer genealogy of the language of trauma and power in contemporary sexual harassment law render visible the truth-regimes that legal institutions have imposed on sex, sexuality and sexual meaning-

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¹ Shaun André de Waal, “A bit out of line, somehow”: William Burroughs and the Queer Reading the Queer 6 (2006) (unpublished M.A. thesis, University of the Witwatersrand).

² Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* 208 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977).

making in the modern era? How might queer theory help us survey a contemporary political landscape in which sex and sexuality have become a battleground for fighting proxy wars that in fact have little or nothing to do with sex/uality at all? Does “queerness” offer a usable conceptual compass for mapping the “ambivalently intersectional” privilege and marginality of the mostly white, mostly heterosexual cis-gendered clients of sex workers in the West? To what extent does an intellectual and ethical commitment to ongoing and unrelenting investigation of its constituent theoretical terms distinguish queer legal studies from other, more mainstream modes of legal thought and scholarly discourse?

While they vary in form and focus, the contributions to this issue of *Critical Analysis of Law* invite reflection on what I take to be one of the animating ambitions of queer legal teaching and writing on sex and sexuality law: to radically reimagine and rethink the relationship between legal *theory* and legal *practice* (a relationship, it should be noted, which in the U.S. common law system and legal academy has always accorded priority and primacy to the latter). If the central object of mainstream sex law scholarship is the *theory of legal practice*, the field-defining feature of queer legal studies is a preoccupation with the *practice of legal theory* or, more precisely, a reflexive understanding that the practice of legal theory is a kind of legal practice and not just a second-order theory *about* law practice. Put another way, queer legal studies involves a commitment by those who do it to active and ongoing mindfulness of the ways in which legal theorizing about sex, gender and sexuality, like all legal theory, is a *practice* that takes place “in the world, as well as in the academy.”³

“Queer legal methods” (and we must speak here in the plural) thus reject the traditional and (at least in the U.S.) still dominant view that positions legal scholars and the practice of legal scholarship in a domain which—at least aspirationally or “in theory”—is separate and distinct from, and only contingently connected to, the legal actors, ideologies and institutions law studies. Queer legal inquiry understands itself to be *immanently* located, embedded and invested in the field of sex and gender law that it investigates.

Taking these axiomatic observations about the dependent origination and transversal imbrication of theory and practice as a point of departure, I propose to offer a few thoughts on the relevance, meaning and value of the idea of “critical analysis of law” in queer legal studies. Notions of the “critically queer,” “queer as critique,” the “queer-critical,” “critical queer engagement” and “critical queer legal sensibility” figure explicitly here in Joseph Fischel’s conversation with Paisley Currah and Aeyal Gross,⁴ as well as in the essay by Brenda Cossman.⁵ Each of these contributions draws—or can be read to draw—an implicit distinction between “critical” and “non-” or “anti-critical” queer inquiry, interpretation and argument. The question I propose to explore here is, “What makes this or that practice of queer legal theory a ‘critical’ practice?” Using two very different queer

³ Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* 2 (1982).

⁴ Joseph J. Fischel, *Social Justice for Gender and Sexual Minorities: A Discussion with Paisley Currah and Aeyal Gross*, 6 *Critical Analysis of Law* 82 (2019).

⁵ Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 *Critical Analysis of Law* 23 (2019).

theoretical arguments on the subject of same-sex marriage as interlocutive texts, I am going to suggest that we can parse the distinction between “critical” and “non-critical” queer legal imaginaries and analysis by looking at whether and (if so) how particular queer theory arguments engage the question of *power*.

In *Wedlocked: The Perils of Marriage Equality*, Katherine Franke argues that the story of the legal struggle for the right to “same-sex marriage” offers a case study of the ways “rights-bearing subjects are almost inevitably shaped by the very rights they bear.”⁶ For Franke, this juridical subject-shaping reveals that “rights” and “freedom” are not only contingently, but inversely, related: to gain rights is to lose freedom. Writing in the midst of what would become a successful campaign to secure the right to marry in the U.S., Franke notes the paradoxical situation in which gay and lesbian Americans were to find themselves once they were forced to reckon with the reality that “the state acquires a legal interest in your relationship” when one enters the regime of civil marriage.⁷ “[Y]our relationship is now governed by law, and . . . you have to play by law’s rules.”⁸ This “[c]loaking” of “freedom in state regulation . . . is a curious freedom indeed, for this freedom comes with its own strict rules.”⁹

