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Falling through the Cracks: Queer Theory, Same-Sex Marriage, Lawrence v Texas, and Liminal Bodies

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Andrew Clark

**Falling through the
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On November 4, 2008, voters in California voted on Proposition 8 and successfully overturned state-recognized same-sex marriage. Before the vote on November 4, both sides of the argument were concerned with how marriage might be redefined, and what the continuation or the end of same-sex marriage would mean for California, married couples (both gay and straight), and the institution of marriage itself.

The vote on Proposition 8 is just one in a long line of legal battles that define and refine same-sex relationships. Since the *Baehr v. Lewin* decision in Hawaii in 1993 and the passage of DOMA in 1996, gay relationships, and more specifically gay marriage, have been at the fore of political social thought. Looking at the literature available on same-sex relationships vis-a-vis politics and the law, *Lawrence v. Texas* is a major defining legal decision and is often the focus of law scholars, academic writers, and queer theorists. Queer theorists and the contemporary gay rights movement both use *Lawrence* to support their claims about the institution of marriage and its value to the queer community. Queer readings of

marriage question the regulatory and demarcating effects of state sanctioned relationships, citing *Lawrence* as evidence of the state further defining acceptable queer relationships.¹ As Nan Hunter explains, the government will ironically be more (not less) involved in the examination and propagation of properly queer relationships.² National gay rights organizations cite *Lawrence* as a step in the direction of full equality. *Lawrence v. Texas* decriminalized sodomy, thereby protecting same-sex sex acts in the private sphere. For many national gay organizations, with the achievement of privacy protection in hand, the next step is public recognition of gay relationships and their value to society.

Both sides of the gay marriage debate miss two key elements in their arguments. First, both frame same-sex marriage in an either/or dichotomy. Either there is gay marriage, or there is traditional marriage. While both sides are willing to examine the effects of marriage for either gay or straight couples, neither side really looks at those liminal relationships and bodies that occupy the liminal space produced by state-recognized marriage, regardless of configuration. Carroll Smith-Rosenberg defines liminal bodies as those that occupy "the state of being between categories and the power inherent in that process."³ Liminal bodies do not neatly fall into a single category, but rather have the ability to slip in and out of categorical spaces. This slippage allows liminal bodies to use the current system to their advantage while simultaneously exposing the cracks in that system through their occupation of liminal political and cultural space.

Secondly, neither side examines how the institution of marriage is both positively and negatively productive of bodies. Jasbir Puar argues that *Lawrence* reflects the nationalist, regulatory, and racialized rhetoric of post-9/11 politics,⁴ while Amy Brandzel highlights the function of racialized citizenship in same-sex marriage.⁵ *Lawrence* and the current debate on same-sex marriage function within cultural and political rhetoric that serves to delimit further who can access state-recognized marriage and the benefits that come with it, read by Brandzel as full citizenship.⁶ The refinement of what marriage means broadens the gap of accessing marriage for bodies that do not fit within current nationalist politics and who are not properly raced or middle or upper class. The effects of marriage as an institution coupled with post-9/11 politics further produces liminal and racialized bodies that are increasingly 'other' in that they are non-white, of the poor and working classes, and definitely not part of the national fabric of the US.

While both queer theory and the current gay rights movement examine what same-sex marriage means/will mean for the LGBT community, it is important to examine what liminal bodies can tell us about marriage and the current political landscape of surveillance and racialization. Looking at the current literature, I examine how both queer theorists and the contemporary gay rights movement have situated the current debate surrounding gay relationships and same-sex marriage. This examination highlights a gap in the research that can be filled by looking

at how liminal bodies function within the marriage debates in a post-9/11 political setting. This kind of examination frees the debate of the either/or dichotomy while providing a more nuanced reading of the current marriage debate. And while the social positioning of liminal bodies is marginalized, the embrace of that position and the ways in which people choose to navigate the regulatory system through differing modes of resistance could provide those bodies/relationships, which seemingly have no future, with a liberatory destiny that bridges the gap of queer theory and the mainstream gay and lesbian culture.

In what follows, I trace the historical past of the gay liberation movement up to the 2003 *Lawrence* decision and the critiques of the case. While the decriminalization of sodomy laws should be celebrated, we should pay attention to the decision's phraseology and the function of the decision as a regulation and surveillance tool of the state. I expand this critique of *Lawrence* by placing it in the context of a post-9/11 regulatory regime that functions not only to marginalize bodies on the basis of race, class, and nationality, but that is also productive of both deviant and liminal bodies and relationships. In the final section, I use the concept of liminal bodies in the hopes of blending both the queer critique and the push for same-sex marriage. This particular queer reading of politics acknowledges the queer past and looks to the future, embracing a multiplicity of family structures that includes marriage, while questioning the role of the state in regulating bodies via sexuality.

RIGHTS OF THE CITIZEN: QUEERING (OR STRAIGHTENING) THE NATIONAL BODY

The events of September 11, 2001 set in motion nationalistic rhetoric that was not only overtly racist, but which also had sexual undertones (and perhaps overtones), within which *Lawrence* plays a distinct chord. Puar believes that,

Considering the contemporaneous consolidation of new racial populations, a racialization of religion, implicating Arabs, Muslims, and South Asians and those mistaken for them ("terrorist look-alikes"), the impact of *Lawrence-Garner* must be examined in this intensely charged racial atmosphere, which repetitively defines the slippery contours of racial markings not only in relation to a dominant white American formation, but also among people of color themselves.⁷

Working from her theory of US sexual exceptionalism—one that sets up Americans as having a superior (read restrained) sexuality in comparison with the undoubtedly Muslim terrorist 'other'—she argues that *Lawrence* allows the US to accept a domesticated type of homosexuality that paints

the US as sexually diverse, while simultaneously creating space for the homophobic rhetorical description of terrorist sexuality as unrestrained and always already verging on the psychotic. According to Puar, the decision presented in *Lawrence* and the current push for same-sex marriage work in collusion with nationalist anti-Muslim rhetoric that maintains the sexual superiority of the US while appearing legalistically free of race.

