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WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY by Katherine Franke. New York and London: New York University Press, 2015. 275 pp. \$35 hardcover.

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**WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY by Katherine Franke. New York and London: New York University Press, 2015. 275 pp. \$35 hardcover.**

**INTRODUCTION**

Law, as Robert Cover declares, is often violent, operating to dismantle the integrity of lived experiences: “when [legal] interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart. . . .”<sup>1</sup> This insight is all too familiar for those who have had their relationships degraded by the law’s withering gaze, individuals whose narratives of relationality are deemed illegitimate within the oppressive idiom of statutory discourse,<sup>2</sup> and are thereby excluded from receiving the imprimatur of legal validity. Consider the case of Richard Adams, a United States citizen, and his Australian partner, Anthony Sullivan. After they were granted a marriage license in Colorado, Adams filed a visa petition for Sullivan on April 25, 1975, contending that Sullivan was his “spouse” under federal immigration law.<sup>3</sup> Responding to Adams, the Immigration and Naturalization Service (INS) denied the petition, scornfully stating that he had “failed to establish that a bona fide marital relationship can exist between two faggots.”<sup>4</sup>

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1. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986).
2. Patricia Williams importantly reveals the manner whereby the experiences comprising these narratives “are somehow *made* legitimate . . . corroborated by hidden or unspoken models of legitimacy.” Indeed, there is tacitly embedded within statutory language an “Idealized Other” that serves as the standard by which our experiences are judged, an ideologically-constructed standard “whose gaze provides us either with internalized censure or externalized approval . . .” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 9 (1991). For more on the ideological nature of such standards, see *infra* note 14.
3. *Adams v. Howerton*, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980) (upholding the INS’ denial of the visa petition on the grounds that neither Colorado nor federal statutory law recognizes same-sex marriages). Specifically, Adams had sought to have Sullivan classified as his “immediate relative” under 8 U.S.C. § 1151(b)(2)(A)(i), with “immediate relative” being defined as “the children, spouses and parents of a citizen of the United States.” *Id.* at 1120–21.
4. Robert Barnes, *40 Years Later, Story of A Same-Sex Marriage in Colo. Remains Remarkable*, WASH. POST (Apr. 18, 2015), [https://www.washingtonpost.com/politics/courts\\_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/politics/courts_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfab310_story.html) [<https://perma.cc/M8VQ-RY6L>]. Upon appeal to the 9th Circuit, which affirmed the denial of Adams’ petition, the court found the exclusion of same-sex spouses from classification as “immediate relatives” to have a rational basis, since “homosexual marriages . . . violate traditional and often prevailing societal mores.” *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982). In this case, the social primacy of

A conventional response to the erasure of gay attachments within the law might highlight the necessity of legal belonging in constituting gays as rights-bearing subjects.<sup>5</sup> Thomas Grey instead offers a revisionary take. In a 1980 essay, he perceptively cautions against conceptualizing inclusion under the law as an unqualified good for the gay community. To this end, Grey suggests that gay marriage's desirability lies predominantly in its efficacy as a tactic of governance, protecting the dominant social order through assimilating gays into the long-established, state-sanctioned institution of marriage:

For the gay community to be governed effectively, it must be recognized as legitimate. Perhaps something like marriage will have to be recognized for homosexual couples, not because *they* need it for their happiness (though they may), but because *society* needs it to avoid the insecurity and instability generated by the existence in its midst of a permanent and influential subculture outside the law.<sup>6</sup>

In bringing gays within the regulatory grasp of the state, marriage can thus be utilized as a method by which to discipline gay kinship, ensuring that it “conform[s] to the ideas of relationship held by others.”<sup>7</sup> Such a Foucauldian interpretation, however, seems to militate against Justice Kennedy’s poignant characterization of marriage in *Obergefell v. Hodges* as embodying “the highest ideals of love, fidelity, devotion, sacrifice, and family.”<sup>8</sup> Implicit in Kennedy’s rhetoric is the presumption that, for those gay couples seeking “to live their lives . . . joined by [marriage’s] bond,”<sup>9</sup> the legal recognition of their unions also serves to validate the affective ties underlying these unions. This was, at least, a prominent cultural response to *Obergefell*, evidenced by the ubiquity of the Twitter hashtag #LoveWins in the decision’s aftermath.<sup>10</sup>

Yet, as Katherine Franke has previously indicated, the gay community pos-

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heterosexuality is reinforced through its importation into statutory discourse as the “Idealized Other,” such that Adams and Sullivan’s marriage is delegitimized, their once legally valid union becoming the object of judicial censure.

5. Such is the view of Hannah Arendt, who famously wrote: “The calamity of the rightless is . . . that no law exists for them.” HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295–96 (Harcourt, Inc. 1973) (1951). In order to receive rights, then, one must be removed from “[one’s] own absolutely unique individuality” and initiated into a system of legality that regulates one’s relations with others. *Id.* at 302.
6. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83, 97 (Summer 1980).
7. MICHEL FOUCAULT, *Sexual Choice, Sexual Act*, in FOUCAULT LIVE: COLLECTED INTERVIEWS, 1961-1984 322, 332 (Sylvère Lotringer ed., James O’Higgins trans., 2d ed. 1996).
8. 135 S. Ct. 2584, 2608 (2015) (recognizing a fundamental right to same-sex marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).
9. *Id.* at 2595.
10. See Kerry Flynn, *How #LoveWins on Twitter Became The Most Viral Hashtag Of The Same-Sex Marriage Ruling*, INT’L BUS. TIMES (Jun. 26, 2015), <http://www.ibtimes.com/how-lovewins-twitter-became-most-viral-hashtag-same-sex-marriage-ruling-1986279> [<https://perma.cc/BFY4-RVW9>].

sesses “a broader range of . . . loving that far exceeds the marital form,”<sup>11</sup> loving which grows out of non-normative visions of relationality and affect. Are these modes of attachment not only undeserving of the superlatives that Justice Kennedy attached to marriage, but are they, in fact, the very sources of the “insecurity” and “instability” that Grey alluded to?