Wedlocked figures the presence of the state and state regulation of sex as the absence of sexual freedom. In this vision, then, the decision to embrace a civil rights vision that sought “public citizenship” in the “distinctly private domain” of marriage can only be considered a tragic choice.¹⁰ Indeed, Franke depicts the decade or so between the 2003 Supreme Court decision in *Lawrence v. Texas*¹¹ that struck down criminal prohibitions on consensual gay and lesbian sex and federal judicial recognition of a constitutional right to same-sex marriage rights in almost nostalgic terms. During this brief interregnum, lesbians and gay Americans were able to live out “a kind of freedom from the ‘bonds’ of marriage.”¹² This was a moment, in Franke’s account, that allowed gay men and lesbians to creatively experiment with and explore relational possibilities beyond the boundaries of state governance. What, we might then ask, drove the leaders of the “marriage equality” movement to throw themselves so eagerly into the arms of the law, to bargain away their “freedom from marriage” in exchange for the “freedom to marry”? How do we explain the “strange,” “curious,” “odd yearning” of some gay men and lesbians for public state recognition of our private sexual relationships and intimate associations?¹³

⁶ Katherine Franke, *Wedlocked: The Perils of Marriage Equality* 13 (2015).

⁷ *Id.* at 9.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 51.

¹¹ 539 U.S. 558 (2003).

¹² Franke, *supra* note 6, at 64.

¹³ *Id.* at 9.

Building on a line of argument first developed by queer studies scholars such as Lauren Berlant and Michael Warner,¹⁴ Franke's answer begins by noting the ways in which "gaining the right to marry has marked a kind of emancipation from the burden of social abjection."¹⁵ This is so on at least two grounds. First, the marriage license operates as a badge of social belonging and state recognition of the equivalence of hetero- and homo-conjugality. Second, the marriage license serves as a symbolic credential that attests to the value and legitimacy of a homosexual couple's relationship. To possess a marriage license is to possess a species of symbolic currency—a conjugal coupon, if you will—which can be used to redeem the myriad economic, legal and social privileges that flow from membership in the marriage club.¹⁶

Franke contends that the success of the American campaign for "marriage equality" was achieved in no small part through a "conscious strategy of radically refiguring the meaning of homosexuality."¹⁷ In a pivotal passage, *Wedlocked* describes this cultural project in language that warrants extended quotation:

This entailed carefully crafting a revised conception of gayness organized around a status or stable identity rather than sexual acts, and substituting love and familial devotion as the operative forms of affect that bound same-sex couples together rather than sodomy or sexual attraction. Put more bluntly, it meant reorienting the public's attention from the genitals to the heart, from the bushes to the hearth, from prurience to parenthood and from sin to sacrament.¹⁸

In short, argues Franke, the campaign to achieve lesbian and gay marriage rights "successfully rebranded" gay and lesbian identity and experience by "cleaving the sex out of homosexuality."¹⁹ The tragedy, in Franke's view, was that this historic social movement mobilization and meaning-making sought and secured nothing more than the hollow, heterocentric right to be "locked into a set of traditions and roles that [the lesbian and gay community] had no part in creating and that were not formed with us in mind."²⁰

In this volume, Brenda Cossman includes Katherine Franke in the company of scholars who draw on the language and ideas of queer theory without identifying as queer theorists.²¹ In both its formal method and its substantive themes, *Wedlocked's* argument against same-sex marriage is clearly "queerly influenced."²² Contrast the "no name

¹⁴ Lauren Berlant & Michael Warner, *Sex in Public*, 24 *Critical Inquiry* 547 (1998).

¹⁵ Franke, *supra* note 6, at 60.

¹⁶ *Id.*

¹⁷ *Id.* at 61.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 231.

²¹ Cossman, *supra* note 5, at 36.

²² *Id.* at 36.

queerness²³ of Franke’s cautionary tale about the perils of the same-sex marriage with the very different uses to which Kim Katrin Milan and Tiq Milan put queer theory language and concepts in their “A Queer Vision of Love and Marriage.”²⁴

In a TED Talk that has, as of this writing, received nearly 1.5 million views, a black trans queer man named Tiq Milan, and Kim Katrin Milan, a black queer cisgender woman, share the story of their whirlwind “courtship” and marriage.²⁵ One of the most striking things about this talk is its almost dizzying deployment of queer theory ideas and arguments to make a case for embracing the “institutions and traditions” of civil marriage, a wedding ceremony, monogamy, adopting and raising a family.²⁶ Because “God was never supposed to bless a union for folks like us, and the law was never supposed to recognize it,” Tiq Milan says, “sprinting towards” his wife’s “hand in marriage was the queerest thing that I could do.”²⁷ Because the “gift of queerness is options,” Kim Milan tells the audience, “it was incredibly freeing” for her, “my father’s bastard child,” to be able to “choose the name of a man who chose me first.”²⁸ The Milans met and fell in love during a 3,000-message, 72-hour-long Facebook conversation, and so “fittingly,” they shared “all of our wedding photos on Facebook . . . and Instagram, of course.”²⁹