Puar not only mentions those bodies/relationships/races/religions that are scrutinized and ostracized by national sexual exceptionalism presented in *Lawrence*, but actually analyzes the effects of the decision in concert with the current political, national and global landscape, noting that it is both regulatory and *productive* of bodies.⁸ Moreover, she critiques the ascendancy of whiteness that other critics of *Lawrence* leave unexamined. Puar looks at bodies that occupy a space of crossing, whether it be of race, gender, sex, sexuality, nationality, religion or geography. Her examination of bodies of crossing produces a more nuanced reading of the racial and class effects of *Lawrence* and the desire for same-sex marriage, while not forgetting the other already domestic bodies of crossing. Applying a lens that considers both race/ethnicity and class to *Lawrence* and the current debate surrounding same-sex marriage removes the argument from an either/or framework without committing the modernist move of returning to an idealized and romanticized notion of queer politics.

In *No Future: Queer Theory and the Death Drive*, Lee Edelman examines queerness and its rejection in terms of a nationalistic claim on the future. Edelman argues that, because homosexuals and queers have been painted as a disease unto death that has no (re)productive future, queers should embrace the identity they have been given in an effort to end the ceaseless and repetitious claims on futurity by the heterosexist nation-state. For Edelman, it is the notion of the future that is a regulatory practice, one that calls bodies to heterosexuality and monogamy while serving to render queer bodies as anti-nationalist. Edelman believes that we are compelled to heterosexuality because we as a nation place so much emphasis on the future and the reproduction of our people and culture.

While Edelman's work seems unrelated to the issue at hand, one could say that the nation-state's wish to claim reproductive futurity ended with the *Lawrence* decision. Albeit limited, *Lawrence* indicates that the state is willing to recognize same-sex relations, although the extent to which those relationships are recognized and the effects of that recognition are subject to debate. On the other hand, one could read *Lawrence* and the push for same-sex marriage as a way in which to incorporate gays and lesbians into the regulatory and endlessly repetitious notion of the future. Marriage is bound up with institutions that prefigure a future: property rights, rights of inheritance, children and their rights. Allowing same-sex couples to marry would grant them access to a state-propagated future. It is this latter reading of Edelman that, in conjunction with Puar, highlights how *Lawrence* functions within a regulatory nation-state whose politics

create properly nationalist and deviant bodies. Further, the political landscape in which *Lawrence* and same-sex marriage function produces bodies that are not clearly defined, that can slip in and out of categories.

QUEER VESTIGES: LOOKING BACK IN TIME

Gay politics today is one of domestication. Everywhere one looks, gays and lesbians are seemingly visible in the media and on the street. Depending on location, it is not uncommon to see two men holding hands or kissing, or to hear of a union ceremony between two people of the same sex. Gay characters are present on nearly every primetime television network: *Desperate Housewives*, *Ugly Betty*, *Will & Grace*, *Family Guy*, *South Park*, and *Grey's Anatomy*. The list goes on and on. Showtime Networks has even more gay and lesbian exposure with the recently ended *Queer as Folk* and *The L Word*, and has continued with *Nurse Jackie*. Although the presentation of gay and lesbian (and sometimes bi or trans) characters is a welcome addition to television dramas, gay and lesbian characters are invariably relegated to either a stereotypical performance of gayness, or are nicely domesticated and rarely deviate from the norms and lives of their straight counterparts.

The domestication we see of gay narratives reflected in the media is part and parcel of a much larger project of domestication and nationalism. In order for a group to be domesticated, the state must define it as a category through state institutions of power. Institutions serve to regulate bodies and groups through the production and maintenance hierarchical social positioning. Numerous historians have examined how the "homosexual" as an identity category came into being,⁹ most starting with Foucault, who stated,

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology...Nothing that went into his total composition was unaffected by his sexuality...The sodomite had been a temporary aberration; the homosexual was now a species.¹⁰

Foucault highlights social, medical, religious, and psychological institutions and ideologies that, by working together, produce categories of bodies—in this example the deviant body—while also simultaneously defining normal bodies. The production of categories allows institutions to exercise power over bodies by making bodies easily manageable and culturally intelligible, as well as by compelling subjects to bend their bodies and bodily experience into a defined category.

Lawrence v. Texas exemplifies both the function of power to render bodies and subjects as intelligible and how bodies and subjects are compelled to fit within existing categories. First and foremost, the notion that same-sex acts—defined as sodomy in *Lawrence*—should be legal does not necessarily constitute a category of (gay) people called into legal being. But it does show the desire to have certain sexual acts between two consenting adults recognized as legal under the Constitution. Further, the language of the decision provides room for same-sex sex acts in private and is further supported, as we will see in Katherine Franke's reading of the decision, by a language that alludes to same-sex sex acts occurring in the form of a couple.¹¹ The desire for legality of same-sex sex acts and the language of the decision alludes to gays and lesbians being compelled by the state to seek a state-authorized relationship, just like that of straight people.

