Policing Privacy, Migrants, and the Limits of Freedom

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In June 2003 the U.S. Supreme Court delivered a landmark ruling that decriminalized consensual sodomy. *Lawrence and Garner v. Texas* protected the liberty to engage in "certain intimate conduct" as a dimension of a person's privacy and autonomy. Justice Kennedy, writing for the 6–3 majority, expounds on the constitutional meaning of liberty. He begins with the tenets of classical liberalism, that the state recognizes and makes visible the "dwelling," the "home," and "other private places" to protect "persons" from the state's own intrusive policing. And then Kennedy argues that this liberty and freedom "extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[1]

The *Lawrence* decision repudiated the 1986 *Bowers v. Hardwick* ruling and explicitly extended the rights of privacy and sexual freedom to adult consenting homosexuals. Justice Kennedy's decision drew on over thirty years of Supreme Court decisions that limited government intervention in the reproductive choices of women (in terms of both contraception and abortion).[2] In *Lawrence and Garner v. Texas*, the terrain of privacy and sexual freedom shifted from heterosexual reproduction to adult sexual intimacy more broadly:

> Adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[3]

Significantly, Kennedy's decision broadened the constitutional protections of privacy beyond the married heterosexual couple and their bedroom, which had dominated the reproductive freedom cases of the 1960s to early 1990s, to encompass the homosexual couple in their home, and perhaps beyond. The parameters for exercising liberty and privacy from govern-

Social Text 84–85, Vol. 23, Nos. 3–4, Fall–Winter 2005. © 2005 by Duke University Press.

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ment interference required that the relationship be between consenting adults.

The Supreme Court ruling in *Lawrence* produced a privacy shield for homosexual couples. Kennedy's opinion focused on redressing the inequality between heterosexuals and homosexuals. Yet the historical dynamics of inequitable policing and prosecution feasted on distinctions of race, nationality, and class. As both the historian's amici brief and Kennedy's decision explain that sodomy prosecution in the twentieth century has intensified to target homosexuals, our own historical and legal analysis must recognize the social inequities and prejudices, and the dynamics of social space, that shaped the policing of sodomy.[4] *Lawrence and Garner v. Texas* offers an important opportunity to consider where and for whom does privateness apply historically and legally. Under what circumstances does a person have privacy, mobility, and freedom of intimate contact unfettered by government policing?

The specific circumstances of the arrest of John Geddes Lawrence and Tyron Garner explicates the Supreme Court's focus on individual autonomy and privacy of homosexual conduct in the home. On the night of 17 September 1998, John Lawrence, a fifty-five-year-old white medical technician; Tyron Garner, a thirty-one-year-old black unemployed man; and Robert Royce Eubanks, a forty-one-year-old white neighbor, were socializing in Lawrence's apartment in the suburbs of Houston, Texas. Later that evening Eubanks called the police and reported that a man was behaving erratically with a gun. The police met Eubanks in the parking lot, and Eubanks directed them to Lawrence's eighth-floor apartment. The police barged into the unlocked apartment and discovered Lawrence having anal intercourse with Garner. The police arrested Lawrence and Garner for "homosexual conduct," handcuffed them, and hauled them off to jail. Eubanks later served fifteen days in jail for making a false police report. Lawrence and Garner were convicted of "deviate sexual intercourse" in Harris County Justice Court, and five years later they successfully appealed their conviction in the U.S. Supreme Court.[5]

The location of the arrest—John Lawrence's apartment—and the Texas statute that explicitly criminalized homosexual sodomy have much to do with the legal and political tension of how the presumed privacy of the home is at odds with homosexual sodomy. Texas had in 1973 repealed sex laws that criminalized all anal sodomy and oral sex and adopted a homosexual conduct statute that prohibited oral and anal sex when performed by persons of the same sex. At the time of the 1998 conviction, nineteen states had sodomy statutes that barred consensual anal or oral sex, but Texas was only one of five states that had laws targeting same-sex partners.[6]

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In the actual case of *Lawrence and Garner v. Texas*, interracial relations may be important, yet unremarked, circumstances in the details of the police action that led to the legal case. Historically, concerns about interracial sodomy aggravated fears of sexual and social danger and catalyzed anxieties about the undermining of the social order.