And we quickly realized that our coming together was more than just a union of two people, but was a model of possibility for the millions of LGBTQ folks who have been sold this lie that family and matrimony is antithetical to who they are—for those of us who rarely get to see ourselves reflected in love and happiness.³⁰

Later in their presentation, Tiq Milan characterizes the “possibility that we are practicing” in even more expansive terms.³¹ The Milans understand their queer marriage, and the queerness which is their “major key,” as experiments, without “any blueprints,” for “reinventing time, love and institutions.”³²

We are creating a future of multiplicity. *We* are expanding the spectrum of gender and sexuality, imagining ourselves into existence, imagining a world where gender is self-determined and not imposed, and where who *we* are is a kaleidoscope of possibility without the narrow-minded limitations masquerading as science or justice.³³

²³ Id. at 36.

²⁴ Tiq Milan & Kim Katrin Milan, A Queer Vision of Love and Marriage, TEDWomen, Oct. 2016 (https://www.ted.com/talks/tiq_milan_and_kim_katrin_milan_a_queer_vision_of_love_and_marriage).

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id. (emphasis added).

Kim and Tiq Milan performatively enact a marital relationship which “has always been about setting each other free.”³⁴ As they tell it, this practice of reciprocal freedom is animated by a queerness that is “fluidity and limitlessness all at once,” that claims “a freedom too strange to be conquered.”³⁵ In the Milans’ queer vision of love and marriage, their relationship is nothing less than a “tool of revolutionary change.”³⁶

Obviously, Tiq and Kim Milan’s queer paean to conjugal freedom offers an answer to the question “Why marriage?”³⁷ that is diametrically opposed to Katherine Franke’s “progressive queer” elegy on the limits and unfreedom of wedlock.³⁸ I am less interested here in the very different uses to which *Wedlocked* and “A Queer Vision of Love and Marriage” put the language of queer theory than I am in the degree to which Franke’s queer case against, and the Milans’ queer case for, gay marriage may be said to inhabit the same or at least overlapping “logical space.”³⁹ Although Franke and the Milans come down on radically different sides of the queer marriage debate, they are united in a common preoccupation with the meaning of marriage to and for the “subjects” of marital rights. Kim and Tiq Milan celebrate the legal right to marry as a terrain of possibility in which people who have been “marginalized because of our identities” can find and live “their authentic selves.”⁴⁰ Katherine Franke reminds us that legal marriage rights, like all rights, entrench, regulate, channel, constrain and stabilize identity and “produce the subject they pretend only to presuppose.”⁴¹ The subjugation of rights in marriage law threatens to “lock us into roles, responsibilities and limitations from which it is very hard to break free.”⁴²

Despite their differences and disagreements, however, both these “queer”-influenced accounts and the shared preoccupation with the “subjective side” (the “we,” “us,” “you” or “I”) of marriage rights show an unqueer and uncritical lack of deep interest in, or engagement with, what the modern story of civil marriage, marriage equality and the right to legally marry tells us about the question of *power*.

Why power? I began this discussion by suggesting that the *queerness* of queer legal theory derives in part from a recognition that it is a socially and institutionally *situated practice*. This situated mindfulness of the myriad ways in which legal scholarship is not only connected to, but also continuous with, law and “all the apparatuses, institutions, and rules

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Franke, *supra* note 6, at 7.

³⁸ Id. at 235.

³⁹ Richard Rorty, *Essays on Heidegger and Others* 13 (1991).

⁴⁰ Milan & Milan, *supra* note 24.

⁴¹ Wendy Brown, *Revaluing Critique: A Response to Kenneth Baynes*, 28 *Pol. Theory* 469, 472 (2000).

⁴² Franke, *supra* note 6, at 230.

that apply it,”⁴³ is also a hallmark of “critically queer” legal-theoretical practice. One of the insights which makes critical queer legal studies *critical* in the sense that interests me here, however, is the recognition that the field of legal practices in which queer legal theory work takes place is not just an intellectual but a *political* domain; what this means, specifically, is that no truly critical analysis of law is possible that fails to reckon with and provide an account of the “economy of power relations” to which legal theory and legal practice belong.⁴⁴

Further, critical queer legal theory can think reflexively about its status as a way to study law and legal power, and a locus of the very normative and performative power that is its object of study. We can measure the distance between critical and non-critical uses of queer legal theory by looking at whether and how a given queer legal analysis “works” (as they say in house ball culture), and works with its own implication in the nexus of force relations and “power-knowledge.”⁴⁵ Because it understands that “nothing more than a dash or a hyphen keeps power and knowledge apart,”⁴⁶ *critical* queer legal studies acknowledges, accepts and performatively *leverages* the political conditions and constituent components of the mixed modal analysis that I have been calling “theory-practice” as an interpretive framework for understanding how legal power is exercised in and through the production of legal knowledges. Deepening and extending queer theory’s destabilizing interrogations of binary thinking about heterosexuality and homosexuality, maleness and femaleness, masculinity and femininity, sexual acts and sexual identities, or normative and non-normative sexualities, critical queer legal studies resists the disciplinary division of labor between legal theory and legal practice, insisting that only a critical articulation of theory-practice can provide an adequate framework for understanding legal power-knowledge relations in the modern era.