Secondly, *Lawrence* and the current push for same-sex marriage show just how the state functions to further define and refine social categories of bodies. The queer and legal literature presented here expresses anxiety about *Lawrence* because of its defining characteristics, which arguably and ironically give the state more control over same-sex relationships. What started with *Lawrence* and continues with gay marriage is the state creating, defining, and controlling same-sex relationships. The definition of same-sex relations, closely demarcated by the state, serves to regulate what bodies qualify for marriage, and thereby some bodies and relationships have either very limited access or no access to the state-propagated relationship.

While parts of the gay and lesbian movement celebrated *Lawrence* as a landmark case for civil rights, the queer faction decried the decision and was left wondering how marriage—an institution heavily critiqued during gay liberation—suddenly became the focus of most of the national gay and lesbian organizations. Many queer activists and academics believed that the sudden push for same-sex marriage was indicative of a sort of cultural amnesia that left the projects of gay liberation behind.¹² Further, many queer activists and academics view the *Lawrence* decision and the push for same-sex marriage as further state intrusion into personal relationships and increased regulation of sex and sexuality.

HISTORY OF QUEER MOVEMENT

The 1950s and 1960s homophile movement experienced many of the same issues that the current gay and lesbian civil rights movement is experiencing. The question of how gay people fit into the fabric of the American public plagued the homophile movement, causing serious f(r)actioning among the movement's leaders and of the gay and lesbian community. Some—like the Daughters of Bilitis and the later incarnation of the Mattachine society led by Ken Burns—wished to operate on terms of "respectability" in an effort to show straights that gays were no different, except in their choice of partner. Others wished to take a separatist

approach, pointing out that gays and lesbians were not at all like straight society and did not wish to be assimilated into an already white, middle class, heterosexist and heteronormative culture.

Seeing a growing movement on the rise in 1969, Carl Wittman wrote his gay manifesto. He examines and disavows many of the tenants of straight society while calling out those who wish to seek a politics of gay respectability through mimicry of straight society. Quite specifically, Wittman criticizes gay marriage:

Traditional marriage is a rotten, oppressive institution. Those of us who have been in heterosexual marriages too often have blamed our gayness on the breakup of the marriage. No. They broke up because marriage is a contract which smothers people...Gay people must stop gauging their self respect by how well they mimic straight marriages. Gay marriage will have the same problems as straight ones except in burlesque. For the usual legitimacy and pressure which keep straight marriages together are absent, e.g. kids, what parents think, what neighbors say.¹³

Wittman calls on gays and lesbians to stop comparing their lifestyle and relationships to those of heterosexual people. Rather, Wittman would prefer to see the gay and lesbian community form its own set of ideas, produced from the questioning and critique of straight society.

Even with such a radical approach to politics, identity, and community formation as put forth by Wittman in 1969, larger and deeper assumptions are implicit in Wittman's critique of straight society. While calling out straight society for the propagation of heteronormativity and what is essentially a broken system, neither Wittman nor his contemporaries were ready to challenge the meaning of the categories of "woman" or "man", nor were they yet willing to look at sex/gender/desire as connected, self-producing, and endlessly repetitious. Further, Wittman does not question race, class, or nationalist issues within his piece. He chalks up the notion of mimicry to the desire to emulate straight society, rather than viewing heteronormativity as working in collusion with nationalistic and regulatory ideology of the state. In an Althusarian way, straights are called to function as straights just as much as gays and lesbians are compelled to mimic them. In the late 1980s and early 1990s, activists and academics began to develop Queer Theory that sought to question larger sites of regulation and oppression by opening up discourse to multiplicative, and sometimes contradictory or contentious, ways of thinking, being, and presenting.

With the advent of Queer Theory came the unraveling of identity politics. Theorists like Judith Butler,¹⁴ Eve Sedgwick,¹⁵ Lee Edelman, and Michael Warner have questioned the emphasis on identity politics and the myriad ways in which identity as a mode of rights-seeking is problematic.

Specifically, identity politics works within the very institutional and normative regulating structures which function to parse out bodies through the use of identity markers, such as man/woman, gay/straight or Black/white. Those who do not neatly fit into existing identity categories are pushed to the margins of society. Moreover, queer theorists look at how institutions and social structures tend to endlessly reproduce bodies, narratives and inequality while continuing to reify their own authority. For Queer Theory, state recognition of relationship status and marriage are both suspect because of the rights and privileges conferred on individuals by the state. With the rise in advocacy following the *Baehr v. Lewin* decision in Hawaii and *Lawrence*, queer activists and theorists have been calling for the deconstruction of same-sex relationship recognition given by the *Lawrence* decision. Because *Lawrence* recognizes intimate same-sex acts that "[do] not exceed the honor of the domesticated private,"¹⁶ same-sex marriage activists argue that the next logical step in gay and lesbian civil rights is same-sex marriage, while queer theorists believe state-sanctioned and regulated same-sex marriage would place gays and lesbians and under further scrutiny and surveillance.

"OUR BROWN": LAWRENCE v TEXAS, HISTORY, CONTEXT, AND CRITIQUE...BUT NOT OF RACE

The *Lawrence v. Texas* decision was handed down in June of 2003, and overturned *Bowers v. Hardwick* from 1986. This decision, making criminalization of sodomy unconstitutional, was championed by national gay and lesbian organizations as a landmark decision, one group going so far as to call *Lawrence* "our Brown."¹⁷ Yet obviously not everyone, and certainly not all gays and lesbians, were pleased with the decision, its arguments, and its possible implications as a method of regulation of queer bodies and relationships. Within a year, more than a handful of law scholars, activists, and academics challenged the good intentions of *Lawrence* and interrogated what it may mean for the future of gay rights—and they were not alone in their uneasy and mixed feelings about the *Lawrence* decision. The same year *Lawrence* was handed down was also the year that several states had ballot initiatives to amend their respective constitutions to define marriage as between one man and one woman. It was also the same year that Massachusetts legalized same-sex marriage, using *Lawrence* as a small part of the majority's reasoning (although the Massachusetts court has a history of making decisions in favor of gay and lesbian families). The court decisions and numerous ballot initiatives, happening just months apart, indicate an anxiety about gays and lesbians, and how recognition of their relationships fit into the national fabric. National gay and lesbian organizations hoped that *Lawrence* would be the gateway decision to same-sex marriage, while lawmakers and the public at large were thrown into a pro/con debate on marriage. While some lawmakers may have been supportive of gay rights, many did not want their constituents to believe they were attacking traditional marriage.

