3 Queer Legal Victories

Intersectionality Revisited

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IN MY 1995 article "Queer Intersectionality and the Failure of Lesbian and Gay 'Victories,'" I merged queer and intersectionality theories to critique four lesbian and gay legal "victories."[1] I argued that queer identity intersected with other identity characteristics, yielding queer communities whose diverse needs reflect their various class, race, gender, and sex identifications. This intersectional perspective led me to view these decisions as victories for only a privileged subset of queer communities that, "but for" their gay or lesbian identity, conform to the "American dream" (De Lauretis 1991; Robson 1992).[2] The United States' juridical heterosexism stifled the progressive potential of these cases.

Since that article, the intersectionality of queerness has become accepted wisdom (Eng, Halberstam, and Muñoz 2005). This chapter applies a queer intersectional analysis to more recent queer legal successes, interrogating both their utility and some of the queer critiques that have greeted them. In 2003, the U.S. Supreme Court reversed *Bowers v. Hardwick* (1986) in *Lawrence v. Texas*, finding that state regulation of private sexual conduct violated the U.S. Constitution. A few months after *Lawrence*, the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health* (2003), in which it found that the restriction of marriage to opposite-sex couples violated Massachusetts' constitution, opening the way for the first legal marriages between two people of the same sex in the United States. About five years later, the California, Connecticut, and Iowa Supreme Courts and the Vermont, Maine, and New Hampshire legislatures followed Massachusetts' lead and established marriage equality.

A queer intersectional analysis remains vital. Time has proven the accuracy of an expansive and fluid understanding of sexuality, both as borders dissipate and as younger individuals battle heterosexism while refusing to be confined to established identity categories. As in the mid-1990s, articulating queer legal needs and assessing whether these cases adequately reflect the breadth of these needs require probing analysis. In that period, the 1989 case, *Braschi v. Stahl Assoc.*, embodied the law's progress and limitations concerning queer issues, which are in part a function of the cultural complexity of queer identity.

Here I apply the queer intersectional yardstick to both *Lawrence* and *Goodridge*, concluding that while the early 1990s "victories" merited questioning, these more recent cases present far more substantive opportunities for queer communities. Although litigation continues to exhibit marginalizing and essentializing propensities that render it an incomplete impetus for queer social change, accounting for these limits does not obligate us to take an exclusively critical posture toward legal developments. Litigation should not define strategy, but in concert with political action, litigation can and does play an important role in advancing queer legal needs.

Part I of this essay introduces some of the theories still relevant to a queer intersectional critique. The 1990's opposition between "queer" and "lesbian and gay" reflected the increasingly legitimized nature of the "lesbian and gay" community. Today, the widespread use of LGBT (lesbian, gay, bisexual, and transgender) encompasses some of the varied identity concerns that prompted the use of "queer." It is also worth noting that any notion of community (in the singular or plural) in a world where borders of all kinds have become a bit more fluid for many is quite complex (Neal 1996; Valdes 1995). This complexity delineates the spectrum of queer identity and forms a queer continuum, a reconceptualization of Adrienne Rich's lesbian continuum. Part II briefly considers *Lawrence*, *Goodridge*, and other state Supreme Courts cases and the progress and constrictions they represent from various queer perspectives, including those of poor queers, queers of color, sexual subversives, and gender subversives. Part III assesses the implications of this critique for the relationships among queer communities, litigation, and broader goals of social justice.

Queer Theories

Queer identity intersects with sex, race, class, sexual practice, and gender preference. A continuum of queer identity reflects this fluidity of identity elements. Two theoretical contributions, intersectionality from Critical Race Theory ("CRT") and the lesbian continuum from lesbian feminism, yield a queer intersectional perspective.

It is nearly two decades after activists began to reclaim "queer," a word originally used to deride strange behavior or social outcasts. The rehabilitation of the word has been a largely successful endeavor, as queer projects have established themselves at U.S. universities and in tradition-bound disciplines such as international law. Simply put, reclaiming "queer" had two goals: avoiding essentialist implications of "lesbian and gay" and subverting normative presumptions of sexuality. "Queer" as a political category avoids the essentialist meaning presumed by the terms "lesbian and gay" (Boswell 1982, 58–59; Calhoun 1993; Foucault 1978, 43).