Where, then, might a “critically queer” account of the techniques and forms and relations of “conjugal power” in U.S. marriage law start? As a threshold matter, answering this question will almost certainly require a shift in focus from the issues of identity and subjectivity to which I called attention in my discussion of *Wedlocked* and “A Queer Vision of Love and Marriage.” As Bruno Perreau has recently argued in his *Queer Theory: The French Response*, queer theorists have “revitalized the way that subjectification is conceptualized.”⁴⁷ Queer theory has provided a language and lens for analyzing the cracks between and non-coincidence of “sexual categories and behaviors,” the convergent, colliding, contradictory practices of “identification and deidentification,” and the complex choreographies through

⁴³ Michel Foucault, “Society Must Be Defended”: Lectures at the Collège de France, 1975-1976, at 27 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003).

⁴⁴ Michel Foucault, The Subject and Power, 8 *Critical Inquiry* 777, 779 (1982).

⁴⁵ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed., Colin Gordon et al. trans., 1980).

⁴⁶ Thomas Keenan, *Fables of Responsibility: Aberrations and Predicaments in Ethics and Politics* 141 (1997).

⁴⁷ Bruno Perreau, *Queer Theory: The French Response* 80 (2016).

which “subjects constitute themselves.”⁴⁸ Nonetheless, concludes Perreau—and I concur—a queer theoretical practice that centers *only* on questions of identity, subjectivity and its performativities will eventually hit an analytic brick wall “if it fails to pay attention to the role of institutions.”⁴⁹

The call for critical queer analyses beyond the subjectification paradigm is not a call to abandon the investigation of gender and sexual identities. Rather, it’s a plea to attend to the emergence, or better yet, the *institution* of those identities in and through government and the art of governing. Foucault describes “government” in this sense broadly as a “conduct of conduct.”⁵⁰ The term refers to all the modes and techniques of power or the “ensemble of actions”⁵¹ by which actors, including state actors, “structure the possible field of action of others”⁵² through “acts upon their actions.”⁵³ The analysis of a society’s power relations cannot “be reduced to the study of a series of institutions,”⁵⁴ including the all too often reified and fetishized power of “the state,” or as Foucault put it, “the set of institutions we call the state.”⁵⁵ Accordingly, a queer legal critique approaches “the state” as “nothing more than a way of governing” or “type of governmentality” that sits alongside many other institutions, apparatuses and rules tasked with applying the law.⁵⁶

In my own scholarship, I’ve always been much more interested in thinking instead about reconfiguring and retriangulating identity and subjectivity as they connect with and inform the “psychic life”⁵⁷ of state power and the political unconscious of legal state institutions and state discourse.⁵⁸ What I think this means for a queer critical theoretical practice around same-sex or queer marriage is that we should be careful not to confine our attention to those modes or exercises of state power that conform to a narrow legal model of recognition and regulation. Examined queer-critically, state marriage law discourse can be made to illuminate aspects of marital state power that elude the subjugation perspective and the familiar queer theory approach for which questions of identity and subjectivity are discussed only in connection with consideration of the ways rights discourse embeds rights-

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, at 42 (2007).

⁵¹ Foucault, *supra* note 44, at 786.

⁵² Id. at 790.

⁵³ Id. at 789.

⁵⁴ Id. at 792.

⁵⁵ Foucault, *supra* note 50, at 247.

⁵⁶ Id. at 248.

⁵⁷ Judith Butler, *The Psychic Life of Power: Theories in Subjection* (1997).

⁵⁸ See, e.g., Kendall Thomas, *Corpus Juris (Hetero)Sexualis: Doctrine, Discourse, and Desire in Bowers v. Hardwick*, 1 GLQ 33 (1993); Kendall Thomas, *Envisioning Abolition: Sex, Citizenship and the Racial Imaginary of the Killing State*, in *Sensible Politics: The Visual Culture of Nongovernmental Activism* 256 (Meg McLagan & Yates McKee eds., 2012).

bearing subjects in conjugal power relations. If state actors and entities “institute” their own identities through the same arts and acts of governing that produce the identity of the “subjugated” subjects of legal marriage rights, we need to pay at least as much attention to those discourses of identity and practices of subjectification that are *interior* to conjugal state power.