By looking at the writings of law scholars and queer theorists, I examine the debate about *Lawrence* and the implications the decision has for the current campaign for same-sex marriage. While both queer theorists and law scholars believe that *Lawrence* reifies a limited type of gay relationship, they worry about how the decision and same-sex marriage could further allow the state to regulate sexual relations and relationships, placing the homosexual body and other "deviant" bodies under further scrutiny. In this sense, *Lawrence* and gay marriage have been read as part of a "domesticating" project, which seeks to push the homosexual body into a "proper" form of existence (read monogamous, safe, long-term, stable) that closely resembles the straight body.¹⁸ Both the *Lawrence* decision and the push for same-sex marriage fit within a post-9/11 politics of surveillance, regulation, and interrogation of improperly raced, classed, sexed, and sexualized bodies and relationships; this serves to discipline deviant bodies, while also unintentionally producing liminal bodies that occupy the line between the mainstream and the deviant as the private and public spheres further converge.

QUEER LEGAL DISSENTS: THE POLITICS OF PUBLIC/PRIVATE AND SURVEILLANCE

Writing in *The Michigan Law Review*, Nan Hunter states, "In *Lawrence v. Texas*, the Supreme Court performed a double move, creating a dramatic discursive moment: it both decriminalized consensual homosexual relations between adults, and, simultaneously authorized a new regime of heightened regulation of homosexuality."¹⁹ For some, the *Lawrence* decision meant the decriminalization of homosexual acts, and therefore the state would be less involved in the prosecution of private sexual relations. Hunter believes that the *Lawrence* decision, framed in a mixed language of privatized liberty, gives the state the right to continuously hear homosexuality spoken and examined, placing the homosexual body and same-sex sex acts under further and more injurious examination and regulation.

Hunter finds that, because of *Lawrence*, "the state... will be more, not less, involved with the regulation of homosexuality."²⁰ The paradox of *Lawrence* is that the decision clearly indicates that the state should have nothing to do with what consenting adults do behind closed doors, yet the actual function of *Lawrence* ends up placing gays and lesbians in closer contact with the state and functions as a regulatory apparatus. Hunter equates the regulation of homosexuals with containment: how can the state allow homosexuality to exist while keeping it apart from, and thereby protecting, straight culture? Through the regulation of relationships, the limiting of culture, and the instillation of a hierarchy within the homosexual community, gays and lesbians will be compelled into a domesticated and regulated form of sexuality with affixed state rights and privileges, while further ostracizing non-monogamous and differently formed families. The limited display and space of gay culture and the

hierarchy within the gay community gives gays and lesbians the incentive to buy into the state propagated form of same-sex marriage. *Lawrence* functions with other state institutions to domesticate queer bodies and relationships.

Ironically, while Hunter argues that *Lawrence* puts gays and lesbians in closer contact with the government, she does not acknowledge those racialized and classed queer bodies that are already under the close surveillance of the state, and therefore have varying degrees of access to privacy.²¹ For raced and classed queer bodies, the divide of public and private spheres, which Hunter assumes to be separate, becomes a slippery boundary that is not only examined and further refined by state institutions, but also by the bodies occupying that space. Depending on social positioning, raced and classed queer bodies slip in and out of both spheres, creating a liminal raced and classed queer body. Hunter's containment theory sounds strikingly like Jim Crow laws of the early twentieth century, which were often undermined by bodies of passing. I do not mean to say that gays and lesbians are blatantly (and legally) separated from the dominant heterocentric culture, but I do mean to point out that her theory has a specifically racialized past. Containment, or the sectioning off of privileges and rights of a minority group under the guise of equality, is at work both in segregation laws of the past and post-9/11 politics of surveillance. Hunter is right to point out that *Lawrence* and same-sex marriage would put queer bodies in closer contact with regulatory government institutions, yet she does not account for the racialized implications of her theory, which not only serve to define and promote a domesticated and white queerness, but also to further regulate queers of color.

Looking at how *Lawrence* functions within both the public and private sphere will help illustrate the racialized implications of Hunter's containment theory, and how liminal bodies are produced. Katherine Franke, writing in the *Columbia Law Review*, believes that "the liberty principle upon which the [*Lawrence*] opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."²² Because the *Lawrence* decision states that the government should have nothing to do with what two consenting adults do behind closed doors, *Lawrence* puts forth a notion of liberty that is bound up in the domesticated private sphere. Noting that *Lawrence* articulates privacy as framed in terms of liberty, Franke looks to other nations and their rulings on sodomy laws to show the limited and privatized liberty exhibited in *Lawrence*. She notes that South Africans' arguments against sodomy laws are grounded in a politics of equal rights that is overtly centered in the public sphere. South African Justice Ackermann, Franke notes, posits a hypothetical in which several couples, both gay and straight, are kissing passionately in public. Ackermann notes that, while a straight and lesbian couple could kiss as such in public, the male same-sex couple would be guilty of a criminal offense. "What is remarkable," Franke argues, "is the degree to which [the hypothetical's]

absurdity does not depend on a conception of privacy...It is the disparate legal treatment of similarly situated kissers that strikes Justice Ackermann as absurd and unfair, not the location in which the same-sex kissing takes place."²³