Scholars have derided such essentialist constructs as both inaccurate (Halperin 1986, 34; Padgug 1979) and destructive (Halley 1989). "Queer," unlike "lesbian and gay," describes not merely sexual practices but rather a destabilization of heterosexual hegemony (Anonymous Queers 1990).[3] "Queer" as a term suggests "the truly polymorphous nature of our difference" (Harper 1990, 30).

Intersectionality references the bind of multiple identities and its effect on social position and exposure to discrimination. Mainstream feminist understandings of "women" relied on a universalized white identity that rendered women of color invisible (Crenshaw 1989; hooks 1981). Crenshaw describes the bind black women face because of liberation movements: "Black women's Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas" (Crenshaw 1989). Just as feminist and antiracist agendas fail Black women by centering on femaleness or blackness, lesbian and gay positions may reduce their communities' identifications to same-sex partner choice, sometimes to the exclusion of other diverse identities. "Queer" casts a wide net of intersectionality, as most queer people face additional forms of discrimination based on gender, race, class, or sexual subversiveness. As one Black commentator stated, "[a] lot of times when you're black and gay, you don't know whether the discrimination is due to your blackness or your gayness" (Ronald Price quoted in L. Williams 1993, A1). The multiplicity of antiqueer discrimination moves beyond antilesbian and antigay discrimination.

Although intersectionality retains a certain currency, it is not without its detractors. One of the many critiques, the "infinite regress" argument, holds that that any particular identity can be subdivided into further distinctions, leading to an infinite loop of identities. Intersectionality's potential for infinite regress risks leading to a radical, even existentialist, individualism that vitiates the potential for collective political action (Ehrenreich 2002).

The queer continuum may remedy the infinite regress problem. It builds on Adrienne Rich's formulation of the lesbian continuum, which comprises "the multitude of identities which constitute lesbian existence" (Rich 1993). "Lesbian existence comprises both the breaking of a taboo and the rejection of a compulsory way of life" (Rich 1993). Compulsory heterosexuality, the system that forces women to define themselves in relation to men, dictates women's heterosexuality. The lesbian continuum represents the range of women's resistance to compulsory heterosexuality, while the queer continuum includes a multigendered range of sexual identities that subverts compulsory heterosexuality. In a sense, the long-discarded term "sexual preference" may express sexuality's fluidity more accurately than the widely used term "sexual orientation."

Several parallels between the queer continuum and the lesbian continuum provide a useful comparison. Rich's lesbian continuum includes women who

behave homosocially but do not identify as lesbians. The queer continuum likewise includes a range of people who resist compulsory heterosexuality, including sexual minority activists and those who do not even identify as a sexual minority but nonetheless subvert traditional gender and sexual identities. The breadth of queer existence, like lesbian existence, draws on acts of resistance. Thus, queer might include men who have sex with men ("MSM") but might loathe the word "queer" and even "gay." Acts of sexual subversion stand outside what Gayle Rubin has called the "charmed circle" of socially approved sexual behavior (Rubin 1984) and constitute a resistance against compulsory heterosexuality.

The queer continuum unites a broad range of disempowered communities. By including the occasionally subversive and the intersectional, the queer continuum embraces broad resistance to compulsory heterosexuality. Respecting intersectional identities fosters the trust necessary for alliances within antisubordination efforts.

Facially, intersectionality and the queer continuum contradict each other: intersectionality emphasizes differences, whereas the continuum seems to erase difference. The continuum contains the potential for political unity through the respect of difference, a fundamental strategy for subordinated communities. It also prevents the collapsing of different queer communities into a unitary queer identity.[4] While intersectionality's infinite regress problem may shrink the potential for broad political action, the queer continuum may convert queer intersectionality into social justice coalitions.

Awareness of queer intersectionality reshapes our conception of queer legal needs. A limited concentration on lesbian and gay legal needs, the extension of rights to people without regard to sexual orientation, inadequately describes queer legal needs. If such a narrow focus is taken, intersectional queers will face exclusion by other forces of subordination in the law, such as classism, sexism, and racism.