To render these abstract claims a bit more concrete, my remaining pages are devoted to a “queer” reading of the U.S. Supreme Court’s opinion in *Obergefell v. Hodges*.⁵⁹ I deploy a queer-critical legal method that seeks to “queer the state” and state power.⁶⁰ Reading the institutional pronouncements of the Supreme Court “diagonally” and “on the bias,” I suggest that *Obergefell*’s declarations about the meaning of marriage and the subject of marriage rights are “self-subjectifying” practices through which the *state*’s identity gets imagined, elaborated and expressed even as it discursively produces the identities of the rights-bearing subjects who seek judicial recognition and protection. As we shall see, a critical understanding of the discursive forms and techniques that implicate and “interpellate”⁶¹ the state as a queerly “split” governing subject yields insights into the “libidinal economy”⁶² of conjugal power and legalized power relations in the age of marriage.

In the years before *Obergefell v. Hodges*, queer-influenced critiques of the “freedom to marry” movement’s civil rights strategy focused on the paradox—and poverty—of a claim to “public citizenship” that was framed in the narrowly constricted language and “distinctly private domain” of marriage.⁶³ It came as something of a surprise then, when one of the central planks in Justice Anthony M. Kennedy’s Opinion for the *Obergefell* Court turned out to be a distinctively political image and understanding of civil marriage.⁶⁴ In making the case for a federal constitutional right to same-sex marriage, Kennedy draws a picture of civil marriage as a nested relationship and series of ongoing “transactions between the public and the private realms.”⁶⁵

Kennedy’s case against the exclusion of gay men and lesbians from civil marriage finds its normative bearings in a line from Alexis de Tocqueville’s classic work, *Democracy in America*, in which the French writer observed that “[t]here is certainly no country in the world where the tie of marriage is so much respected as in America.”⁶⁶ Building on this ideology of American conjugal exceptionalism, Justice Kennedy quotes a passage from

⁵⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁶⁰ Lisa Duggan, *Queering the State*, 39 Soc. Text 1, 1 (1994).

⁶¹ Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *Lenin and Philosophy and Other Essays* 85, 123 (1971).

⁶² Jean-François Lyotard, *Libidinal Economy* (1974).

⁶³ Franke, *supra* note 6, at 9.

⁶⁴ *Obergefell*, *supra* note 59, at 2601.

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting 1 Alexis de Tocqueville, *Democracy in America* 309 (Henry Reeve trans., rev. ed. 1990)).

Maynard v. Hill, a late-nineteenth-century Supreme Court opinion, in which the Court insisted that marriage has long been “a great public institution, giving character to our whole civil polity.”⁶⁷ This political conception of marriage, argues Kennedy, “has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential.”⁶⁸ “Marriage,” Kennedy concludes, “remains a *building block of our national community*.”⁶⁹

The *Obergefell* opinion thus advances and defends a vision of civil marriage that emphasizes its constitutive role in our national public life. In Kennedy’s account, marriage is not just a “building block” but a veritable “keystone” in the ideological architecture of our nationally imagined community.⁷⁰ From this perspective, civil marriage is a foundational political ontology, both a consequence and a condition of possibility for the “imaginal”⁷¹ political culture through which Americans envision and enact civil identity and existence, individually, in affiliative connection to one another, and in relation to the U.S. nation-state. Like its heterosexual counterpart, homosexual marriage—and the reconfigured political order to which it belongs—entail problems and practices of governmentality.⁷² Brenda Cossman has denominated these networks and operations of conjugal state power “marriage-as-governance.”⁷³

In noting the *Obergefell* Court’s emphasis on what I’ve called the political conception of civil marriage, I by no means intend to endorse the conjugal nationalism that drives Kennedy’s constitutional case for lesbian and gay marriage equality. To the contrary. My purpose, rather, is to open a space for a critically queer theoretical vantage point which centers aspects of civil marriage’s institutional, public character that the privacy paradigm and its vision of marriage as intimate association obscure. Specifically, I want to identify three distinct and different dimensions of the American marital state and American conjugal nationalism that the successful political campaign for gay and lesbian marriage rights brings into clearer conceptual relief.

The first has to do with the dynamic relationship of the marriage equality movement to the independent “movement” of the American conjugal state. This dialectical double movement has not only given the U.S. state a legal possessory interest in the intimate associations of those of its gay and lesbian citizens who marry (and in a sense, even of those among us who do not); we might say, further, that the recognition of a legally cognizable right to same-sex civil marriage has also demarcated a public realm and provided a public resource for the American state to practice the art of conjugal government in a new,

⁶⁷ Id. (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

⁶⁸ Id.

⁶⁹ Id. (emphasis added).

⁷⁰ Id.

⁷¹ Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* 54 (2014).

⁷² Foucault, *supra* note 50, at 115-16.

