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# Queer Necropolitics

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## Queer politics and anti-blackness

*Morgan Bassichis and Dean Spade*

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Figure 9.1 Poster from a protest following the passage of California's Proposition 8 same-sex marriage ban

Photo by Lydia Marcus

In his article 'People-of-Color-Blindness: Notes on the Afterlife of Slavery', Jared Sexton writes:

Every attempt to defend the rights and liberties of the latest victims of state repression will fail to make substantial gains insofar as it forfeits or sidelines the fate of blacks, the prototypical targets of the panoply of police practices and the juridical infrastructure built up around them. Without blacks on board, the only viable political option and the only effective defense against the intensifying cross fire will involve greater alliance with an anti-black civil society and further capitulation to the magnification of state power.

(Sexton 2010: 31–56)

Countering the popular fantasy that the 13th amendment marked the end of slavery's reign, Sexton, along with Saidiya Hartman, Frank Wilderson, and others, have articulated what Hartman calls 'the continuities of slavery and freedom' (Hartman 1997: 13) – the ways in which the legal, social, political and emotional structures of slavery have been re-inscribed throughout an allegedly post-slavery society (and its global neoliberal dominion), highlighting how anti-blackness constitutes the condition of possibility for the United States itself. Within this predicament, Sexton argues, social movements of non-black people invariably are compromised by seeking redress from a political system hell-bent and built on the destruction of black life.

The poster in Figure 9.1 – from a protest following the passage of California's Proposition 8 same-sex marriage ban, which we will come back to throughout this chapter – illustrates one way in which this contradiction plays out within LGBT politics.<sup>1</sup> Notice two things: first, that the poster lists simply 'African-American' in its to-do list – instead of, perhaps, 'African American Rights' – and second, that there is a check mark beside it, signalling its completion. What was perhaps an oversight by its author points to the widespread notion that black people having rights is both redundant (already done) and oxymoronic (impossible). In effect, black people are the paradigmatically progressed population and at the same time incapable of advancing on the path of progress. Gay rights (which apparently have no overlap with either women's rights or 'African Americans'), on the other hand, are both possible and unfinished. And so the proclamation resounds: 'Gay is the New Black!'<sup>2</sup>

Wilderson invites us to understand anti-blackness as the precondition for this contradiction:

[C]oalitions and social movements – even radical social movements such as the prison abolition movement, bound up in the solicitation of hegemony so as to fortify and extend the interlocutory life of civil society – ultimately accommodate only the satiable demands and finite antagonisms of civil society's junior partners (i.e. immigrants, white women, and the working class),

but foreclose on the insatiable demands and endless antagonisms of the prison slave and the prison slave-in-waiting.

(Wilderson 2007: 23)

The 'supplemental anti-blackness' of the United States' 'junior partners' – those whose grievances might be redressed, however incompletely, by 'rights', to which we might add non-black LGBTQ people – functions hand in hand with the systematic state and para-state violence targeted at black people. The tactics of 'crowding out' black claims (like we see in the poster) and the tactics of actively terrorizing black people are two wings of the same endeavour. Because 'blackness' and 'criminality' are wedded in the US lexicon, as Saidiya Hartman argues in her book *Scenes of Subjection* (Hartman 1997), any claims to *not* being a criminal – or on the flipside, to *being* a citizen – must literally be made on the backs of black people. When rights-seeking constituencies claim they are 'not criminals', they articulate their bid for inclusion through an implicit assertion that they are 'not black'. Even if the articulation is made on behalf of a group that supposedly does not exclude black members, as Sexton and Wilderson argue, such an assertion enters a system of meaning that necessarily signifies the group as non-black and appeals for a chance to participate in anti-blackness.

How might we bring these analyses to bear in our critiques of the ascendancy of neoliberal LGBT political and cultural practices? A growing number of critical thinkers such as Lisa Duggan and Jasbir Puar have worked to theorize 'homonormativity' and 'homonationalism' in the United States in an effort to disarticulate LGBT political claims from the absorptive thrall of late capital (Agathangelou, Bassichis and Spira 2008; Duggan 2004; Puar 2007). Simultaneously, we are witnessing the proliferation and expansion of visionary racial and economic justice-focused LGBT activist formations challenging the status quo of state violence and structural adjustment, both in terms of what issues and constituencies are centred within LGBT political work as well as the ways in which the process of organizing and movement building replicates racial norms and domination.<sup>3</sup> These critiques and organizing efforts offer a vital intervention into the frightening alignment of gayness (and increasingly transgenerness) with capital. They also invite us to continue exploring the ways in which non-black LGBT political claims are produced by and reproduce anti-blackness as a foundational structure of US Americanness. This exploration helps us to situate contemporary LGBT anti-black racism – evidenced in, for example, the blaming of black voters for the passage of Proposition 8, the prioritization of sentence-enhancing hate crimes laws as a solution to anti-LGBT hate violence or the failure of the largest LGBT organizations to oppose the rapid expansion of the prison police state – as a *logical extension* of the constitutive and enduring antagonisms of slavery and its mobilization of racial-sexual norms and terror.