To take class as an example, courts subjugate working-class people by presuming that legitimate claims arise from plaintiffs with education, professional backgrounds, and property. "Covering" poverty may aid working-class plaintiffs but will not improve their limited access to the courts in the first place (Yoshino 2006). As Marc Galanter (1974) has demonstrated, the legal system and profession are organized to protect the interests of the powerful. Economic inequality leaves many queers of color facing this same classism. Sexual and familial norms differ among social groups, whether those groups coalesce around race, ethnicity, nationality, and/or language (Rosenblum 2007). Such groups define queerness differently as a result of their identities (Reid-Pharr 2007). Since manifestations of homophobia and heterosexism are culturally contingent, remedies that counter white heterosexism fail to address this discrimination. Courts that rely on traditional sexual and gender norms will fail to understand and, in effect, ignore sexual and gender subversive litigants and their priorities.

The legal priorities of sexual subversives often differ from those of the privileged "but-for" queers. A "but-for queer" is someone who, "but for" being queer, would be perfect (Robson 1992). Before courts that recognize only discrete categories, "but-for queers," with only one subordinate identity, may constitute the ideal plaintiffs. "But-for" queer litigants permit the courts to focus on antilesbian and antigay discrimination independent from other discrimination. The resulting legal remedies centered in that identity may simultaneously exclude on the basis of class, sex, race, sexual practice, and gender performance. This queer critique of litigation draws on Stuart Scheingold's (2004 [1974]) analysis of what he terms the "myth of rights," that litigation directly links to social change. Rather than establish and advance a particular social priority, activist lawyers search for successful litigation targets. The targets, on the basis of their potential as successful litigants, define the priorities of those lawyers and, therefore, the courts.

One cannot entirely disassociate legal responses from discrimination within queer communities. The maturing of what is now known as the LGBT movement has come with an awareness of discriminatory impulses. Sexism (both against women and against those with nonbinary gender identities), racism, classism, internalized homophobia, and other discriminations that plague heterosexual society also divide queer communities. "Gay and lesbian" litigation, which can further "but-for" queer interests over intersectional queer interests, may deepen such rifts. As intersectional critiques reveal, courts recognize targets of discrimination solely on the basis of their belonging to a specific protected class. Typically, lesbian and gay litigation requires a client who, but for that trait, would not have fallen victim to discrimination. Courts have begun to move beyond this narrow view to consider the sexism and gender stereotyping inherent in much homophobic expression (see Herald, this volume).[5] Even then, courts confronting queer conflicts often feel compelled to dive into either a gender analysis *or* a sexual orientation analysis (*Riccio v. New Haven Board of Education* 2007).

Analyzing the utility of cases for queer movements requires not only an awareness of queer needs, but also a critical posture to serve as a more ambitious yardstick for social change. A queer intersectional perspective may aid the assessment of whether change comes incrementally or radically. Recent court decisions optimize the possibility for assessing queer change.

Queering "Victories"

"Queer Intersectionality" interrogated the meaning of a legal victory for queer communities. In the 1990s, legal groups engaged in lesbian and gay issues justifiably trumpeted successes, particularly in the face of continued judicial homophobia post-*Hardwick*. As other civil rights movements have learned, in part through

Critical Race Theory, legal victories often fail to translate into social change. "Queer Intersectionality" brought this understanding to bear on cases that achieved their goals for the plaintiffs but presented complications for other queer legal goals.

This analysis remains worthwhile, but the legal and cultural landscape has changed vastly since 1995. As legal activists have logged several notable successes, other scholars, both legal and nonlegal, have assessed these victories with a queer critical eye. In contrast to the earlier study, a queer intersectional perspective yields markedly different results when directed at these recent legal victories. Considering the legal needs of this broadly conceived set of queer communities, here I briefly analyze *Lawrence*, *Goodridge*, and other state Supreme Court cases and their respective effects on case law concerning sexuality and relationship recognition.

In 1871, Victoria Woodhull, a feminist from the mid-to-late nineteenth century, aptly expressed the legal aspect of sexual rights: "Yes, I am a Free Lover. I have an inalienable, constitutional, and natural right to love whom I may, to change that love every day if I please, and it is your duty not only to accord [my right], but, as a community to see that I am protected in it" (Woodhull 1872). This statement not only neatly summarizes a queer sexual agenda but serves to measure the success of advances in sexual liberty.