This question is passionately addressed in Franke’s provocative new work *Wedlocked: The Perils of Marriage Equality*. In interrogating the aims of the gay rights movement, which largely celebrated *Obergefell* as a major victory,<sup>12</sup> Franke juxtaposes this movement with the struggles of newly-freed black slaves upon the legal recognition of their marriages in the mid-nineteenth century. Certainly, the conferral of the right to marriage effects “a shift in status from *outlaws* to *inlaws*,” a point Kennedy eloquently underscores in *Obergefell* (p. 11).<sup>13</sup> Deepening Kennedy’s analysis, Franke crucially draws attention to how as a consequence of this shift the “private lives” of gay couples and emancipated blacks are “organized in both wonderful and perilous ways by law” (p. 11). To this end, while marriage is a freedom bestowed by the state, it is also, as Grey realized, a social construct, and therefore necessitates an understanding of “what it means to be liberated into a social institution that has its own complicated and durable values and preferences” (pp. 2-3).

The recognition of gay or black relationships by the state, then, does very little to challenge the deeply entrenched normative assumptions—those “durable values and preferences”—governing the reproduction of sexual and racial hierarchies.<sup>14</sup> Indeed, rights language largely perpetuates the fundamentality of these repressive norms, a practice which is masked by rights’ seemingly robust capacity for enhancing moral status: in Wendy Brown’s paradoxical formulation, “rights secure our standing as individuals even as they obscure the treacherous

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11. Katherine Franke, “Dignity” *Could Be Dangerous at The Supreme Court*, SLATE (Jun. 25, 2015),

[http://www.slate.com/blogs/outward/2015/06/25/in\\_the\\_sotus\\_same\\_sex\\_marriage\\_case\\_a\\_dignity\\_rationale\\_could\\_be\\_dangerous.html](http://www.slate.com/blogs/outward/2015/06/25/in_the_sotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html) [<https://perma.cc/R7XZ-2H46>].

12. Boris Dittrich, LGBT Rights Advocacy Director at Human Rights Watch, referred to the *Obergefell* decision as both “a huge victory” and “a joyous occasion for same-sex couples in the U.S. and their families.” *U.S. Supreme Court Upholds Same-Sex Marriage*, HUM. RTS. WATCH (Jun. 26, 2015), <https://www.hrw.org/news/2015/06/26/us-supreme-court-upholds-same-sex-marriage> [<https://perma.cc/RTE6-QEBZ>]. It is worth noting that Franke’s book contains no references to *Obergefell*, presumably having gone to print before the case was decided. I will, however, discuss *Obergefell* as a means of extending Franke’s analysis of the gay rights movement and its role in promoting marriage and marriage-like relationships.

13. Indeed, as Kennedy writes: “[the plaintiffs’] hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.” 135 S. Ct. at 2608.

14. Such norms, operating in an ideological capacity, shape the social structure responsible for the “maintenance of the actual distribution of goods and resources, status and prestige.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 n.20 (1988). The norms are thus constitutive of “the indispensable medium in which individuals live out their relations to a social structure.” TERRY EAGLETON, *IDEOLOGY: AN INTRODUCTION 2* (New and Updated ed. 2007).

ways that standing is achieved and regulated.”<sup>15</sup> Under this view, the norms regulating traditional marriage can complicate the lives of those rights-holders resisting such a notion of kinship. Much as social and political discourse stigmatizes black families as “dysfunctional” or “unhealthy,” Franke argues that gays will “reap similar scorn for the non-traditional families . . . [they] have forged” (p. 13). Hence, what is inherent in Franke’s text is a thorough engagement with the rights critique offered by Brown—the principle that rights, like the right to marriage, “can both burden you and set you free” (p. 12).

While Franke elucidates valuable similarities, as well as significant differences, between gay and post-slavery experiences with marriage, this Review will focus on one particularly salient similarity: namely, the violence wrought against these groups not only by physical force or the threat of force, but also the epistemic violence perpetrated by institutional discourse.<sup>16</sup> The term “epistemic violence” refers to the discursive constitution of the black or gay subject as an “Other,” existing beyond the boundaries of socio-legal legitimacy, while simultaneously being normalized through inclusion within institutional structures.<sup>17</sup> The dialectical tension between the processes of Othering and normalizing manifests itself in the practice of mimicry, a stifling of autonomous subjecthood defined by Homi Bhabha as “the representation of a difference that is itself a process of disavowal.”<sup>18</sup>

This Review proceeds as follows. In Part I, I summarize Franke’s discussion of the physical violence emancipated slaves faced in the aftermath of the legal recognition of their marriages. I propose that these individuals occupied the unique subject-position of appearing *before the law*,<sup>19</sup> a position that was solidified by the epistemic violence directed towards them through political rhetoric.