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The power of a U.S. Supreme Court ruling is the ability to abstract the specific circumstances into far-ranging rules of law, doctrine, and juridical governance, and yet much of the texture and tensions of social life are lost when we lose sight of the historical context. My own research of early-twentieth-century sodomy court cases in the western United States and Canada shows that sexual identity is not the determining factor in prosecuting sodomy, but, rather, differentials of class, age, and race shape the policing that leads to sodomy and public morals arrests. Pursuing these social and spatial dynamics illuminates the social and spatial dimensions of difference that regulate sexual relations and privilege individual autonomy and sexual liberty in public, semipublic, and private spaces.

During the first decades of the twentieth century, thousands of men and boys from all over the world converged on small towns and new cities in western North America. These male migrant laborers took on seasonal work in sawmills, farms, and canneries from British Columbia to California. Migrants from India, Poland, China, Armenia, Mexico, and the midwestern United States lived together in boardinghouses, bunkhouses, and work camps. Male migrant sociability was entangled into the culture and mobility of the streets. The geography of the rapidly urbanizing town and city provided the settings and spaces for casual, fortuitous, and dangerous encounters between men and boys of different ethnicities, classes, and ages. Migrant males encountered each other on the streets, alleys, and parks, at the train and stage depots and other public spaces where men congregated. They socialized and drank in saloons and brothels as well as the bunkhouses and hotels rooms they rented for a day or weeks.

Police walking their neighborhood beats observed public activity and the social relations of the street. The policing of potential criminal activity included the regulation of improper social and sexual activity such as vagrancy, soliciting prostitution, loitering, public drunkenness, and lewd and lascivious conduct. Many of the court cases that I have researched were brought forward through the policing of migrant sociability. For example, in Marysville, California, in the early morning of 4 February 1928, two police officers drove by a Ford coupé parked in a secluded spot, about a block from residences farther down the street. The officers' suspicions were aroused by someone inside the car, leaning against the passenger window, asleep, who "looked like a Mexican." They pulled Rola Singh

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out and discovered Harvey Carstenbrook, a "young man [who] was lying in the seat with his head under the wheel, his pants . . . down to his knees, his union suit underwear split . . . open, his coat . . . turned up and his rectum . . . exposed."[7] The officers grabbed Carstenbrook and roused him from a deep sleep; Carstenbrook started throwing punches as they jerked him out of the car.

What had begun as police curiosity on a routine patrol became amplified by racial suspicion. Apparently, the presence of a dark man in a parked car at night was enough cause for suspicion. Although one officer had initially mistaken Singh for a "Mexican" and later testified that he was a "Hindu," the officer treated his initial confusion about Singh's racial identity as irrelevant.[8] The police presumed that neither a Mexican nor a Hindu, both of whom were typically migrant laborers, would own an automobile. Racial suspicion quickly turned into police investigation when they discovered a white male partially undressed and unconscious in Singh's company. The police officers arrested both men and hauled them to the police station for observation and medical examination. Eventually, Singh was charged with a "crime against nature."

In court, Singh testified that he had met Carstenbrook near the stage depot on Second Street. Carstenbrook was sitting in his car and asked if Singh wanted a ride. Singh responded that he "wanted to go to Yuba City." They drove to the secluded spot where the officers had found them. Carstenbrook claimed that he was too drunk to drive home.[9] When he was called to the stand, Carstenbrook could not remember anything of the evening until he had been brought to the police station. He did not remember picking up Singh and denied that anything happened between them. All he could recall was that he was drunk.[10]

Carstenbrook's denial of sexual assault did not hinder the prosecution's case, nor did it impede the jury's conviction. In the appeal, the defense attorney reasoned that "had Carstenbrook's person been subjected to such an assault, it is reasonable to say he would have experienced therefore some uncomfortable or unusual injury, and would have been eager to testify to such injury. There is no reason why he should be inclined to protect a strange Hindu, with whom he had no previous acquaintance. On the contrary, had he even suspected such an assault, he would have felt himself humiliated and outraged."[11] (One could well argue that Carstenbrook would have suffered more humiliation by public acknowledgment of sexual relations with Singh.) During the trial, he was repeatedly referred to as the "Carstenbrook boy," treated as the underage victim of sexual assault, and thereby protected from any public interrogation of his solicitation of Singh.

