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# FREEDOM IN A REGULATORY STATE?: LAWRENCE, MARRIAGE AND BIOPOLITICS

CRAIG WILLSE\* AND DEAN SPADE\*\*

## I. INTRODUCTION

This paper questions the status granted *Lawrence v. Texas*<sup>1</sup> by LGBT<sup>2</sup> legal

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\*\* Dean Spade is a transgender attorney, and founder of the Sylvia Rivera Law Project, a law collective providing direct legal assistance to low-income people and people of color facing gender identity discrimination. He thanks the many people whose comments and dialogue contributed to ideas in this article, including Kendall Thomas, Gael Gundin Guevara, Rickke Mananzala, Sonja Sivesind, Paisley Currah, Urvashi Vaid, and Jody Marksamer.

1. *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. We use this term "LGBT" (abbreviating Lesbian, Gay, Bisexual and Transgender) because it is what is most commonly currently used by the more well-resourced organizations working on issues of policy and law that disadvantage people on the basis of sexual orientation, though we would contest the meaningfulness of the attempted inclusiveness of this term. The disgraceful battles over transgender inclusion in the federal Employment Non-Discrimination Act ("ENDA"), backed by the Human Rights Campaign, or the New York State Sexual Orientation Non-Discrimination Act ("SONDA") backed by the Empire State Pride Agenda are only some of the more blatant examples. See Andy Humm, *Unity Eludes SONDA Advocates, Gender Identity Protection Divides Duane, Pride Agenda*, GAY CITY NEWS, Dec. 13, 2002, at 1, available at <http://www.gaycitynews.com/gen29/unity.html>; See also, Kristina Krawchuk, *SONDA Bill Heads to Senate*, CAPITAL NEWS 9, available at <http://www.capitalnews9.com/content/headlines/?SecID=33&ARID=7580>.

Broader failures of the "gay agenda" to include and prioritize the experiences of people of color, people with disabilities, women, the poor and immigrants have been continually critiqued by theorists and activists who produce intersectional and multi-issue queer and trans analysis and activism. See, e.g., Ian Barnard, *Fuck Community, or Why I Support Gay Bashing*, STATES OF RAGE: EMOTIONAL ERUPTION, VIOLENCE, AND SOCIAL CHANGE 74 (Renee R. Curry and Terry L. Allison, eds., 1996); ELI CLARE, EXILE AND PRIDE (1999); Amber Hollibaugh, *Queers Without Money: They are Everywhere. But We Refuse to See Them*, VILLAGE VOICE, June 26, 2001, at 46; C. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?* 3 GLQ 437; Craig Willse & Jane Spade, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (Spring 2000); Sylvia Rivera, *Queens in Exile, the Forgotten Ones in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY* 67 (Joan Nestle et al. eds. 2002); Richard Blum et al., *Why Welfare is a Queer Issue*, 26 N.Y.U. REV. L. & SOC. CHANGE 207 (2001); THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION (Matt B. Sycamore, ed. 2004). When we speak of our own goals for seeking an end to coercive systems of gender and sexuality, we will use a variety of other terms intended to be more descriptive, and hopefully, more accurate of the work we suggest. We use the term "well-resourced" where "mainstream" is often used because we wish to be critical of the notion that these groups represent the views of a majority, which the latter term

organizations and advocates who have proclaimed the decision “Our Biggest Victory Yet!”<sup>3</sup> In short, we seek to ask the fairly obvious yet still pertinent questions of: Who shares in this victory? What sort of victory is it? Interestingly, one way in which organizations and advocates have expressed the apparent significance of *Lawrence* is by comparing it to the legal successes of the civil rights movement, naming it “the gay community’s *Brown v. Board of Education*.”<sup>4</sup> As Kenyon Farrow has pointed out, not only are current LGBT rights struggles *not* analogous to U.S. black civil rights movements, but the appropriation of this history by organizations that have failed to take on racial justice struggles evidences and widens divisions between LGBT movements<sup>5</sup> and other, anti-racist social justice struggles.<sup>6</sup> As will become clear, Farrow’s critique

would imply.

3. LAMBDA UPDATE: OUR BIGGEST VICTORY YET (Civil Rights News From Lambda Legal, Summer 2003).

4. Michael Barnett, *Positive Ruling for Supporters of Equality*, G.W. HATCHET, July 7, 2003, available at

<http://www.gwhatchet.com/news/2003/07/07/Opinions/Column.Positive.Ruling.For.Supporters.Of.Equality.446372.shtml>, citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. We use the word “movement” with caution, based on the idea that social movements have as their central component a base-building goal of mass mobilization. At its inception, the “gay rights movement” may have been characterized by such base-building in its early “take to the streets” celebrations and its roots in uprisings against police brutality, but the institutionalization of the work, and the move toward leadership by an elite of white legal professionals, have marked a massive shift that makes it currently far from centralized around base building. See *Four Pillars of Transformative Social Justice Infrastructure*, available at <http://www.miamiworkerscenter.org> and on file with the authors.

6. There have always been racial tensions in the gay community as long as there have been racial tensions in America, but in the 1990’s, the white gay community went mainstream, further pushing non-hetero people of color from the movement. The reason for this schism is that in order to be mainstream in America, one has to be seen as white. And since white is normative, one has to interrogate what other labels or institutions are seen as normative in our society: family, marriage, and military service, to name a few. It is then no surprise that a movement that goes for “normality” would then end up in a battle over a dubious institution like marriage (and hetero-normative family structures by extension).

Kenyon Farrow, *Is Gay Marriage Anti-Black?*, at

<http://colours.mahost.org/articles/farrow.html> (Nov. 8, 2004) [hereinafter Farrow]. Farrow cites the continued misuse of analogies between “Gay Civil Rights” and “Black Civil Rights,” instructing that this false analogizing contributes to homophobia and strengthens resistance to gay rights. He writes:

These comparisons of “Gay Civil Rights” as equal to “Black Civil Rights” really began in the early 1990’s, and largely responsible for this was Human Rights Campaign (HRC) and a few other mostly-white gay organizations. This push from HRC, without any visible black leadership or tangible support from black allies (straight and queer), to equate these movements did several things:

- 1) Piss off the black community for the white gay movement’s cultural

points to exactly what, for us, is lacking in both *Lawrence* and the analyses of those who celebrate it: a commitment to radical political change that challenges, rather than accommodates, the perpetuation of inequality.

This paper examines the ways that the winning decision in *Lawrence* and its aggrandizement in LGBT legal circles represents a frightening reduction in the demands of what was, at its inception, a movement against violent and coercive systems of gender and sexual regulation. While *Lawrence* marks a shift in the terms of regulation and criminal stigmatization of one type of consensual adult sexual activity, it nonetheless maintains coercive systems of regulating gender, sexuality, and family structures through violent and punitive mechanisms. Furthermore, an examination of the strategies of LGBT legal organizations demonstrates ties between the lauding of the *Lawrence* victory and the broader framing of a “gay agenda” that focuses on marriage rights and fails to meaningfully oppose state regulation of sexuality, gender, and family structure.