⁷³ Brenda Cossman, *Marriage As? A Reply to Marriage as Punishment*, 112 *Colum. L. Rev. Sidebar* 220, 221 (2012).

distinctively homonationalist register.⁷⁴ To put the point another way, the emergence of homoconjugalality has enlarged, augmented and intensified the practices of “publicity” through which the U.S. state “conducts itself,”⁷⁵ represents itself and “reproduces itself”⁷⁶ in and on the intimate associational lives of its private citizens.

A second notable feature of conjugal state power after same-sex marriage equality has to do with the role the U.S. state plays in modern civil marriage. The successes of the marriage equality movement have provided a new vantage point from which to appreciate how, and with what effects, the marital state apparatus intimates itself (etymologically, “impresses” or “makes (itself) familiar”) inside the lives and relationships of conjugal couples. The state does not just facilitate, but actively—and on the evidence of the *Obergefell* opinion, enthusiastically and even passionately—*participates* in the marriages it purports, formally, simply to license. As an ideological matter, then, civil marriage is best understood to entail a triangulated relationship that simultaneously involves a “triple marriage” between the conjugal couple, and between each marital partner and the State: when two people get married *by* the State they always also get married *to* the State, in ways both material and symbolic. When Justice Kennedy writes, in the final paragraph of his Opinion for the Court in *Obergefell*, that “[i]n forming a marital union, two people become something *greater* than once they were,”⁷⁷ he unwittingly exposes conjugal governmentality as a political regime which does not merely claim a “legal interest” in marriage, but insinuates the state as an active and ongoing material partner in the “marital unions” to which it otherwise presents—and, as importantly, represents—itsself as simply lending the government’s official imprimatur. *Every* civil marriage is, from this angle, a poly- or plural marriage. However, it should be said right away that the pluralizing dimensions of “political marriage” to and by the state in no way exclude relational space within the imaginary institutional domain of “conjugal nationalism” for a *sologamous* marriage, as it were, of the U.S. state *to itself*. We might capture this dimension of “political self-marriage” by recalling the title of the famous one-character play about the life of the German transgender woman Charlotte von Mahlsdorf: *I Am My Own Wife*.⁷⁸ Within this “queer” perspective (and it’s precisely that queerness which makes this point worth making), we can view the legal recognition of a right to same-sex marriage as a local affirmation of a larger truth: whatever else they are, in political terms, *all* state-sanctioned marriages are same-sex marriages.

A third feature of the U.S. conjugal state complex brings us to the notional heart, and the signal rallying cry, of the marriage equality movement: I refer here to the proposition that the campaign for marriage equality was, in Evan Wolfson’s memorable

⁷⁴ Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (2007).

⁷⁵ Michel Foucault, *The Subject and Power*, in *3 Power: The Essential Works of Michel Foucault, 1954-1984*, at 326, 341 (James D. Faubion ed., 2001).

⁷⁶ Jacqueline Stevens, *Reproducing the State* 44 (1999).

⁷⁷ *Obergefell*, *supra* note 59, at 2608 (emphasis added).

⁷⁸ Doug Wright, *I Am My Own Wife* (2004).

words, a “fight for the freedom to marry.”⁷⁹ The “freedom to marry” idea aimed to capture the senses in which the same-sex marriage campaign sought something more than the minimal, negative liberty not to be denied equal treatment under the law (a goal, it bears remarking, that could just as well have been achieved through a campaign to prohibit the state from involving itself in any way in the intimate relations of consenting adults). The demand for the “freedom to marry” aspired, rather, to satisfy the “civic desire” and achieve recognition and legitimacy for a “personal politics” that views marriage and marriage rights in much the same way that the “choice theory” of contract views contract and contract rights. The “choice” theory of contract holds that contracts and contracting are a form of freedom, whose purpose is to enhance our ability “to help write the stories of our lives.”⁸⁰ The choice theory of marriage regards the recognition and exercise of the legal right to marry in much the same way that the choice theory of contract views the act of making and fulfilling contracts: both are practices of freedom by a “sovereign self.”⁸¹ Like the choice theory of contract, marital choice theory locates the root injustice of excluding same-sex couples from the institution of civil marriage in the injurious denial of the simultaneously freedom-expressive and freedom-enlarging right to conjugate (as it were) “one’s mature and authentic self.”⁸² This is a vision of conjugal rights in which the freedom *to* marry is thus not only a condition of possibility for, but is intimately connected to, the practice *of* marital freedom. At stake here are the “personal political” uses of civil marriage and the lived experience of the status of “being” married as the bilateral pursuit and enjoyment of “self-sovereignty.”⁸³

The paradox of marital choice and marital self-sovereignty, though, is this. While the “freedom to marry” movement managed to successfully mobilize the quasi-contractarian, liberal individualist language of “marital choice” and to win the legal debate over same sex marriage, it has by no means overcome, and in some respects has “intensified and broadened[,] a social commitment to think of marriage as status.”⁸⁴ After several decades of law and policy reform that made civil marriage a more contractual, flexible form of intimate association, the state stands poised to assume and resume practices of conjugal governing that for a time seemed to have been consigned to the past. With the reemergence of marriage-as-status, it could be argued that the institution may again become more about state government than about either the art of self-government or the “self-sovereign”

⁷⁹ Evan Wolfson, *Why We Should Fight for the Freedom to Marry: The Challenges and Opportunities that Will Follow a Win in Hawaii*, 1 *J. Gay, Lesbian & Bisexual Identity* 79, 79 (1996).