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15. Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM/LEFT CRITIQUE 420, 430 (Wendy Brown & Janet Halley eds., 2002). Duncan Kennedy espouses a similar insight in his characterization of the “fundamental contradiction” that lies at the core of our social existence: “But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good.” Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 211–12 (1979).
  16. See, e.g., Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in COLONIAL DISCOURSE AND POST-COLONIAL THEORY 66, 76 (Patrick Williams & Laura Chrisman eds., 1994).
  17. Gayatri Spivak notably illustrates this perplexing dynamic in the context of post-colonial theory: “Europe . . . consolidated itself as sovereign subject by defining its colonies as ‘Others,’ even as it constituted them, for purposes of administration and the expansion of markets, into programmed near-images of that very sovereign self.” Gayatri Chakravorty Spivak, *The Rani of Sirmur: An Essay in Reading the Archives*, 24 HISTORY & THEORY 247, 247 (October 1995).
  18. HOMI K. BHABHA, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, in THE LOCATION OF CULTURE 121, 122 (Routledge Classics 2004) (1994).
  19. See JACQUES DERRIDA, *Before the Law*, in ACTS OF LITERATURE 181 (Derek Attridge ed., Avital Ronell & Christine Roulston trans., 1992). As discussed more thoroughly in Part I, to appear before the law is to be made a subject of the law, insofar as one becomes vulnerable to the law’s violence, yet is also without the normative protections codified in legal discourse. The phrase originates in a parable by Kafka, later adopted by Derrida to describe the liminal state of one who is exposed to legal sanction, but denied full legal personhood and its attendant rights and privileges.

In Part II, I explore Franke's analysis of the gay rights movement and its strategic elision of gay sexual subjectivity, linking this to the epistemic violence wrought by the Supreme Court in *Lawrence v. Texas*.<sup>20</sup> While *Lawrence* is not a marriage-related case per se, it nonetheless reveals the manner in which marriage exerts a powerful normalizing force, particularly in its totalizing construction of gay sexuality as embodying a "marriage-like intimacy."<sup>21</sup> This is a construct that renders illegitimate those forms of gay sex lacking domestic intimacy. Finally, I reflect on Franke's call for an erotically-conscious gay politics, concluding with some observations on *Lawrence* and the limitations inherent in a legal articulation of racialized sexuality.

### I. THE "VIOLATING ENABLEMENT" OF BLACK MARRIAGE RIGHTS

In April 1864, the Union Army, experiencing a critical deficit in troop numbers, began enlisting under its command "all able-bodied negro slaves" in Kentucky, a state which, despite remaining a part of the Union during the Civil War, was nonetheless a slave state (p. 28). While the government compensated slave owners who lost slaves to the military, what really raised the ire of many white Kentuckians was that former slaves were granted their freedom upon enlistment. This incited slave owners to engage in vindictive outbursts of violence toward not just their male slaves desiring to join the Union forces, but also the wives and children of the new recruits. As a result of her husband's enlistment, for example, Patsy Leach reported that her owner "treated me more cruelly than ever, whipping me frequently without any cause." (p. 32). Concerned about the safety of their family members, black males became fearful about enlisting. To allay this trepidation, Congress passed what became known as the Enlistment Act, bestowing freedom upon the wife and children of black Union recruits (pp. 40-41). One significant hurdle faced by the legislation was that marriages between slaves had not previously been legally recognized. This required the drafters "to define what it meant for enslaved people to be married," with cohabitation being codified as the primary determinant (p. 43). In seeking to protect Black families as a means of encouraging recruitment, then, the Act ultimately endowed Black relationships with the legal status of marriage.

Yet the Act's instrumentalist conception of black familial welfare cuts against its ostensible progressiveness, suggesting to Franke that the Act's "true aim was raising more black troops," not "com[ing] to the aid of the enslaved wives and children of black enlistees" (p. 42). In fact, black women were still subject to horrifying abuses that stifled the exercise of their newly granted freedom. Mary Wilson, a wife of a former slave who served in the Union Army, was arrested by a police officer without cause in May 1865 and taken to her former

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20. 539 U.S. 558 (2003) (finding that a Texas statute criminalizing consensual homosexual intercourse conducted in private violated the right to Substantive Due Process under the Fourteenth Amendment).

21. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 57 (2012).

owner. The police officer then proceeded to “inflict . . . upon her naked body a severe beating and bruising” as her owner watched (p. 45). For Franke, Wilson’s case is emblematic of the harms that occur when legally prescribed rights are incompatible with social realities, or when “the law gets out . . . ahead of the attitudes of society” (p. 49). It is implausible to claim, then, that the marriage rights granted to blacks upon their emancipation inaugurated “a kind of civil subjectivity” which enabled them to be recognized as equal subjects deserving of equal treatment (p. 62).<sup>22</sup> As Franke perceptively observes, marriage rights functioned “as a tactic of governance that reinforced rather than erased a notion of racial difference for African Americans” (p. 62).

Though the purpose of the Enlistment Act, as characterized by Secretary of War Edwin Stanton, was to place black women and children “*under the protection of the law* as free persons,” Wilson’s story reveals the manner in which the law functioned as a coercive mechanism that continued to render black bodies vulnerable to physical violence (p. 46). Consistent with Franke’s analysis, I would suggest that the recently freed black slaves were neither under nor beyond the law, but were instead *before the law*, as in the title of Kafka’s tantalizingly ambiguous parable.<sup>23</sup> Jacques Derrida’s interpretation of this story is particularly instructive here:

Before the law, the man is a subject of the law in appearing before it. This is obvious, but since he is *before* it because he cannot enter it, he is also *outside the law* (an outlaw). He is [not] under the law . . . he is both a subject of the law and an outlaw.<sup>24</sup>

This aporetic formulation parallels the legal status of blacks in the mid-nineteenth century, and as such, is useful in demonstrating how the violence stemming from the recognition of marriage rights served to “reinforce . . . a notion of racial difference” (p. 62). We can begin from the axiomatic premise that the legal interpellation of emancipated blacks as married subjects rendered them subjects of the law. To gain analytic traction, however, we must more closely parse the dynamics embedded within this axiom. In ascribing to blacks the status of married persons, the law carried out a process of subjectivization that conferred intelligibility on them through the socializing power of institutional discourse. Moreover, the oppression generated by violence, as Judith Butler crucially explains, is in fact contingent upon subject formation: “to be oppressed means

22. Indeed, equality under the law, as promised by the Equal Protection Clause of the Fourteenth Amendment, is not necessarily coextensive with equal treatment in the course of social practice: this is made tragically clear in the jurisprudence surrounding the “separate but equal” doctrine. Consider the Court’s statement in *Plessy v. Ferguson*, undoubtedly the most infamous iteration of this doctrine, that the Fourteenth Amendment “could not have been intended . . . to enforce social, as distinguished from political, equality. . . .” 163 U.S. 537, 544 (1896).