On one end of the queer continuum are individuals and communities that embrace heteronormative (if not heterosexual) relationships and family structures, and on the other end lie sexual subversives. In addition to those queers who do not choose lengthy relationships, monogamy, or marriage for various reasons, there are those queers who explore radical forms of sexuality in what has been called laboratories of sexual experimentation: public sex (parks, backrooms), anonymous sex, group sex, promiscuity, and sadomasochism (Foucault 1989, 225). Many queers do not have or seek to have lengthy relationships; some couple in ways unrecognizable to U.S. courts or view monogamy as a fundamental obstacle to sexual liberation (Crimp 1988, 237–53). Ideally, courts' attitudes toward sexuality would respect these and other divergent and personal choices that exist along the queer continuum.

Lawrence takes a big step toward respecting queer interests. Although the holding does not instruct states to eliminate vice laws that still may be used against sexual minorities, *Lawrence* recognizes a notion of privacy, with sexuality as a core element, as being protected under the U.S. Constitution. The very existence of sodomy laws marked certain people as targets for state regulation (Thomas 1992), even though more than thirty-seven states had repealed or overturned their sodomy laws by the time *Lawrence* reached the Supreme Court, in 2003. *Lawrence* eloquently and forcefully closed the centuries-long story of sodomy laws in the United States, eliminating a key tool for states in the criminalization and oppression of queer communities and identities.

Impressive queer analysis has identified many of *Lawrence*'s challenges. *Lawrence* created strange allies among gay-rights groups and libertarians (Harcout 2004). Although the holding in *Lawrence* focused on autonomy, sexual self-determination, "sexual sovereignty," and a general idea of free choice among individuals (Weinstein and DeMarco 2004), some fear that *Lawrence* may provoke a backlash against gay rights and sexual liberalization (Katyal 2006). More important, some legal commentators fear that *Lawrence*, like *Brown v. Board of Education*, will initially be a "toothless legal formalism" that will be "ill-equipped to provide" justice (Franke 2004). The legal gay rights landscape since *Lawrence* is varied. Although *Lawrence* aligns U.S. jurisprudence with international norms on private consensual sexuality (see Frank et al., this volume), it has not facilitated full queer citizenship in the United States (Hernández-Truyol 2004) and may have unintended consequences, such as fostering polygamy (Emens 2004). Its reliance on privacy doctrine, to the extent we view sex as a public issue, may create a hierarchy of good homosexual sex and bad homosexual sex (Ruskola 2005). One might also argue that *Lawrence* moved sexual minorities into an "interstitial place in constitutional law" as a group that is neither formally recognized, nor formally outlawed (Valdes 2004).

Despite queer critics' concerns about *Lawrence*'s consequences, and despite continued debate over whether liberty or equal protection arguments will serve queer communities better, *Lawrence* takes a step toward fulfilling Victoria Woodhull's dream of sexual freedom, even if some of its language does not reflect queer utopian ideals.

One consequence of *Lawrence*, Justice Scalia warned in his dissent, would be the likely reversal of sex-based restrictions on marriage. As marriage rights begin to include queer couples, many queer theorists continue to criticize marriage rights efforts for shunning subversive sexuality. The effort for marriage equality dates back to the early 1970s, when two state supreme courts rejected challenges (*Singer v. Hara*). In the early 1990s, Hawai'i's Supreme Court took steps toward recognizing marriage equality, only to be negated by a state constitutional amendment. Several years later, Vermont's Supreme Court ruled that barring same-sex couples from marrying was unconstitutional and required the state legislature to provide for same-sex marriage or an analogous institution with all the benefits of marriage. The Vermont legislature responded by enacting civil unions; however, the Defense of Marriage Act prevents the federal system from permitting the portability of these benefits. Other states have since instituted civil unions, but when this volume went to press, Massachusetts, Connecticut, Iowa, Maine, and now Vermont as well remain the only states in which marriage equality exists.