In the vein of critics such as Cathy Cohen and M. Jacqui Alexander (Alexander 2005; Cohen 1997: 437–465) who have persuasively theorized the ways in which both the white gay and lesbian rights framework and many strands of more

progressive queer politics participate in white supremacy's tactics of pitting 'good gays' (white, middle class, gender normative, able bodied) against 'bad queers' (black, brown, poor, and disabled, which necessarily mean gender non-normative), we want to understand how the basic assumptions, tactics, and epistemologies underlying contemporary queer political claims often unwittingly reproduce and are productive of the fundamental structures of anti-blackness, settler colonialism, and permanent war undergirding the United States itself. In this chapter, we explore the implications of Sexton's critique of anti-blackness within the domain of contemporary gay and lesbian rights politics within the US, as two white activist-scholars invested in advancing and centring anti-racism within queer and trans political work. Our work here is enabled in particular by Andy Smith's foundational essay, 'Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing' (Smith: 2006) in which she suggests that white supremacy is not singular, but operates in differentiated ways to target different populations. She describes three pillars of white supremacy – the Orientalism/war pillar, the slavery/capitalism pillar and the genocide/colonialism pillar – arguing that white supremacy enacts different technologies of violence and produces different narratives and mythologies in each of these pillars. Her work encourages scholars and activists to analyse the specificity of particular forms of racism, and acknowledge that people targeted in one pillar can also be made complicit with another through promises of inclusion and recognition. In his article 'People of Color Blindness', Sexton (2010) argues that the failure to look at the specificity of anti-black racism in the United States, and the willingness of many movements and intellectuals to do two things – to analogize other struggles to anti-black racism generally and emancipation from slavery specifically, and to speak generally about 'racism' without attention to the specificities of anti-blackness – is anti-black. While there is a great deal to be said about how contemporary lesbian and gay rights advocacy participates in all three pillars Smith describes, as well as about how settler colonialism is indeed foundational along with slavery in the fabric of US Americanness, in this chapter we want to look at the specific ways that particular US anti-black logics, methods and institutional arrangements are mobilized by some recent campaigns and events that illustrate Sexton's concerns about how movements that fail to contest anti-blackness participate in it. We look specifically at the focus on reproduction, legal redress, and analogy within gay and lesbian politics as three key sites that illustrate these investments. Critiques of anti-blackness, ultimately, are necessary to elucidate white supremacy's 'queer' junior partnerships, the 'contradictions of coalitions between workers and slaves' (Wilderson 2007: 33), the ghostly 'continuities of slavery and freedom' (Hartman 1997: 13), and the ways in which the unspeakable violences at the core of the US refuse to be subdued by the latest proclamation of their completion or replacement.

## Reproduction

Saidiya Hartman has argued that the transatlantic slave trade constructed a notion of blackness that is fundamentally *fungible* and *criminal*, making blackness permanently available for the 'full enjoyment' of white people and making black people always already guilty in the eyes of the law, incapable of being violated (Hartman 1997). The civil and social death of black people forms the basis on which white life and citizenship become knowable, their compass and their shadow. Whiteness must be constantly yoked to the future and victimhood while blackness must be yoked to death and pathology. The story of endangered white futurity and dangerous black negativity – the sexual politics that motors anti-blackness – can be found on every channel. Lauren Berlant has explored how the celebrated figure of the feminized white child at risk of racialized violence in the post-Reagan years has been mobilized to justify claims to state protection and citizenship (Berlant 1997). Joy James has written about how the widely accepted justification for lynching as the sexual threat posed by black men to white women and their progeny (as well as the erasure of sexual violence against black women) has been recalibrated in the contemporary demonization and 'high-tech lynching' of black men in high-profile legal cases in which white women have been raped (James 1996). These are just a few of limitless versions of this same narrative.

Cue the gay remix! Gay and lesbian claims to imperilled domesticity, privacy, and kinship (popular in earlier homophile organizing but renewed with a fervour since the 1990s) illustrate the capaciousness of white supremacy to mutate these key 'founding' figures – now it is the wounded white gay citizen who requires state inclusion and protection to ensure his successful reproduction. These claims, remember, come amidst and in the wake of ongoing efforts from the right wing to cathect gayness to pathology, murder and non-reproductivity (Bersani 1987: 197–222; Delany 1994; Sontag 1989) – qualities usually reserved for blackness – with the emergence of HIV/AIDS. A few illustrations of the powerful mobilization of white futurity within contemporary gay and lesbian politics are useful. First, we point to the widely popular 'It Gets Better' project, started by author Dan Savage and his husband Terry Miller in response to a series of publicized suicides of queer youth, encouraging teens that life does indeed improve. Thousands of people responded to their initial video by making their own videos sharing this message of future improvement, and eventually over 22,000 videos were collected on the 'It Gets Better' website, including ones created by gay and lesbian police officers and the president of the US himself (Savage 2013). A book of essays from the project was released in 2011. In the original video, Savage and his husband, two white non-trans gay men, describe their high school years where they faced bullying for being gay. They then describe how their lives got better after high school because their natal families came to accept and include them, they met each other and adopted a child. Savage shares a memory of walking around Paris with their child and Miller talks about their love of and accomplishments at snowboarding as a family. The two earnestly address an audience of

12–17-year-old viewers, urging them that their lives will get better after high school. Speaking about bullies and bigots, Savage states ‘Once I got out of high school, they couldn’t touch me anymore.’