As we will argue, the agenda put forth by the most well-resourced LGBT organizations works towards achieving formal legal equality.<sup>7</sup> In other words, these organizations seek the security and entitlements distributed by regulatory state institutions and in so doing, fail to oppose the very mechanisms that maintain and reproduce inequality. This paper attempts to trace the links between the *Lawrence* decision and campaigns for gay marriage rights in order to envision movements that seek justice for more than just the most racially and economically privileged lesbians and gay men. We outline the limits of the agenda represented by *Lawrence* and propose alternative modes for resisting the coercive regulation of sexuality, gender, and family formations.

The move we wish to make in this paper—from a strategy for formal legal equality that, we argue, primarily benefits white and wealthy gay men and lesbians, towards a radical vision of the deregulation of gender, sexuality, and

appropriation, and making the straight black community question non-hetero black people's allegiances, resulting in our further isolation. 2) Giving the (white) Christian Right ammunition to build relationships with black ministers to denounce gay rights from their pulpits based on the HRC's cultural appropriation. 3) Create a scenario in their effort to go mainstream that equates gay and lesbian with upper-class and white.

*Id.* But see Randall Kennedy, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 17 (dismissing objections from black activists to analogizing racial and sexual orientation discrimination) Darren Hutchinson has also addressed the problems with using analogies to struggles for black civil rights when talking about gay rights. “By comparing ‘blacks’ and ‘gays’ (or racism and homophobia)” these analogies “purport to equate, or to locate similarities between, the historical experiences of the two groups (really white gays and black heterosexuals). In so doing, they ignore the legacy of racial and class hierarchy—or racial and economic privilege and subordination.” Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 631 (1997).

7. For more on legal reform movements versus other forms of social movement, see, e.g., CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* (Theory Out of Bounds No. 18, 2000).

families—demands a fundamentally different account of how power operates than that implicit in analyses of *Lawrence* put forth by LGBT legal organizations. We must develop a conceptual understanding of the insidious, intimate, and persistent nature of regulatory mechanisms if we wish to intervene in new or interesting ways that take seriously the goals of broad social, racial, and economic justice and the radical redistribution of capital and resources. This requires moving away from understanding marriage as simply an enclosed institution that either includes or excludes and towards understanding marriage as a technology of power that organizes all parts of a population in terms of access to resources necessary for survival. We turn to the work of Michel Foucault to guide our discussion because it helps elucidate both the theories of power we see underwriting much discussion of *Lawrence* and the theories of power that we believe can inform queer and trans activist work to formulate more radical goals and more effective strategies.

## II. LAWRENCE AND DISCIPLINARY POLITICS

Drawing from the discussion of the invention of homosexuality in Michel Foucault's *The History of Sexuality, Vol. I*,<sup>8</sup> critical legal scholars have looked at the regulation of queer bodies in terms of discourses about acts and identities. As Foucault outlines, the invention of homosexuality could be understood as a solidification of an identity set in a tautological relationship with specified acts:

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, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.<sup>9</sup>

So whereas a sodomite had simply been a person who practiced sodomitical acts, the invention of a homosexual personage forged an injunctive link between a homosexual identity and what came to be understood as homosexual acts. Hence, the act of sodomy evidences a homosexual identity (to practice sodomy is to be a homosexual); and, simultaneously “homosexual” defines one who commits sodomitic acts (to be a homosexual is to practice sodomy). As with the hysterical woman, the masturbating child, and the reproductive couple, the

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8. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* 1 (Robert Hurley trans., 1978) [hereinafter FOUCAULT, *THE HISTORY OF SEXUALITY*].

9. *Id.* at 43.

inventions of which Foucault also explored,<sup>10</sup> the homosexual in this sense is conceived in terms of disciplinary power. For Foucault, discipline describes techniques of power focused on the human body—defining its corporeal contours, organizing a subjectivity or selfhood coterminous with that body, and arranging such bodies in relations within enclosed spaces.<sup>11</sup> Thus, the identities of discipline hold a particular bodily form and move through the enclosures of society, including the school, the family, the army, and the prison.<sup>12</sup> The management of the disciplined body unfolds through networks of medico-judicial discourse, a fact to which queer and trans bodies (discursively marked as deviant, physically disabled, mentally ill, and criminal) can certainly attest.<sup>13</sup>

It seems that the significance ascribed to the *Lawrence* decision rests in the view that *Lawrence* departs from *Hardwick*'s<sup>14</sup> portrayal of homosexual sodomy as aberrant and justifiably criminalized, and embraces a more "liberating" idea that the state cannot ban this consensual sexual act between adults based solely on morality. As the majority and dissent take their separate positions about the breadth of the decision,<sup>15</sup> the limits of this newfound liberty become clear. Both the majority and the dissent recognize the old standard slippery slope argument: "If you put any limit on the state power to regulate sexual behavior, soon bestiality, incest, and rape will have to be protected from infringement as well!" The majority wrestles with this argument as they explain that *Bowers v. Hardwick* was incorrectly decided, since it provides only a moral justification for the criminalization of sodomy.<sup>16</sup> The majority nonetheless promises that *Lawrence* does not justify the de-criminalization of prostitution, adult incest, or other illegal adult consensual sexual activities that could also be said to have a moral justification of their criminal status.<sup>17</sup> The majority also clearly distinguishes the issue of same sex marriage, working to make clear that *Lawrence* does not require

10. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 8, at 43.

11. Foucault elaborates this theme elsewhere as a discussion of "docile bodies," *see, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 135 (Alain Sheridan trans., 1979).

12. *Id.*

13. Much work in the fields of queer theory and lesbian/gay/trans studies has drawn from the corpus of Foucault's work for inspiration. *See, e.g.*, DAVID HALPERIN, SAINT = FOUCAULT: TOWARDS A GAY HAGIOGRAPHY (1995).

14. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

15. *Lawrence v. Texas*, 539 U.S. 558 (2003).

16. *See Lawrence*, *supra* note 15.

17. *Id.* at 561. A July 28, 2004 decision by the 11th Circuit demonstrated how narrowly the holding in *Lawrence* could be read. The court, upholding an Alabama statute criminalizing the sale of sex toys, made it clear that *Lawrence* did not undermine the power of the state to criminalize and stigmatize sexual practices based on morality by finding that *Lawrence* establishes no right to sexual privacy. *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004).

the state to discontinue its methods of incentivizing certain sexual relationships through the provision of a special legal status.<sup>18</sup>

In his dissent, Scalia, not surprisingly, takes up the slippery slope argument, suggesting that *Lawrence* will indeed result in opening the flood gates to same-sex marriage, various illegal adult consensual sexual activities, and other frightening possibilities.<sup>19</sup> In fact, the majority does have difficulty constructing a convincing argument that possibilities for regulating sexuality and family structure remain after *Lawrence*. This difficulty stems in part from the construction of homosexual identity and practice in their opinion, which departs significantly from its construction in *Hardwick*.