23. See FRANZ KAFKA, *Before the Law*, in THE COMPLETE STORIES 3 (Nahum N. Glatzer ed., Willa & Edwin Muir trans., Schocken Books 1995) (1971).

24. DERRIDA, *supra* note 19, at 204.

that you already exist as a subject of some kind. . .to be oppressed you must first become intelligible.”<sup>25</sup>

Wilson’s experience quite aptly illustrates and augments the theoretical moves outlined above. Receiving her freedom by virtue of her marital relationship, one that was entered into during her enslavement, Wilson became a legal subject, in that she was formally recognized as a married person by the law. While the physical violence she experienced at the hands of the policeman violated her legal standing as a free individual, what is less apparent is the manner in which the law’s violence also implicated Wilson’s marriage, maintaining the inferiority of a relationship that was purportedly legitimized. This inferiority was achieved through the law’s operation as a destructive force that quashed *black subjectivity*, understood here as referring to kinship practices responsible for establishing a uniquely black “normative world.”<sup>26</sup> According to Robert Cover, such a world arises through shared moral values that engender the social bonds “constitut[ing] the community in which the values are grounded.”<sup>27</sup> The marriage customs slaves developed in the absence of law were one significant source of shared values; as Franke finds, male and female slaves considered themselves married “in the eyes of god,” often married in ceremonies administered by slave preachers (pp. 67, 71). Insofar as the Commissioner of Pensions relied on eyewitness testimonies to these ceremonies in determining whether a black war widow was entitled to a pension, there appeared to be some congruity with Cover’s characterization of the “creation of legal meaning” as “an essentially cultural activity” which gives voice to communal values (pp. 71-72).<sup>28</sup>

This analysis, though, is problematized by the violence wrought against Wilson, as well as the political discourse describing the kinship relations of slaves. Tellingly, Wilson’s beating by the police officer occurred while she was “tied . . . in a *slaughterhouse* to a rafter or beam” (p. 45; emphasis added). Two years earlier, the American Freedman’s Inquiry Commission, created to develop policies concerning “freed people after emancipation,” stated in its report that slaves “spent the night in huts of a single room, where all ages and both sexes *herded* promiscuously . . . without any pretence [*sic*] of fidelity” (p. 66; emphasis added). The presence of the slaughterhouse as the site of Wilson’s abuse, viewed alongside the deployment of the word “herd” in describing slave relationality, strongly suggests an animalizing of the black subject, one who lacks the requisite subjectivity to even conceive of marital-like attachments. The police officer’s disregard for Wilson’s freedom, or, more aptly, the marriage which se-

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25. JUDITH BUTLER, *Beside Oneself: On the Limits of Sexual Autonomy*, in UNDOING GENDER 17, 30 (2004).

26. See Cover, *supra* note 1, at 1602–03.

27. *Id.* at 1603.

28. *Id.* at 1602 n.2. This is consistent with Cover’s conception of the “jurisgenerative process,” or “the way in which real communities do create law and do give meaning to law through their narratives and precepts.” Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).



cured that freedom, might then be conceptualized as entailing an *erasure* of her subjectivity—the very capacity to create a normative world—and is thus indicative of her *exclusion* from the ethical protections embodied in legal culture.<sup>29</sup> To be certain, this was a culture that, in displacing black subjectivity from the realm of legal legitimacy, imbued blacks with the stigma of Otherness.

Perhaps the most articulate demonstration of appearing *before the law*, as a subject of the law and yet also outside of it, is another statement from the American Freedman's Inquiry Commission's report. Enunciating a normalizing strategy to further its infliction of epistemic violence on blacks, the Commission wrote that "[the Negro] is found quite ready to copy whatever he believes are the rights and obligations of what he looks up to as the superior race" (p. 68). Under this view, a right to marriage was not a recognition of political autonomy, but rather, a mode of mimicry that, in Franke's words, "provide[d] a new opportunity to elaborate [black] inferiority," reinforcing Otherness through the very process of assimilating blacks into the institutions of the "superior" race (p. 62).<sup>30</sup> Hence, blacks *before the law* were subjects signifying the very absence of will, what Patricia Williams has termed "black antiwill," supplanting normativity in favor of a mimetic faculty which uncomprehendingly performed the practices of the "superior" race.<sup>31</sup> Indeed, "antiwill" is implicit in Bhabha's framing of mimicry as an ambivalent dynamic creating "a reformed, recognizable Other, *as a subject of a difference that is almost the same, but not quite*."<sup>32</sup> This is because the "not quite" which engendered the "difference" between blacks and whites was the fundamental denial of black agency, constructing blacks as pliant subjects onto which whites could exert their will.

Therefore, while the right to marriage may have had some positive symbolic resonance within legal doctrine, its purported conferral of liberty did not free blacks from the hegemony of the racial hierarchy. Instead, it reinforced socio-

29. Law, understood this way, represents a totalizing ideology that excludes blacks from the process of meaning-creation, effectively restricting the potential for a system of legality rooted in shared values: "[A]s long as . . . [law] is constitutive of violent behavior as well as meaning . . . there will always be a tragic limit to the common meaning that can be achieved." Cover, *supra* note 1, at 1629.

