

PUBLIC SEX, SAME-SEX MARRIAGE AND THE
AFTERLIFE OF HOMOPHOBIA ©

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Consider two events that dominated the news in the summer of 2011: Anthony Weiner resigned from Congress after it became public that he had been tweeting to some of his female Twitter followers photos of himself in various stages of undress, and New York State became the largest and most significant state in the U.S. to grant same-sex couples the right to marry. Two iconic images captured this juxtaposition: a thumbnail of Weiner's bulging briefs and wedding cakes topped with same-sex couples.

While these two events may bear no strict causal relation to one another, they are meaningfully related synchronically. How so? The panic that unfolded upon the revelation of Representative Weiner's taste for a kind of public sexuality that Twitter enabled was fueled in important respects by something I'll call the *afterlife of homophobia*; an afterlife that appeared in the wake of the success of same-sex couples' demand for marriage equality rights. The summer of 2011 marked an important turning-point in the geography and politics of sex: public sex, previously a domain dominated by the spectre of a hyper-

sexualized gay man, became the province of the irresponsible, foolish and self-destructive heterosexual man, such as Anthony Weiner. Meanwhile, homosexuals were busy domesticating their sexuality in the private domain of the family. Just as hetero-sex shamefully seeped out into the open, homo-sex disappeared from view into the dignified pickets of private kinship. While Anthony Weiner was exploring – at his peril – new sexual publics that social media made possible, same-sex couples celebrated their official, legal inclusion in the domain of the traditional, sexual private.

The twin projects of privatization and legitimization of homosexuality began, of course, with Justice Anthony Kennedy in his 2003 opinion in *Lawrence v. Texas*, in which he put an end to the identity of the homosexual as the sodomite by refiguring the homosexual in homosocial terms. As I have written elsewhere:

With respect to the right to make decisions about intimate affiliations in private settings, Justice Kennedy notes that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do,” and that the statutes at issue in *Lawrence* and in *Bowers* “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” Note that the analogy here is between persons in a homosexual relationship and heterosexual persons. Thus, the issue in *Lawrence*, as well as in *Bowers*, was not the right to engage in certain sexual conduct — that, says Kennedy, would be demeaning to John Lawrence

and Tyron Garner. They would be disgraced just as a married couple would be if the claim were made that “marriage is simply about the right to have sexual intercourse.” Kennedy writes that “[sexual conduct] can be but one element in a personal bond that is more enduring.” More enduring than what? Than sex?²

Justice Kennedy’s finding in Lawrence that the Texas sodomy law violated a fundamental liberty right was premised upon a story he made up about Lawrence and Gardner being in a relationship in which their interactions allowed them to elaborate their “concept of existence, of meaning, of the universe, and of the mystery of human life.” Dale Carpenter’s work on the back-story of this “relationship” tells a quite different tale — but the truth of the matter is really irrelevant.³ What is important is that the Supreme Court was willing to welcome lesbian and gay people into the community of rights-bearing citizens not because of the sex we have, but rather because of the “enduring personal bonds” we seek — bonds that gain constitutional protection for reasons that are not squarely or even obliquely about sex.

This new emplotment of gay life, one animated by characters who are kin not hook ups, whose connection is romantic not sexual, is taken up in the briefs in the marriage equality cases. The homosexual portrayed in these filings is the soccer mom, the partner who is a good provider, the loving father, the de-facto daughter-in-law, and the fellow who attends stamp-collecting conventions. The legitimate homosexual is he or she who is willing to keep quiet about the sex part of homosexual. In this sense, the spaced cleared out by the

vanquishing of sodomy law's homophobia is a space for the desexualized gay subject who longs for the stability and fidelity of "enduring personal bonds."

In the marriage cases, the decent, loving, faithful gay character is met by adamant arguments from the other side insisting that marriage is essentially a procreative enterprise, and that since only a man and a woman can procreate, marriage can only be made up of husbands and wives. In response to this hetero-sexualization of marriage, the same-sex couples insist that "we too have children, just not the way you do." It makes sense for the plaintiffs in these cases to insist that there are ways to make babies that aren't essentially heterosexual, but the consequence of this argument is that homo-sex loses any political, legal or social significance. Marriage, it seems, is where homo-sex goes to die. While the path of the argument may not have been one we initiated, lesbian and gay advocates have been complicit in the marginalization, if not erasure, of homo-sex and other forms of sex that are the excess over reproduction. Of course the female orgasm, contraception and abortion have a stake in this politics as well. But who, if not lesbian and gay people, see themselves as having an interest in carrying a brief for sex? Sex for its own sake, and as part of a politics of freedom.