In order to de-emphasize the implications of *Lawrence* for other sexual acts, the majority emphasizes a newly-validated and more palatable identity of homosexuality.<sup>20</sup> They do so by addressing homosexuality in terms of "coupled" behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more parallel to incentivized heterosexual family norms.<sup>21</sup> This framing contrasts sharply with *Hardwick*'s depiction of homosexual sodomy as a long-criminalized and reviled aberrant sexual practice. The majority's attempt to re-write the significance of sodomy, transforming it into an act constitutive of a sympathetic identity group, moves homosexuality into the "charmed circle of sexual practices," to use Gayle Rubin's terms.<sup>22</sup> In so doing, *Lawrence* rearticulates the definitive distinction between consensual sexual/procreative practices that the government may not criminally prohibit (contraception, abortion, sodomy) and those in the "outer limits"<sup>23</sup> (prostitution, adult incest, etc.) subject to

18. The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

*Lawrence*, 535 U.S. at 590.

19. *Id.* at 590.

20. *Id.* at 560-61.

21. The *Lawrence* majority frames the criminal prohibition of sodomy as "control[ling] a personal relationship," *Lawrence*, 535 U.S. at 558; as opposed to the *Hardwick* framing of the right in question as "a fundamental right [of] homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190.

22. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in THE LESBIAN AND GAY STUDIES READER 13 (Henry Abelove et al., eds. 1993). Rubin describes how hierarchies are maintained by legal, medical and cultural institutions, separating "bad" sex practices from "good" sex practices. She writes that, "[a]ll of these models assume a domino theory of sexual peril. The line appears to stand between sexual order and chaos." *Id.* at 14. Both the majority and Scalia have this domino effect in mind as they write, the majority promising that homosexual sodomy has crossed over into "good" sex without toppling the clear line between "good" and "bad," and Scalia warning that this decision will invite chaos.

23. *Id.* Patrick Califia similarly sites the limits of the *Lawrence* victory in his essay "Legalizing Sodomy is Political Foreplay." Patrick Califia, *Legalizing Sodomy is Political Foreplay in THAT'S*

prohibitions. At the same time, as Rubin points out, the fact that a sexual practice can move across that line (from a prohibited state unworthy of protection to a protected state of relative cultural acceptance) questions the stability of the system of sexual norms, exposing its mutability.<sup>24</sup> It becomes imperative, then, for the majority to articulate clearly that they are *not* questioning a system of sexual regulation in which the state *can* criminalize adult consensual sexual behavior and incentivize certain family structures on the basis of morality.

The rhetorical positioning of the majority in this case is no surprise. Courts frequently work to make their decisions appear centrist, non-controversial, and logically flowing from existing legal doctrines, even when overturning earlier rulings. Depicting homosexual acts as connected to sympathetic expressions of love, asserting that the case will not upend other moral and criminal condemnation of sexual outsiders, and reaffirming traditional incentives and punishments regarding the state's preferred family structure, should all be expected from a court making the significant move of overturning a ruling that is not even twenty years old. What is, or should be, more surprising and disturbing, is an embrace of state regulatory power regarding sexuality and family structure by movements that were, at their inception, opposed to such coercion. In our view, the acceptance of state regulation of sexuality, gender, and family structure by LGBT organizations focused on formal legal equality for lesbians and gay men stems from an incomplete conception of the operations of power.

Given that disciplinary power coagulates the human subject as a specific body that performs specific acts, it might be tempting to understand *Lawrence* as a triumph against disciplinary power. Such a read would emphasize how *Lawrence* decriminalizes an act collapsed with the identity of the homosexual and valorizes a formerly abject subject position.<sup>25</sup> However, as the contradictions in the decision make clear, *Lawrence* does not challenge the mechanics of discipline itself

REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 65 (Matt B. Sycamore ed. 2004). Califia argues that the *Lawrence* ruling's decriminalization barely scratches the surface of the widespread injustices still faced by people labeled as sexual deviants. *Id.* He discusses BD/SM practitioners losing custody of their children, increasingly rigid "obscenity" laws being used to confiscate pornography, increased surveillance under the U.S. Patriot Act, the continuing inability of transgender people to obtain identification matching their gender identity, and the classification of those who violate sex and gender norms as mentally ill. *Id.* Given these enduring and severe coercive practices targeting "freaks," he suggests that the celebration of *Lawrence* as a victory for gay rights should be tempered. *Id.*

24. Rubin, *supra* note 22, at 15.

25. Patricia Ticineto Clough outlines the connections between disciplinary mechanisms and identity-based politics and argues that discipline works "through a politics of representation, by which familial and national ideological apparatuses function to constitute subject identities, and where resistance to these identities, and the transgression of the institutional norms that support them, is possible, even enabled, by the instability of the strategies of disciplining." Patricia Ticineto Clough, *Future Matters: Technoscience, Global Politics, and Cultural Criticism*, 22 SOCIAL TEXT 1, 14 (Fall 2004).



even if it shifts the terms of subjectification. Hence, despite its celebration as a moment of progress towards sexual liberation, *Lawrence* actually serves as an occasion to reaffirm the rights and power of the government to employ coercive tactics for maintaining regulatory norms of gender, sexuality, and family structures. A more cautionary or suspicious read might understand *Lawrence* as a marker of the passing of the significance of disciplinary power.<sup>26</sup> In other words, *Lawrence* may suggest a loosening of certain disciplinary mechanisms—legal holds on some sexual acts—because those mechanisms are no longer sufficient or efficient for managing bodies and resources. Legal claims to the body may be simultaneously taking place at registers other than the legal individual who is apparently freed in this decision. To argue that the U.S. legal system might not care too much about defining and regulating homosexual acts is not to say that it is less interested in regulating sexual and family norms through punitive and violent systems of coercion, even if it is less phobic of a certain, limited class of homosexuals. An increasing disinterest in some aspects of discipline indicated by *Lawrence* should draw our attention to how power is regrouping in different techniques that not only address the queer as a disciplined subject, but ensure the domination of some queers nonetheless. This, then, is to call for another model of power for interpreting contemporary queer and trans political oppression and politics.

### III. GAY MARRIAGE AND BIOPOLITICS

To explore this other model of power, which we discuss in terms of biopolitics, it might be useful to look at what is taken as another defining battle in gay politics today. Of course we are not the only ones to see links between sodomy and marriage, as the above discussion of *Lawrence* makes clear. It is also not surprising that gay politics might help us move from an analysis of discipline to an analysis of biopower, as Foucault suggested that sexuality might have been an increasingly important site of investment because it hinges between the disciplinary and the biopolitical.<sup>27</sup>

A biopolitics-based analysis allows us to engage in critical thinking about the failures of the priorities of the most well-resourced LGBT organizations, and their failures to address the most pressing and dangerous issues facing queer and trans people. Our concerns with this “LGBT agenda” become clear when viewed alongside what is claimed to be the most celebrated incendiary moment in U.S. queer struggles, the Stonewall Uprising.<sup>28</sup> On the night of June 27, 1969,

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26. Michael Hardt suggests this in *The Withering of Civil Society*, 45 SOCIAL TEXT 27 (Winter 1995).

27. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 251-252 (David Macey trans., 2000) [hereinafter FOUCAULT, SOCIETY MUST BE DEFENDED].