⁸⁰ Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (2017).

⁸¹ Jean Bethke Elshtain, *Sovereignty: God, State, and Self* 159 (2012).

⁸² Franke, *supra* note 6, at 61.

⁸³ Elshtain, *supra* note 81, at 181.

⁸⁴ Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 *Unbound* 1, 3 (2010).

freedom of those who choose marriage to “pursue their conception of the good life.”⁸⁵

In the face of this emerging reality, my earlier observation that marriage *by* the state always also entails marriage *to* the state tells only one side of the story. The “freedom to marry” movement has narrated its history as a collective act of ethical will, a story of a coalition of determined gay and lesbian Americans who went “from being an oppressed moral minority, whose love was denied and scorned, to a group that claimed the freedom to marry and at last won respect, dignity, and equality for their love and for their families.”⁸⁶ On the evidence of *Obergefell*, however, alongside the thesis that marriage law and legal discourse are modes of conduct through which states “make up” the legal subjects on whom they confer the right to marry sits another, which has to do with the instituted “identity” and “subjectivity” of the state and state power. If the rights-claiming subject of marriage law is “always already an effect of those rights,” what of the state that grants those rights?⁸⁷ In other words, are civil marriage laws themselves not merely constituted by, but constitutive of, state conjugal power? Is the “fight for the freedom to marry” a consequence of the introjected desire of rights-bearing subjects or of the “institution” of state power and state desire and state identity on and through the bodies of self-sovereign citizens? Do conjugal power relations, particularly after marriage equality, force the recognition (to paraphrase the eponymous *femme fatale* in Alban Berg’s opera, *Lulu*⁸⁸): it is not we who marry the state, but the state that marries us?

To pose these particular questions in these terms is to remark the importance of a relational analysis of conjugal state power, and the need for critical legal studies that attend to the ways state institutions and identity are produced in and through the desires they elicit from, and address to, the rights-claiming subjects of marital law. In my view, the problem of desire and its relationship to conjugal power promises to provide a particularly promising avenue of inquiry for queer critical analyses of law “after” marriage equality. Although it is certainly true that the new regime of marriage equality law has “radically refigur[ed] the meaning of homosexuality,” it by no means follows that the shift from a focus on sex acts and erotic practice has entirely divested legal discourse about sexual and gender minorities of its libidinal energy.⁸⁹ One urgent task for queer critical analysis of law after same-sex marriage is to look at why and how marriage equality law remains an area of the law that is about bodies and pleasures, from which issues of sex and sexuality do not so much disappear as get displaced and register their presence in legal discourses which as a formal matter may have nothing at all to do with sex. Another queer critical project is investigation

⁸⁵ Elizabeth S. Scott & Robert E. Scott, From Contract to Status: Collaboration and the Evolution of Novel Family Relationships, 115 Colum. L. Rev. 293, 309 (2015).

⁸⁶ Freedom to Marry, Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign, Freedom to Marry (<http://www.freedomtomarry.org/pages/how-it-happened>).

⁸⁷ Ben Golder, Foucault and the Politics of Rights 111 (2015).

⁸⁸ See Alban Berg, *Lulu*, in 2 George Perle, *The Operas of Alban Berg* 80 (1989) (“*Lulu*: You didn’t marry me. Schön: Whom, then did I marry? *Lulu*: I—I married you.”).

⁸⁹ Franke, *supra* note 6, at 61.

of the ways in which anti-discrimination law, education law, criminal law, family law and race law (to name a few) have become sites for the circulation and distribution of ideas about sex and sexuality or, more broadly, for a discursive erotics of state power. Indeed, much work remains to be done on the ways in which marriage equality law itself remains an arena and an instrument for the movement, energy and seductive powers of the “sexual state.” Finally, and equally important, a queer critical analysis of law must look at economies of conjugal and sexual power relations in which queer legal and other theories have become sites or sources of political contestation. I am thinking in particular here of the highly pitched struggles in Latin America, France and Eastern Europe, especially around the question of “gender theory.”⁹⁰