There are several puzzling elements that emerged in the trial testimony but occasioned little comment by the attorneys or judges. First, there was

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no reference made to the ownership of the car; second, during the lunch break of the trial, the prosecutor urged Carstenbrook not to turn up as a defense witness; and third, his parents or guardians were conspicuously absent. As it turns out, Carstenbrook was a member of a prominent small-business family in Marysville that had lived in the region since the late nineteenth century. Harvey's father and uncle were landowners and had a history of contracting service work from the city. Probate records reveal that in May 1927, nine months prior to the sodomy arrest, Carstenbrook's father died. Carstenbrook, twenty-seven at the time, was named executor of the will.[12] Voting records, probate records, and the biographical detail in the testimony all point to Carstenbrook as a twenty-eight-year-old former lineman for PG&E who lived in Marysville in 1928 during the trial proceedings.[13]

In many ways, the very possibility of having a private sphere was precarious for migrant male laborers. Bodily autonomy was questionable, and privacy did not obtain in the government's understanding of the interracial and interclass male migrant world. How can we rethink the spaces, practices, and cultures of public sex and the pursuit for contact uninhibited by state surveillance and intervention? Queer studies scholars of the public have raised an array of theoretical questions and problems that resonate with this early-twentieth-century history of sodomy cases. Prior to the *Lawrence* decision, the late-twentieth-century Supreme Court rulings about privacy narrowly promoted heterosexual domesticity and sexual expression. The "zone of privacy" argument applied from the *Griswold v. Connecticut* decision to *Bowers v. Hardwick* limited what spaces could be considered constitutionally protected. According to the queer studies scholar Michael Warner, "The 'zone of privacy' was recognized not for intimate associations, or control over one's body or for sexuality in general but only for the domestic space of heterosexuals. The legal tradition tends to protect sexual freedom by privatizing it, and now it reserves privacy protections for those whose sexuality is already normative."[14] Warner further argued that "your zone of privacy requires the support of an elaborate network of state regulations, judicial rulings, and police powers, and if it is based on the prejudicial exclusion of others from the rights of association or bodily autonomy you take for granted, then your privacy is another name for armed national sex public to which you so luckily belong."[15]

Richard Mohr in *Gays/Justice: A Study of Society, Ethics, Law* challenges the reasoning in Bowers by arguing that sex is "inherently private" and should be protected no matter where it occurs. Instead, scholars like Warner and William Leap argue that the practices of public sexual culture involve "not only a world-excluding privacy but a world-making publicness."[16] This public sexual culture has its "own knowledges, places,

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practices, languages, and learned modes of feeling." One learns the codes of subculture, its rituals, typologies, and "improvisational nature of unpredicted situations." Public sexual culture is a counterpublic to the norms of public morality, which offer public status exclusively to privatized heterosexuality. Its publicness is constituted in transmitting and circulating sexual knowledges that are made cumulative. The erotics and bodily sensations are both public and extremely intimate.[17]

The migrant sociability of the early twentieth century that I have described—with its public meeting, offering, drinking, conversing, and sexual trysts—may have its corollary in the late-twentieth-century practices of cruising. The kind of belonging that cruising creates (according to Warner) is "directly eroticizing participation in the public world of the intimate." He explains that, "contrary to myth, what one relishes in loving strangers is not mere anonymity, nor meaningless release. It is the pleasure of belonging to a sexual world, in which one's sexuality finds an answering resonance not just in one another, but in the world of others. Strangers have the ability to represent a world of others in a way that one sustained intimacy cannot."[18]

The gay male subject Warner assumes has both free access to participate in the public world of the intimate and may also retreat to a private realm of intimacy. The class and race privileges of this undifferentiated subject do not anticipate any inequality or difference in the rapport, subjectivity, and opportunities for this male subject's "world making publicness" among other males. In his analysis, Warner ignores the diversity of social relations, the relative differences and privileges, status, opportunities, and constraints. The axis of disenfranchisement is prominently and significantly sexual in Warner's analysis. Class and race differences, the differences of access and opportunity, the differential relation to public spaces and how that might impact the dynamics of sociability, erotics, and subjectivity are not discussed.

Samuel Delany's queer ethnography and memoir of the radical transformation of Times Square, however, situates inequality and interclass and interethnic contact at the center of his analysis of public sex and sexual publics. Delany valorizes cross-class contacts in public space that encompass a range of random, interclass, and interethnic social encounters in urban public spaces, which he heuristically distinguishes from the professional, motive-driven, intraclass practices of networking. He contrasts bar going and other institutional social practices of networking from the broadly social, random practices of contact, which, he argues, include the endless variety of casual sex and public sexual relations. As an "outdoor sport," contact is "contoured, if not organized by earlier decisions, desires, commercial interests, zoning laws, and immigration patterns."[19] However,