Because the *Lawrence* decision is rendered in terms of a privatized liberty, Franke believes that "[Justice] Kennedy's privatized liberty leaves a wide range of homosexual and heterosexual behaviors and 'lifestyles' subject to criminalization."²⁴ Franke worries that both the possibilities opened up and foreclosed by the *Lawrence* decision create a "domestinformative" notion of subjectivity that is relegated by the state to the private. *Lawrence* does little to find new ways of expressing sexuality, both publicly and privately, that are counter to the heteronorm. Franke wishes to remind us that rights gained does not necessarily mean liberty gained: "Why should we take it as a priori true that the expansion of rights necessarily promises greater freedom? What do we risk when our political agenda sets a horizon that has no greater depth of field than securing legal rights and recognition by the state?"²⁵

While Franke interrogates the domesticating effects of *Lawrence* and questions the notion that "more rights equal more freedom," she does not question to whom these rights and freedoms are supposedly given. Situating her argument in a post-9/11 politics elucidates just how *Lawrence* functions to regulate sex and sexuality in specifically raced and classed terms. Because *Lawrence* functions within a post-9/11 politics of surveillance and regulation and is framed as a privatized liberty with domesticating effects, *Lawrence* renders raced and classed bodies, already under surveillance through interactions with state institutions such as state medical clinics and state housing, subject to further scrutiny, and therefore forces them to occupy a liminal space that is neither entirely public nor private. Franke, like Hunter, points out the domesticating effects of *Lawrence*, but does not call attention to the bodies, relationships, and sexualities—as they intersect with race and class—that are further marginalized through the state recognition of rights within the limited purview of liberty. First, Franke does not examine the issue from the standpoint of those bodies/relationships, but merely calls attention to the effects of the law to support her claim of the "domestinformative" functions of *Lawrence* and its further extension into marriage. Further, she misses the racial implications of a domesticated liberty that, while seemingly applicable to all citizens as worded in *Lawrence*, is difficult for raced and classed queer bodies to achieve because of their liminal position in between the public/private divide. Secondly, Franke returns the debate to the either/or framework of "are you for or against same-sex marriage?" because of her heavy critique of *Lawrence* and same-sex marriage. Simply, she believes that if queer subjects wish to avoid state regulation of their relationship and family formations, they should question the methods of obtaining rights and privileges exemplified in *Lawrence*. Apparently marriage and personal/individual liberty cannot coexist. And lastly, in pointing out how the *Lawrence* decision mixes liberty and privacy, Franke

covers over the potential radical nature of the court purposefully showing a connection between the public and private spheres (as it is for raced and classed queer bodies), rather than the spheres existing as clearly demarcated and discrete.

Both Hunter and Franke focus on Justice Kennedy's majority opinion while passingly mentioning the dissent of Justice Scalia. Bernard Harcourt takes up this issue and tries to fabulously reconstruct Scalia's dissent as "post-queer." Justice Scalia, the conservative anchor of the court, calls attention to several issues while writing for the minority: the ongoing "culture wars," the court's decision to take a side in those wars, the law profession that tends to function in a liberal-leaning ideology, and the supposed "homosexual agenda" at work in our nation. What Harcourt finds interesting is that, if framed differently, Justice Scalia's arguments against *Lawrence* could be read as radical, perhaps more so than Justice Kennedy's majority opinion.

Scalia calls out the non-neutral position of the majority in *Lawrence*, stating that the court has taken a side in the culture wars. Further, Scalia is amazed that the court would not heed *standare dicis* by overturning *Bowers* so quickly and with such radical language. Harcourt rightly argues that no decision by the Court, no matter how well argued, is ever clearly free of bias, and that it continues to operate within dominant cultural and social ideologies. Scalia is right when he says that the court has taken a side in the culture wars; there was simply no way around it. Moreover, he is right in pointing out that the seemingly liberal law profession functions within ideologies that led to the *Lawrence* decision, but Harcourt further points out that Scalia himself is a product of a larger set of interlocking institutions and cannot help but be influenced by ideology. Lastly, Harcourt believes that

it is critical to dispense with the notion of a 'homosexual agenda' and to explore, instead, the proliferation of sexual projects in contemporary society, to examine the surprising alliances that form on sex matters, and to reconsider all the different interests at stake. This may lead us, in the process, to revisit exactly who won and who lost in *Lawrence*.²⁶

By reworking Scalia's dissent in this fashion, Harcourt argues, we can see the post-queer critiques of the powers of the state and the legitimizing institutions behind the judicial system, as well as the social regulations imposed on queer bodies.

What is left out here—as in all of the above critiques of *Lawrence*—are the issues of *race*, *class*, and *nationality*. For these authors, it is assumed that, given the wording of *Lawrence*, all bodies *that are citizens* and are properly raced and classed have access to the liberties granted by the decision. To put it simply: every subject is the same before the law. Yet as the reading of Hunter and Franke above demonstrates, raced and

classed bodies occupy a liminal space, and therefore have limited access to the liberties that the *Lawrence* decision grants. Surprisingly, Harcourt does not call attention to the post-9/11 ideologies of surveillance, of which Scalia and the rest of the court are also part. By leaving issue of race and class untouched, Harcourt misses an opportunity to examine the true implications of a refashioned—and what he terms “post-queer”—reading of Scalia’s dissent. Rather, Harcourt’s wheels are spinning in the quagmire of queerness that is based out of a limited, one strike view of oppression and marginality, namely that of sexual identity. Being post-queer, through the deconstruction of Scalia’s identity, without an in-depth analysis of race and class (not to mention sex and gender) is simply insufficient at rendering an accurate picture of the regulatory regimes at work in the production and decision of *Lawrence v. Texas*.