The project illustrates how a form of gayness implicitly linked to whiteness and upward mobility stakes its claim to the future. After all, for whom will it get better? And what kind of better does it get? When we consider this directive that life gets better against the backdrop of the systemic imprisonment, police murder and state abandonment of black people at every age, we can see how it is white suffering that this campaign aims to make legible as worthy of protection. Black suffering, as Jared Sexton has articulated in his analysis of Hurricane Katrina (Sexton 2006), is unspectacular, banal, self-induced, a cause for, if anything, shame or fascination, not redress. Savage’s assertion that his departure from high school protected him from the reach of homophobic violence is certainly indicative of a white-owning class trajectory of matriculation. What guarantees can be given to those who will remain in the grasp of foster care systems, homeless shelters, psychiatric facilities, jails, prisons, and immigration detention centres, regardless of their age? Savage’s story generalizes a particular narrative in which white queers can ‘escape’ homophobia by moving to gay enclaves in urban areas, a trajectory out of reach for so many queer and trans people who will remain targets of policing and immigration enforcement, even and perhaps especially in white gay neighbourhoods where they are read as dangerous outsiders (Hanhardt 2008).

The fantasy of life ‘getting better’ imagines ‘violence’ as individual acts that ‘bad’ people do to ‘good’ people who need protection and retribution from state protectors (law enforcement, policymakers, administrators), rather than situating bodily terror as an everyday aspect of a larger regime of structural racialized and gendered violence congealed within practices of criminalization, immigration enforcement, poverty, and medicalization targeted at black people at the *population* level – from before birth until after death – and most frequently exercised by government employees. It is not a leap to see, then, how this cultural politics of naturalizing the premature death of black people produces a benevolent thrall for white gays and lesbians to adopt black children. White gay and lesbian politics must remain silent on anti-black racism, must position itself as anything *but* black, to keep its place in line for the future.

A second example of white gay and lesbian politics staking its claim to the future on the backs on black people can be seen in the prominent discourse that blamed black voters for the passage of Proposition 8 in California (L.A. Now; 2008 McCullom 2008). US white gay and lesbian advocates regularly used the language of being ‘second class citizens’ (Farrow 2005),<sup>4</sup> invoking the metaphor of US racial apartheid under Jim Crow laws to demand equality and decrying the fact that in some jurisdictions same-sex relationships are recognized as civil unions or domestic partnerships rather than being called marriage. In fact, the case that led to Prop 8 was entirely about this linguistic issue because California’s domestic partnership law already granted the material benefits of marriage within the state to

same-sex couples prior to the case.<sup>5</sup> Dan Savage was one of the noteworthy commentators who illustrated the popular anti-black sentiment much underlying Proposition 8 protest, writing on 5 November 2008: 'I'm done pretending that the handful of racist gay white men out there -- and they're out there, and I think they're scum -- are a bigger problem for African Americans, gay and straight, than the huge numbers of homophobic African Americans are for gay Americans, whatever their color' (DiMassa and Garrison 2008; Vick and Sundrin 2008).

There are a number of ways in which anti-blackness operates in this widely circulated discourse. First, the depiction of black homophobia as disproportionate to white homophobia is a common trope, part of an articulation of blackness as adverse to sexual modernity, and whiteness as predisposed towards it. This notion produces blackness as 'straight' and gayness as white and increasingly non-black, erases the existence of black queers, and affirms the exceptionalism of whiteness against the 'backwardness' of blackness.

Second, the articulation of this blame with regard to same sex-marriage advocacy buries the fact that marriage itself is anti-black, functioning to reproduce the intergenerational transmission of white wealth, and consistently operating in US law and politics as a method of policing and controlling black people (Farrow 2005). After denying the recognition of family ties to black people during the period of explicit governmental recognition of chattel slavery, in the period immediately after formal legal emancipation the Freedman's Bureau put significant effort into encouraging marriage for the newly free as a 'civilizing element' (Farmer-Kaiser 2010) for a population that whites feared and sought to contain and control. Marriage was seen as key to turning former slaves into wage workers through the enforcement of patriarchal family formation norms (Farmer-Kaiser 2010). The enforcement of those norms, and the depiction of black families as pathologically non-marital and female-headed continued – the infamous Moynihan Report is an oft-cited example of this argument – justifying anti-black, anti-poor policy interventions through this logic (Moynihan 1965). Anti-illegitimacy laws that prevented children born out of wedlock from accessing certain benefits and privileges have been used in the US to specifically target black people for exclusion, especially in the post-*Brown* period when more explicitly race-based legislation became less available (Mayeri 2011).<sup>6</sup> These anti-black ideas about the value of marriage have also been prevalent in the period of the dismantling of poverty alleviation programmes in the US since the Reagan era, where drastic and harmful policy changes have been justified by the mobilization of sensationalist images of black unwed mothers receiving public benefits. Poverty has been effectively blamed on the failure to marry and 'marriage promotion' programmes have been funded to target people on public benefits with the racialized idea that marriage, as a moral activity, will alleviate poverty and dependency on public aid.<sup>7</sup> Given the long history of marriage as a form of social control targeted at black people and used to produce the demonization of black people that rationalizes various schemes of criminalization and abandonment, the depiction of same-sex marriage by white gay and lesbian rights politics as a question of 'equality' alongside the accusation