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Delany observes that the 1990s campaign to "clean up" and "gentrify" Times Square is drastically narrowing the "varieties of erotic life," "dampening interclass contact, and foreclosing the promise and necessities of a democratic city." He proclaims that in a "democratic city it is imperative that we speak to strangers, live next to them and learn how to relate to them on many levels, including the sexual." Delany further emphasizes that the vitality of queer public life and sexuality has thrived on the abundance of "interclass contact" despite decades of marginalization and policing by dominant heterosexually normative society.[20]

The intimate contact of migrant men interfered with the boundaries of a race- and class-segregated society. The vision of free movement and association, the mingling of the races, that some may have presumed was the promise of democratic citizenship and civic belonging, however, was under the conspicuous suspicion and surveillance of the middle-class district attorneys and police magistrates and working-class police officers. They interpreted the activity as enhancing and leading to immorality that required surveillance, particularly at any moment when the migrant males attempted to remove their social activities from public visibility into the murky arena of the semiprivate.

In the early twentieth century it was impossible for migrant men to pursue "privacy" or to enjoy freedom from state surveillance of those spaces removed from public view, such as automobiles, boardinghouses, bars, and gambling houses. These countersites and landscapes of queer contact and communities were shaped by both the activities of migrant men and policing. These queer sexual publics exposed the contradictions of normative expectations and fluidity at the borders of public spaces. The queer and homoerotic presence can unsettle the very demarcations of public and private.[21] In this context what does public space mean? Is the middle-class framing of public space, as the site of safe public spectacle of middle-class citizens' domestic status, being challenged and resisted by the many ways that squares, streets, alleys are creating a spectacle of migrant social life? A promenade of fortuitous encounters and juxtapositions allows masculinity, class status, and physicality to be displayed and to test sensibilities and expectations of the migrant males and the working-class and middle-class women, children, and men who also travel and use the same locations. Queer studies scholars have vigorously questioned how modern nationalist citizenship, entitlement, and valued public experience is contingent on the public performance of respectable domesticity and coupled, heterosexual intimacy.[22]

In the twenty-first century, the Supreme Court's *Lawrence* ruling has potentially accorded freedom for privacy within the parameters of a homosexual domestic identity. The decision has been widely hailed as a

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victory for gay rights. And yet some sexual relations and social contact remain unprivileged and unprotected. Scholars of ethnic studies, colonial studies, gender studies, and queer studies have questioned how the usage of minority "identity" and "community" tends to ignore social variety and flatten differences. Incommensurate lives, acts, politics, and ways of knowing are frequently subsumed into a unitary category, such as "lesbian," "gay," "homosexual," and "transgender." Legible identities and social taxonomies—those of race, class, religion, sexual orientation, and gender—have shaped much of what we think of as minority history within the nation-state. As historians, much of our preoccupation has had to be the documentation of "deviance," "difference," "queerness," and "alerity" that is both prohibited and incited in law, policing, markets, local embodiments, and cultural expression.[23] "Gay" identity and community as an urban U.S. and Western European formation has underwritten the epistemology and knowledge production of the queer past. Throughout the twentieth century, social movements of protest and subcultural communities have demanded, reshaped, and expanded the scale and scope of this civic culture of sexual liberty, association, and expression. The heterogeneity and contradictory terrain of sexual dissidence has been impossible to contain in a unitary gay identity and community. Yet government and civil society—the police, the courts, interest groups, and the media—have framed the debate as a contest between heterosexual norms and homosexual resistance, one that the Supreme Court in the *Lawrence* decision seeks to resolve.[24]

In sharp contrast to *Bowers*, which denied any rights of privacy and any respected public status to gay men, the *Lawrence* decision provides recognition to "homosexuals" in coupled relationships as visible subjects that can be managed, governed, and afforded the liberty of "certain intimate conduct." However, this only embraces a segment of the persons, groups, and communities that have been vigorously policed. The immense heterogeneity of how persons live—in social relations, locales, practices, and cultures—counters, confounds, and queers the norms of coupled households. The decision keeps intact the public sphere idealization that protects the liberties of those who possess a recognizable home and their public communicative expression. Homelessness or temporary habitations such as bunkhouses, SROs, and vehicles may or may not be privacy protected. Queer knowledge projects and politics must continue to destabilize the assumptions that personhood and citizenship emanate from the "domestic private" and coupled intimacy, either heterosexual or homosexual. For those who do not possess such attributes, the "transcendent" possibilities of liberty in intimate conduct, expression, and civic life are all curtailed. In the early twentieth century "foreign" and racialized migrants, tramps,

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and hoboes were subject to heightened police surveillance and arrests of vagrancy and sodomy. In the early twenty-first century "illegal" migrants, homeless, "enemy combatants," and refugees awaiting asylum proceedings may be the most visible and vulnerable subjects of state power. For those identified outside norms and normativity, the liberties to pursue "certain intimate conduct" remains unfathomable in a liberal ethos that links private intimacy with respected and protected public status.