Let me end where I began. How do the readings I’ve offered here of legal or legally-influenced discourses about marriage and marriage equality help us think about the connections between legal theory and legal practice generally, and the critical articulation that I’ve here called theory-practice? Consider in this context, a moment in the colloquy among Joseph Fischel, Aeyal Gross and Paisley Currah when Gross asserts a distinct and privileged relationship between “queer” sensibility and “critical” thinking. “How,” he asks, “do we maintain or rekindle the idea of queer as critique?”⁹¹ Distinguishing “queer critique” from queerness as “identity,” on the one hand, and as “ideology,” on the other, Professor Gross laments the way in which over the years, the popular appropriation of the term “queer” to mean sexual personhood or identity rather than (for example) sexual practices has weakened its critical thrust.⁹²

Of course, Professor Gross’s forceful triangulation of critique, identity and ideology, and the suggestion that queer critique, queer identity and queer ideology belong to three distinct and separate domains, overlook the ways in which “queer theory” is an “essentially contested concept.”⁹³ To put the same point in different terms, we might say that the discourse of “queerness” is just that, a discourse, a practice of meaning-making. Like all worlds of meaning, the “queer” world is a world in which meanings cannot be adjudicated, where the “queerness” of signs and signifiers is “open to infinite sliding” and slipping, to destabilization and disruption by other signs and other signifiers.⁹⁴ Take the case of “A Queer Vision of Love and Romance.” In less than twenty minutes, Kim and Tiq Milan mobilize a congeries of mostly conflicting meanings under the sign “queer,” some “critical” in Gross’ sense, some not. “Queer” is used as a synonym for a type of personhood (as in “queer and trans people”), a form or mode of existence (“queer being”), a “capability” (“it refers to the way I’m not restricted by choosing partners”; “the gift of queerness is options”), and an ethics (queer “is about loving people as they are, not as they’re supposed

⁹⁰ See Perreau, *supra* note 47.

⁹¹ Fischel, *supra* note 4, at 83.

⁹² *Id.*

⁹³ W.B. Gallie, *Essentially Contested Concepts*, 56 *Proc. Aristotelian Soc’y* 167 (1955).

⁹⁴ Stuart Hall, *The Fateful Triangle: Race, Ethnicity, Nation* 171 (2017).

to be”). “Queer” is a temperament (“fearlessness”) and act of imagination, a temporality (“possibility”) and “practice,” and a mode, or multiply layered modes, of desire.⁹⁵

Even if it were possible in principle to delimit the definition of “queer” as a practical matter, should we want to do so? Is it always and everywhere the case that “critical queerness” is set up against rather than alongside “queer ideology” and “queer identity”? Or can we conceive of social contexts in which “queer ideology” or even “queer identity” could or might have to be put to work to do the kinds of discriminating, distinctly intellectual heavy lifting that Gross’ division of labor reserves for “critique”? This might be the case, for instance, where unequal and unjust power relations deny some participants in a queer discursive community the right to use the language of “critique,” or where relations of domination—e.g., racial and ethnic, gender or class, or eroticized—degrade, deform and disfigure the critical spirit of “queer critique,” with effects that render it as or more “doctrinaire” than “queer identity” or “queer ideology.” The sheer taken-for-grantedness of the idea that we can or should aspire to “pure” queer critical practice ignores the ways in which, from its inception, queer has been a “contaminated” critique.

Using the example of marriage equality law and theory as an interlocutive discourse, I have argued here for the priority of a “critically queer” or “queer-critical” conception of queer legal analysis that first, understands itself as an articulation of theory and practice (theory-practice) and second, commits itself to a reflexive and ongoing engagement with legal issues around sex, gender and sexuality that sit at the nexus of power and knowledge (power-knowledge). I’ve no doubt that the story I’ve told here about queer critical theory and the defense of queer critical practice I’ve urged here are woefully incomplete. Nonetheless, I think the conceptual field I’ve sketched here (theory-practice-sex-sexuality-gender-power-knowledge) offers a framework for approaching several of the contributions to this issue, from a methodological if not a thematic perspective. While none of the essays that follow focus centrally on marriage or marriage equality (same-sex or otherwise), they do share a common interest in a critical study of law that views law internally and externally, approaches law as a site for a double analytical procedure that marshals both theoretical and practical methods, and seeks to locate legal events and legal discourses (including its own) in the relations of power-knowledge from which they emerge. In the roughly quarter century since the term was first used, the boundaries of queer legal theory have been expanded considerably. In my view, queer theory’s encounters with critical race theory, subaltern studies, trans studies, disabilities studies, and work on crime, criminalization and the prison industrial complex (to name a few) have only enriched it. Of course, we cannot possibly know what queer legal theory will look like in another quarter century, or whether it will even be recognized by that name. On the strength of the contributions to this volume, however, there is every reason to believe that wherever queer theory practice is taking place it will be speaking directly to the issues of its time.

⁹⁵ Milan & Milan, *supra* note 24.