28. See JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES (1983); MARTIN DUBERMAN, STONEWALL (1993); Michael Bronski, *Sybil Rivera: 1951-2002, No Longer on the Back*

in New York City, low income gender and sexual outsiders—many of whom were people of color and people of non-traditional gender identities—rebelled against their systemic targeting by police. Participants in Stonewall were struggling to survive in a city that not only criminalized their very identities, but also excluded them from economic and educational opportunity, housing, and bar protection from state and institutional violence. The people at the Stonewall that night were those who lived day-to-day on the front lines of police violence, many because they earned a living through informal street economies and found community in night life havens like the Stonewall bar. In the decades since that time, we have seen the consolidation of legitimacy and power in organizations whose leadership, priorities and strategies sharply depart from these origins.

A significant force of change has been the creation of funded organizations led primarily by white lesbians and gay men with economic and educational privilege that claim to represent a broad-based movement for LGBT rights.<sup>29</sup> However, the agendas of those organizations have come to focus on the rights of people with occupational, educational, gender, and race privilege and to marginalize or ignore the struggles of transgender people, queer and trans people of color, and queer and trans poor people.<sup>30</sup> These organizations have fought for the rights of gay youth to join the Boy Scouts,<sup>31</sup> but virtually ignored the struggles of queer and trans youth who remain over represented and abused in the juvenile justice system. They have fought for the rights of gays and lesbians to pass their apartments on to one another<sup>32</sup> and to rent or buy property without facing discrimination,<sup>33</sup> but have provided no assistance to queer and trans people struggling in blatantly homophobic and transphobic homeless shelter systems

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of the Bumper, available at <http://zmag.org/Zmag/articles/april02bronski.htm>.

29. Edmund White has written about how AIDS played a role in increasing conservative leadership in the struggle for gay rights, in part because many of the sex radical leaders of the 1970s died and a new leadership emerged.

Whereas the only visible gay leaders in the 1970s had been the leftist liberationist crowd, AIDS in the 1980s flushed out of the woodwork conservative, middle-class men, the ones who'd had no stake in coming out previously but who now were forced by disease out of the closet. Once out, these middle-class men seized power and know how to wield it. They brought to the gay movement their own conservative values—including a respect for the family and for marriage.

Edmund White, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 18 [hereinafter White].

30. Essex Hemphill has remarked on the history of the institutionalization of the LGBT rights movement excluding the concerns of black gay men, noting that the “white gay community of the 1980’s was not seriously concerned with the existence of Black gay men except as sexual objects,” ESSEX HEMPHILL, CEREMONIES 38 (1992).

31. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

32. *Braschi v. Stahl Assoc.s*, 544 N.Y.S.2d 784 (1989).

33. Fred Sternbach, *Fair Housing*, LAMBDA UPDATE: OUR BIGGEST VICTORY YET, at 12 (Civil Rights News for Lambda Legal, Summer 2003).

nationwide and in the most well-funded housing program for the poor, the criminal justice system. They have waged battles on behalf of gay men who want to share frequent flyer miles with their partners,<sup>34</sup> and lesbians who want a couple's rate for country club membership,<sup>35</sup> but have entirely ignored the plight of queer and trans prisoners who face shocking violence with no relief. The interventions of the LGBT movement have moved away from Stonewall's original protest of police brutality and toward a push for hate crimes legislation, which increases the punishing power of an overtly racist criminal justice system, and has never been determined to deter hate crimes or increase safety.<sup>36</sup> Overall, the "gay agenda" has narrowed increasingly over the years, with occasional tokenization of people of color, transgender people, and other excluded groups, to the point where its most core goals now seem utterly aligned with state agendas to regulate sexuality and family structure.

We take recent and ongoing campaigns for same-sex marriage to exemplify the narrow scope of this agenda and its collusion with the legal framework instated by *Lawrence*. "Marriage Equality" itself is an ironic term, given that the legal designation of marital status serves to differentiate between and to privilege select family structures and sexual choices, and our critique of the push for same-sex marriage and the consolidation of LGBT movement resources towards that goal develops from an assumption that marriage itself institutes and distributes inequalities.<sup>37</sup> We see in current public debates about gay marriage an inability to move from a disciplinary to a biopolitical model. For some time, marriage has been understood as a mechanism of disciplinary society, whether or not descriptions have always been couched in those exact terms.<sup>38</sup> The rise of legal

34. Steinbach, *supra* note 33, at 7.

35. Lambda Legal filed *Koebke v. Bernardo Heights Country Club* in October, 2004. For information about the case, see <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1542>. See also Marcia Chambers, *At Country Clubs, Gay Members Want All Privileges for Partners*, N.Y. TIMES, Sept. 21, 2003, at A31.

36. See Craig Willse & Jane Spade, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, THE CHICANO-LATINO L. REV. 38 (1999) [hereinafter Willse & Spade, *Hate Crimes*].

37. While same-sex marriage redresses an inequality between gays and straights, it reinforces inequality between married people and unmarried people. It will force homosexuals, as it now forces heterosexuals, to sign on to a particular state-sponsored, religion-based definition of their legal relationship if they want full rights as parents and members of households. The desire for recognition and "normality" that motivates many of its proponents inescapably implies that the relationships of the unmarried and those that do not conform to conventional "family values" are less worthy of respect.

Ellen Willis, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 16.

38. For an interesting discussion of the absence of an explicitly gender analysis in Foucault's work, and suggestions for feminist applications to understand something like marriage in Foucauldian terms, see JANA SAWICKI, *DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE*

institutions of marriage corresponds with the birth of disciplinary society.<sup>39</sup> Clearly, the medico-juridical regulation of marriage (the management of biological and economical reproduction by states and doctors)<sup>40</sup> works towards the solidification of the enclosure of the family, guaranteeing proper relationships between sexes within the home, and towards the channeling of all adult bodies into such familial arrangements. We see a recognition of the operations of discipline in critiques of marriage as a sexist institution (reproducing the subordinate status of wives, for example, in property relations) as well as in critiques of how it enforces normative ideals, rewarding those who meet the demands of discipline and capital for proper reproductive arrangements.

An implicit or explicit understanding of disciplinary power not only underwrites critiques of marriage, but also runs through discourse supporting gay marriage. Advocates for gay marriage will acknowledge that marriage is a flawed institution, and the flaws they point out are those very techniques of discipline described above—its exclusionary principles and its enforcement of ideologies of gender inequality.<sup>41</sup> Advocates, however, set aside these disciplinary concerns,

BODY (1991).

39. The family cell, in the form in which it came to be valued in the course of the eighteenth century, made it possible for the main elements of the deployment of sexuality (the feminine body, infantile precocity, the regulation of births, and to a lesser extent no doubt, the specification of the perverted) to develop along its two primary dimensions: the husband-wife axis and the parents-children axis.

FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 8, at 108.