Notes

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

2. Ibid., 3–4, 13–14. The Supreme Court decisions on reproductive freedom include *Griswold v. Connecticut* 381 U.S. 479 (1965); *Eisenstadt v. Barid* 405 U.S. 438 (1972); *Roe v. Wade* 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

3. *Lawrence v. Texas*, 6.

4. George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber, "Historians' Case against Gay Discrimination," amicus brief, 1–3.

5. "Two Men Charged under State's Sodomy Law," *Houston Chronicle*, 5 November 1998; "Houston Case May Test Sodomy Law: Lawyer Says His Clients' Privacy Invaded," *Dallas Morning News*, 7 November 1998; Steve Brewer, "Texas Men Post Bonds, Challenge State's Sodomy Law," *New York Times*, 20 November 1998; "Arrests Will Put Sodomy Law on Trial," *San Francisco Chronicle*, 2 December 1998. The context of the case has been imaginatively reconstructed in Dale Carpenter, "Colloquium: The Boundaries of Liberty after *Lawrence v. Texas*: The Unknown Past of *Lawrence v. Texas*," *Michigan Law Review* 102 (2004: 1464–1527.

6. *Lawrence v. Texas*, 7–8, 12; Chauncey, "Historians' Case against Gay Discrimination," 1–3.

7. *People v. Rollo* [*sic*] *Singh*, Third Court of Appeals, Transcript of Testimony, District Court, Yuba County, 5, 6, 7, 10, 12, 13, California State Archives, Sacramento, APWA #359 (June 1928).

8. "Hindu" was both the formal and informal racial category used to describe migrants from colonial India. Most early-twentieth-century migrants were Punjabi Sikhs; however, "Hindu" less explicitly designated religious identity and more frequently was short for "Hindustani," a geographic or national identity.

9. *People v. Rollo* [*sic*] *Singh*, 43–44.

10. Ibid., 48–50.

11. *People v. Rollo* [*sic*] *Singh*, Appelent's Opening Brief, 7, California State Archives, Sacramento.

12. Harry J. Carstenbrook Probate Case #3226, Yuba County Superior Court, Marysville, California, filed 18 May 1927.

13. Great Register of Yuba County, General Election, 1928 Marysville Library; *People v. Rollo* [*sic*] *Singh*, Clerk's Transcript of Testimony, 48, California State Archives, Sacramento.

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14. Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 1999), 174.

15. Ibid., 175.

16. Richard Mohr, *Gays/Justice: A Study of Ethics, Society, Law* (New York: Columbia University Press, 1988), 110–116; Warner, *Trouble with Normal*, 177; William Leap, ed., *Public Sex/Gay Space* (New York: Columbia University Press, 1999).

17. Warner, *Trouble with Normal*, 177–79.

18. Ibid., 179.

19. Samuel R. Delany, *Times Square Red, Times Square Blue* (New York: New York University Press, 1999), esp. 126–42.

20. Ibid., 186–92.

21. David Bell, "Sexual Citizenship," in *Mapping Desire: Geographies of Sexualities*, ed. David Bell and Gill Valentine (London: Routledge, 1995), 306; Lawrence Knopp, "Sexuality and Urban Space: A Framework for Analysis," in Bell and Valentine, *Mapping Desire*, 149–61.

22. Lauren Berlant, "Intimacy: A Special Issue," *Critical Inquiry* 24 (1998): 281–86; Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (1998): 547–58; Elizabeth A. Povinelli, "Notes on Gridlock: Genealogy, Intimacy, Sexuality," *Public Culture* 14 (2002): 215–31; Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon, 2003).

23. Jennifer Terry, "Theorizing Deviant Historiography," *Differences* 3, no. 2 (1991): 55–74; David Halperin, "Forgetting Foucault: Acts, Identities, and the History of Sexuality," *Representations* 63 (1998): 93–120.

24. Janet R. Jakobsen, "Queer Is? Queer Does: Normativity and the Problem of Resistance," *GLQ* 4 (1998): 511–36.

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