WRAPPED INTO MARRIAGE AND BORDERS: FURTHER EXTENSIONS OF *LAWRENCE V. TEXAS*

From the standpoint of the national gay and lesbian organizations, once *Lawrence* became the law of the land and gay relationships protected under the Constitution, the next logical step was a state-by-state or national campaign for same-sex marriage: “But the political agenda leveraged by that recognition [of gays and lesbians as rights-bearing citizens] does not exceed honor of the domesticated private. The most likely project to be launched from this conception of subjectivity is, of course, marriage.”²⁷ Franke argues that the language of *Lawrence* relegates homosexual relations to the private sphere. Once the right-to-privacy subjectivity is achieved, the next step would be to fight for public recognition of same-sex relationships—gay marriage.

While same-sex marriage seems to be a ubiquitous issue today—especially with the Proposition 8 trials in California—the public at large rarely gets to hear queer voices that are against same-sex marriage. Queers who question the value of same-sex, government-recognized marriage are often drowned out by the national campaigns and the media hype surrounding the issue. Further, because of the benefits afforded to married couples and the “obvious ubiquity” of the issue for the gay community, it seems crazy that any self-identified gay or lesbian would speak out against gay marriage. It is important to examine the arguments of anti-marriage queers for a few reasons: 1) their arguments provide a voice that is not usually heard on a national scale, 2) their arguments further implicate state and social institutions as sites of oppression, and 3) they also provide a discursive look into how race and class can sometimes be forgotten in what has become a more “mainstream” queer movement.

Michael Warner exemplifies a queer perspective on same-sex marriage.²⁸ He examines the problems with gay marriage on two fronts: first, how *Lawrence* gets wrapped up in the debate and, secondly, how the gay and lesbian community has been wrapped into the desire for same-sex marriage, despite the costs to both gay and lesbian history and to other

queer bodies and relationships. Given the history of the gay and lesbian movement,²⁹ he argues, it is striking that the contemporary movement is so willing to forget their past and ask to be regulated by an institution that was so heavily questioned in the 1960s, '70s, and '80s:

Others argue, either ingenuously or disingenuously, that marriage has nothing to do with these historical commitments, that it is not a question of social change or cultural politics at all but a neutral matter on which each individual must decide. This is the official or semiofficial position of the major national gay and lesbian organizations: the National Gay and Lesbian Task Force, the Human Rights Campaign, and Lambda Legal Defense. Either way, the crucial founding insights behind several decades' worth of gay and lesbian politics are now being forgotten. If the campaign for marriage requires such a massive repudiation of queer culture's best insights on intimate relations, sex, and the politics of stigma, then the campaign is doing more harm than marriage could ever be worth.³⁰

For Warner, the issue of marriage is not an individual question that is outside queer history. Rather, Warner works at length to call attention to queer history and its critique, focused on marriage as part of a larger system of regulation. The queer past's repudiation of marriage was only one part of a much larger critique of social systems. For queers of the past, questioning and challenging marriage was a way in which queers could fight for social change on a much larger scale. Yet the current configuration of marriage politics for the larger social/activist organizations requires, according to Warner, an erasure of the past, a forgetting of “queer culture's best insights on intimate relations, sex, and the politics of stigma.”³¹ Erasure of the past allows for marriage advocates to point to ways in which marriage will “benefit” the queer community. Warner takes up several of the various arguments for same-sex marriage—the domestication of “obviously promiscuous” men, recognition of love, the social and economic incentives of the government, and social stigma and shame—and deconstructs them to highlight how each still plays into a hierarchy of valued relationships, placing married couples higher up on the chain, while devaluing single people, alternate families, and long-term unmarried partners.

Ultimately, Warner argues that privileges that are conferred on married couples should be given to all citizens, regardless of marital status. At the same time, he questions the social value we place on coupling and state recognition of relationships, the shame and social stigma placed on gay relationships, and how culture compels gays and lesbians to desire marriage. Calling attention to the arbitrary link between

marriage and benefits, Warner writes, "Most of the benefits could be extended to other kinds of households and intimate relations. Very few have a necessary relation to a couple or intimate pair—perhaps, logically enough, only those having to do with divorce. All others could be thought of in different ways."³² This approach to marriage, or rather the removal of marriage from other economic and social benefits, fits in with the queer past's desire to challenge larger social norms in order to fight for social change.

While this approach would remove the economic pressures from couples to marry, it does not account for the symbolic nature of marriage, nor does it account for those who are aware of the marginalizing effects of marriage but still wish to have their relationship recognized by both the community and the state. How do these queers fit in? How, given Warner's critique of marriage, could queer subjects reconcile an attachment to the queer movements of the past while still fulfilling their desire to marry? Further, what about ethnic or racial minorities? It seems that Warner envisions the queer community as unilaterally similar in both race and class, and as if neither social category were worrisome. Warner leaves questions like these unexamined because they do not fit within the strong and unapologetic commitment to larger social change of queer ideology.