that it was black voters who prevented white gay and lesbian people from achieving marriage rights in California are simply the most recent installments in a much longer trajectory of anti-black American marriage politics.

Third, the widespread call to 'build coalitions' between (non-black) gay people and (straight) black people in the wake of Proposition 8's passage performed what Wilderson calls a 'crowding out' of black political claims. The assessment that the strategic error in the anti-Proposition 8 campaign was a lack of black voter education and mobilization misunderstands the relationship between non-black gay and lesbian politics and black politics. Dominant gay and lesbian politics over the past three decades have either explicitly or tacitly supported nearly every site of black abjection and abandonment – namely, privatization, militarization, and criminalization. In particular, gay and lesbian politics' unwillingness to oppose policing and prison expansion has been a key faultline demonstrating its dissonance with the demands of black politics. When black people's lives and deaths are centred in analysing barriers to reproduction, the centrality of marriage quickly dissipates to reveal civil society itself – including but not limited to police, prisons, courts, schools, social services, foster care, child protective services, public benefits and more – as sites of what Dylan Rodriguez describes as the mass-based immobilization and routinized terror of black people, determining the life chances of current and future black generations (Rodriguez 2006). From this view we can understand that it is not merely a coincidence that gay and lesbian rights politics has, in many ways, championed the existence (including the reform) of the US prison regime. We can see this only most explicitly in two decades of hate crimes legislation lobbying, police training, increased police presence in 'gayborhoods' (Hanhardt 2008: 61–85), and enmeshment with criminal legal victim advocacy frameworks, as well as the silent support for endless prison construction, law enforcement–immigration collaboration, and police militarization.

The prison regime – the decentralized complex of institutions and practices that permeates all of civil society and works to liquidate black life – is a key way that slavery has been re-inscribed after its purported 'abolition'. How non-black social movements relate to this regime, then, is an important illustration of the 'contradictions of coalitions between workers and slaves' (Wilderson 2007), the diverging demands, claims, and strategies among those meant to work and those meant to die. Most non-black social movements and particularly white social movements have invariably bolstered, normalized and extended this regime, either explicitly or by challenging only its 'excesses' instead of its fundamental existence.

We have attempted to illustrate how the cultural politics defending white gay and lesbian reproduction is enabled by the ongoing exclusion of black people from the future. From this place, we want to move to think about how attempts to be recognized by law extend these fundamental antagonisms.

## Law

Any account of the anti-black framework of the gay and lesbian rights project must identify the centrality of claims to what critical race theorists call 'formal legal equality' as a key technology of its anti-blackness. Gay and lesbian rights politics, which is the most legible contemporary anti-homophobic and anti-transphobic resistance, centres on and limits itself to recognition and inclusion claims to be achieved through legislation and litigation that knock down formal barriers to 'equal citizenship' in neoliberal terms. This means access to military service, decriminalization of sodomy (but not anything else that is criminalized), the ability to register a marriage of two same-sex partners, and the listing of sexual orientation in hate crimes and anti-discrimination laws. In official terms, these legal 'fixes' are said to guarantee freedom, liberation and equality. In plain terms, they promise to make sure white gay and lesbian people can pass on their stolen wealth as they choose when they die, call the police to defend it, endorse invading armies to expand it, and protect it from taxation. White gays and lesbians seek to more fully redeem the promises of white privilege – to overcome the hurdles they face when attempting to fully enjoy the spoils of colonialism and white supremacy that can be hard to reach because of how they are constructed through heteropatriarchy. The legal reforms they seek refine (rather than eradicate) the heteropatriarchal racial and colonial enforcement of gender and sexuality norms, slightly adjusting the lines of who is inside and outside the state-sanctioned forms and can reap their numerous material benefits. These reforms utterly fail to contest the arrangements of anti-blackness, thereby endorsing, legitimizing and expanding it in the name of 'equality'.

The unabashed thrust of gay and lesbian politics to achieve equality under the law continues despite long-standing critiques of the limitations of such legal equality projects by women of colour feminism, critical race theory, critical disability studies and indigenous scholars and activists. Table 9.1 illustrates the ways in which the rhetorical arguments mobilized by gay and lesbian rights discourse rely on and extend foundational racial narratives justifying black premature death.