30. The imitative ability of blacks was also emphasized in medical discourse. As Dr. Cartwright wrote, "[Slaves] . . . reflect their master in their thoughts, morals, and religion, or at least they are desirous of being like him. They imitate him in everything, as far as their imitative faculties, which are very strong, will carry them." Samuel Cartwright, *Dr. Cartwright on the Caucasians and the Africans*, 25 DEBOW'S REVIEW 45, 53–54 (1858) (quoted in ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 79–80 (2006)).

31. Expanding on this conception, Williams writes:

"[O]ne of the things passed on from slavery, which continues in the oppression of people of color, is a belief structure rooted in a concept of black (or brown or red) antiwill, the antithetical embodiment of pure will. We live in a society where the closest equivalent of nobility is the display of unremittingly controlled willfulness. To be perceived as unremittingly without will is to be imbued with an almost lethal trait."

WILLIAMS, *supra* note 2, at 219.

32. BHABHA, *supra* note 18, at 122.

ideological conceptions of black subordination. Probing the manner in which marriage served as a representation of egalitarian citizenship that nonetheless perpetuated unegalitarian power relations, Franke reveals it to be what Gayatri Spivak pithily termed “a violating enablement.”<sup>33</sup>

## II. THE “MARRIAGE-LIKE” CHARACTER OF GAY RIGHTS

In a 2002 case challenging the Massachusetts ban on same-sex marriage, the plaintiffs unsurprisingly made an analogy to race, contending that the ban at issue operated in much the same manner as anti-miscegenation laws. “The exclusion of same-sex partners from free choice in marriage stigmatizes their relationships, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy” (p. 63).<sup>34</sup> While exclusion from the institution of marriage imposed a stigma on gay couples, rendering their relationships inferior to those of heterosexuals, Franke argues that the legal recognition of gay marriage is not a panacea for these plaintiffs, because it will not afford them full legal citizenship (pp. 111-12). In other words, many forms of gay relationality will become positioned as existing *before the law*, in the Derridean sense of the term.<sup>35</sup> That is to say, gays in non-traditional relationships are made subject to the law’s normalizing force through the conferral of marriage rights, but continue to be stigmatized and relegated outside the law if they resist this effort to place gay subjectivity under erasure. Put more broadly, Franke draws on the black experience with marriage to reveal how the recognition of gay rights by the State, including the right to marriage, legitimizes only a certain, narrowly-conceived subset of gay kinship: namely, those “monogamous, long-term, conventional relationships” that conform to heteronormative ideals (p. 108).<sup>36</sup>

While Franke does not minimize the very real threat of physical violence faced by those in gay relationships,<sup>37</sup> she focuses predominantly on the epistemic violence perpetrated by the law, which advances a form of mimicry not unlike that espoused by the American Freedman’s Inquiry Commission. However, the

33. GAYATRI CHAKRAVORTY SPIVAK, *More on Power/Knowledge*, in *OUTSIDE IN THE TEACHING MACHINE* 27, 49 (Routledge Classics 2009) (1993).

34. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 19, *Goodridge v. Dep’t of Pub. Health*, 14 Mass. L. Rep. 591 (Mass. Super. Ct. 2002) (No. 01-1647-A).

35. See DERRIDA, *supra* note 19.

36. These “monogamous” and “long-term” gay relationships are deemed legitimate because of their purported intimacy, which is itself the foundational heteronormative ideal: “modern heterosexuality . . . refer[s] to relations of intimacy and identification with other persons, and sex acts are . . . the most intimate communication of them all.” Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547, 555 (1998). I will discuss the relation between sex and intimacy through an analysis of the Court’s rhetoric in *Lawrence v. Texas*. See *infra* pp. 196–198.

37. For example, in a stunningly exploitative appropriation of anti-slavery rhetoric, Bryan Fischer, Director of Issues Analysis for the American Family Association, essentially advocated a “kidnapping strategy,” posting on his Twitter feed that “we need an Underground Railroad to deliver innocent children from same-sex households” (p. 56).

violence of legal discourse is in fact bolstered by the efforts of gay rights advocates to create a “politically acceptable category of gay identity”<sup>38</sup> that is cleansed of the uniquely different sexual subjectivity gays possess. To Franke, these advocates have distanced themselves from securing “a right to non-normative sex and sexuality” in favor of an emphasis on “the dignity of gay . . . kin who share a normative similarity to heterosexuals” (p. 12). Extending her analysis, Franke writes:

This remaking of gay and lesbian subjectivity and the turn toward respectability . . . entailed carefully crafting a revised conception of gayness organized around a status or stable identity rather than sexual acts, and substituting love and familial devotion as the operative forms of affect that bound same-sex couples together rather than sodomy or sexual attraction (p. 61).

In short, the granting of rights to gays, in an effort to emphasize their political equality with heterosexuals, has entailed a concomitant norming of gay subjectivity, rejecting the constitutive role sexual acts play in the formation of affective bonds, while conceiving of sex simply as a means of reinforcing the emotional intimacy already present between those in a committed relationship. In order to further examine the concepts of gay subjectivity and respectability that Franke raises, I will turn to the text of the majority opinion in *Lawrence v. Texas*,<sup>39</sup> a case which famously decriminalized consensual homosexual intercourse conducted in private. *Lawrence* is often held up as a paradigmatic example of sexual deregulation.<sup>40</sup> Franke, however, finds Justice Kennedy’s rhetorical construction of the plaintiffs, John Lawrence and Tyron Garner, to mirror the normalizing discourse invoked by gay rights advocates, since, in both instances, gays are presented as “intimate, committed kin, not participants in a causal hookup, whose connection[s] [are] romantic[,] not sexual” (p. 227). Evidence suggests that Lawrence and Garner were only “occasional sexual partners” and not in a “long-term, committed relationship.”<sup>41</sup> By contrast, Kennedy’s opinion prominently features the following language:

Statutes [criminalizing homosexual intercourse] . . . 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 . . . when sexuality finds overt expression in *intimate conduct* with another person, the conduct can be but one element in a *personal bond that is more enduring*.