How did we get to this curious place, a place with a politics that would be almost unimaginable to the sexual freedom fighters of Stonewall? Once here, should lesbian and gay-rights activists care about sex in public any longer? Should we cede that terrain to misfits such as Weiner while we celebrate the legitimization of same-sex love that marriage rights afford, or do we maintain a stake, or at least an interest, in the notion of

sexual publics? Better yet, now that homo-sex has become privatized is sex in public only of interest to those who define themselves as Queer?

The space evacuated by the repeal of sodomy laws need not be taken up immediately or entirely by the domain of kinship and the family — but there is a great risk that it would be. This space could be one in which a kind of sexual legibility might emerge that is not private, does not entail property relations, is not matrimonial, does not take the couple form, and is not necessarily enduring. The terms of its zoning would be beyond marriage, kinship, or the family. Although serious attachments may form, they simply wouldn't be ones whose terms of legibility are set out by the state. It is these spaces that are most threatened by homophobia's afterlife.

In a time when homosexuality has been heteronormativized (so long as it conforms to the hygienic rules of marriage) certain forms of sex-based shame and perversion have been rendered all the more vulnerable to social and legal stigma. Here we find the afterlife of homophobia. Homophobia's work has shifted from buttressing the criminalization of sodomy, and from justifying the ongoing exclusion of same-sex couples from legal marriage, to imposing a kind of penalty on those people, regardless of their sexual orientation, who cannot or will not organize their desires, their attachments, and their values in a way that echoes the model homo-citizens recounted in the briefs in the same sex marriage cases. The desires these cases leave out find themselves ostracized into a domain of increasingly marginalized illegitimacy, if not degeneracy. Now, as much as, or even more than ever, these outlaws are regarded by more conventional members of the community as out of

step with the main current of gay politics — and indeed they are seen to pose a threat to that politics insofar as they undermine the claims to decency, respectability and dignity that the plaintiffs in the marriage cases claim entitle them to the benefits of legal marriage.

So here's where Public Sex can be so crucial as a site for resisting homophobia's afterlife and for imagining a kind of sexual citizenship that isn't defined by and through the redemptive pastorality of marriage. It's time sex pushed back and resisted a hygienic sexual politics that aims to cleanse homosexuality of its raunchier elaborations, and demanded a legitimate presence in quasi-public spaces such as Twitter and Facebook, along with the more commonly understood public space of the street, the bar or the bookstore. Since same-sex marriage advocates have surrendered to, if not embraced, the heteronormativity of the private family, the public sphere may be the last refuge for sexual liberty. In this sense, Anthony Weiner may be more of an ally in the cause to defend sexual liberty than are lesbian and gay rights advocates. The elaboration of sexual publics (and by this I don't mean weddings) and new forms of Public Sex are essential as counter weights that can challenge the hegemony of the matrimonialized gay subject/gay couple.

NOTES

- 1 Professor of Law, Director of the Center for Gender & Sexuality Law, Columbia Law School. © Katherine Franke. The article was originally printed in *PETITE MORT: RECOLLECTIONS OF A QUEER PUBLIC* (2011)
- 2 Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *Columbia Law Review* 1399, 1408 (2004).
- 3 Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 *Michigan Law Review* 1464 (2004). Carpenter's description of Lawrence and Garner's "relationship" is quite different from that portrayed by Kennedy's opinion. The two men, Lawrence white and Garner black, were not in a relationship, but were more likely occasional sex partners. The night of the arrest another sex partner of Garner's called the police to report that "a black man was going crazy" in Lawrence's apartment "and he was armed with a gun." (Carpenter notes that a racial epithet rather than "black man" was probably the term used.) The police arrived at the apartment and found Lawrence and Garner having sex.