Legal equality arguments require those making them both to articulate existing legal structures as generally fair and neutral *but for* the exclusion focused on and to portray the excluded group as a population that deserves inclusion. This work constructs desirable and undesirable populations, those deserving a chance at life and reproduction and those whose exile, imprisonment or death is acceptable or even important for the survival of the nation. Mobilization of images of white gay and lesbian families as 'hard working' invokes the anti-black logics of 'cultures of dependency', distinguishing the constituents of gay and lesbian rights politics as *not* public benefits recipients. Claims that gay and lesbian people are crime victims assert that constituents of this politics are on the 'right' side of the white innocence/black criminality divide. The articulation of white gay and lesbian populations as 'gay Americans' suggests a patriotic citizenship that suggests membership in racial national norms that consistently operate at the expense of black life. The central

Table 9.1 Foundational racial narratives justifying black premature death

<i>Rhetorical arguments advocating (white) gay and lesbian legal equality</i>	<i>Foundational and default racial narratives mobilized by the state and civil society to describe black people</i>
Hard-working and property-owning targets of discrimination deserving employment and wealth protections (Steinberger 2009)	Lazy and dependent drains on civil society incapable of assimilating into productive workers
Good, non-abusive, well-resourced parents deserving legal protection (Gates, Lee Badgett, Macomber and Chambers 2007) <sup>a</sup>	Neglectful, abusive, culturally regressive parents deserving punitive policing and forced removal of children
Crime victims deserving state protection offered by police, prisons, courts, child welfare, immigration enforcement, psychiatric systems <sup>b</sup>	Crime perpetrators deserving state containment and slow/immediate death from police, prisons, courts, child welfare, immigration enforcement, psychiatric systems
Vulnerable students needing the protection of school administrators	Delinquent and dangerous pre-criminals needing the policing of school administrators and/or law enforcement

a 'Same-sex couples raising adopted children are older, more educated, and have more economic resources than other adoptive parents' (Gates, Badgett, Macomber and Chambers 2007: i).

b In recent years, many writers have examined the problematic engagement of lesbian and gay rights politics with victims' rights frames and hate crime statutes specifically, centring the criminalization of queer and trans people of colour as a key concern. (See, e.g. Bassichis (2007); Coolman, Glover and Gotsch (2005); Lee (2004); Mogul, Ritchie and Whitlock (2011); Whitlock (2001).)

role of formal legal equality in the gay and lesbian rights framework requires, of course, these investments and belongings because the legal system itself, as so many movements and theorists have shown, establishes and maintains racialized-gendered property statuses (Chin 2002: 1–63; Gomez 2007; Harris 1996; Ngai 2004; Omi and Winant 1986; Smith 2006). Declarations that the state is racially neutral and, in the cases of hate crimes laws and anti-discrimination laws, a benevolent protector *against* racism, function to expand and instantiate the apparatuses of punishment, containment, and exploitation structuring black life and death. Uncritically seeking inclusion in such frameworks – trying to get the 'equality' that has purportedly been granted 'already' to black people by such laws – invests gay and lesbian rights politics in the anti-black national narrative that racism has been resolved by law and that law reform is the way to resolve the complaints of marginalized or excluded populations.

Critical race theorists have helped identify the inadequacy of the discrimination principle that is central to the failing of 'formal legal equality' to deliver material relief from racism. The discrimination principle conceptualizes racial harm as

individual manifestations of bias in activities like hiring, firing, leasing, selling or serving (Freeman 1996). This approach to understanding and addressing racism relies on at least two harmful assumptions. The first is that race consciousness (on the part of both people of colour and white people), not intergenerational structures of white supremacy, is the problem that the law must eliminate (leaving 'colourblindness' in its place, contributing to the dismantling of programmes seeking to address racial disparity such as affirmative action).<sup>8</sup> In the absence of explicit, intentional exclusion, courts rarely find a violation of discrimination law. Most black people who have been denied a job, apartment, or access to public accommodation cannot produce evidence of intent required, not to mention that most people for whom such losses might produce the worst consequences cannot afford an attorney (Legal Services Corporation 2007). The second faulty assumption underlying the discrimination principle is that the law itself can remedy the most significant conditions of white supremacy. The broad conditions of extreme racial disparity in access to housing, employment, education, food and healthcare, and severe disproportionality in criminal punishment, environmental damage and immigration enforcement, are cast as natural and inevitable by the discrimination principle. When racist harm is framed as a problem of aberrant individuals who discriminate and when intention must be proved to find a violation of the law, the background conditions of white supremacy are implicitly declared neutral. In the US, this has been accompanied by a robust discourse that blames black people for their poverty and criminalization, a logical leap required when colourblindness has been declared and racism has been defined so narrowly as to exclude it from being blameworthy in the most widespread conditions of maldistribution.