A few years before the Hawai'i Supreme Court's decision in *Baehr v. Lewin*, *Braschi v. Stahl Associates* paved the way for recognition of relationships involv-

ing same-sex couples. Reports of the decision gleamed from the *New York Times'* front page. The lead attorney, Bill Rubenstein, stated: "Today's decision is a ground-breaking victory for lesbians and gay men. It marks the most important single step forward in American law towards legal recognition of lesbian and gay relationships" (Gutis 1991).

In *Braschi*, Stahl Associates tried to evict Miguel Braschi, the partner of a deceased tenant, Leslie Blanchard. Braschi sued to inherit the lease as a cohabiting family member, presenting the Court with the issue of whether the noneviction provision should be extended to same-sex couples. The Court of Appeals put forth several indicia for same-sex couples to merit consideration as "family" for rent-control purposes: "exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." The court applied this test to Braschi and Blanchard, found that their relationship was sufficiently family-like and granted Braschi noneviction protection and tenancy inheritance.

Brashi's holding continues to carry great relevance for queer analysis of relationship recognition. Rent-control statutes, which require strict tests to prevent widespread abuse, provided the first, albeit restricted, recognition of lesbian and gay couples' rights. Overtly designed to prevent fraud by "roommates," this strict test enforces a heteronormative relationship structure on queer couples hoping to benefit from rent-control protection. The Court of Appeals test, progressive in moving beyond heterosexual marriage, nonetheless demands relationship traits that queer couples may not seek, such as monogamy, longevity, openness, and financial commitment. *Braschi* provided limited protection for relationships that were simultaneously held to a higher standard. Marriage, in contrast, imposes no such standards on couples. Nearly twenty years after it was decided, *Braschi* remains the only case to recognize lesbian and gay relationships in New York, a disappointing fact after the horribly reasoned *Hernandez v. Robles* decision denying marriage equality.[6]

In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts examined whether the state could legally bar same-sex couples from civil marriage and found that there was no rational basis for denying same-sex couples the right to marry. Because the Massachusetts constitution "affirms the dignity and equality of all individuals" and "forbids the creation of second-class citizens," the court reasoned that Massachusetts's marriage law "violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." The court also noted concrete tangible benefits that flow from civil marriage, including, but not limited to, rights in property, probate, tax,

and evidence law. "Marriage also bestows enormous private and social advantages on those who choose to marry . . . [and] is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."

The Massachusetts Senate responded to *Goodridge* with a civil union bill and made an unusual request for an Advisory Opinion from the court on the bill's constitutionality. The court replied that "[b]ecause the proposed law by its express terms forbids same-sex couples' entry into civil marriage, it continues to relegate same-sex couples to a different status. . . . Group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal."

The Supreme Judicial Court of Massachusetts's rejection of "separate but equal" marks one of the strongest affirmations of queer couples' rights in the United States. The concept of "separate but equal" was established by the U.S. Supreme Court in 1896 to permit government-sanctioned segregation of the races. Sixty years later (and now more than fifty years ago), in *Brown v. Board of Education*, the U.S. Supreme Court rejected this logic and held that racially segregated schools are unconstitutional. The court's reference to this landmark case links LGBT couples' struggle for equal rights to the core of the civil rights movement. However, this was a connection followed only by the New Jersey Supreme Court, which ultimately accepted civil unions, as Maryland, New York, and Washington rejected marriage discrimination challenges.

Almost five years later, the California, Connecticut, and Iowa Supreme Courts' decisions extended the right to marry. The nation's largest state, California, utilized a strict-scrutiny standard of review to recognize the de jure inequality, entrenched homophobia, and "widespread disparagement that gay individuals historically have faced." The court noted the fundamental interest same-sex couples have in seeing their family receive the "same respect and dignity enjoyed by an opposite-sex couple." California also rejected civil unions as a status for "second-class citizens." The California Supreme Court relied extensively on one of the earliest civil rights cases, the sixty-year-old case *Perez v. Sharp* (1948), in which the California Supreme Court overturned its antimiscegenation law, almost twenty years before the U.S. Supreme Court declared such laws unconstitutional, in *Loving v. Virginia* (1967). Connecticut's decision, which took a similar appraoch to civil unions, became practice without significant controversy. After six months of marriage equality, California's voters narrowly approved Proposition 8, which attempted to deny same-sex couples the right to marry. Although Proposition 8's passage throws *In re Marriage*'s effect into doubt, it may not alter the case's landmark status, pending the outcome of the ensuing litigation. In any case, subsequent recognition of mar-

riage rights by the Iowa Supreme Court and the Vermont and Maine legislatures demonstrates that Proposition 8 has not halted the shift toward equality.