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38. DAVID M. HALPERIN, WHAT DO GAY MEN WANT?: AN ESSAY ON SEX, RISK, AND SUBJECTIVITY 5 (2007).

39. 539 U.S. 558 (2003).

40. See, e.g., Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in CATO SUPREME COURT REVIEW 2002-2003 21, 35 (James L. Swanson ed., 2003) (finding *Lawrence* to recognize the principle that “same-sex sexual freedom is a legitimate aspect of liberty”).

41. Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004).

The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>42</sup>

What is immediately striking about this excerpt is the manner in which gay sex is conceptualized as being present solely within the affective domain of an intimate relationship, leading Melissa Murray to contend that *Lawrence* “re-cast[s] [gay sex] as relational and marriage-like, rather than as a full-throated expression of sexual liberty.”<sup>43</sup> Indeed, the equivocation of sex with “intimate conduct,” conduct which occurs in the broader context of a “personal relationship,” suggests that sex cannot be conceived of on its own terms, as an end in itself. Rather, sex is an affirmation of a prior emotional connection between two individuals. Because this judicially legitimated category of intimate sex entirely forecloses any consideration of sex for the sake of sex, there necessarily emerges a normalizing force, which creates what Franke terms “the desexualized, non-threatening gay [subject]” (p. 228). To this end, in promoting intimate sex as the ideal to which gays should adhere, the *Lawrence* Court enacts a vision of gay respectability, rendering the “recognition of gay people and relationships . . . contingent upon their acquiring a respectable social identity.”<sup>44</sup> This identity strategically omits “the disquieting and . . . discreditable details of *gay subjectivity*.”<sup>45</sup> Thus understood, the “disquieting” and “discreditable” act of non-intimate sex, as an element of gay subjectivity, is responsible for constituting gays as Others, participants in a practice which poses “an immanent threat to . . . ‘normalized’ knowledges.”<sup>46</sup>

Respectability, then, signals a reversion to mimicry, purportedly including gays as equal citizens under the law, while simultaneously eliding gay subjectivity in the maintenance of dominant understandings of sex—that is, sex as an expression of a preexisting affective bond. Particularly relevant to *Lawrence* is Bhabha’s conception of mimicry as occurring “at the crossroads of what is known and permissible and that which though known must be kept concealed.”<sup>47</sup> While the Court finds permissible the right of gays “to engage in certain *intimate* sexual conduct,”<sup>48</sup> the other element of the oppositional pair, *non-intimate* sex, appears to be entirely concealed throughout the language of the opinion. However, in mimicry’s liminal space, intimate sex reveals itself to contain, as Derrida would put it, the *trace* of non-intimate sex, that which is the “undesirable ver-

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42. *Lawrence*, 539 U.S. at 567 (emphasis added). As Franke has astutely remarked elsewhere, “Justice Kennedy takes it as a given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship.” Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004) [hereinafter Franke, *Domesticated Liberty*].

43. Murray, *supra* note 21, at 57.

44. Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 417 (2012).

45. HALPERIN, *supra* note 38, at 5.

46. BHABHA, *supra* note 18, at 123.

47. *Id.* at 128.

48. *Lawrence*, 539 U.S. at 562 (emphasis added).

sion”<sup>49</sup> of the permissible, or, more to the point, its Other. According to Derrida, the trace articulates “the structure of the relationship with the [O]ther,”<sup>50</sup> in this way constituting the category of the permissible by emphasizing its difference from the Other.<sup>51</sup> The Other’s presence in the trace, though, is one of “[n]ever quite showing up in person,”<sup>52</sup> or a presence that is felt through absence, causing the trace to function as “the mark of the absence of a presence.”<sup>53</sup> Applied to *Lawrence*, the trace is not only a dynamic responsible for establishing the primacy of intimate sex, but is also the very mark of non-intimate sex: the Other that has been divested from the permissible by the normalization process. Non-intimate sex is thus the absent presence that “haunts” the text of *Lawrence*—an unspoken prohibition looming behind every invocation of intimate sex.<sup>54</sup>

Highlighting this prohibitory specter, Franke finds *Lawrence* to stand for the principle that “[s]ex for its own sake remains without constitutional protection” (p. 229). Yet, as Murray notes, in the wake of *Lawrence*, courts have imbued the specter with legal materiality, excluding from protection sexual activity that does not occur within an intimate relationship.<sup>55</sup> Consider *Williams v. Pryor*,<sup>56</sup> which, though decided prior to *Lawrence*, continued to be contested in federal court well after *Lawrence* came down. In *Williams*, the 11th Circuit upheld an Alabama statute banning the distribution of sex toys, determining that the statute was “rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex and . . . the pursuit of orgasms by artificial means for their own sake.”<sup>57</sup> The court is quite explicit here about its disdain toward masturbation, enacting a proscription against this form of non-intimacy-reinforcing-sex in order to maintain dominant sexual norms. Tellingly, upon re-