Critical race theorists have supplied the concept of 'preservation through transformation' to describe the neat trick that civil rights law performed in this dynamic (Harris 2007: 1539–1582; Siegel 1997: 1111–1148). In the face of significant resistance to conditions of subjection, law reform tends to provide just enough transformation to stabilize and preserve status quo conditions. In the case of widespread black rebellion against white supremacy in the US, civil rights law and colourblind constitutionalism have operated as formal reforms that masked a perpetuation of the status quo of violence against and exploitation of black people. Explicit exclusionary policies and practices became officially forbidden, yet the distribution of life chances remained the same or worsened with the growing racialized concentration of wealth in the US, the dismantling of social welfare, and the explosion of criminalization that has developed in the same period as the new logic of race neutrality has declared fairness and justice achieved. Lesbian and gay rights politics' reproduction of the mythology of anti-discrimination law and the non-stop invocation of 'equal rights' frameworks by lesbian and gay rights politics marks an investment in the legal structures of anti-blackness that have emerged in the wake of *Brown*. The emergence of the demand for LGBT inclusive hate crime laws and the accomplishment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act as a highly lauded federal legislative 'win' for lesbian and

gay rights offers a particularly blatant site of the anti-blackness central to lesbian and gay rights – literally an investment in the expansion of criminalization as a core claim and desire of this purported ‘freedom’.<sup>9</sup> In the context of the foundational nature of slavery in US political formation, it is perhaps not surprising to see a political formation of white ‘gay and lesbian Americans’ articulate a demand for freedom that is contingent on the literal caging of black people.

The fantasy that formal legal equality is all that is needed to eliminate homophobia and transphobia is harmful not only because it participates in the anti-black US progress narrative that civil rights law reforms resolved anti-blackness in the US (thus any remaining suffering or disparity is solely an issue of ‘personal responsibility’),<sup>10</sup> but also because it constructs an agenda that is harmful to black queer and trans people and other queer and trans people experiencing violent systems mobilized by anti-blackness. Formal marriage rights will not help poor people, people whose kids will be stolen by a racially targeted child welfare system regardless of whether or not they can get married, people who do not have immigration status or health benefits to share with a spouse if they had one, people who have no property to pass on to their partners, or people who have no need to be shielded from estate tax. In fact, the current wave of same-sex marriage advocacy emerges at the same time as another pro-marriage trend, the push by the right wing to reverse feminist wins that had made marriage easier to get out of and the Bush-era development of marriage promotion programmes (continued by Obama) targeted at women on welfare (Adams and Coltrane 2007: 17–34; Alternatives to Marriage Project 2007; Coltrane and Adams 2003: 363–372; Feld, Rosier and Manning 2002: 173–183; Pear and Kirkpatrick 2007; Rector and Pardue 2004). The explicitly anti-black focus of the attacks on welfare and the mobilization of racialized–gendered images to do this go hand in hand with the pro-marriage gay rights frame that similarly invests in notions of ‘personal responsibility’, and racialized–gendered family formation norm enforcement. The articulation of a desire for legal inclusion in the explicitly anti-black, anti-poor governance regime of marriage, and the centralization of marriage rights as the most resourced equality claim of gay and lesbian rights politics, affirms its alliance with anti-blackness.

It is easy to imagine other queer political interventions that would take a different approach to concerns about parental rights, child custody and other family law problems. Such approaches centre the experiences of queers facing the worst violence of family law, those whose problems will not be resolved by same-sex marriage – parents in prison, parents facing deportation, parents with disabilities, youth in foster care and juvenile punishment systems, parents whose children have been removed because of ‘neglect’ due to their poverty. The choice of seeking marriage rights, like the choice to pursue hate crime laws rather than decriminalization, the choice to pursue the *Uniting American Families Act*<sup>11</sup> rather than opposing immigration enforcement and the war on terror, the choice to pursue military service rather than demilitarization, is a choice to pursue a place for white gay and lesbian people in constitutively anti-black legal structures.

## Analogy

The centrality of legal equality claims to gay and lesbian rights politics and the specific investment of them in accessing and expanding key institutions of anti-blackness is often accomplished through the deployment of a 'like black' civil rights analogy. Sexton observes that this analogy is a key technology of anti-blackness in non-black social movements. He describes the 'peculiar, long standing and cross-racial phenomenon' where a range of struggles allegorize themselves to revolts against slavery, meanwhile the suffering of black people during slavery and its afterlife is something perpetually figured as already known and addressed, not needing to be further discussed, and of course, mainly historical (Sexton 2006: 42).<sup>12</sup> Sexton writes:

The metaphoric transfer that dismisses the legitimacy of black struggles against racial slavery (and . . . its 'functional surrogates') while it appropriates black suffering as the template for nonblack grievances remains one of the defining features of contemporary political culture.