In the face of the *Goodridge* and *In re Marriage* decisions, many queer activists continue to question the primacy of marriage and whether it serves queer goals. Despite these changes, queer studies theorists often reject the effort to win the right to marry, citing same-sex marriage as "mimicking" a heterosexual institution, "diluting its traditional patriarchal dynamic," but not "transform[ing] society" (Ettlebrick 1989). More recently, Nancy Polikoff has argued that relationship recognition should be much more nuanced than marriage. This position reflects the long-standing feminist critique of marriage as a patriarchal system of coverture in which wives were the property of their husbands (Dunlap 1991; Eskridge 1993; Polikoff 1993, 2008). Some critics argue that marriage equality positions require an emphasis on the similarity of same-sex relationships to heterosexual marriages, thus preventing a more transformative effort (Polikoff 1993, 2008). Others criticize the marriage effort as a prime example of a litigation-driven strategy that ignores grassroots efforts (Levitsky 2006). More recently, Lisa Duggan has argued that the lesbian and gay political platform for marriage depends on coding liberation as domesticity and privacy (Duggan and Kim 2005; Eng, Halberstam, and Munoz 2005).

Although these critiques point to some real challenges, to a certain extent the arguments essentialize both the queer position and the meaning of marriage, leading to a binary opposition. This presumptive opposition fails to integrate the breadth of queer understandings of social institutions, which can be subverted and transformed from within. These queer critiques of marriage confront several limitations, an understanding of which facilitates a queer recognition of the potential marriage holds for queer people.

First, as a utilitarian matter of meeting individual needs, many people in queer communities may legitimately need to marry. Some may, without respect for the normative implications, need or want to take advantage of the many hundreds of economic and social benefits that accompany marriage (Chambers 2001, Wolfson 1994). Although ideally our state and society would decouple marriage from key social benefits, in the current context, exclusion from marriage economically harms queer relationships, in particular those of poor individuals who may depend on their partner's health or retirement benefits. Without marriage, the efforts of a queer couple to capture, at best, some of marriage's benefits require attorneys and contracts, a process that inherently excludes poor people. Were they permitted to marry, working-class people in queer communities would obtain a wide range of financial and social benefits by virtue of the stealth and ease of a quick civil marriage (Wolfson 2004). Moreover, queer couples' inability to marry deprives their communities of millions of dollars in saved taxes and increased benefits.

Second, the adherence by some in queer communities to anti-assimilationism should not obligate all members of queer communities to follow that principle and abandon their wishes. Simply put, a queer understanding of individual agency should permit those who want lives that include more common and well-established relationship structures to recognize them. Queer arguments that those who seek to marry "mimic" straight people are essentializing those queers and the nature of marriage. Marriage grants a vast array of rights and responsibilities while permitting an equally vast range of acceptable marital behavior, particularly compared with the *Braschi* standard that mandates explicit requirements of longevity, self-presentation as a couple, "exclusivity," and financial interdependence. Heterosexual marriage, by contrast, is not just Ward and June Cleaver; it's also majority of married people who engage in adultery, not to mention the swingers depicted in Ang Lee's *The Ice Storm*, "bridezillas," and the day-long marriages plastered on tabloid covers. In the wake of *Lawrence*'s rejection of state control of private consensual sexual contact, the exercise of sexual liberty calls. Queers may well choose to revel in the instantaneous legitimacy and frivolity that is heterosexual marriage today.