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49. Barbara Johnson, *Translator’s Introduction* to JACQUES DERRIDA, *DISSEMINATION*, at vii, viii (Barbara Johnson trans., 1981). As Derridean philosophy maintains, the binary opposition of intimate sex/non-intimate sex is characteristic of Western thought, which “has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error . . . these polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it. . . .” *Id.*
50. JACQUES DERRIDA, *OF GRAMMATOLOGY* 47 (Gayatri Chakravorty Spivak trans., Corrected ed. 1997).
51. Geoffrey Bennington illustrates this process when he states that “anything at all is what it is only in its relational difference from its [O]thers in general. . . .” GEOFFREY BENNINGTON, *The Limits of My Language*, in *NOT HALF NO END: MILITANTLY MELANCHOLIC ESSAYS IN MEMORY OF JACQUES DERRIDA* 86, 93 (2010).
52. *Id.* (quoting JACQUES DERRIDA, *DE LA GRAMMATOLOGIE*, 69 (1967)). The translation of the original French text offered here is Bennington’s own.
53. Gayatri Chakravorty Spivak, *Translator’s Preface* to DERRIDA, *supra* note 50, at ix, xvii.
54. Indeed, “we can say that the trace entails a general ‘spectrality’: any apparently ‘present’ element is ‘haunted’ by the [O]thers of which it bears the trace. . . .” BENNINGTON, *supra* note 51, at 93.
55. See Murray, *supra* note 21, at 58 n.312 (listing cases in which courts declined to hold that *Lawrence* extends constitutional protections to consensual sex outside of intimate relationships).
56. (*Williams I*), 240 F.3d 944 (11th Cir. 2001), *aff’d sub nom. Williams v. Morgan (Williams II)*, 478 F.3d 1316 (11th Cir. 2007).
57. *Williams I*, 240 F.3d at 949.

hearing the case after *Lawrence* was decided, the court simply affirmed its earlier ruling, asserting that “even after *Lawrence* . . . the State’s interest in the preservation of public morality remains a rational basis for the challenged statute.”<sup>58</sup>

The importance of majoritarian morality in conferring rights is manifest within the gay marriage context. For example, Yuvraj Joshi, in his careful study of *Obergefell*’s dignity rhetoric, deduces that “legal recognition of minority claims to dignity depends in important respects on majority acceptance.”<sup>59</sup> Franke espouses a similar view when she characterizes marriage as a vehicle of normalization, attributing legitimacy to gay couples only by virtue of their equivalence with “normative conjugal couples” (p. 60). Put otherwise, marriage is an institution serving to “domesticat[e] . . . [gay] sexuality in the private domain of the family,” thereby reinforcing such heteronormative constructs as “the soccer mom” and “the loving father” (pp. 227-28). This rewriting of gay sexuality in terms of the quaint, affective domesticity of the family unit is entirely consistent with the *Lawrence* Court’s normalizing discourse on intimate sex.<sup>60</sup> However, a critical question persists unanswered even after *Obergefell*: what will become of marriage’s Others—those “distinctly queer forms of attachment, kinship, desire, and love” that reject a marital or marital-like framework of domestic intimacy (p. 109)? Will they go the way of self-pleasure in *Williams*, rendered, as Franke asserts, “illegitima[te] and devian[t]” (p. 111)?

Curiously, the Justice on the Court most attuned to these questions is Clarence Thomas, who, in his *Obergefell* dissent, admonishes the majority for “suggest[ing] that marriage confers ‘nobility’ on individuals.”<sup>61</sup> For Justice Thomas, marriage “does not make one person more ‘noble’ than another . . . the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.”<sup>62</sup> Though *Obergefell* did not turn out the way Thomas would have liked, maybe we can still harness his insights, along with Franke’s, to ensure that non-normative modes of gay relationality will flourish in a post-*Obergefell* world. Marriage certainly is, as the Court previously articulated, “an association that promotes a way of life,”<sup>63</sup> but it is just that—a way of life. The present task of gay rights activists, then, is to encourage “different experiments of living,”<sup>64</sup> following this Millian ideal in the hopes of fostering institutions capable of respecting the richly varied patterns of gay kinship.

58. *Williams II*, 478 F.3d at 1323.

59. Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CALIF. L. REV. CIRCUIT 117, 124 (2015), [http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi\\_Respectable\\_Dignity.pdf](http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi_Respectable_Dignity.pdf) [<https://perma.cc/2QP6-ZY3R>].

60. In fact, marriage can be thought of as perpetuating the strategy employed in *Lawrence*, such that “[t]he world post-*Lawrence* remains invested in forms of social membership and, indeed, citizenship that are structurally identified with domesticated heterosexual marriage and intimacy.” Franke, *Domesticated Liberty*, *supra* note 42, at 1416.

61. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 n.8 (2015) (Thomas, J., dissenting).

62. *Id.*

63. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

64. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND THE SUBJECTION OF WOMEN* 1, 65 (Alan Ryan ed., Penguin Classics 2006) (1859).

### CONCLUSION

*Wedlocked* serves as an important contribution to the critique of rights scholarship; it is also a powerful work of legal history, keenly demonstrating how rights, like the right to marriage, have prolonged violence against blacks and gays. This is particularly relevant in our current landscape of constitutional rights—rights that, according to one commentator, “perpetuate greater injustices than they address.”<sup>65</sup> Further, by revealing the recursive nature of epistemic violence, Franke establishes the necessity for an urgent paradigm shift in gay politics, declaring: “it is time sex pushed back and resisted a hygienic sexual politics that aims to cleanse homosexuality of its more erotic inclinations” (p. 228). Echoing in some ways Susan Sontag’s impassioned plea for “an erotics of art,” one that will allow us to “recover our senses,”<sup>66</sup> Franke calls for a gay erotics within the political, advancing a liberatory pursuit devoted to recovering gay sexual subjectivity. We should therefore resist the “redemptive pastoralism of sex,”<sup>67</sup> insisting that we are not in need of redemption, not desirous of the purportedly idyllic conformity that has rendered so many of us untenable: alienated not only from those around us, but also from ourselves.