40. Decisions in cases concerning the legitimacy of the marriages of transsexual women often demonstrate the underlying gender-regulatory notions that are at the root of the marital contract. For example, in *M.T. v. J.T.*, the court focuses on the capacity of the woman's surgically constructed vagina when determining whether she is a woman for purposes of marriage. *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976). The court spares no detail:

The examination of plaintiff before the operation showed that she had a penis, scrotum and testicles. After the operation she did not have those organs but had a vagina and labia which were "adequate for sexual intercourse" and could function as any female vagina, that is, for "traditional penile/vaginal intercourse." The "artificial vagina" constructed by such surgery was a cavity, the walls of which are lined initially by the skin of the penis, often later taking on the characteristics of normal vaginal mucosa; the vagina, though at a somewhat different angle, was not really different from a natural vagina in size, capacity and "the feeling of the walls around it." Plaintiff[s] . . . vagina had a "good cosmetic appearance" and was "the same as a normal female vagina after a hysterectomy." Dr. Ihlenfeld had seen plaintiff since the operation and she never complained to him that she had difficulty having intercourse. . . . [H]e no longer considered plaintiff to be a male since she could not function as a male sexually either for purposes of "recreation or procreation."

*Id.* at 206.

41. This line of argument often posits gay marriage as one step towards a state of justice, an

citing broader access to the institution and the rights it guarantees as a form of progress.<sup>42</sup> Justification for supporting the disciplinary institution of marriage is grounded in the economic and social entitlements attached to it.<sup>43</sup> Furthermore, the symbolic significance of marriage is cited in family-values terms by mainstream gay rights groups that argue that access to entitlements such as property rights represents a legitimization of the formerly abjectified identity of the homosexual;<sup>44</sup> the fact that *Lawrence* addresses the validity of homosexual relationships attests to this. However, our argument is that these social and economic entitlements are mechanisms of biopolitics, and that far from marking an incremental liberation of the disciplined subject, they in fact mark operations of power that discipline cannot fully describe.

What then do we mean by biopolitics? If discipline operates at the level of the body of the individual subject, biopolitics operates at the level of the mass of bodies or the population. Biopolitics is characterized by the production of a population with overall “characteristics of birth, death, production, illness, and so on.”<sup>45</sup> If disciplinary mechanisms are discursive (in legal or medical contexts, for example), biopolitical mechanisms are statistical, grounded in collections and calculations of data.<sup>46</sup> Some aspects of biopolitics to which Foucault alludes

impartial and imperfect transition in a history of progress. So, while the flaws of marriage are acknowledged, they are deemed less important than what is gained. Evan Wolfson describes this as “patchwork” advances in arguing that all gays should support marriage. Evan Wolfson, *Is now really the right time to fight for the freedom to marry?*, at

[http://www.freedometomarry.org/document.asp?doc\\_id=2438](http://www.freedometomarry.org/document.asp?doc_id=2438).

42. See White, *supra* note 29, at 18.

Until a year ago I would have sniffed at the gay pro-marriage movement as just one more effort on the part of gay neocons to assimilate with their white middle-class, straight friends and relatives. . . . The question for me is no longer one of lifestyle but rather of civil rights. Lesbians and gays should have all the same rights as straights. Some of the rights we gained earlier were peripheral (and often reversible), whereas marriage goes right to the heart of national concepts of community and the future.

This is folded into a narrative of gay rights as a “civil rights” struggle, a position critiqued by Kenyon Farrow. See Farrow, *supra* note 6.

43. The Mississippi American Civil Liberties Union estimates that civil unions in Massachusetts will extend 350 benefits to partners, and marriage would extend about another 1400 rights. See [http://www.msacclu.org/marriage\\_benefits.htm](http://www.msacclu.org/marriage_benefits.htm). “According to the GAO, there are 1,138 federal statutes in which marital status factors into benefits and rights.” For Richer or Poorer: For All but Royalty, Weddings Were Once Modest Affairs; Now They Are a \$50 Billion Annual Industry, MOTHER JONES, Jan./Feb. 2005, at 24-25.

44. Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 144 (Mary Ann Mason et al. eds. 2nd ed. 2003). See also JUDITH STACEY, *in THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POST MODERN AGE* (1996).

45. FOUCAULT, SOCIETY MUST BE DEFENDED, *supra* note 27, at 242.

46. *Id.*

include the census and health insurance programs.<sup>47</sup> Biopolitics depends upon generalizations and forecasts, and therefore does not concern itself with the individual body, as would discipline.<sup>48</sup> The disciplining of the family that arranges sexed relations between bodies towards reproduction makes possible a broader and more general regulation of the birthrate across a mass of familial enclosures.<sup>49</sup> In other words, if discipline manages the family in terms of gendered relations, including reproduction, biopolitics manages the nation in terms of phenomena such as population patterns.

As Foucault writes, the purpose of statistical measures, for example, “is not to modify any given phenomenon as such, or to modify a given individual insofar as he is an individual, but, essentially, to intervene at the level at which these general phenomena are determined, to intervene at the level of their generality.”<sup>50</sup> The forces that discipline arranges within the family, biopolitics massifies across families and throughout society.<sup>51</sup> Disciplinary power, then, concerns the individual subject, how the subject sees himself or is seen by society, and what he is or is not allowed or encouraged to do based on his subject position.<sup>52</sup> Biopolitics concerns the distribution of life chances across the population, the collection of data about this distribution and the regulation of resources at this general level.<sup>53</sup>

A biopolitical analysis, therefore, requires moving away from only understanding marriage as an institution, or an enclosure, and beginning to think of it as a technology or mechanism for channeling resources and populations. A disciplinary analysis of gay marriage cites its ideological struggles—attempts to change the meaning of that cultural institution. Similarly, an analysis of *Lawrence* in terms of discipline emphasizes ideological changes in the identity category of the homosexual, as it comes to signify a member of a committed partnership. A biopolitical analysis looks to a register other than ideology or meaning, and draws attention instead to how marriage serves to set populations in relation to resources such as medical insurance and how that impacts life chances. Thus, while advocates of same-sex marriage suggest it will challenge the very institution of marriage and its ability to maintain ideological norms regarding gender and sex,<sup>54</sup> we argue that the legalization of same-sex marriage simply redirects and intensifies biopolitical functions of the state.

47. FOUCAULT, *supra* note 27, at 243.

48. *Id.*

49. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 8, at 107.

50. FOUCAULT, SOCIETY MUST BE DEFENDED, *supra* note 27, at 246.

51. *Id.*

52. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 8, at 47-48.