Third, and perhaps most important, marriage equality has the distinctly queer effect of de-gendering marriage. As same-sex and transgender marriages become more common, marriage will be liberated from its historical ties to a Napoleonic Code vision of male property, in which the woman and her belongings are the husband's chattel (Hunter 1991). As Nan Hunter has argued: "What is most unsettling to the status quo about the legalization of lesbian and gay marriage is its potential to expose and denaturalize the historical construction of gender at the heart of marriage." The impact of gay and lesbian marriage "will be to dismantle the legal structure of gender in every marriage" (Hunter 1991, 9). Marriage's gendered nature will dissipate as same-sex and transgender marriages become more common. Removing gender from the calculus of who can marry whom will benefit transgender people, as well. Once accepted into a legal institution considered by many queers to be oppressive, queers might transform the institution itself. Recent studies indicate that same-sex couples evince higher levels of balance and equality between partners. Surely, spreading these egalitarian norms serves the queer goal of making marriage a fairer institution.

Marriage raises different questions for people of color and people of different national origins. The right to marry implicates different technologies and living situations, which, because of economic and social racism and cultural differences, are not often available to many people of color. Gender varies along cultural lines of race, ethnicity, nationality, and/or language (Rosenblum 2007). So does sexuality. Marriage carries different meanings across these lines. For some queers of color or of different religious and cultural backgrounds, marriage carries greater

legitimacy than it does for queer whites: many link their relationships' legitimacy to marriage (Dang and Frazer 2005).

In short, domestic-partnership-type recognition structures, whether created by governments or by corporations, require a far higher standard for lesbians and gays than for heterosexuals in marriage. Many have extensive cohabitation requirements that, simply put, do not affect heterosexuals when entering into marriage. Now that marriage equality is imaginable, queers can appreciate its benefits and its costs. They can also savor leaving behind the second-class alternatives that *Braschi* offered. Marriage efforts need not serve as the sole end of social justice efforts; they can and do interact with struggles for state recognition of wider sets of relationships, including those of friendship or other forms of kinship. *Lawrence*, *Goodridge*, and *In re Marriage Cases* confront serious queer critique and still echo many heterosexist norms. Yet, because they undermine juridical sex binarism and heteronormativity, they merit the moniker "victories" more than prior cases as they undermine juridical sex binarism and heteronormativity.

Pluralist Transformations

As I argued in 1995, litigation should be only one of several vehicles for effecting social change. Litigation's key role in lesbian and gay rights efforts carries risks of essentializing identity. The relationship of law to queer communities should reflect a "plurality of resistances" (Foucault 1978) toward the law: continued litigation and simultaneous political institutional transformation.

Continuing legal strategies presume law's viability for social change despite its exclusions. Progress, in this view, depends on working within the law, and only the law may eradicate discrimination. However, as law reform scholars have noted, individuals and attorneys bring cases for their own reasons without regard to broader political goals, disrupting even the most well-considered legal strategies (Sturm 1993).

Law's centrality in social change faces limits. Queer legal activists draw on broader political agendas and bend the cases to fit those needs. This shift requires closer work between legal advocacy groups and other politically motivated associations working within the same movement. The ideal relationship between cause lawyers and grassroots groups should be complementary (Levitsky 2006, noted in Sarat and Scheingold 2006, 145). Building on her case study of Chicago's LGBT movement, Sandra Levitsky argues that, although legal groups do assist activists, the relationship between the two is often unilateral, rather than reciprocal, and that "many activists in the movement perceive legal advocacy organizations as operating independently from the rest of the movement, imposing their agendas without consultation" (Levitsky 2006, noted in Sarat and Scheingold 2006, 145).

Scheingold advocates the use of political rather than legal strategies to further social change, a process that, depending on the issue and the need, may include litigation as an element (Scheingold 2004 [1974]). Activists often presume that progressive legislation is impossible due to heterosexist entrenchment in legislatures; however, it can serve as a venue for reform. As I have argued elsewhere, lesbian and gay interests would play a larger role in electoral politics if the U.S. electoral system were not so clearly stacked in favor of the two-party system's incumbency. Although legislatures have proven slow to approve lesbian and gay rights measures, political empowerment through increased attention to political representation and voting rights would permit queer communities to achieve legislative change.[7]

Although litigation may exclude, it may also liberate through its distillation of social problems into individual dramas that generate publicity, bargaining leverage, and the mobilization of activists. Litigation can subvert the impact of losses or interact with social movements to invite subsequent, broader applications of limited victories that reach intersectional identities.