Even while Warner tries to accommodate more queer bodies and relationships into his refiguring of the debate surrounding same-sex marriage, his argument still comes up short, because he does not examine the contemporary social and political contexts within which the marriage debate operates. Again, he highlights those queer bodies and relationships that are pushed to the outer margins of society by state recognition of relationships—especially marriage—but does not examine the debate from the standpoint of those liminal bodies/relationships that are not sufficiently queer, nor does he acknowledge the workings of post-9/11 regulatory politics on raced and classed bodies. Warner's critique of marriage serves to produce yet another type of docile body, one that is sufficiently queer to not desire marriage, or is not duped by the desire of state recognition of any form of relationship which can be read as another type of queer liminal body—the docile and insufficiently queer body. Warner's call to the queer past ends up refiguring an already wide divide within the queer community. Queers who desire marriage, despite being aware of the implications of marriage, are rendered as insufficiently queer, occupying a liminal space in the queer community, and therefore subject to shame. Arguments like Warner's call queer bodies to self-regulate into a state that is "correctly" queer, a subject that heeds the queer past and aligns his/her desires to the goals of that past. Warner's argument does another double turn: while trying to lessen (if not end) hierarchical social relations, he ends up rearticulating a rhetoric that has implications of division and shame, still leaving some queers to fall through the cracks of personal desire, duty to the (queer) community, and state regulation.

LIMINAL BODIES: A PRODUCTIVE USE OF MODERNITY AND THE FUTURISTIC POLITICS OF THE HERE-AND-NOW?

Indeed, any viable rendering of contemporary biopolitics must address more specifically how biopower attempts not just to produce and control life in general...but also to privilege some lives over others.³³

Looking at the queer responses to *Lawrence* and the push for same-sex marriage, we can see that queer theorists and activists also frame the debate in either/or terms, exchanging one form of scrutiny for another. The implication is that if subjects are not sufficiently queer, they too are rendered suspect, and are therefore in need of interrogation, examination, and—in an extreme sense—radical violence to (re)produce those subjects as queer.

How can we piece together both the queer arguments while allowing space for those that embrace *Lawrence* and the national campaign for same-sex marriage? What other ways of examining the debate allow us to find new paths to bridging this gap? It is ironic that both sides acknowledge the limiting of bodies and relationships produced through *Lawrence* and same-sex marriage, yet neither examines the debate from a standpoint of raced and classed queer liminality. The modernist time claims of queer theorists are not useful because, given the current progression of the political landscape, it is not possible to reclaim that kind of activism without accounting for the mainstreaming of gay and lesbian culture. Further, the mainstream can no longer ignore queer critiques of governmental regulation and the interrogation of bodies and relations. Because both sides point to the production of bodies that exist outside of the either/or framing of the debates, should we not start our examination of the issue from these bodies/relations that toe the line between queer and mainstream?

Liminal bodies are those bodies that slip in and out of spaces, but are not fully acknowledged in either space. Further, because liminal bodies actualize slippage between categories, they highlight the ability to get beyond the either/or framing of the debate, while showing cracks in institutional frameworks—cracks that are potential sites of resistance. Examining bodies that occupy the raced and class liminal space between the queer and the mainstream will further open up the debate, allowing scholars and activists to account for those who are forced to the margins by both sides in the dichotomous debate.

For example, consider a man or woman who is married and has a child, but openly admits his/her attraction to the same sex and openly discusses his/her feelings with his/her partner. Or consider the black lesbian couple who is unmarried and has a child, the father of whom provides support and care. Or the widower who has a child, and now finds himself attracted to men. Or the transgendered FTM who wants to marry

his partner, but cannot because doing so would disqualify him from receiving federal benefits such as food stamps. Or consider the lesbian couple and the gay couple who live together and have a child between the four of them. How do these relationships and their 'non-normative' family structures fit within both the queer and mainstream recognition and marriage debate?

Currently, they do not.³⁴ Both queer and mainstream arguments call attention to these liminal bodies and relationships without examining them. The first couple would appear 'normal' in some circles, while being read as queer in others—but it would really never fit neatly into either. The black lesbian couple could get married in some states, but how does that recognize the father of their child, who is deeply connected to them? The widower would pass in one society, and be looked at with suspicion in the other, while once again not really feeling at home in either. The FTM and his partner are left with an economic choice: food and affordable bills with assistance, or relationship recognition. The gay and lesbian couples could marry their partners, but that would not in any way acknowledge their status as a family.

And these are but a few of the issues with the liminal bodies produced by *Lawrence* and same-sex marriage. An interrogation of the domestic implications of the regulatory, domesticating, and productive functions of *Lawrence* and the mainstream push for same-sex marriage needs to be conducted through the lens of raced and classed liminal bodies, bodies that are not unaffected by the regulatory regime of the nation-state, that are variously rendered unintelligible or intelligible depending on context, and that move in and out of spaces of normality and queerness. This analysis will further complicate the debate surrounding *Lawrence* and same-sex marriage, but will also provide more paths to questioning the effects of the state and its regulatory practices, showing that such practices are simultaneously oppressive and sites of resistance, while also removing the current debate from the either/or framing that serves to foreclose alternate options.

Notes

¹ For the purpose of this paper, I use "queer" to mean a paradigm that seeks to destabilize categories and relationships that are seemingly binary in nature. "Queer" seeks out and valorizes that which is odd or counter-normal, and reads between the lines to find the queerness in the everyday, the regulatory, and the normative.

² Nan Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny," *Michigan Law Review* 102 (2004): 1528-1554.

³ Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (New York: Knopf, 1985), 93.

⁴ Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2008).

⁵ Amy L. Brandzel, "Queering Citizenship? Same-Sex Marriage and the State," *GLQ* 11:2 (2005): 171-204.