53. This is also outlined by Gilles Deleuze, *Postscript on the Societies of Control*, OCTOBER 59, at 3 (Winter 1992).

54. See LAMBDA UPDATE: LEADING THE CHARGE FOR MARRIAGE (Civil Rights News from Lambda Legal, Summer 2004).

We see indications of a biopolitical critique of marriage in feminism and women's rights movements, but this analysis has been neglected by LGBT organizations that both celebrate *Lawrence* and seek gay marriage rights. Those feminists and other thinkers and activists understand marriage as fundamentally an institution of private property originally designed to both make women into the property of men and to make women's property into men's property.<sup>55</sup> Though this legal-economic function of marriage may have historically leaned on ideological (or disciplinary) justification about proper roles and activities of men and women,<sup>56</sup> we can see clearly how it addresses sub-populations (those marked as male and those as female) in terms of access to resources, such as property claims. The first social welfare programs in the United States were entirely shaped around traditional notions of male and female citizenship. Male citizenship was recognized in relation to military service to the republic, and women's citizenship was defined by their marriage to men who had rights to civic participation that women lacked, including suffrage, the right to serve on juries, and the right to claim American nationality independent of marital status.<sup>57</sup> The first legal rights that women won with the passage of the Married Women's Property acts and creation of maternal child custody preference again reinforced women's role as wife and mother and the connection of resource allocation to a family role.<sup>58</sup> Even the first wage and hour laws resulted from protectionist legislation that framed women as the weaker sex, needing protection in the workplace in order to preserve their childbearing abilities.<sup>59</sup> In light of this, feminists have fought long and hard to reduce the legal significance of marriage in order to increase the articulation of independent citizenship for women and to reduce the significance of marriage as a coercive institution. They have further sought to make it easier to get out of undesired marriages, understanding that obstacles to divorce made it more difficult for women to exit economically dependent and, too often, violent relationships with men.<sup>60</sup>

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55. For an historical analysis, see, e.g., MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE AND THE LAW IN VICTORIAN ENGLAND, 1850-1895* (1993).

56. *Id.*

57. Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State in WOMEN, THE STATE, AND WELFARE* 92 (Linda Gordon ed. 1990).

58. *Id.* at 97.

59. *West Coast Hotel v. Parrish*, 300 U.S. 379, 394-5 (1937).

60. In her remarks at the Solidarity Socialist Feminist Retreat in 2003, Ann Glatt connected Bush's current push to coerce women on welfare into marriage to recent efforts by the right wing to roll back the advances that have been made in divorce law to make it easier for people to get out of marriages, making clear the use of marriage as a specific strategy for limiting regulating sexuality and family structure. Ann Glatt, Oregon Human Rights Coalition, Remarks at Solidarity Socialist Feminist Retreat, May 30-June 2, 2003, Sonoma, CA. A recent case illustrates these dangers. In December 2004, the Associated Press reported that a judge in Spokane had rescinded a divorce granted by a commissioner upon finding out that the woman seeking the divorce was pregnant, citing a Washington state law establishing that any child born within 300 days of a divorce is

Not surprisingly, these battles rage on, and low-income women and women of color remain the primary targets for the coercive regulation of gender, sexuality, and family structure through marriage. The welfare reform debates of the mid-1990's focused heavily on the sexual choices of welfare moms, myths about their continued childbearing outside of marriage, and an overblown panic about teenage pregnancy, all of which supported reduction in benefits that primarily impacted women of color.<sup>61</sup> Recently, George W. Bush proposed that \$1.5 billion of welfare money be dedicated to "healthy marriage promotion"; that is an increase in coercive measures pushing low-income women into marriage.<sup>62</sup> These policies not only have a disproportionate effect on poor queer women,<sup>63</sup> who are often forced to choose between revealing the paternity of their children or losing benefits,<sup>64</sup> but also severely affect women who are survivors of domestic violence.<sup>65</sup> In redirecting federal monies to correcting and controlling the sexual behavior of poor women, such policies reinforce a notion that poverty results from the moral failings of the poor, rather than from economic, biopolitical arrangements that require a pool of unemployed laborers to maintain low wages and uphold the consolidation of capital.<sup>66</sup> While we might expect an alliance between poor women and queer and trans folks, all of whom bear the brunt of policies designed to coerce people into a limited notion of family structure, instead we find LGBT organizations currently aligned with George W. Bush's position, advocating loudly that marriage is the backbone of society, an

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presumed to fathered by the husband in the divorce. The husband in the case had been convicted of abuse in 2002, and had not contested his wife's filing for divorce, but the judge ruled that no divorce could be granted until paternity was established. *Washington State Judge Refuses to Let Pregnant Woman Divorce*, ASSOCIATED PRESS, Washington, D.C., Dec. 2004.

61. Holloway Sparks, *Queens, Teens and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 171 (Sanford F. Schram et al. eds. 2003) at 188-89.

62. Current Republican proposals for the reauthorization include an increase in work requirements to 40 hours a week and \$200 million in federal grants plus \$100 million in state matching grants for marriage promotion programs. Jonathan Riskind, *House Set to Revisit Welfare Reform this Week: Legislators to Vote on Bill Very Similar to One Passed in May*, COLUMBUS DISPATCH, Feb. 12, 2003, at A. See also Sharon Tubbs & Thomas C. Tobin, *When Government Wants Marriage Reform*, ST. PETERSBURG TIMES, Feb. 8, 2003, at D; also available at <http://falcon.arts.cornell.edu/ams3/npmbasis.html>.

63. See Richard E. Blum, et al., *Why Welfare is a Queer Issue*, N.Y.U. REV. L. & SOC. CHANGE 26, 207 (2001).

64. *Id.*

65. "A 1996 study conducted by the Taylor Institute asserts that up to 80% of women receiving public assistance may be survivors of, or are attempting to escape, violent relationship." available at [http://www.opdv.state.ny.us/health\\_humsvc/welfare/fvo.html#client](http://www.opdv.state.ny.us/health_humsvc/welfare/fvo.html#client). Because economic coercion is often a part of domestic violence relationships, tying receipt of public benefits to incentives to marry or stay in marital relationships further endangers women.

66. FRANCIS FOX PIVEN & RICHARD CLOWER, *REGULATING THE POOR* (Pantheon 1971).



essential right that should not be denied to same-sex couples, and, implicitly, a reasonable method of distributing life chances such as child custody and health care.

Framing same-sex marriage in terms of healthcare access is particularly misleading, and similarly suggests an embrace of the status quo of uneven distribution of health chances within a biopolitical context.<sup>67</sup> Campaigns for state legislated same-sex marriage frequently refer to employment-based health care benefits and hospital visitation rights as primary examples of the marital benefits to which those campaigns would expand access. However, the reduction in full-time jobs with benefits and the discrimination queer and trans people face in job markets both suggest that fewer and fewer queer/trans workers have access to employment-based health care benefits.<sup>68</sup> Given this, marriage rights would not seem the best strategy for insuring health care to our communities. Furthermore, these same marriage-focused LGBT organizations have given no indication of a commitment to broad-based struggles for increased health care access for all queer and trans people; they have failed to direct resources towards opposing cuts in Medicaid and Medicare; and they have neglected opportunities to build alliances with social justice organizations focused on single-payer health care system proposals. Forming such alliances would force recognition that the distribution of resources, such as health benefits, evidences vast inequalities in terms of class and ethnicity; the biopolitical analysis we seek to develop explains this as the formation of populations with access to life resources, and populations without such resources. The concern about hospital visitation and end of life health decisions also seems in many ways overstated, since health care proxy forms and other simple legal agreements (usually basic forms requiring minimal legal assistance) can resolve these problems. However, providing direct services and assistance to queer and trans people who cannot afford private legal advice has never been a priority of the institutions leading the "marriage equality" battle. They are busy representing country club members.