Perhaps, to combat the demeaning of transgressive sexual practices, we must in fact utilize sex’s inherent transgressiveness, recognizing, as Leo Bersani pointedly states, “*the value of sexuality itself is to demean the seriousness of efforts to redeem it.*”<sup>68</sup> Might this entail challenging the Freudian machinery by which psychical energy is sublimated from erotic pursuits into civilization-building endeavors, such that “a revolt by the suppressed elements” is necessary to reaffirm our humanity against the institutions that deprive us of all conviction?<sup>69</sup> How can we build a civilization that promotes a more expansive politics of sexual justice?

In grappling with this question, it behooves us to be cognizant of Tyron Garner, the *Lawrence* plaintiff whose discursive framing illustrates the pernicious confluence of race and sexuality. According to the Probable Cause Affidavit, the police received a call that “a black man was going crazy in the apartment and he was armed with a gun.”<sup>70</sup> But, upon entering Lawrence’s apartment, the police officers did not discover a black man with a gun: instead, they found Gar-

65. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 716 (2011).

66. SUSAN SONTAG, *Against Interpretation*, in AGAINST INTERPRETATION AND OTHER ESSAYS 3, 14 (Picador 2001) (1966).

67. Berlant & Warner, *supra* note 36, at 566.

68. Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 222 (1987).

69. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 60 (James Strachey trans., W. W. Norton & Co. 1989) (1930). As Freud theorizes, civilization’s increasing complexity has required that it impose greater restrictions on sexual activity, “since a large amount of the psychical energy which it uses for its own purposes has to be withdrawn from sexuality.” *Id.* at 59.

70. Carpenter, *supra* note 41, at 1479.

ner, a black man, having sex with Lawrence, a white man.<sup>71</sup> Still, what is so troubling about the statement contained in the Affidavit is its pathologizing of the black subject, an all too “familiar form of disgrace” (p. 196). Indeed, read within the historical context Franke provides, the Affidavit’s language connotes that Garner is governed by a brutish, animalistic impulse, bereft of a normative world which would allow for the exercise of unfettered self-determination.

Violence, then, was actually inflicted *on* Garner—not only when he was arrested, jailed, and convicted for engaging in “deviate sexual intercourse . . . with a member of the same sex,”<sup>72</sup> but also when he became enmeshed in overlapping layers of social discourse, holding together an assemblage of words dictated by a force exterior to himself. Garner—the committed yet unstable partner—thus occupies the same interstitial space as Toni Morrison’s *Beloved*, the ghost of her eponymous novel: “Everybody knew what she was called, but nobody anywhere knew her name.”<sup>73</sup> A name, it could be said, is a claim to personhood, something we assert in the presence of others, in order to avoid being “called” in ways that are inconsistent with our sense of self. However, to give voice to our names is essentially a subversive act, resisting spectrality through an exercise of radical will, demanding we be recognized as the people we have chosen to be, the people we know ourselves to be.

Did Garner ever make such a demand?

On June 26, 2003, Lawrence and Garner attended an afternoon press conference in Houston, just hours after the Court’s decision was announced.<sup>74</sup> As Lawrence read from a prepared statement, “Garner stood by, mute. He had not been given anything to say.”<sup>75</sup> Later that same day, a rally was held at Houston city hall, with a crowd of hundreds present when Lawrence and Garner arrived.<sup>76</sup> There is, to my mind, a truly indelible photograph<sup>77</sup> taken at this rally, which depicts the two plaintiffs participating in the Pledge of Allegiance, their hands duti-

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71. This is, at least, the narrative offered by one of the officers dispatched to Lawrence’s apartment. *See id.* at 1488–89. Carpenter insightfully raises the possibility that “complex racial feelings—unstated and perhaps subconscious—entered the decision to cite [Lawrence and Garner] and take them to jail . . . few have commented on the fact that they were an interracial pair. . . .” *Id.* at 1502. Furthermore, it is worth considering the manner in which the caller’s overt reference to a “black man with a gun” may have interfaced with the officers’ more implicit racial biases.

72. *Lawrence*, 539 U.S. at 563. Emphasizing the violence inherent in legal procedures, Cover writes: “a legal world is built only to the extent that there are commitments that place bodies on the line . . . the interpretive commitments of officials are realized, indeed, in the flesh.” Cover, *supra* note 1, at 1605.

73. TONI MORRISON, *BELLOVED* 321 (Vintage Books 2004) (1987).

74. *See* DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 272 (2012).

75. *Id.* at 273.

76. *See id.* at 273–74.

77. Erich Schlegel, Photograph of John Lawrence and Tyron Garner Reciting the Pledge of Allegiance, *in Strange Justice*, N.Y. TIMES, (Mar. 16, 2012), <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html> [<https://perma.cc/LZT5-TGMR>].



fully placed over their hearts. While both their gazes are fixed on the flag before them, there is something incredulous about their expressions, a sort of uneasy apprehensiveness. Perhaps reciting the words “liberty and justice for all” evoked a visceral image of their own cruelly illusory status as citizens: beneficiaries of a liberty that afforded freedom from criminal sanction, but which nonetheless deemed them subjects incapable of self-definition, ultimately nameless.

As I focus on Garner’s face, though, there seems to be a brooding pensiveness weighing on his features. What if, in the midst of this ceremony that reinscribed him as perpetually appearing *before the law*, Garner was engaged in an act of defiant interiority—in “a rapt contemplation of the thought, of the thought, of the thought of his name”?<sup>78</sup> Rather than longing for admittance to the law, desiring to be bathed in the “radiance that streams inextinguishably from the gateway of the Law,” should we instead locate the source of this luminosity in our own inviolable ingenuity?<sup>79</sup>

To name ourselves, must we leave the law behind?

*Darius Dehghan*

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78. T.S. ELIOT, *The Naming of Cats*, in *THE COMPLETE POEMS AND PLAYS: 1909-1950* 149, 149 (1971).

79. KAFKA, *supra* note 23, at 4.