⁶ *Ibid.*, 172.

⁷ Puar, *Terrorist Assemblages*, 119.

⁸ *Ibid.*, 114.

⁹ See Graham Robb, *Strangers: Homosexual Love in the Nineteenth Century* (New York: W.W. Norton & Company, 2004); Matt Cook, ed., *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages* (Oxford: Greenwood World Publishing, 2007); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890-1940* (New York: Basic Books, 1994); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Penguin Books, 1991).

¹⁰ Michel Foucault, *The History of Sexuality*, Vol. 1 (New York: Random House, 1978), 43.

¹¹ Katherine Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 (2004): 1408.

¹² The current rhetoric deployed by queer activists and theorists is ironic. Queer activism, and especially queer theory, are bound up in post-structuralism and postmodern critiques of institutions, systems, the production of bodies and hierarchies. Further, the activism and rhetoric surrounding queer theory is usually characterized not only by interrogation of systems, but also by the express support and claiming of contention and contestation, a purposely dis-unified approach to talking about systems of oppression and bodies. The latter of these characterizations places both the gay liberation movement and the current queer movement squarely in the postmodern framework that embraces alternate epistemologies, anarchy, and—some would say—complete chaos. The irony is that calling attention to the ways in which the contemporary gay and lesbian civil right movement has forgotten its queer past could be read as a nostalgic call for a reliving of the past. Queers are now put into a position of claiming a past that is no longer present, and therefore risk romanticizing the past. With this modernist move, questions are raised about the intent of claiming a time past and harkening back to an epistemological stance that seems to be all but forgotten to the gay and lesbian movement at large: What do queer activists and theorists hope to gain by looking back in time? How does this modernist move function within the postmodern paradigm of the contemporary queer movement? How would this time claim, if actualized, function within the current political landscape?

¹³ Carl Wittman, "A Gay Manifesto," in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997), 383.

¹⁴ See Judith Butler, *Gender Trouble* (London: Routledge, 1990).

¹⁵ See Eve Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

¹⁶ Katherine Franke, "The Domesticated Liberty of *Lawrence v. Texas*," 1413.

¹⁷ *Ibid.*, 1399. See endnote 2.

¹⁸ See Michel Foucault, *Discipline and Punish* (New York: Vintage Press, 1995).

¹⁹ Nan Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny," *Michigan Law Review* 102 (2004): 1528.

²⁰ *Ibid.*, 1534.

²¹ I used the terms "raced" and "classed" throughout the paper to call attention to how whiteness enjoys the ability to appear as a nonrace.

²² Katherine Franke, "The Domesticated Liberty of *Lawrence v. Texas*," 1401.

²³ *Ibid.*, 1406.

²⁴ *Ibid.*, 1407.

²⁵ *Ibid.*, 1419.

²⁶ Bernard E. Harcourt, "Foreword: 'You are Entering a Gay and Lesbian Free Zone': On the Radical Dissents of Justice Scalia and Other (Post-) Queers," *The Journal of Criminal Law & Criminology*, 94:3(2004): 548.

²⁷ Franke, "The Domesticated Liberty of *Lawrence v. Texas*," 1413.

²⁸ Michael Warner, *The Trouble With Normal: Sex, Politics and the Ethics of Queer Life* (Cambridge, Mass: Harvard University Press, 1999).

²⁹ Warner's outrage at the cultural amnesia of the contemporary gay and lesbian movement is exemplary of the modernist move of claiming and longing for a time past.

See Eric Savoy, "You Can't Go Homo Again: Queer Theory and the Foreclosure of Gay Studies," *English Studies in Canada* 20:2(1994).

³⁰ Ibid, 91.

³¹ Ibid, 91.

³² Ibid, 119.

³³ Henry A. Giroux, "Reading Hurricane Katrina: Race, Class, and the Biopolitics of Disposability," *College Literature* 33:3 (2006): 181.

³⁴ A complete reading of the ways in which queer notions of family or kinship function would consider the queer reading of state legitimated marriage and the delegitimation of kinship in Judith Butler, "Is Kinship Always Already Heterosexual?" *Differences* 13:1 (2002):

In the case of gay marriage or of affiliative legal alliances, we see how various sexual practices and relationships that fall outside the purview of the sanctifying law become illegible or, worse, untenable, and how new hierarchies emerge within public discourse. These hierarchies not only enforce the distinction between legitimate and illegitimate queer lives, but they produce tacit distinctions among forms of illegitimacy. The stable pair who would marry if only they could are cast as currently illegitimate, but eligible for a future legitimacy, whereas the sexual agents who function outside the purview of the marriage bond and its recognized, if illegitimate, alternative form now constitute sexual possibilities that will never be eligible for a translation into legitimacy. These are possibilities that become increasingly disregarded within the sphere of politics as a consequence of the priority that the marriage debate has assumed. This is an illegitimacy whose temporal condition is to be foreclosed from any possible future transformation. It is not only *not yet* legitimate, but it is, we might say, the irrecoverable and irreversible past of legitimacy: *the never will be, the never was*. (18)

Three Poems by Daniele Pantano

EASTERN VILLAGE WITH FACTORY

Dogs bark in untended fields. Outside, artificial light
Pools the road nobody's died on with men sauntering
The graveyard shift, unafraid to sing alone. I stretch out
And find I married a woman who doesn't care that they
Have picked up the ambrosial bouquet of sex—neatly
Wrapped in tissue paper—at the foot of our bed. She
Welcomes the rabid charge. Anything that reminds her
She belongs to the faint hinterland. She keeps the doors
Unlocked. I say nothing. Men or dogs. There will be no
Other end.