The underlying assumptions and principles of the struggle for same-sex marriage mirror those of the *Lawrence* majority: an acceptance of existing criminal and civil incentives for compliance with regulatory norms regarding sexual practices and family structures.<sup>69</sup> This LGBT agenda asks only for what the

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67. The U.S. census bureau estimated that 43.6 million Americans did not have health insurance in 2002, an increase of 2.4 million from 2001, *available at* <http://www.census.gov/prod/2003pubs/p60-223.pdf>.

68. This certainly correlates with the elimination of union jobs in the U.S. According to the U.S. Department of Labor, 12.9% of wage and salary workers were union members in 2003. In 1983, 20.1% of wage and salary workers were in unions, *available at* <http://www.bls.gov/news.release/union2.nr0.htm>.

69. Laura Kipnis has written that statistical evidence of the dissatisfaction with marriage that so many married Americans (40% in the study she cites) feel suggests a larger political significance to the institution of unhappy marriage.

Court grants in that case: a slight shift in the terms of that coercive framework, creating inclusion for people who would benefit from marriage but for their desire to partner with a person of the same sex. In this sense, such work upholds marriage as a mechanism for organizing populations in relation to resources for life chances. While same-sex marriage would redirect some resources towards those people who have enough economic privilege<sup>70</sup> to benefit from marriage (money to inherit, private health insurance benefits to share) but who can't currently marry, it does not disrupt the distribution of economic resources themselves.<sup>71</sup>

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[W]hat if luring a populace into conditions of emotional stagnation and deadened desire were actually functional for society? . . .

. . .

If modern marriage has transpired into a social institution devoted to maximizing obedience and the work ethic while minimizing freedom and mobility, to renouncing excess desires (and whatever quantities of imagination and independence they come partnered with) in exchange for love and companionship, clearly there are social advantages here: The psychology of marital stasis is remarkably convergent with that of a cowed work force and a docile electorate. Who needs a policeman on every corner with such emotional conditions in effect?

Laura Kipnis, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 19. She suggests that if most people leave marriages because of "wanting more freedom," gay marriage as a political demand seems depressingly non-liberatory.

70. [Marriage] favors the interests of the propertied and privileged. That is why marital stability correlates with employment, income and education, particularly for men. Admitting same-sex couples to this primarily bourgeois club will likely intensify discrimination against the unmarried and their kin—the explicit goal of marriage-promotion campaigns now directed at welfare recipients. It will replace sexual-orientation discrimination with even harsher discrimination by marital status.

Judith Stacey, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 25.

71. Certainly, family recognition (child custody and visitation rights specifically) is also an important aspect of marriage, and the recognition of same-sex marriages would allow certain people to secure their rights to their children through the law. However, while it would assist certain individuals and families who are currently cruelly deprived of recognition of their connection to their children, it still maintains the broader coercive framework, punishing those who don't submit to marriage by continuing to deprive them of family recognition. We support broader frameworks of family recognition reform, many promoted by feminist and queer organizations strongly before the 'gay marriage' battle eclipsed them, which focused on flexible, individualized and contextual possibilities for legally enforceable agreements related to child rearing. Many other communities have long histories of being deprived rights to procreation or family recognition or of having their children taken away from them, including Native Americans, mothers on public assistance, people with disabilities, and prisoners. In the case of prisoners, these issues have become even more significant in recent years as the rate of incarceration has skyrocketed for women due to Drug War

## IV. RAISING THE STAKES

The current agenda of the well-resourced LGBT movement does not only put forward too-narrow demands; the limits of the agenda itself derive from an underlying conception of the operations of power that suggests these as the most reasonable demands for achieving formal legal equality. Again, organizing towards formal legal equality fundamentally departs from the early calls for “liberation” in the Stonewall era. Two potential frameworks for understanding discrimination might be said to exist as options for this work. One would suggest that discrimination or oppression is fundamentally an individual problem: a person is denied an opportunity to work, or to live somewhere, or to access benefits from the state based on a personal quality that has nothing to do with that activity (such as sexual orientation). This model of discrimination fits with an analysis of how discipline targets the individual subject. Within such a framework, the obvious remedy is individual rights—the right not to be denied access to a job or apartment, for example, on the basis of one’s sexual orientation. Another view of discrimination or oppression suggests that it is a condition that situates people and affects their life chances, and that it happens systemically, not just to individuals, but to entire communities or populations,

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policies that criminalize poverty, and as new laws have terminated incarcerated mothers’ parental rights as early as 18 months after incarceration. See CORRECTIONAL ASSOC. OF N.Y., WOMEN IN PRISON PROJECT, THE EFFECTS OF IMPRISONMENT ON FAMILIES, available at <http://www.correctionalassociation.org/publication/Children-of-Incarcerated-Parents.pdf>; Ann Farmer, *Mothers in Prison Losing All Parental Rights*, WOMEN’S ENEWS, June 21, 2002, available at <http://www.womensenews.org/article.cfm/dyn/aid/947>; Nel Bernstein, *Terminating Motherhood: How the Drug War Has Stamped an Entire Class of Parents as Permanently Unfit*, available at <http://www.asentenceoftheirown.com/Essays%20-%20Terminating.html>. These struggles of other communities facing government attack on familial relationships and child rearing rights suggest a possibility for significant solidarity work between communities, a possibility foreclosed by the decision to instead seek marriage rights through a rhetoric that further stigmatizes unmarried people, strengthens regulatory family norms, and fails to think critically about race. As Priya Kandaswamy noted in a recent interview when asked whether gay marriage is important because it will protect parental rights:

In the U.S., race is the strongest determinant of whether or not the state chooses to recognize your parental ties. Black families are the most likely of any racial group to be disrupted by Child Protection authorities, and 42 percent of all children in foster care in the U.S. are black. If being married doesn’t protect straight black families from having their children taken away, it’s unlikely that it will protect queer black families.”

*Is Gay Marriage Racist: A Conversation with Marlon M. Bailey, Priya Kandaswamy, and Mattie Udora Richardson*, in THAT’S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 87, 89 (Matt B. Sunstien ed. 2004). During that same interview, Marlon M. Bailey noted: “We should not assume, in a racist, sexist, heterosexist, and homophobic society, that all people will have access to the so-called rights and privileges that marriage purports to offer.” *Id.*

creating an uneven distribution of life chances; this fits with biopolitics as outlined by Foucault and recapitulated in our paper. The remedy under the latter view is redistribution, and entails a critical view of the status quo such that removing barriers to an individual's access to rights or benefits will not be enough.<sup>72</sup> It also requires an LGBT movement that struggles for racial and economic justice.