(Sexton 2006: 42)

White gay and lesbian rights advocates and the lawyers who lead their charge consistently analogize the gay and lesbian rights struggle to the black civil rights movement. Examples abound. *Lawrence v Texas*, the Supreme Court decision finding sodomy statutes unconstitutional, was lauded as 'our *Brown v Board of Education*' (Graff 2003). Same-sex marriage advocates consistently analogize their struggle to *Loving v Virginia*, the 1967 case in which the Supreme Court declared anti-miscegenation laws unconstitutional (American Foundation for Equal Rights (n.d); Capehart 2011; Farrow 2005; Klarman 2005: 485–86; Pascoe 2004; Rosenfeld 2007). More broadly, the articulation of the fight for same-sex marriage or gay and lesbian rights generally as a 'frontier' of civil rights (Beavers 2000: 31–33; Colvin 2011; Marquez 2008; Seltzer 2011; Tolbert and Smith 2006), or sometimes 'the final frontier of the civil rights movement' (Marco n.d.; May-Chang 2008). This analogy, of course, heavily relies on the idea that the civil rights movement successfully freed black people and made them equal, thus gay and lesbian rights can be framed as the 'new frontier' since the others have been accomplished. Recall that decisive check mark next to 'African American' on the poster we invoked earlier: the trope maintains that 'other' populations (especially black people) have been freed by legal equality and now it is time to complete the project of American freedom by granting legal equality to (apparently non-black) lesbian and gay people. The triumphant and well-circulated claim that 'Gay is the New Black' performs dual labour: first, it disappears the unspectacular and enduring conditions of black suffering that persist in the neoliberal era. Second, it appropriates the apparently satisfied struggle of black people. Remember that it does not say 'Gay = Black', but that 'Gay is the *New Black*'—its suffering exhausted, passé, black is no longer 'black enough'. Black, not needing to be black anymore, has now

objectively *passed on* its reference point to gay, which is not black, and which apparently needs it more.

What does it mean, then, for queer politics to reckon with the 'insatiable' demands of black liberation? Wilderson articulates black liberation as 'a politics of refusal and a refusal to affirm, a "program of complete disorder"' (2007: 32). Today's gay and lesbian rights politics is a critical illustration of the ways in which slavery's afterlife is maintained and recuperated, as well as a painful demonstration of Sexton's assertion that any resistance politics that 'forfeits or sidelines the fate of blacks' invests in anti-blackness and becomes a site of its expansion. It is inside this predicament that we struggle to advance, already compromised, the unfinished project of abolition.

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## Notes

- 1 We thank Prof. Russell Robinson for drawing our attention to this poster in his presentation at the 2011 Association of American Law Scholars annual meeting.
- 2 The gay magazine, *The Advocate*, appeared with a black cover with white text reading 'Gay is the New Black?: The Last Great Civil Rights Struggle' on its November 2008 issue, just after the election cycle that brought Barack Obama to the White House and saw the passage of Proposition 8, rescinding the legalization of same-sex marriage, in California.
- 3 FIERCE! and the Audre Lorde Project in New York City and Southerners on New Ground (SONG) in the south are three of many examples of LGBT political efforts that have emerged over the last decade that centralize racial and economic justice issues over legal equality ones and community organizing strategies over legal reform-focused ones.
- 4 Kenyon Farrow discusses the use of this term by 'countless well-groomed, well-fed white gays and lesbians on TV' as part of his analysis of the analogy often made in white lesbian and gay rights advocacy between its own efforts and black suffering and resistance (Farrow 2005: n.p.).
- 5 The judicial decisions in the litigation challenging Proposition 8 provide an insight into the ways that same-sex marriage advocacy has been a source of rejuvenation for the institution of marriage itself, long challenged by feminist and anti-racist movements as a site of harmful racialized-gendered norm enforcement, control and maldistribution. The decisions in *Perry v Brown*, in which first a district court and then the 9th Circuit Court of Appeals struck down Prop 8, are lengthy arguments about the importance of marriage to society and human dignity. Both decisions find that although Prop 8 only denies same-sex couples the title 'marriage' since the material benefits of marriage are available under California's domestic partnership statute, the denial of 'marriage' status is unacceptable. To do so, the judges spill a great deal of ink arguing for the symbolic significance of marriage. Judge Reinhardt invokes many unsubstantial romantic clichés about marriage, mostly the ones about its relationship to human dignity and its recognition of enduring bonds of mutual care. The mystique of marriage, long critiqued by feminists and queers naming violence inside the family and resisting rigid gender roles and compulsory heterosexuality, is central to his reasoning, as he discusses the excitement of witnessing public marriage proposals 'whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron'. He writes, 'The name "marriage" signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships . . . We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries . . . It is the principal manner in which the State attaches respect and dignity to the highest form of committed relationship and to the individuals who have entered into it.' *Perry v Brown*, 671 F.3d at 1078 (9th Cir. 2012). This embrace of the romantic mystique of marriage, and dismissal of the material realities of marriage as a racialized-gendered system of distribution of healthcare, immigration status, wealth and other arrangements of survival, is accompanied by a romanticized notion of legal marriage as a system that has been reformed to be fair, and now requires an additional reform – inclusion for same-sex couples – to serve its true role of affirming human dignity and supporting loving and caring relationships. Judge Walker writes, 'Race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage.'
- 6 Mayeri writes:

Although illegitimacy penalties were centuries-old and firmly rooted in religious and civil traditions, in the post-*Brown* period many efforts to punish non-marital childbirth

were thinly veiled attacks on the civil rights movement and on racial desegregation. Ostensibly race-neutral illegitimacy penalties adopted in the 1960s purposefully targeted African Americans, often in ways that reinforced both racial segregation and poverty . . . In cases like *Levy v. Louisiana*, the first Supreme Court case to invalidate an illegitimacy-based classification on constitutional grounds, plaintiffs argued that illegitimacy penalties had the purpose and effect of discriminating on the basis of race, and therefore violated equal protection. They had powerful statistical evidence of what we would now call disparate impact on African Americans—often upwards of 75–90 percent of the families affected by illegitimacy penalties were black.