Courts' formalist reliance on rigid and discrete identities and their inability to react to fluid and intersectional issues may frustrate queer activists. Taken to its logical end, a litigation-centered strategy may tailor goals to suit conservative courts. One may argue that such efforts forestall more radical change and coopt radical demands to prevent a broader subversion of the current heterosexist order. In this argument, *Braschi*, not to mention *Goodridge* and *In re Marriage*, recognizes some queer relationships so as to avoid more revolutionary queer threats to traditional relationship structures. This reductive cooptation perspective relies on a theory of resistance that dichotomizes law and grassroots political action. Legal tactics, when part of a plurality of resistances, may reflect queer multiplicity and fluidity. Even if on their face they present arguments that courts will adopt, their strategies may nonetheless seek to prevent a broader subversion of the current heterosexist order.

The liberal/radical dichotomy hides more complex interactions of social change that involve strategic and critical engagement with liberal remedies. Social change movement participants may include actors who play both good cop (i.e., lawyers at a negotiation table) and bad cop (street activists and civil disobedience). This array of techniques may even permit reformist conservatives, such as Log Cabin Republicans, to play a role in social change alongside more radical actors. In fact, queer change may arise from the strangest of bedfellows, including some unwilling participants. Although Sex Panic! and other groups spent years trying to draw attention to the lunacy of much sex regulation, it was Larry Craig's arrest that opened up a broad conversation about the legality and fairness of prosecuting public sex.

The plurality of resistances highlights the cost of accommodationist policies. In retrospect, *Braschi*, for example, reflects the allure of inclusion in social structures,

which emphasizes "but-for" queer conformist components of the queer continuum and the risk of creating a second-class queer status. Some marriage equality advocates make similar arguments regarding civil union efforts—that seeking a compromise status (civil unions) may in fact institutionalize a subordinate status.

Queer interventions in sexual and relationship regulation carry great transformative potential to alter legal institutions. Nan Hunter has argued that marriage among lesbian and gay people may effectively drain marriage's remnant patriarchy (Hunter 1991). Once accepted within a legal institution (even one considered repressive by many queers), queer lives may act to vitiate marriage's heteronormativity. Although obtaining marriage through courts may require assimilationist rhetoric (Polikoff 2008), marriage will not look the same once emptied of its binary sexual nature. Queer theorists who conceptualize our communities as universally subversive may be disappointed by the rush to join a conservative institution such as marriage. Litigation cannot provide the complete expansion of rights it appears to promise, but it can reform, empower, and raise awareness: queers can work for change and subversion while being aware of the danger of cooptation by the law.

Conclusion

Although queer studies strives to maintain its subversive mantle, examining queer victories fosters a more self-conscious rapport with the law. This relationship reaches beyond the progressive reliance on litigation as the principal vehicle for change (Fiss 1978; J. Greenberg 1974). The language of Massachusetts's Supreme Judicial Court, "separate is rarely, if ever, equal," demonstrates the extent to which lesbian and gay issues have been incorporated into the civil rights paradigm. Queer scholars presume that such cases exclude queer interests. It is an impulse that I myself followed in "Queer Intersectionality," in 1995. Now we must be prepared to accept that this queer critical positionality may err; *Lawrence*, *Goodridge*, *In re Marriage*, and *Kerrigan* do open space for significant advancements in queer lives. Recognizing that, in certain contexts, juridical institutions may actually foster queer interests does not betray queer normativity. Diverse tactics, beyond a litigation-driven model, have triumphed: the 2004 civil disobedience of several mayors across the country led to thousands of same-sex marriages, instantly humanizing the debate. The efficacy of such efforts arose from their audacity and even their extralegality. Queer interests advance in myriad ways as the legal landscape of queer lives arises through a multiplicity of resistances and activisms, whether led by national organizations or by queer individuals desiring legal reform or even (unintentionally) by conservatives caught in the trap of their own obsessive sex regulations. Queer legal activists must be aware of their role at once both inside and outside the law: to reform law and eliminate heterosexist legal norms.