In our view, the individual rights perspective has been chosen as the LGBT agenda, and redistributionist liberation struggles have been undermined and cast aside. It is the choice to fight for hate crimes laws, framing violence against our community in terms of individual criminal acts rather than decades of targeted police harassment and violence.<sup>73</sup> It is the choice to bring individual law suits for rich queers denied the rights to pass on apartments to their partners, but to take no stand in the struggle for affordable housing, shelter access, or the elimination of public housing programs. It is the choice to frame health care in terms of a battle for marital rights so that those few queers with private health insurance can add their partners, but to ignore the disproportionate numbers of queer and trans people who rely on declining Medicaid and Medicare programs for basic care, and those queer and trans people in state custody who are denied medical care those routinely.<sup>74</sup> It is the choice to virtually ignore the most vulnerable members of

72. The failures of formal legal equality to address systemic maldistribution of power have been well-articulated by Critical Race Theorists. See A.D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: a Critical Review of Supreme Court Doctrine in CRITICAL RACE THEORY THE KEY WRITINGS THAT FORMED THE MOVEMENT 29* (Kimberle' Crenshaw et al., eds. 1995) [hereinafter CRITICAL RACE THEORY]. See also Cheryl I Harris, *Whiteness as Property, in CRITICAL RACE THEORY*, at 276.

73. See Willse & Spade, *Hate Crimes*, *supra* note 36.

74. Marlon M. Bailey argues,

The crux of this movement is led by white, middle-class gays and lesbians who would largely benefit from same-sex marriage. . . . What these white queers are not concerned about. . . is the vast majority of people of color who do not enjoy such social mobility and who are largely disenfranchised, and who need health care and don't have it, etc.

*Supra* note 71, at 91. Mattie Udora Richardson echoes this concern, stating

This question about hospital visitation [in the argument for supporting same-sex marriage] is always linked to the issue of gaining access to spousal health insurance. I think it's ridiculous to have health care contingent on employment status. . . . I'd like for society to truly honor families in their diversity and to actually have a commitment to the health and well-being of everyone—regardless of citizenship, marital and employment status.

*Id.* at 89. Following a similar track, asking that we take one step further back from analyzing the benefits of same sex marriage by questioning the distribution of privileges overall, Priya Kandaswamy responds to the argument that same-sex marriage will be good for queer immigrants in the same interview.

It is true that theoretically if you and your partner were able to have a legally recognized marriage, it may have allowed your partner to remain in the

our “community,” including immigrants and prisoners.

This agenda based on individual rights consistently articulates the single issue of discrimination on the basis of sexual orientation in a way that limits the impact of its work to those people for whom sexual orientation is the only or one of very few vectors of discrimination. It takes the status quo as a given, and argues only for formal equality within the existing distribution of life chances.<sup>75</sup> For those reasons, many of its wins are primarily symbolic—a shift in ideological constructions of proper sexual behavior, for example. From such a viewpoint, decriminalization of sodomy statutes becomes the most important legal victory possible, despite the fact that a very small number of queer and trans people are incarcerated for sodomy, but a disproportionate number are incarcerated for crimes of poverty such as loitering, prostitution, and possession or sale of illegal drugs. Both in its legal and rhetorical strategies, this agenda upholds the status quo of maldistribution, and continually asserts, as did the *Lawrence* Court, that its demands will not disturb that status quo. For example, Lambda Legal’s recent “Leading the Charge for Marriage” publication frames their outpouring of resources toward the struggle for same-sex marriage as an issue of increasing choice for same-sex couples.<sup>76</sup> “We’re fighting for lesbian, gay, bisexual and transgender people to have the same choices as everyone else: the choice to be honest about who we are; the choice to start a family; the choice to live where we

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country. However, I think that there are a couple of important things to consider before taking this as a reason to endorse gay marriage. The first question that I would ask you is: Was your partner really deported because the two of you couldn’t get married? Or was s/he deported because of racist immigration policies that readily exploit immigrant labor while at the same time forcing millions of immigrants to live in constant fear of deportation because the state refuses to grant them legal status in this country?

*Id.* at 90.

75. Last year, San Francisco Mayor Gavin Newsom was applauded by the gay marriage advocates as he endorsed their struggle. He is the same politician against whom a multi-racial, multi-income, queer and straight alliance fought during his bid for office because of his extreme anti-poor and anti-welfare views. His endorsement of these two positions, against poor people, and for gay marriage, demonstrate the fact that gay marriage does not challenge the overwhelming maldistribution in our society which Newsom supports and works to increase. The benefits of marriage being primarily property rights, this policy change does not redistribute wealth but rather enters same-sex couples into institutions that have been designed for centuries to ensure the maintenance of the wealth gap, such as inheritance. See Matt B. Sycamore, *Breaking Glass: An Introduction*, in *THAT’S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 5 (Matt B. Sycamore ed. 2004); Tommi A. Mecca, *It’s All About Class*, in *THAT’S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 21 (Matt B. Sycamore ed. 2004).

76. Kevin M. Carthcart, *Moving Light Years Ahead Toward Full Equality*, *LAMBDA UPDATE: LEADING THE CHARGE FOR MARRIAGE*, at 2 (Civil Rights News From Lambda Legal, Summer 2004).

want; the choice to get married.”<sup>77</sup> This assertion of free will masks the coercive functions of state, relies on an imagined “everyone else” who is free to make such choices as long as they are not lesbian, gay, bisexual and transgender, and presumes that all or even most of “us” will be able to access those choices once marriage is legal.<sup>78</sup>

We envision a broader framework for queer and trans rights, one that makes redistribution a central goal. Some of the benefits currently conferred upon married couples, such as the ability to immigrate to the U.S. and the recognition of ties to children produced in a family, are no doubt fundamental to human dignity, but expanding them ever-so-slightly to include a new class of people, and strengthening the legitimacy of state conferred marital status, rather than working on deeper reforms of those instances of maldistribution, is short-sighted and unjust. It is not simply what the sodomy decriminalization/same-sex marriage “rights” package does that concerns us, but what it fails to do. The allocation of virtually all the resources of the institutionalized LGBT movement toward these goals, and the abandonment (increasing as the marriage battle heats up) of broader goals that affect more queers, especially those in more dire circumstances, is unacceptable.

The most just approach to opposing gender and sexual orientation oppression would be to devote resources first to the struggles of those who experience the greatest impact of that discrimination: people surviving in prisons, people in foster care and juvenile justice, people accessing health care through Medicaid, people working in low-wage jobs or surviving on benefits, people struggling against immigration policies, people experiencing the intersections of racism and sexual and gender coercion. Those locations, where the most violent effects of these coercive systems occur, should be the initializing points of action, as they were at Stonewall, both because of the urgency of those quests for survival and because they are most instructive of the operations of power. Additionally, these would be the proper starting points of our work because they would make clear the location of our alliances and our place in a struggle with others who bear the brunt of state and institutional violence. Our messages about family integrity should echo those of prison abolitionists fighting to preserve the parental rights of incarcerated mothers, not of George W. Bush as he articulates sexist and heterosexist moral judgments against welfare mothers. As we see the increasing wealth gap in the U.S. and the increasing consolidation of capital worldwide, fueled by policies decreasing protections of workers, the natural environment, and aimed at criminalizing poverty and promoting white supremacy, we should recognize that a necessary result will be a growing resistance of rising numbers of people endangered by these changes. It is with them that we should cast our lot and expect to be victorious.

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77. Cathcart, *supra* note 76, at 2.

78. See Carol Queen, *Never a Bridesmaid, Never a Bride*, in *THAT’S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 85 (Matt B. Sycamore ed. 2004).