(Mayeri 2011: 3–4)

- 7 See, e.g. Sparks 2003 ; Rector and Pardue 2004; Neubeck and Cazenave 2001; New York Times 1976. The ‘Findings’ section of the 1996 Personal Responsibility and Work Opportunity Act, the legislation signed by President Clinton in his efforts to ‘end welfare as we know it’, exemplify the logic that poverty is a result of the failure of poor people to marry. The text reads:

The Congress makes the following findings:

- (1) Marriage is the foundation of a successful society.
- (2) Marriage is an essential institution of a successful society which promotes the interests of children.
- (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.
- (4) In 1992, only 54 percent of single-parent families with children had a child support order established and, of that 54 percent, only about one-half received the full amount due. Of the cases enforced through the public child support enforcement system, only 18 percent of the caseload has a collection.
- (5) The number of individuals receiving aid to families with dependent children (in this section referred to as “AFDC”) has more than tripled since 1965. More than two-thirds of these recipients are children. Eighty-nine percent of children receiving AFDC benefits now live in homes in which no father is present. . . .
  - (c) The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women. Between 1970 and 1991, the percentage of live births to unmarried women increased nearly threefold, from 10.7 percent to 29.5 percent.
- (6) The increase of out-of-wedlock pregnancies and births is well documented. Public Law 104-193, 10 Stat. 2105, 1996.

- 8 American critical race theorists have extensively critiqued how the legal prohibition of racial apartheid in the US was undertaken through a regime of ‘colourblindness’ that attacks explicitly race-conscious policymaking in the US. As a result, programmes designed to remedy the long-term and continuous exclusion of people of colour from education systems and particular areas of employment have been struck down by courts for improperly taking race into account. These legal decisions establish a fiction that contemporary conditions in the US (such as the extensive racial segregation in public schools) are race neutral, so that taking race into account to remedy them violates the laws prohibiting race discrimination (Crooms 1999; Freeman 1996; Gotanda 1996; Harris 1996; Peller 1996).
- 9 The 2009 controversies around the addition of the death penalty to the federal hate crime statute brought these themes closer to greater articulation in national queer politics. The National Coalition of Anti-Violence Projects released a statement critiquing the addition of the death penalty clause specifically, while other groups, such as the Audre Lorde Project, the American Friends Service Committee, Community

United Against Violence, and the Sylvia Rivera Law Project critiqued the hate crime law strategy itself. The controversy brought attention to the alliance with criminal punishment expansion that hate crime laws advance (Sylvia Rivera Law Project 2009; Sylvia Rivera Law Project, FIERCE, Queers for Economic Justice, Peter Cicchino Youth Project, and the Audre Lorde Project 2009; Waggoner-Kloek and Stapel 2009).

- 10 This phrase, 'personal responsibility' has been a watchword of neoliberal economic policy and criminalization in the US. The notion of individual responsibility, and the idea that people who are poor are poor because they are irresponsible, operates as code language to invoke images of black immorality, laziness, and criminality and to justify austerity and criminalization as responses to poverty. See, e.g. the Personal Responsibility and Work Opportunity Act described earlier.
- 11 The Uniting American Families Act (H.R. 1024/S. 424) would allow a US citizen or permanent resident to sponsor their same-sex partner for immigration to the US. The advocacy organization Immigration Equality, in its literature promoting the legislation, writes:

U.S. immigration law is based on the principle of 'family unification'. Accordingly, it allows Americans to reunite with their parents, children, and spouses by sponsoring these family members for immigration. However, gay and lesbian Americans cannot sponsor their foreign born partners for immigration, no matter how long they have been together or how committed their relationship is. According to the 2000 U.S. Census, over 36,000 couples are affected by this discrimination; and 46% of them are raising children . . . With no ability to sponsor their partners, Americans are being forced abroad: taking their tax base, their talent, and enterprise to one of more than 20 countries that offer immigration benefits for same-sex partners.

(Immigration Equality n.d.)

The images contained in this description of gay and lesbian Americans with immigrant partners who pay taxes and are talented and enterprising invokes the implicit whiteness and wealth of these figures to articulate the American immigration enforcement system as effectively pro-family while in need of a slight tinkering to include a few forgotten deserving families. What might such framings mean for those targeted by a racially selective immigration enforcement system that is increasingly tied to criminal punishment technologies in ways that ensure disproportionate enforcement on black populations? As the deservingness/undeservingness divide in immigration politics increasingly hinges on the perceived criminality of immigrants, how might such framings increase harm to black people who are perpetually cast as criminals? How narrow a concern about immigrants does this advocacy suggest, in its limitation to immigrants who are partnered with enterprising gay and lesbian Americans?

- 12 See also Sexton 2006.